

Legislating Against Hate Crime: Considering International Frameworks for an Irish Context

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Declaration

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Summary

Across the common law world, legislation which has the aim of combating hate crime has become a familiar part of the criminal code. The Irish State has been historically reluctant to introduce hate crime legislation, and this thesis examines the need for, and the potential form of, hate crime legislation in an Irish context. The purpose of this research is to provide an account of how hate crime is currently addressed through the Irish criminal justice process, and to explore options for legislative reform in this context. Thus, this thesis first seeks to understand why we punish 'hate', and place the legislative experience internationally in its historical context by looking to the early hate crime provisions as introduced in the United States. It then describes and explores how hate crime is currently addressed in an Irish context through a comprehensive analysis of case law. It sets out Ireland's obligations at an international level, as well as examining how Ireland complies with international standards in the area. The thesis will then examine the international approach to legislating for hate crime in a comparative perspective by analysing legislation from Canada, England and Wales, and Northern Ireland.

Hate crime legislation takes two primary forms: the first is based on what are referred to as 'aggravated offences' – which are new offences whereby a hate element is attached to an offence already familiar to the criminal law; and the second is based on the concept of aggravated or enhanced sentencing – whereby the court is instructed or advised to increase the penalty awarded where there is a bias or hate motivation evident in the case.

Once the form of such legislation is determined, the next issue to be decided is the manner in which the hate element is injected into the offence, or defined in its aggravating element. Three possible models are explored. The first requires that it be established that the offence was motivated by a hate element; the second requires that a hate element be demonstrated during the course of the commission of the offence; and the third requires that the offender selected the victim based on their personal characteristics. The most contentious political issue in determining hate crime legislation tends to be the range of victims groups protected by the legislation. The thesis considers which groups should be protected by hate crime

legislation, looking at both theoretical understandings and examples from practice in this regard. It particularly addresses the question as to whether the 'such as' proviso as utilised in Canada could be used in Ireland, as well as considering other constitutional considerations in this regard.

Overall, through a doctrinal and comparative analysis, the thesis identifies key considerations which should be taken into account when legislating for hate crime in Ireland. It also incorporates a socio-legal dimension which, for example, includes the views of criminal justice practitioners in determining both the need for, and form of, legislation. It seeks to balance the rights of the victims of hate crime with the rights of the alleged offender in this regard, asking when it is legislatively appropriate to use the label of, for example, criminal racist, or criminal homophobe. It considers the particular context of the Irish criminal justice process, both from a practical and constitutional perspective, and ultimately makes informed proposals for legislation based upon lessons drawn from the experiences of other jurisdictions, which are fit for purpose in an Irish context.

The original contribution of the thesis is thus two-fold: first, it provides, for the first time, a comparative analysis of the construction and operation of key elements of hate crime legislation. Second, it places this analysis within the Irish policy, legislative, and constitutional framework, ensuring that proposals for an Irish statutory framework are fit for purpose.

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It is written in memory of my mother, Anne Schweppe.

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Chapter 1: Introduction

As early as the 1970s in the United States, the concept of hate crime was being discussed and problematised. The idea of the concept, as Jenness observes, emerged ‘through the confluence of several social movement discourses, most notably the black civil rights movement, the disabilities rights movement, and the crime victim movement.’¹ These movements reflected what Jenness and Grattet refer to as ‘the increasing acceptance of the idea that criminal conduct is “different” when it involves an act of discrimination.’²

That said, this concept was, at least initially, not without controversy, with those opposed to the introduction of such legislation arguing that hate crime is ‘thought crime’, and that the introduction of hate crime legislation is an exercise in identity politics. Thus, as Phillips and Grattet observe, if legal rules and controversies exist on a continuum ‘from controversial to settled’³, hate crime laws were seen as one of the more controversial. Further, there was – and is – no consistency in how legislation is introduced, with the manner in which bias or prejudice is addressed by the criminal justice process various and varied.

However, while the introduction of hate crime legislation was seen initially by some as controversial, with scholars and practitioners alike debating and criticising the movement,⁴ the issue has become more settled recently, with hate crime addressed through legislation since the 1980s in the United States, and firmly embedded in legislation in common law jurisdictions such as Canada, New Zealand, and Australia and across Europe. That said, Ireland has not yet introduced any bespoke legislation to address the issue. The absence of such legislation facilitates what Perry refers to as ‘at least a tacit permission for bias-motivated crime’ in Irish society.⁵

¹ Valerie Jenness, ‘Hate Crime Canon and Beyond: A Critical Assessment’ (2001) 12 *Law and Critique* 279, 283.

² Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (Russell Sage Foundation 2001) 1.

³ Scott Phillips and Ryken Grattet, ‘Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law’ (2000) 34(3) *Law and Society Review* 567, 567.

⁴ See in particular, JB Jacobs and K Potter, *Hate Crimes – Criminal Law and Identity Politics* (Oxford University Press 1998).

⁵ Barbara Perry, ‘Legislating Hate in Ireland: The View from Here’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2016) 76.

What I propose to do in this thesis, then, is to understand the need for, and potential form of, hate crime legislation in an Irish context. While the Irish state has been traditionally resistant to the claims of international bodies which have advocated for the introduction of bespoke legislation in Ireland,⁶ there seems to be a growing acceptance that there is a need for legislation of some description in an Irish context, though the precise formulation of this legislation has yet to be determined. This thesis will draw on the experiences of other jurisdictions, as well as the Irish policy and practice context, to formulate a proposed legislative context for addressing the hate element of a crime in Ireland. In doing so, it will further develop understandings of the constitutive elements of hate crime legislation from an international perspective, adding to and developing the literature in this area.

Methodology

The purpose of this research is to provide an account of how hate crime is currently addressed through the Irish criminal justice process, and to explore potential legislative reform options in this context. Thus, there are three distinct aspects to the research: the first seeks to understand the manner in which the hate element of a crime is addressed currently through the criminal justice process in Ireland; the second looks to whether hate crime legislation is needed; and the third looks to how legislation might be developed in order to address the issue. For this reason, the methodological approach taken is a mixed methods approach, which utilises doctrinal, comparative, and socio-legal research methods. One of the ‘hallmarks of high-quality empirical socio-legal research’ – or, I would argue – any research – is a detailed discussion of the methodology and methods used which allows the reader to make an informed judgement about the strength of the arguments and evidence upon which the research is based.⁷ This section of this thesis will explore the methods utilised, as well as discussing some of the sources used in the research.

⁶ See Amanda Haynes and Jennifer Schweppe, ‘Internationalizing Hate Crime and the Problem of the Intractable State: The Case of Ireland’ in Jennifer Schweppe and Mark Walters, *The Globalisation of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016).

⁷ Fiona Cownie and Anthony Bradney, ‘Socio-Legal studies: A challenge to the doctrinal approach’ in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013), 43.

Doctrinal approach

In order to frame any future legislation on hate crime in an Irish context, it was necessary to first understand the current legal context. Lawyers traditionally and typically utilise a doctrinal methodology to understand, define, and elaborate upon legal principles in an effort to develop their considerations of a particular legal principle. Kilcommins describes the law as ‘technocratic, employing rigorous analytical processes, emphasising precision and inductive-deductive logic, but also fidelity to complex institutional practices.’⁸ A doctrinal approach, he suggests, involves the ‘wading through layers of authority, its ordering, and its interpretation.’⁹ The approach has been – perhaps sometimes unfairly – criticised,¹⁰ However, in the context of hate crime legislation the criticisms, at least in an Irish context, are justified as case law on the manner in which hate crime is addressed is extremely limited. Despite these limitations, however, I have provided a doctrinal analysis of relevant case law, legal principles and legislation from an Irish context. However, whilst a doctrinal approach was utilised, at least in the context of Irish law, it was of limited value in seeking to answer any of the research questions posed.

Socio-legal approach

There was very little case law and no legislative statement on the issue of hate crime in Ireland, which required me to utilise a socio-legal methodology in the research to determine how the law was operating in practice. The field of socio-legal studies is defined by the Socio-Legal Studies Association:

‘Socio-legal studies embraces disciplines and subjects concerned with law as a social institute, with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions.’¹¹

⁸ Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 8.

⁹ Ibid 9.

¹⁰ See, for example, Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016); Rónán Kennedy, ‘Doctrinal Analysis: The Real “Law in Action”’ in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016).

¹¹ Socio-Legal Studies Association, *First Re-Statement of Research Ethics*, (SLSA 2009) para. 1.2.1

In this context, I adopted a 'law in action' approach, which explores 'how legal norms function in reality and what actors shape their implementation.'¹² Empirical legal research, that is, the study of 'law, legal processes and legal phenomena using social research methods', is central to socio-legal studies.¹³ Adapting this approach allowed me to examine any gaps between 'the law on the books' and 'the law in practice'. As Bradney states, empirical legal research:

'... provides not just more information about law; it provides information of a different character from that which can be obtained through other methods of research. It answers questions about law that cannot be answered in any other way.'¹⁴

Thus, throughout the thesis, I draw upon empirical research conducted by, and previously published by, myself and co-authors at the University of Limerick which explored the manner in which the hate element of a crime is addressed through the criminal justice process in Ireland, and the manifestations of hate crime as reported to civil society organisations.¹⁵ The research was published in a number of key reports, which explored different aspects of hate crime in Ireland namely:

- *A Life Free From Fear: Legislating for Hate Crime in Ireland – An NGO Perspective*¹⁶
- *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings*¹⁷

¹² Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016), 110.

¹³ Mandy Burton, 'Doing Empirical Research: Exploring the decision-making of magistrates and juries' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 55.

¹⁴ Anthony Bradney, 'The Place of Empirical Legal Research in the Law School Curriculum' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 1031.

¹⁵ The reports utilised both qualitative and quantitative methods, details of which are set out in the methodology sections of those reports.

¹⁶ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free From Fear: Legislating for Hate Crime in Ireland – An NGO Perspective* (CUES 2014).

¹⁷ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

- *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism*¹⁸
- *STAD: Stop Transphobia and Discrimination Report 2014-2016*¹⁹
- *Lifecycle of a Hate Crime: Country Report for Ireland*²⁰
- *Lifecycle of a Hate Crime: Comparative Report*²¹

These reports provide an understanding of the manifestations of hate crime in an Irish context, as well as the manner in which criminal justice practitioners treat and understand hate crime. Two reports proved most relevant to the thesis: *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings*²² and *Lifecycle of a Hate Crime: Country Report for Ireland*.²³ The *Out of the Shadows* report was commissioned by the National Steering Group Against Hate Crime, and the core research question was to determine the need for, and potential form of, hate crime legislation in Ireland. In that research, my co-researchers and I conducted qualitative interviews with 74 individuals in total, including 22 barristers/solicitors and 11 members of An Garda Síochána. The *Lifecycle of a Hate Crime* project was funded by the European Union, and the core research question in that study was to trace the manner in which the hate element of a crime was treated by the criminal justice process from the point of recording to post-conviction offender management. As part of that research, my colleague and I conducted 74 qualitative interviews in total, including 14 barristers and solicitors who exclusively represented the defence in criminal proceedings; four barristers who acted for both the prosecution and the defence; and a further 20 individuals who were involved in the prosecution or investigation of crime, including two prosecuting solicitors and 18 police officers. Data collected from the interviews across both projects was subject to thematic analysis.

¹⁸ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism* (HHRG 2016).

¹⁹ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017).

²⁰ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

²¹ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

²² Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

²³ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

The doctrinal and socio-legal research engaged in allowed me then to answer my first two questions: a third approach was required to allow me to explore potential forms of hate crime legislation in Ireland.

Comparative analysis

The third key research question I sought to answer in this project was how best to legislate against hate crime. Thus, a comparative methodology was utilised, which allowed me to draw from the experiences of other common law jurisdictions, learning from their experiences. This comparative analysis allowed me to 'draw out of the process of comparison knowledge that could not be obtained from examining separately' the findings from each jurisdiction.²⁴ Thus, it is through this type of analysis that I was able to draw out good practices that may be applicable across in an Irish context, while acknowledging the differences that exist across common law countries. As Paris observes, there is 'no definition of what the method of comparative law is, let alone, to some extent, what comparative law is.'²⁵ Thus, she suggests, the researcher will have to 'set her own parameters of research within the theoretical framework provided in the comparative law literature and ... justify the direction she chooses to give as regards her methodological choices.'²⁶

In terms of the approach that I took to the question, one of the objectives of comparative research is 'aiding law reform and policy development',²⁷ which is the key objective of this research. Paris notes that a comparative scholar can utilise a 'policy-based and socially based perspective' in an effort to determine preferable best practices for the purposes of promoting legislation on an particular issue. Given the fact that hate crime legislation in various forms has been in existence across a number of jurisdictions, in stark contrast to the Irish position, a micro-comparative approach - ie, one which allows for the comparison of aspects of two or more legal

²⁴ Geoffrey Samuel, 'Comparative law and its methodology' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013).

²⁵ Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 41.

²⁶ Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 42.

²⁷ E Örüçü, 'Developing Comparative Law' in E Örüçü and D Nelken (eds) *Comparative Law: A Handbook* (Hart 2007).

systems – which allowed me to learn of, and from, the experiences of other jurisdictions with a similar legal heritage, was vital to explore the potential form of hate crime legislation in this jurisdiction.²⁸ In this context, scholars have identified that there are three core questions whose relevance transcends the differences and commonalities in the construction of hate crime laws:

- The range of victim groups which hate crime legislation should protect;
- The formal recognition of the hate element as either part of an aggravated offence or through the sentencing process;
- The extent to which the hate element should be present in the offence.²⁹

In essence, the three core questions are in this thesis three mini-research questions, which are explored in the second half of the thesis by utilising the micro-comparative approach. I have chosen to look, in the main at least, to three separate jurisdictions in this context: Northern Ireland, England and Wales, and Canada. These jurisdictions were chosen, first, because of the shared common law heritage that is shared between those and Ireland; and second, because of the different approaches taken in the legislation from each of the three jurisdictions which allows for interesting and useful comparisons to be drawn; and third, there is a wealth of case law to draw on in England and Wales and Canada to understand the manner in which the legislation operates. Thus, I expected that the experiences of these jurisdictions would provide useful insight into the operation of the legislation. That said, I have not limited myself to those jurisdictions, and where a particular issue arises in other jurisdictions which is of use in discussing a discrete issue such as, for

²⁸ This is the term Rheinstein adopts for the comparison of aspects or topics of two or more legal systems: See M Rheinstein, 'Teaching Tools in Comparative Law' (1952) 1 American Journal of Comparative Law 95.

²⁹ See, for example, Jon Garland and Corinne Funnell, 'Defining hate crime internationally: issues and conundrums' in Jennifer Schweppe and Mark Walters, *The Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016); Piotr Godzisz, 'Eastern crimes, western theories: Conceptualising the hate crime model in Central and Eastern Europe' (*International Network for Hate Studies*, 22 January 2015) <<http://www.internationalhatestudies.com/eastern-crimes-western-theories-conceptualising-hate-crime-model-central-eastern-europe/>> accessed 24 February 2018; Joanna Perry, 'Evidencing the case for "hate crime"' in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015); Kay Goodall, 'Conceptualising 'racism' in criminal law' (2013) 33(2) Legal Studies 215; Jon 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.

example, the constitutional context of hate crime legislation in the United States and the application of particular models in that jurisdictional context, or the application of the 'proviso' in Australian legislation, I have drawn on the experiences of those other jurisdictions to elaborate on the issue. European Union and Council of Europe policy, as well as case law emanating from the European Court of Human Rights is also considered where relevant. It is now clear from the ECtHR that States Parties have obligations under the Convention in the context of the investigation of hate crime.³⁰ This, combined with the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, has resulted in most Member States in the European Union introducing hate crime legislation, with Ireland being a distinct outlier in this regard. The relevance of such legislation to this particular project is relatively limited, however, given the fact that it operates in a civil law context. Further, there is a dearth of literature on the issue of hate crime legislation in a European context.³¹ Thus, a common law comparative approach was deemed most appropriate.

Connecting policy and research: an evidence based approach

As well as providing a theoretical contribution to the field of hate studies through the exploration and critical analysis of legislative frameworks, this thesis is also a policy-driven piece of research, which seeks to explore the means by which the hate element of a crime might be addressed within the Irish criminal justice process. In taking a mixed methods approach to the research question at hand, I sought ultimately to make the findings of the research relevant to policy makers, who would then be in a position to, as Cownie and Bradney state, 'inform social or economic policy in an attempt to ensure that it is 'evidence-based'.'³² In the context of hate crime, Chakraborti observes that the value of policy interventions is clearer when 'such interventions are grounded in scholarly evidence'³³ and notes that when policy is not empirically driven, it is less likely to be effective. Thus, by understanding the

³⁰ The Convention is given effect in Ireland by the European Convention on Human Rights Act 2003. In this context in particular, section 3 requires that every organ of the State must 'perform its functions in a manner compatible with the State's obligations under the Convention provisions.'

³¹ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

³² Fiona Cownie and Anthony Bradney, 'Socio-Legal studies: A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013), 42.

³³ Neil Chakraborti, 'Mind the Gap! Making Stronger Connections Between Hate Crime Policy and Scholarship' (2016) 27(6) Criminal Justice Policy Review 577, 582.

need for hate crime legislation through fieldwork, and by exploring different models of legislation through empirical analysis, the recommendations made for legislative change in this thesis are evidence-based, and suited to an Irish context.

Structure of the thesis

There are seven main chapters to this thesis, which build on and draw from one another in developing an understanding of the need for, and form of, hate crime legislation in an Irish context. Following the short exposition in this first chapter, the second chapter then seeks to explore sociological, criminological, and ultimately, legal definitions of hate crime, in an effort to define the field of study in question. It differentiates, for example, between hate incidents, hate speech, and hate crime, and in doing so briefly explores the European context to hate crime. It then looks at some of the general constitutional issues which determine the ambit and structures of hate crime legislation, particularly drawing on jurisprudence from the United States in this regard.

Chapter 3 then looks specifically at the Irish context, first setting out an analysis of the only legislation on the statute books addressing hate crime, the Prohibition of Incitement to Hatred Act 1989. It then goes on to describe how a hate element is currently addressed by the Irish criminal process, drawing on fieldwork conducted with criminal justice practitioners. It discusses research conducted by the European Union Fundamental Rights Agency which shows that Ireland has relatively high rates of hate crime as compared to other European Union Member States, and then describes the international obligations of the State with respect to hate crime, as well as how the Irish state has responded to such obligations. It finally describes briefly a recent legislative attempt at addressing hate crime.

Chapter 4 first asks, what the purpose of hate crime laws is, and enters into a theoretical discussion as to the theories of punishment in the context of hate crime specifically. It then engages in a comparative discussion of hate crime legislation in Canada, England and Wales and Northern Ireland, with another brief discussion of developments in the United States in this regard. It particularly explores the relative

merits of aggravated offences and aggravated sentencing provisions, the two key means of injecting the hate element into a prosecution from a statutory perspective.

Developing the comparative analysis further, chapter 5 addresses how the hate element of an offence should be named, or evidenced, in legislation. It first describes the mens rea and actus reus of hate crimes generally, and then looks to three models of legislation: first, where the offence is aggravated through the mens rea with particular emphasis on the Canadian model in this regard; the second, where it is aggravated through the actus reus with particular emphasis on the model in England and Wales; and the third which utilises the 'discriminatory selection' model which has been recently mooted as a potential 'third way' in England and Wales but rejected as a solution in Scotland.

Chapter 6 then looks at another core issue regarding the construction of hate crime legislation, and that is the range of protected groups which is incorporated into legislation. It looks at theoretical and statutory models in this regard, observing the different functions of such categorisations in policing and prosecutorial practices in some jurisdictions. It then details the constitutional requirement for certainty in respect of hate crime legislation, and particularly victim characteristics, examining the potential of utilising the 'such as' proviso in Irish legislation as a legislative option.

Chapter 7 outlines some of the issues emerging from the thesis in analysing hate crime legislation as it operates in other common law jurisdictions, as well as some of the more conceptual issues that the question of legislating for hate crime raises. Chapter 8 then discusses the core constructive elements which could be included in such legislation, including the manner in which hate might be defined; the question as to whether aggravated offences or an aggravated sentencing provision would be preferred; how the hate element could be named; and the range of identities that might be protected in that legislation. It finally addresses some of the structural processes and policies that might be introduced to bolster such legislation and to ensure that it operates effectively.

Chapter 2 – What is Hate, and What is a Hate Crime?

Introduction

This chapter will place the criminalisation of bias and hate in its historical context, first seeking to explain briefly exactly what ‘hate’ means, given the absence of a legal definition of the term, along with other terms used in criminal legislation such as ‘prejudice’ and ‘hostility’. It will then explore some of the justifications for criminalising hate, identifying the peculiarities of the impact of hate crime. It will then discuss broadly some of the approaches taken to legally defining hate, and developing hate crime legislation internationally. It will conclude by moving towards a working definition of hate crime for the purposes of this thesis.

What is ‘hate’?

The term ‘hate’ is used in a multiplicity of contexts, and as such has no clear lay definition, nor any clear definition in law, psychology or other academic discipline. Hall observes that, for the purposes of furthering our understanding of the hate crime, the term ‘hate’ is ‘distinctly unhelpful’¹ with Berk et al observing that seeking to define the term hate is like entering a ‘conceptual swamp’.² For this reason, ‘hate crime’ legislation often uses terms such as ‘bias’, ‘prejudice’ or ‘hostility’ alongside, or sometimes, in place of, the term ‘hate’. Nonetheless, ‘hate crime’ and ‘hate studies’ remain terms commonly used to describe both the statutory regime regardless of its construction, and the field of research on related scholarship more generally. The first question then, is whether it is possible to define hate in law.

Dictionary definitions can be useful, but more often than not leave questions unanswered. Is hate part of a spectrum which ranges to dislike and indifference? Or is hate qualitatively different to both these? Unfortunately, psychologists have not generated a lot of theories about hate – quite unlike the position in relation to what might be considered its ‘opposite’ emotion, love.³ Indeed, as Royzman et al note that,

¹ Nathan Hall, *Hate Crime* (2nd edn, Routledge, 2013) 9.

² Richard A Berk, Elizabeth A Boyd and Karl M Hammer, ‘Thinking more clearly about hate-motivated crimes’ in Barbara Perry (ed) *Hate and Bias Crime: A Reader* (Routledge 2003) 51.

³ ‘Preface’ in Robert Sternberg (ed), *The Psychology of Hate* (American Psychological Association 2005) ix.

in spite of ‘scores of books, topical discussions, stirring editorials, and hate-fighting initiatives, there is no single, commonly accepted definition of *hate*’, either from a laypersons or any other perspective.⁴

The problems associated with defining the term ‘hate’ are clearly identified by Sternberg and Sternberg, who observe that it is used indiscriminately to describe various circumstances and scenarios:

‘Many of the Hutus in Rwanda hated the Tutsis, many of the Serbs hated the Bosnian Muslims, and many members of the Ku Klux Klan still hate Blacks, Jews, and Catholics. Children hate doing their homework, and a lot of people hate rainy weather. But just because the same word is used in all these instances does not really mean that people feel exactly the same emotion in each situation. There might be some differences concerning the persistence of the hatred, or the quality and quantity of the hatred might depend on the object of hate.’⁵

Hate also has individualised contexts: Royzman et al note that people act out of hate, feel overcome by hate, endure it as a lifelong affliction, or even ‘elevate it to a virtue (“I hate hypocrisy”).’⁶ Royzman et al consider the classic formulations, and state that they are notable for their mutual contradiction:

‘For Descartes ..., hate was an awareness of an object as something bad and an urge to withdraw from it. For Spinoza ..., it was a case of pain (sadness) accompanied by a perception of some external cause. For Aristotle ..., the distinguishing phenomenological fact about hate was that it is pain-free (in addition to being incurable by time and striving for the annihilation of its object). Hume ... argued that neither love nor hate can be defined at all,

⁴ 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. (Emphasis in original)

⁵ Robert J Sternberg and Karin Sternberg, *The Nature of Hate* (Cambridge University Press 2008) 12.

⁶ 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.

because both are irreducible feelings with the introspective immediacy of sensory impressions. Darwin ... also saw hate as a special feeling, one that lacks a distinct facial sign and manifests itself as rage.’⁷

These distinctions between understandings, Royzman et al argue, have to do with ‘the weighting of feeling and ... judgment’.⁸ Some emphasise the negative feeling toward the object of hatred, while others emphasise a negative judgment about that object.⁹ Another distinction is between the behavioural tendencies associated with the hatred:

‘Descartes suggested withdrawal, whereas Aristotle suggested attack. Darwin’s understanding of hatred also suggests attack, insofar as hatred is manifested as rage, but Descartes made hatred more like fear (or disgust) in its link to withdrawal.’¹⁰

There is thus very little we can definitively say about hate. What we do know about hate is that it is learned rather than innate. As Sternberg and Sternberg note, hate is not inherent in human relationships, and humans do not hate from earliest childhood.¹¹ It can be acquired either as a result of our perceptions or as a result of the manipulation by others of our feelings and cognitions.¹² They note that the ‘stories of hate are formed largely by socialization through propaganda’; and thus that, to a large extent, ‘hate is learned.’¹³

In a theory which somewhat accords with modern conceptions of ‘othering’, Dozier suggests that hate evolves from the human instinct to survive: it involves intense aversion, anger, and stereotyping as well as the differentiation between an in-group

⁷ ibid 4.

⁸ ibid.

⁹ ibid.

¹⁰ ibid.

¹¹ Robert J Sternberg and Karin Sternberg, *The Nature of Hate* (Cambridge University Press, 2008), 125.

¹² ibid 52.

¹³ ibid 132.

and an out-group.¹⁴ As Sternberg and Sternberg note, in this sense, hate is ‘an aggressive form of dislike’ which reflects an extreme form of fear.¹⁵ This particular type of extreme fear, they note, causes one to fight rather than flee, and thus can be seen as a kind of ‘anger phobia’ that, when originated, helped people avoid dangerous situations but is obsolete for most people in today’s social order.¹⁶ Thus, according to Dozier, ‘hate is a disorder that impairs social functioning in today’s world and as such must be cured.’¹⁷

Gaylin is of the view that hate is, at its most fundamental, a ‘feeling, an emotion.’¹⁸ To an average person, he says, hate is indistinguishable from rage, but to understand it in such a simplistic manner is to, he argues, disregard the ‘complexity’ of hatred. Much like love, he says, we need an object for hatred to which it attaches.¹⁹ Thus, hate cannot exist in the abstract or a vacuum: it needs to be directed at someone or something. Nor, he argues, can it be fleeting or ephemeral but rather has to be sustained over a period of time. Thus, according to Gaylin, we cannot hate cabbage, facism or homework: these usages of hatred he says, fall short of his complex definition of hatred.

Thus hate in its most general sense in a non-legal sense is both instinctively understood by everyone while being simultaneously notoriously difficult to define in a manner that has universal approval. Further, in the context of the criminal law, it is oftentimes not ‘hatred’ which fuels the fire of a hate crime but rather something less intense, and less extreme. In the context of hate crime specifically, Walters observes that hate has been conceptualised to encompass conducts motivated by ‘prejudice, bias, bigotry, animosity, ill-will, or hostility’ directed towards the identity of an

¹⁴ Rush W Dozier, *Why we hate: Understanding, curbing, and eliminating hate in ourselves and our world* (Contemporary Books 2002) as cited in Robert J Sternberg and Karin Sternberg, *The Nature of Hate* (Cambridge University Press 2008) 16.

¹⁵ Robert J Sternberg and Karin Sternberg, *The Nature of Hate* (Cambridge University Press, 2008) 16.

¹⁶ *ibid.*

¹⁷ Rush W Dozier, *Why we hate: Understanding, curbing, and eliminating hate in ourselves and our world* (Contemporary Books, 2002) as cited in Robert J Sternberg and Karin Sternberg, *The Nature of Hate* (Cambridge University Press 2008) 17.

¹⁸ William Gaylin, *Hatred: The Psychological Descent into Violence* (PublicAffairs, 2003) 19.

¹⁹ *ibid* 21.

individual.²⁰ Thus, prejudice, which Gaylin describes as ‘a way station on the road to hatred’, is sometimes utilised in legislation as being more appropriate in a statutory context.²¹

Bias, prejudice, bigotry and hostility

In his seminal work, Lawrence re-defines the phenomenon of hate crime as ‘bias crime’.²² Emanating from the manner in which hate crime is constitutionally conceptualised in the United States, bias crime is defined by Lawrence as the ‘criminal manifestation of prejudice’.²³ In a piece of work dating back to 1954 which Lerner et al nonetheless describe as ‘the exemplar of scholarship pertinent to hatred which ... still has a great deal of scientific currency’,²⁴ Allport states that perhaps the simplest definition of prejudice is ‘thinking ill of others without sufficient warrant.’²⁵ More expansively he defines prejudice 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.’²⁶

These ‘objectionable qualities’ are not innate, and are, as is hate, learned. According to this theory, Sternberg and Sternberg state, prejudice has two components: an attitude and a belief: ‘there is a favorable or unfavorable attitude toward a group of people that is connected with some overgeneralized belief about that group.’²⁷ When people act upon prejudice, Allport identifies five degrees of severity of action:

- antilocution;²⁸

²⁰ Mark A Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014) 6.

²¹ William Gaylin, *Hatred: The Psychological Descent into Violence* (PublicAffairs, 2003) 23.

²² Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999).

²³ *ibid* 37.

²⁴ Richard M Lerner, Aida Bilalbegović Balsano, Rumeli Banik and Sophie Naudeau, ‘The Diminution of Hate through the Promotion of Positive Individual-Context Relations’ Prevention’ in Robert J Sternberg (ed) *The Psychology of Hate* (American Psychological Press 2005) 106.

²⁵ Gordon W Allport, *The Nature of Prejudice: 25th Anniversary Edition* (Perseus Books 1979).

²⁶ *ibid* 7

²⁷ Robert J Sternberg and Karin Sternberg, *The Nature of Hate* (Cambridge University Press 2008) 44.

²⁸ This involves talking about prejudices, usually with those who share the prejudiced opinion. Most people never get progress beyond this level of prejudice.

- avoidance;²⁹
- discrimination;³⁰
- physical attack;
- extermination.³¹

Thus, as Walters observes, prejudices range from the ‘superficial’ to a ‘deep-seated hatred’ of all people with a particular identity characteristic.³² The fourth and fifth of Allport’s degrees of prejudice are clearly matters of concern for the criminal justice process, and the first and second are generally not, unless antilocution reaches the standards required of the expression offences. Jacobs and Potter illustrate how prejudice is engaged and sanctioned in a criminal justice context:

High Prejudice/ High Causation (I)	Low Prejudice/ High Causation (II)
High Prejudice/ Low Causation (III)	Low Prejudice/ Low Causation (IV)

The fundamental question for the legal process is the line at which the degree of prejudice attracts the attention of the criminal law, and the extent of the causal relationship required in order to criminalise that prejudice. How do we distinguish in the criminal law between legally acceptable prejudice and hostility present in the commission of many offences, and unacceptable prejudice, which transforms a crime into a hate crime? Or, as Hall asks, how do we set the boundaries of hate crime?³³

What is a hate crime?

It is commonly accepted amongst scholars that a global definition of hate crime is not available – nor, as Perry would argue, is it perhaps possible given the historically

²⁹ This stage involves avoiding people from the target group, sometimes involving the prejudiced person inconveniencing himself to avoid the other group.

³⁰ This involves direct measures taken against the disliked group which may include depriving them of political rights, or restricting them of social and economic privileges.

³¹ At this stage, massacres and genocides occur, with the ultimate aim of wiping out the out-group.

³² Mark A Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014) 9.

³³ Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013) 9.

and culturally contingent nature of hate crime.³⁴ Chakraborti and Garland observe that hate crime means different things to different people:

‘Some, particularly lay-people, will understandably adopt a more literal interpretation in line with the more violent and extreme cases that make the news. Scholars, meanwhile, tend to see hate crimes as a social construct with no straightforward meaning and offer a defining set of characteristics which they regard as central to their commission. Practitioners are likely to pursue a much less complex view which requires few of the machinations evident within academic interpretations.’³⁵

Brudholm observes that consensus on the definition of a hate crime is both improbable and ‘to some degree undesirable’.³⁶ However, over recent decades substantive attempts have been made to describe the phenomenon of hate crime, as well as to define a hate crime in law in the literature.

Descriptions of hate crime

Royzman et al believe that, in defining hate crime, we are seeking not so much to name a phenomenon normatively, but rather more to distance ourselves from prejudices we purport not to share:

‘...lurking behind the concept of ‘hate crime’ there seems to be yet another cultural meaning of hate as that which motivates acts of senseless (normatively unjustifiable) violence ... [I]nsistence on the use of *hate* in a particular situation may be less a matter of descriptive characterization than

³⁴ Barbara Perry, *In the Name of Hate* (Routledge 2001). See also, RJ Boeckmann and Caroline Turpin-Petrosino, ‘Understanding the harm of hate crime’ (2002) 58(2) *Journal of Social Issues* 207, where they note, ‘cultural differences, social norms and political interests play a large role in defining crime in general and hate crime in particular.’ *Ibid*, 208.

³⁵ Neil Chakraborti and Jon Garland, ‘Reconceptualising hate crime victimisation through the lens of vulnerability and “difference”’ (2012) 16(4) *Theoretical Criminology* 499, 500.

³⁶ Thomas Brudholm, ‘Conceptualizing Hatred Globally: Is Hate Crime a Human Rights Violation?’ in Jennifer Schweppe and Mark A Walters, *The Globalization of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016) 33.

a reflection of normative commitment to identify with the plights of the victims while distancing from the viewpoints of the perpetrators.’³⁷

Thus, when we seek to describe and define hate crime, according to Royzman et al, we look both to express solidarity with marginalised groups and to send a message to perpetrators that as a society, we do not share the views which they have violently expressed. Quill agrees that in criminalising ‘hate’, we are highlighting society’s disapproval of the offender’s motivation:

‘... [we seek] 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.’³⁸

Gadd and Dixon criticise this application of hate crime laws: they argue that it differentiates perhaps too bluntly between those who ‘hate’ and those who do not, and thus potentially masks the connection between the ‘actions of violent racists and the “prejudice, ignorance and subtle bigotry” that undermines “democratic procedures”’ – ie, institutional racism.³⁹

That said, it is commonly accepted that hate crimes have a ‘symbolic’ purpose, emphasising the wrongfulness of the hate motivated crimes where the punishment of offenders is seen as a ‘denunciation of their evil acts.’⁴⁰ Thus, in the criminalisation of hate, society is also sending a message: that it will not tolerate individuals perpetuating crimes of violent discrimination. In *R v Saunders*⁴¹ Rose LJ discussed the purpose of hate crime legislation, commenting explicitly on the ‘message’ element of such offences:

³⁷ 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.

³⁸ G F Quill, ‘Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration’ (2010) 58 Drake L Rev 181, 188.

³⁹ David Gadd and Bill Dixon, *Losing the Race* (Karnac 2011), xix.

⁴⁰ Phyllis B Gerstenfeld, ‘Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behaviour’ (1992) 10 Behavioural Sciences and the Law 259, 267.

⁴¹ [2000] 1 Cr App R 458.

‘One of the most important lessons of this century, as it nears its end, is that racism must not be allowed to flourish. The message must be received and understood, in every corner of our society, in our streets and prisons, in the services, in the workplace, on public transport, in our hospitals, public houses and clubs, that racism is evil ... Those who indulge in racially aggravated violence must expect to be punished severely.’⁴²

As well as having a symbolic purpose at the point of criminalisation, hate crimes are often described as message crimes at the point of perpetration. This works in two ways: first, in committing the crime, the perpetrator is sending a message to the victim and his or her community. As Perry observes, because victims are interchangeable, the crimes are designed to send a message, not only to the direct victim, but also to the community to which they belong, that they are ‘different’, and ‘Other’.⁴³ The intent of hate crime is, Perry argues:

‘... not only to subordinate the victim, but also to subdue his or her community, to intimidate a group of people who “hold in common a single difference from the defined norm – religion, race, gender, sexual identity”’.⁴⁴

The target, then, is not the victim, but rather his or her community – ‘others like him or her’.⁴⁵

The harms of hate

Perry observes that the impacts of hate crime go far beyond the physical or financial or indeed personal: hate crime, she says, ‘reaches into the community to create fear, hostility, and suspicion.’⁴⁶ It is accepted internationally that hate crime is likely to

⁴² *ibid* 74-75.

⁴³ Barbara Perry, *In the Name of Hate* (Routledge 2001) 10.

⁴⁴ *ibid* citing Pharr, cited in Leslie Wolfe and Lois Copeland, ‘Violence against Women as Bias-Motivated Hate Crime: Defining the issues in the USA’ in Miranda Davies (ed), *Women and Violence* (Zed Books 1994) 203.

⁴⁵ Barbara Perry, *In the Name of Hate* (Routledge 2001) 10.

⁴⁶ *ibid*.

have a more significant impact on its victims than non-hate motivated offences.⁴⁷ Indeed, this is recognised at EU level through the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of the criminal law: in its Report on the implementation of the Framework Decision, the Commission states that one of the reasons for requiring racist and xenophobic motivations to be taken into account at sentencing is the impact of this type of crime on 'individuals, groups, and society at large.'⁴⁸

Direct impacts can range from physical injury to emotional and psychological harm. We now know that there is a qualitative difference to the impact of hate crime as compared to non-hate motivated incidents. For instance, data from the Crime Survey for England and Wales showed that victims of hate crime were more likely than victims of crime overall to say they were emotionally affected by the incident (92% and 81% respectively),⁴⁹ while 36% of hate crime victims stated they were 'very much' affected compared with just 13% for non-hate crime victims. The data also showed that twice as many hate crime victims suffer a loss of confidence or feelings of vulnerability after the incident compared with victims of non-hate crime (39% vs. 17%). Hate crime victims were also more than 'twice as likely to experience fear, difficulty sleeping, anxiety or panic attacks or depression compared with victims of overall CSEW crime.'⁵⁰

Hate crime not only impacts on its direct victims: the targeting of victims on the basis of their membership of a particular community 'communicates to all members

⁴⁷ See eg Paul Iganski, *Hate Crime and the City* (Policy Press 2008); Jennifer Paterson, Mark A. Walters, Rupert Brown, and Harriet Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex forthcoming).

⁴⁸ European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law' [COM(2014) 27 final of 27.1.2014' (2014) 3.4. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>>

⁴⁹ Hannah Corcoran, Deborah Lader, and Kevin Smith, *Hate Crime, England and Wales, 2014/2015* (Home Office 2015) 22.

⁵⁰ *ibid.* Other studies have shown that these impacts can also last longer than victims of equivalent offences which were not motivated by hate. See eg 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.

of that group that they are equally at risk and do not belong.’⁵¹ Paterson et al conducted a study involving over 3,000 LGBT and Muslim people which found that knowing other people who have been the victim of hate crime increases the perception of threat in those indirect victims. This in turn is linked to heightened feelings of vulnerability, anxiety and anger.⁵² These heightened emotions are evidence of the terrorising effects of hate crime, on the broader community of which the victim is part: what the European Union Agency for Fundamental Rights (FRA) refers to as the ‘resonating nature of hate crime’,⁵³ or what Perry and Alvi have referred to as the ‘*in terrorem*’ effect of hate crime.⁵⁴ Hate crime, then, can be perceived as ‘symbolic crimes’ that communicate Otherness and operate as an exclusionary practice.⁵⁵ They have the effect of regulating marginalised social groups. Indeed, the targeted community must be counted as secondary victims of the offender.⁵⁶

Finally, the relationship between the act of the individual and broader societal stratifications are common in other descriptions of hate crime. Unlike most other criminal offences, the personal characteristics of victims are a central – or, as Gerstenfeld would argue - a ‘pivotal’ feature of hate crimes.⁵⁷ Although direct victims may be selected at random, the choice of the targeted group inevitably reflects contemporary social hierarchies. Wolfe and Copeland refer to societal prejudices which create an environment in which hate crime occurs. Hate crime, under their description is:

⁵¹ Amanda Haynes and Jennifer Schweppe, ‘LGB and T? The Specificity of Anti-Transgender Hate Crime’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 130.

⁵² Jennifer Paterson, Mark A Walters, Rupert Brown, and Harriet Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex forthcoming).

⁵³ European Union Agency for Fundamental Rights, ‘Making Hate Crime Visible in the European Union: Acknowledging Victims’ Rights’ (2012) 18 http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf accessed 1 July 2014.

⁵⁴ Barbara Perry and Shahid Alvi, ‘We are all Vulnerable’: The In Terrorem Effects of Hate Crimes’ (2012) 18 *International Review of Victimology* 57.

⁵⁵ Barbara Perry, ‘Where do we go from here? Researching Hate Crime’ (2003a) *Internet Journal of Criminology*, 9
<<http://www.internetjournalofcriminology.com/Where%20Do%20We%20Go%20From%20Here.%20Researching%20Hate%20Crime.pdf>> accessed 1 July 2014.

⁵⁶ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage 2009); Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013); Jack McDevitt, Jennifer Balboni, Luis Garcia and Joann Gu, ‘Consequences for Victims: A Comparison of Bias and Non-bias Motivated Assaults’ (2001) 45(4) *American Behavioural Scientist* 697.

⁵⁷ Phyllis B Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies* (Sage 2013) 11.

‘... violence directed toward groups of people who generally are not valued by the majority society, who suffer discrimination in other arenas, and who do not have full access to remedy social, political and economic justice.’⁵⁸

Perry adapts this perspective but in constructing her own definition looks also from the perspective of Sheffield, who observes that hate crime draws upon but also contributes to this marginalisation:

‘Hate violence is motivated by social and political factors and is bolstered by belief systems which (attempt to) legitimate such violence ... It reveals that the personal is political; that such violence is *not* a series of isolated incidents but rather the consequence of a political culture which allocates rights, privileges and prestige according to biological or social characteristics.’⁵⁹

This further illuminates a point of differentiation between crimes generally and hate crime in particular: it is not the individual that is being targeted in the commission of a hate crime, but rather what they represent to the offender. In developing her own definition, Perry observes that hate crime is like no other crime, as its dynamics both ‘constitute and are constitutive of actors beyond the immediate victim and offenders’. Hate crime, according to Perry:

‘... involves acts of violence and intimidation, usually directed toward already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the ‘appropriate’ subordinate identity of the victim’s group.’⁶⁰

⁵⁸ Leslie Wolfe and Lois Copeland, ‘Violence against Women as Bias-Motivated Hate Crime: Defining the issues in the USA’ in Miranda Davies (ed), *Women and Violence* (Zed Books 1994) 204.

⁵⁹ Carole Sheffield, ‘Hate Violence’ in Paula Rothenberg (ed) *Race, Class and Gender in the United States* (St Martin’s Press 1995) 438.

⁶⁰ Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge 2001) 10.

The determination as to which victim groups are to be named in hate crime legislation is a crucial decision to be made, and one which has the capacity to further marginalise those already on the fringes of society. Chakraborti and Garland⁶¹ argue that even Perry's more expansive definition of hate crime is limited, and propose what they refer to as a simpler 'and in some ways broader' definition in their research, that is by defining hate crimes as 'acts of violence, hostility and intimidation directed towards people because of their identity or perceived 'difference'.'⁶² This definition includes hate incidents as well as hate crime,⁶³ which have, as Garland and Funnell argue, 'just as significant an impact on the victim, their family and wider communities' and is perhaps more practical than the 'complex, ethereal' academic definitions set out above. Given the difficulties with finding a common definition, Iganski suggests that, rather than thinking of hate crime as:

'referring to this or that type of crime it is perhaps more pertinent to think of "hate crime" as a policy domain, an arena in which elements of the political system and criminal justice process have converged and focused on the substantive issue of offences and incidents where some bigotry against the victim plays a part.'⁶⁴

This perspective is particularly useful when considering the field of hate studies and the broader criminological phenomenon of hate crime. However, if we are tasked with determining how the legal system should criminalise prejudice, it is crucially important to differentiate between hate crime, on the one hand, and non-criminal manifestations of bigotry, on the other.

In approaching a legal definition of hate crime, these descriptions inform why we should consider criminalising hate. First, hate crimes are message crimes; second, hate crimes are those which are perpetrated against minoritised groups; and thirdly, hate crimes are different to so-called 'ordinary' crimes because of the impacts they have on both the immediate victim and the wider community. I will explore all these

⁶¹ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (2nd edn, Sage, 2015).

⁶² *ibid* 5.

⁶³ The distinction between these two is discussed below.

⁶⁴ Paul Iganski, *Hate Crime and the City* (The Policy Press 2008) 5.

elements later in this thesis, but it is important to note at this point questions central to a legal definition which the sociological and criminological definitions do not address. Which groups are to be protected? Is it only crimes of violence, or all crimes which are potentially hate crimes? How is the power and oppression to be evidenced in a criminal context? Prior to doing so, it is worth at this point defining the term minoritised group, or minoritised community. I adopt Haynes and Schweppe's definition, in that by using these terms, I refer to a

‘social group with a shared characteristic whose position in society is characterised by relative disadvantage which may be economic, cultural, or political. This position is produced by power imbalances, and maintained by, existing structural inequalities in society.’⁶⁵

The definition is thus broader than ‘minority groups’ including as it does women, and allows for a broad understanding of the term whilst understanding the sociological context in which hate crime occurs.

Legal definitions of hate crime

Moving away from criminological and sociological descriptions of hate crime, then, attempts have also been made to legally define hate crime. In doing so it is important to observe that we generally distinguish between criminal expressions of bigotry (hate speech) and the commission of criminal offences with a bias motive (hate crime). Hate speech offences are generally, and quite rightly, considered separate to and apart from hate crime laws. Laws which criminalise the incitement of hatred, such as those provided for in Ireland's Prohibition of Incitement to Hatred Act 1989, are unusual for the purposes of the criminal law. The international experience of criminalising hate speech is not entirely dissimilar to that in Ireland: legislation is limited in its scope, and prosecutions taken infrequently. Similarly, as Schweppe et al argue, other manifestations of prejudice which are criminalised in some contexts include discrimination, which should also not be included within the definition of

⁶⁵ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 104.

hate crime.⁶⁶ The reason for this is that a hate crime is defined in the first instance as a crime which is committed with a hate element: where no non-hate equivalent of the offence exists on the statute book, then no hate crime can exist. While this definition may be circular, and be a definition of exclusion rather than inclusion, it allows us to, with relative ease, determine if a particular offence falls within the definition of a hate crime or not: for example, there is no 'non-hate' version of incitement to hatred, thus it is not a hate crime.

With hate speech and discrimination removed, then, the search for a definition of hate crime which is relevant or operational in a practical legal context begins. This is no easy task: Hall recounts a conversation with a British government policy-maker who observed:

'... if you could lock academics in a room for six months with the task of producing a single definition of hate crime, they would most likely emerge with more definitions than they had when they went in, which makes for interesting scholarly debate, but is utterly useless for those tasked with actually responding to the problem of hate crime "in the real world".'⁶⁷

At a policy, or practice level, important distinctions are made between hate crime, on the one hand, and hate incidents (that is, all other types of engagement between individuals involving a hate element which fall below the threshold of criminality), on the other. Further, definitions vary depending on which stage in the criminal process we are operating within: the definition of a hate crime at the point of police recording, for example, can and may need to be different to the definition used for prosecution purposes. That said, in the absence of a coherent definition across the process, research finds that we commonly see the hate element of a crime being 'disappeared' or 'filtered out' as it traverses the criminal justice process.⁶⁸

⁶⁶ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

⁶⁷ Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013) 4.

⁶⁸ Jennifer Schweppe, Amanda Haynes and Mark Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

Hate incidents, microaggressions, and hate crime

Where the act of the perpetrator falls below the criminal threshold, the words, gestures or symbols used by that perpetrator are referred to as microaggressions in scholarly literature, and 'hate incidents' in practice. Microaggressions are defined by Nadal as 'commonplace verbal, behavioural or environmental indignities, whether unintentional or intentional that communicate hostile, derogatory or negative slights and insults toward members of oppressed groups.'⁶⁹ They constitute the everyday, often normalised, manifestations of hostility experienced by members of minoritised communities. Sue et al identify three classes of microaggressions: microassaults (that is, intentionally pejorative and/or discriminatory language or behaviour); microinsults (that is, similar acts committed unintentionally), and microindividualisations (the trivialisation or questioning of the lived experiences of members of minoritised communities).⁷⁰ From a legal perspective, the context in which these microaggressions occur can be relevant: while they do not amount to harm for the purposes of the criminal law, if they occur in the context of the workplace, or in the context of the provision of goods and services, for example, the microaggressions could potentially fall within the ambit of the Equality Acts.

In a criminal justice context, microaggressions are often referred to as 'hate incidents', that is is a non-criminal occurrence with a hate element attached to it.⁷¹ Often used for reporting and recording purposes on the part of police services, the definition of a hate incident is often more broad and subjective than that of a hate crime. Perry observes 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'.⁷² For those who are targeted, according to the Association of Chief Police Officers in England and Wales

⁶⁹ Kevin L Nadal and RJ Mendoza, 'Internalised Oppression and the Lesbian, Gay, Bisexual, and Transgender Community' in EJR David (ed) *Internalized Oppression: The Psychology of Marginalised Groups* (Springer 2014) 23.

⁷⁰ Derald Wing Sie, Christina M Capodilupo, and Aisha MB Holder, 'Racial Microaggressions in the Life Experience of Black Americans' (2008) 39(3) *Professional Psychology: Research and Practice* 329.

⁷¹ Where such incidents take place repeatedly between the same offender and the same victim, they may constitute harassment for the purposes of section 10 of the Non-Fatal Offences Against the Person Act 1997.

⁷² 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.

(ACPO), non-crime '[h]ate Incidents can feel like crimes' and need official recognition if they are to be challenged.⁷³ Further, given the relationship between the commission of hate incidents and hate crimes, ACPO observes, hate incidents should be recorded, not only to acknowledge their impact, but also to prevent an escalation of hate incidents into hate crimes.

In England and Wales, and Northern Ireland, definitions of hate incidents are informed by the definition of racist offences emanating from the Macpherson report on the murder of Stephen Lawrence.⁷⁴ A victim-oriented definition, it removes police discretion from the determination as to whether the incident was informed or motivated by prejudice. In England and Wales, for example, the Association for Chief Police Officers (ACPO) defines a hate incident as a non-crime incident '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 membership of a particular group.⁷⁵

The Police Service of Northern Ireland define a hate incident as:

'[A]ny incident perceived to have been committed against any person or property on the grounds of a particular person's ethnicity, sexual orientation, gender identity, religion, political opinion or disability.'⁷⁶

Again, the PSNI definition is broader than the legislative position in Northern Ireland. There are a number of key differences between the ACPO and PSNI definitions. While the perception test is utilised in both, the PSNI definition specifies the groups for which data will be collected. These groups are broader than those outlined in legislation in the Criminal Justice (No 2) (Northern Ireland) Order 2004, extending to, with the incident definition including political opinion and gender identity, allowing for the recording of sectarian and transphobic hate crime. This

⁷³ Association of Chief Police Officers, *Truevision: 'What is Hate Crime?'* (ACPO 2013) available at <<http://report-it.org.uk/what-is-hate-crime>>

⁷⁴ See further, Chapter 3.

⁷⁵ College of Policing, *Hate Crime Operational Guidance* (ACPO 2014) 3. <<http://www.report-it.org.uk/files/hate-crime-operational-guidance.pdf>>

⁷⁶ As cited by Robbie McVeigh, 'Hate and the State: Northern Ireland, Sectarian Violence and "Perpetrator-Less Crime"' in Amanda Haynes, Jennifer Schweppe, and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 405.

occurs relatively frequently across police services, with individual police forces recording hate incidents across a wider range of categories than legislation would require: in Nottingham, for example, the police service records misogyny as a hate crime, with its definition of 'misogyny hate crime' being 'incidents against women that are motivated by an attitude of a man towards a woman and includes behaviour targeted towards a woman by men simply because they are a woman.'⁷⁷

Hate speech and the law

In a simple sense, hate speech is quite simply the verbal or (through gestures, words, or symbols) non-verbal manifestation of hatred, prejudice, or hostility. As Waldron notes, the term hate speech can cover:

'... things as diverse as Islamophobic blogs, cross-burnings, racial epithets, bestial depictions of members of racial minorities, genocidal radio broadcasts in Rwanda in 1994, and swastika-blazoned Nazis marching in Skokie, Illinois, with placards saying "Hilter should have finished the job".'⁷⁸

Indeed, the expression of hatred can be understood within and across the continuum of hatred, extending from a 'throwaway comment' such as a microaggression, to the 'direct and public incitement to commit genocide' and requiring punishment by States Parties under Article 3 the Convention on the Prevention and Punishment of the Crime of Genocide from 1948.⁷⁹ Blurring the clarity of definitional boundaries between hate speech and hate crime, 'speech' – that is, spoken language, written words, gestures and symbols – is also often is key to distinguishing between a hate crime for the purposes of the criminal law (at least in practice) and an ordinary crime: the hate element to a crime is most often evidenced through the presence of what we might call hate speech in the commission of the criminal act.

⁷⁷ See, BBC News 'Nottinghamshire Police records misogyny as a hate crime' (*Nottingham*, 13 July 2016) <http://www.bbc.com/news/uk-england-nottinghamshire-36775398>. For a discussion of this development see Hannah Mason-Bish, "'Get yer tits out": Why Misogynistic Street Harrassment is a Hate Crime' (INHS 2016) <<http://www.internationalhatestudies.com/get-yer-tits-out-why-misogynistic-street-harrassment-is-a-hate-crime/>> See also an evaluation of this innovation, Louise Mullany and Loretta Trickett, *Misogyny Hate Crime Evaluation Report* (University of Nottingham and Nottingham Trent University 2018).

⁷⁸ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 34.

⁷⁹ See also, the International Convention on the Elimination of Racial Discrimination; the International Covenant on Civil and Political Rights.

It is vitally important however, to understand in this context that, at least from a legal perspective, hate speech and hate crime are two separate concepts and are constructed differently. Indeed, hate speech offences have a much longer statutory pedigree, dating back to 'reconstruction-era civil rights statutes and early 20th-century state statutes aimed at the activities of white supremacist.'⁸⁰ Similarly, the British Race Relations Act 1966 criminalised incitement to racial hatred, as did the Irish Prohibition of Incitement to Hatred Act 1989. Goodall observes that one of the key differences between hate speech offences and hate crime is what she refers to as the 'audience' of the crime 'which does not necessarily include the victim, but is rather a separate audience who can be stirred up', and it is this distinction, and the extent to which hate speech can and should be criminalised, which is perhaps one of the more contentious issues in the field of hate studies.⁸¹

From a legal perspective, the criminalisation of hate speech is not unproblematic, being seen as in direct conflict with rights to freedom of expression.⁸² Pejchal and Brayson note that attempts to limit free speech are sometimes seen as an 'attack on the foundations of Western society, where freedom of expression has been considered a developmental cornerstone.'⁸³ This argument was successful in the US Supreme Court case of *RAV v City of St Paul, Minnesota*, discussed below.⁸⁴ That said, while in the United States there are few limitations on the freedom of speech,⁸⁵ this is not the case in other jurisdictions. Through the operation of both Article 10 of the European Convention on Human Rights (which sets out both the protection for and limitations on the freedom of expression) as well as Article 17 of the Convention (which was stated in *Glimmerveen and Hagenbeek v The Netherlands*⁸⁶ as having a

⁸⁰ Scott Phillips and Ryken Grattet, 'Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law' (2000) 34(3) *Law and Society Review* 567, 572.

⁸¹ Kay Goodall, 'Challenging hate speech: incitement to hatred on grounds of sexual orientation in England, Wales and Northern Ireland' in Phil CW Chan (ed) *Protection of Sexual Minorities since Stonewall: Progress and Stalemate Developed and Developing Countries* (Routledge 2010).

⁸² Roger Kiska, 'Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence' (2012) 25 *Regent University Law Review* 107-151.

⁸³ Vera Pejchal and Kimberley Brayson, 'How should we legislate against hate speech? Finding an international model in a globalized world' in Jennifer Schweppe and Mark A. Walters (eds), *The globalization of hate: Internationalizing hate crime?* (OUP 2016) 257

⁸⁴ *RAV v City of St Paul* 505 US 377 (1992)

⁸⁵ See, for example, Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

⁸⁶ *Glimmerveen and Hagenbeek v The Netherlands* Application Numbers 8348/78 and 8406/78.

general purpose of preventing ‘totalitarian groups from exploiting in their own interests the principles enunciated by the Convention’) the Court has upheld laws which criminalise hate speech in, for example, *Norwood v United Kingdom*.⁸⁷ In understanding and articulating what ‘hate crime’ is, we must clearly distinguish it from hate speech, and the related incitement offences.

European understandings of hate crime

There is no common definition of hate crime across Europe, either formal or informal, within the European Union or the Council of Europe. Across Member States of the EU generally, a range of interpretations of the concept of hate crime are in evidence. At a conceptual level, we see key differences in the way that hate crime is understood, which speak fundamentally to the different ways in which hate and hostility have manifested historically across the EU Member States. Perry observes that, across Europe:

‘Recent bitter ethnic conflict, and the legacy of Nazism, colonialism, slavery and communism each influence affected countries’ understanding and conceptualisation of and approach to hate crime policy.’⁸⁸

Glet notes that in Germany, for example, the historical context has dictated a conceptualisation of hate crime in that country which is markedly different to that in the United States (and thus, the definition adopted by the OSCE):

‘In Germany, hate crimes are considered *politically motivated offences* because they present a threat to the human and constitutional rights of the victim and undermine the democratic, pluralistic directive of the country. In this regard, the German approach towards recording hate incidences is based on an offender-oriented system of classification, which focuses primarily on the political motive of the alleged perpetrator.’⁸⁹

⁸⁷ *Norwood v United Kingdom* 16 November 2004. Application number 23131/03.

⁸⁸ Joanna Perry, ‘Evidencing the case for “hate crime”’ in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015) 78.

⁸⁹ Alke Glet, ‘The German hate crime concept: An account of the classification and registration of bias-motivated offences and the implementation of the hate crime model into Germany’s law enforcement system’ (2009) *Internet Journal of Criminology* 1. Emphasis in original.

Member States' divergent conceptualisations of hate crime are reflected in wide-ranging inter-jurisdictional variation in the construction of hate crime laws. Perry notes that the same position applied across the United States in the early 1990s following the passage of the federal Hate Crime Statistics Act:

'The limits of the federal government's commitment to hate crime data collection are immediately apparent in [the Act] itself. Efforts are constrained by the narrow definition of both the protected groups and the enumerated offences ... Moreover, this brings to mind the problem of inconsistency between reporting agencies. Not all states recognise the same categories of bias in their legislation. Some states do not include gender in their hate crime legislation; some do not include sexual orientation; yet others include such anomalous categories as "whistle blowers".'⁹⁰

Ten years following the passing of the Framework Decision, in Europe we are faced with very similar issues as the definitions of hate crime vary across jurisdictions. For the purposes of monitoring and policy analysis, OSCE/ODIHR proposes a generalised definition applicable across boundaries. Hate crimes, it suggests, are 'criminal acts committed with a bias motive.'⁹¹ Perry notes that the approach of the OSCE in coming to its definition was to use one which excluded those offences 'on which there is no international consensus on their criminalization.'⁹²

'For example, while several countries criminalize discrimination, or membership of 'extremist' groups, and include these acts within their national concepts of hate crime, most do not. Similarly, although all European countries criminalize hate speech, to some extent, there is a diverse approach to the threshold of 'hate' above which freedom of expression is no longer protected.'⁹³

⁹⁰ Barbara Perry, 'Counting – and Countering – Hate Crime in Europe' (2010) 18(4) *European Journal of Crime, Criminal Law and Criminal Justice* 349.

⁹¹ OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (OSCE/ODIHR 2009) 16.

⁹² Joanna Perry, 'A Shared Global Perspective on Hate Crime' (2016) 27(6) *Criminal Justice Policy Review* 610, 619.

⁹³ *ibid.*

The consequences of the absence of a common conceptualisation and construction of hate crime, emanating either from the EU or the Council of Europe, are numerous. First, as Perry notes, disparate legislation produces methodological differences with respect to data collection.⁹⁴ Second, case law from the European Court of Human Rights evidences – at best – a lack of awareness amongst police officers as to European-level obligations to evidence the hate element of a crime, and to investigate hate crime appropriately.⁹⁵ At worst, it indicates that the type of bias – both conscious and unconscious – that was found to permeate policing culture in the United Kingdom in the early 1990s following the racist murder of Stephen Lawrence may still represent a challenge for European jurisdictions. Third, and perhaps most fundamentally, victims of hate crime across Europe are treated differently across (and sometimes within) jurisdictions when they are a victim of a hate crime.⁹⁶ From an Irish perspective, the absence of European guidance on this issue from either the EU or the Council of Europe means that an Irish position, drawing both on international practice and on Irish criminal and constitutional jurisprudence, is vital.

Hate crime and the law

Lawrence describes two main models of hate crime legislation that can be used to proscribe prejudice-motivated offences: (a) the ‘discriminatory selection model’ or ‘group selection model’ and (b) the ‘animus model’ or ‘hatred motivation model.’⁹⁷ The group selection model requires that the offender intentionally selected his or her victim from the protected group. The racial animus, or hate motivation model, requires that the offender act out of hostility or hatred for the protected group. The key difference is that in the latter model proof of prejudice, bias, hostility, or hatred is necessary; whereas in the first, the offender’s intention to choose a victim because of his or her perceived association with a particular group is what is required. That said, as he observes, whereas all cases of racial animus are cases of discriminatory selection, ‘the converse is not true.’⁹⁸ In a policy context, it is often not easy to

⁹⁴ Barbara Perry, ‘Counting – and Countering – Hate Crime in Europe’ (2010) 18(4) *European Journal of Crime, Criminal Law and Criminal Justice* 349.

⁹⁵ See Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018) for an evaluation of such understandings.

⁹⁶ See, *ibid.*

⁹⁷ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 29-39.

⁹⁸ *ibid* 35.

determine exactly which model is utilized, with some using a hybrid or both models in different contexts.

In his articulation of how hate can be conceptualised globally, Brudholm observes that there are four 'constitutive features' of hate crime globally:⁹⁹

1. If there is no crime, there can be no hate crime;
2. There is general agreement that the proof of the hate crime lies in the answer to the question *why* the crime was committed;
3. Implied in the definition is a requisite relation between the hate and the crime;
4. There is also an implication that there is a specification of a list of protected characteristics: the hate must be directed towards categories of group identity.

As we have noted, the OSCE/ODIHR definition of hate crime is 'criminal acts committed with a bias motive.'¹⁰⁰ Thus, a hate crime is not a specific offence, but rather a 'type of crime', and can be committed, the OSCE/ODIHR argues, even 'where there is no specific criminal sanction on account of bias or prejudice' in the country in which the crime was committed.¹⁰¹ This is important: hate crime statutes do not typically introduce new forms of offences, but rather attach a bias motivation to existing offences. It is the determination of what 'bias' constitutes, as well as the groups to which that bias is directed, that forms the points of differentiation across jurisdictions. Useful as a starting point, the OSCE/ODIHR definition lacks what I regard as the crucial ingredient to a hate crime: that the bias is directed towards a personal characteristic of the victim targeted. Gerstenfeld's definition resolves this: 'a criminal act that is motivated, at least in part, by the group affiliation of the victim'.¹⁰² The term motivation, of course, has particular resonance in a legal context, and at least in England and Wales there is no requirement to evidence a

⁹⁹ Thomas Brudholm, 'Conceptualizing Hatred Globally: Is Hate Crime a Human Rights Violation?' in Jennifer Schweppe and Mark A Walters, *The Globalization of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016), 34-35.

¹⁰⁰ OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (OSCE/ODIHR 2009), 16.

¹⁰¹ *ibid*

¹⁰² Phyllis B Gerstenfeld, *Hate Crimes: Causes, Controls and Controversies* (3rd edn, Sage 2013) 11.

hate *motivation*: demonstration of hatred is sufficient to move a crime across the threshold to become a hate crime. Her definition also lacks a requirement for that motivation to be based on hate, prejudice, bias or hostility. Criticising the approach taken by OSCE/ODIHR, Goodall suggests a 'constitutive animus' model, which requires either that the offender intended his or her act to have a racist effect, or that the offender utterly disregarded the possibility that his or her actions would have a racist effect.¹⁰³ These aspects will be discussed in chapter 5 of the thesis, but in moving towards a general conceptualisation of hate crime in an Irish context, it is first necessary to discuss some of the constitutional aspects which frame the discussion.

Hate crime and constitutional principles

As with the development of all criminal offences in Ireland, the parameters of the offence will be regulated by the confines of the Constitution. In the context of hate crime, three constitutional principles require particular attention: the protection of freedom of expression; the principle of equality; and the requirement for certainty. Jurisprudence from the United States of America is particularly relevant on these points, and illuminates issues to be considered when legislating in an Irish context.

Legislating against hate in the United States

In the United States (US), these constitutional issues have been explored in a number of cases. While the various ways in which individual states within the US have addressed hate crime will not be dealt with in detail in this thesis, it is useful at this point to outline the constitutional issues which have arisen in that context. Prior to examining these cases it is worth briefly discussing the different approaches taken in the US to legislating against hate. As Phillips and Grattet observe, legal responses to what we would now call 'hate crimes' in the US date back to the early twentieth century; and in the 1960s and 1970s, hate crimes were prosecuted under federal civil rights statutes by the US Department of Justice.¹⁰⁴

¹⁰³ Kay Goodall, 'Conceptualising 'racism' in criminal law' (2013) 33(2) Legal Studies 215. From an Irish perspective, of course, were this approach adopted, a subjective test would apply.

¹⁰⁴ Scott Phillips and Ryken Grattet, 'Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law' (2000) 34(3) Law and Society Review 567, 572.

At the federal level, in 1994, the Hate Crimes Sentencing Enhancement Act (28 USC §994) required the US Sentencing Commission to provide for sentence enhancements for hate crime in its Sentencing Guidelines.¹⁰⁵ The guidelines now provide sentence enhancements for ‘offenses which are hate crimes’ where the defendant ‘intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability or sexual orientation of any person.’¹⁰⁶ When the finder of fact at trial, or the court at sentencing (in cases of a plea of guilty or non contendere), determines beyond a reasonable doubt that the victim was selected in this way, the sentence must be increased by three levels.¹⁰⁷ Thus from a federal perspective at least, the discriminatory selection model applies, although the provisions have not always been interpreted consistently by the courts.¹⁰⁸ The operation of the section further applies purely in the context of sentence enhancement, though admittedly its scope is limited, applying only to federal crimes.

In addition to this sentence enhancement provision, the Hate Crimes Prevention Act 2009 provides under 18 USC Section 249 for a new federal criminal law that criminalizes willfully causing bodily injury, or an attempt to do so by use of fire, weapons, or explosives, to a person because of the actual or perceived race, color, religion, national origin, sexual orientation, gender, gender identity, or disability of the person. Again, it applies only in a limited number of contexts. On conviction, the

¹⁰⁵ See also, 18 USC §241 (Conspiracy against Rights); 18 USC §245 (Bias-motivated Interference with Federally Protected Rights); 18 USC §247 (Interference with the Exercise of Religious Beliefs/Destruction of Religious Property); 42 USC §3631 (Interference with Right to Fair Housing); 18 USC §844 (Federal Explosives Control Statute); 28 USC §534 (Hate Crimes Statistics Act) (Anti-Defamation League, 2012).

¹⁰⁶ United States Sentencing Commission 2013 §3A1.1[a]. Section 3A1.1(b)(1) goes on to apply sentence enhancements in the case of vulnerable victims, in which case the sentence is enhanced by two levels if the defendant knew or ought to have known that the victim was vulnerable; Section 3A1.1(b)(2) provides that the offence level be increased by an additional two levels when the offence involved a large number of vulnerable victims. The section does not apply on the basis of gender in the context of sexual offences, which is provided for in chapter 2 of the guidelines

¹⁰⁷ For example, if the offence level and criminal history category are established at level one (zero to six months), the elevation of the sentence level by three levels will bring it to level four, which is also sentenced at zero to six months. If the offence level is 22 and criminal history category V, this will enhance the sentence from 77 to 96 months to level 25, which is 100 to 125 months. See https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Sentencing_Table.pdf

¹⁰⁸ Kay Goodall, ‘Conceptualising ‘racism’ in criminal law’ (2013) 33(2) Legal Studies 214-238.

offender is to be imprisoned for not more than ten years generally, or between ten years and life if death results from the offence (or there was an attempt to kill), or if the offence includes kidnapping (or its attempt) or aggravated sexual abuse (or its attempt). Finally, in 2010 the Hate Crimes Prevention Act was introduced, also called the Matthew Shephard and James Byrd Jr Hate Crimes Prevention Act. The Act, amongst other things, expands the reach of federal hate crime legislation to include crimes motivated by gender, disability, sexual orientation and gender identity.¹⁰⁹

Most states have adopted hate-crime statutes, with Wyoming the only state without any form of hate-crime law.¹¹⁰ The states that have implemented legislation are by no means uniform in their approach. The resulting picture of hate crime law in the US is haphazard, with some states taking a very committed approach to hate crime enforcement and others defining hate crime narrowly or taking what Henry refers to as a 'lackadaisical' approach to the issue, either defining hate crime very narrowly or having 'inaccurate, incomplete or non-existent' data collection mechanisms.¹¹¹ State legislatures also differ in terms of the characteristics identified and protected by such legislation,¹¹² which, it has been suggested, reflects the role of social movements in the construction of hate crime laws.¹¹³

Some states, as with the federal sentencing guidelines, essentially utilize a sentence enhancement policy and specify what enhancement is appropriate in the context of hate crime. In Florida, for example, the statute essentially reclassifies offences (and thus increases the sentence available to the judge): for example, a misdemeanor of the second degree is reclassified to a misdemeanor of the first degree; a felony of the third degree is reclassified to a felony of the second degree, and so on.¹¹⁴ Some

¹⁰⁹ See further, Laura Meli, 'Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime' (2014) *University of Illinois Law Review* 921, 936-939.

¹¹⁰ Abbee Corb, 'Hate and Hate Crime in Canada' in Nathan Hall, Abbee Corb, Paul Giannasi and John Grieve (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2014).

¹¹¹ James S Henry, 'Hate Crime Laws: A Critical Assessment' in Barbara Perry and Brian Levin (eds) *Hate Crimes Vol. 1: Understanding and Defining Hate Crime* (Praeger 2009) 199.

¹¹² Jordan Blair Woods, 'Hate Crime in the United States' in Nathan Hall, Abbee Corb, Paul Giannasi and John Grieve (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2014).

¹¹³ Ryken Grattet and Valerie Jenness, 'The Birth and Maturation of Hate Crime Policy in the United States' in Barbara Perry (ed), *Hate and Bias Crime: A Reader* (Routledge 2003).

¹¹⁴ Florida Statute §775.085 (1992)

legislatures have even created new substantive laws that are not tied to existing criminal offences at all. These laws are less popular, not least because they involve the formulating of entirely new offences.¹¹⁵

Other states move from prescription to discretion, depending on the severity of the offence. Vermont, for example, states that when a crime is maliciously motivated by a bias against a protected characteristic and the maximum penalty for the underlying offence is a year or less, the enhanced sentence will be for not more than two years or a fine of not more than \$10,000 or both.¹¹⁶ However, it goes on to provide that in cases where the maximum penalty for the underlying crime is more than one year but less than five, the penalty shall be imprisonment for not more than five years or a fine of not more than \$10,000 or both; in cases where the maximum penalty for the underlying crime is five years or more, the sentence for the underlying crime will apply, though 'the court shall consider the motivation of the defendant as a factor in sentencing.'¹¹⁷ This movement from prescriptive sentencing for less serious crimes to a discretionary system for more serious ones is questionable. The defendant who commits the more serious offence may receive no hate-based enhancement at all, with the court under an obligation to consider motive but not to enhance the sentence.¹¹⁸

Legislatures have been far from consistent in their implementation of hate crime laws, and indeed, such consistency would not be expected. It is therefore difficult to place jurisdictions into either the 'hatred motivation' or 'group selection' model without some ambiguity. In some states, the words 'intentionally selects' have been used (for example, Virginia). More commonly used phrases are 'because of' or 'by reason of'. Under these phrases, a penalty enhancement will be enforced where the offender has committed a parallel offence because of, or by reason of, the victim's group identity. For example, the legislation in Maine reads as follows:

¹¹⁵ See for example California Penal Code section 422.6[a] and [b]

¹¹⁶ James S Henry, 'Hate Crime Laws: A Critical Assessment' in Barbara Perry and Brian Levin (eds) *Hate Crimes Vol. 1: Understanding and Defining Hate Crime* (Praeger 2009).

¹¹⁷ Vermont Statutes, Title 13, §1455.

¹¹⁸ James S Henry, 'Hate Crime Laws: A Critical Assessment' in Barbara Perry and Brian Levin (eds) *Hate Crimes Vol. 1: Understanding and Defining Hate Crime* (Praeger 2009).

‘17-A MRSA §1151. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person or of the owner or occupant of that property.’

Under this Act, the offender’s sentence will be increased when he or she is convicted of an offence that has been committed ‘because of’ one of the specified characteristics of the victim. It is evident from the wording of this Act that ‘hatred’ (or prejudice or bias) for the victim is not a prerequisite of the offence. Other ‘because of’ legislation in the US works similarly to this, but may include an intent element such as ‘malice’ or ‘ill will’.¹¹⁹ This model of legislation makes the burden of proof more onerous as prosecutors must prove beyond reasonable doubt that the defendant demonstrated ‘ill will’ towards the victim based on the victim’s identity.

Given the manner in which the freedom of speech is protected and interpreted in a US context, it is unsurprising that it has been raised in key cases involving hate crime statutes. A wave of cases were heard by the superior courts of the United States in the 1990s challenging the constitutional validity of hate crime statutes, primarily with arguments based on the First and Fourteenth Amendments.

In this respect, I will consider three of the primary arguments made in relation to the constitutionality of hate crime laws which are relevant in an Irish context: that they violate the freedom of expression; that they violate the principle of equality; and that they violate the requirement for certainty.¹²⁰

Hate crime and the freedom of expression

In one of the earliest cases, *RAV v City of St Paul, Minnesota*,¹²¹ the applicant was charged with burning a cross on the lawn of a Black family under the city’s Bias-Motivated Crime Ordinance, which prohibited the display of a symbol (including a Nazi swastika symbol or burning cross) that the offender knows or has reason to

¹¹⁹ See, Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 37.

¹²⁰ A further argument made relates to the ‘chilling effect’ of such laws.

¹²¹ 505 US 377 (1992)

know 'arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender.'¹²² This ordinance was deemed unconstitutional by the US Supreme Court on the basis that it proscribed words directed against particular victim groups in violation of the free speech provisions of the First Amendment. Following the judgment in the case, it was unclear whether legislation such as that modelled by the Anti-Defamation League would pass constitutional muster.

This question was answered a year later by the US Supreme Court in the seminal case of *Wisconsin v Mitchell*.¹²³ The statute under consideration in this case was modeled on the ADL legislation utilizing the discriminatory selection model. Mitchell was convicted of aggravated battery with his sentence enhanced due to the biased nature of his crime under Wisconsin Statute §939.45. The legislation allowed for a sentence enhancement where the defendant 'intentionally selects the person against whom the crime ... is committed ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.' Chief Justice Rehnquist gave judgment for the Court and upheld the statute. Differentiating between the penalty enhancement in question here and the previous hate speech ordinance in *RAV v St. Paul*, he observed that while the government cannot punish abstract beliefs, the First Amendment does not prohibit the 'evidentiary use of speech' to establish the elements of a crime to prove motive or intent.¹²⁴ This was particularly true, he held, in the context of hate crime, which he observed are 'thought to be more likely to provoke retaliatory crimes, inflict distinct emotional harm on their victims and incite community unrest.'¹²⁵

Phillips and Grattet in their analysis of appellate court decisions on this issue observe that courts initially found that first, motive can 'and should' be a consideration in the determination of penalties; and second, that speech in the context of a hate crime statute is not the object of punishment but rather provides evidence of motive.¹²⁶ This was extended in later decisions to mean that it is not the

¹²² 505 US 377 (1992), 380.

¹²³ 506 US 476 [1993]

¹²⁴ *Wisconsin v. Mitchell* 506 U.S. 476 [1993]: 489

¹²⁵ *Wisconsin v. Mitchell* 506 US 476 [1993]: 487-488.

¹²⁶ Scott Phillips and Ryken Grattet, 'Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law' (2000) 34(3) Law and Society Review 567, 580.

hate or prejudice of the offender which is being punished, but rather their act of discrimination: 'the perpetrator's attitudes are irrelevant, only the act of discrimination matters.'¹²⁷

Following the enactment of the federal Hate Crimes Prevention Act, some commentators have suggested that the Act is unconstitutional, representing as it does a violation of the freedom of expression (as well as an unconstitutional exertion of the power of Congress), though this assertion has not yet been tested, and, given the precedent of *Mitchell*, it seems unlikely that the first argument would succeed.¹²⁸

Hate crime and the principle of equality

The Fourteenth Amendment to the US Constitution guarantees the principle of equality, though unless a law discriminates on the basis of suspect categories (such as race or religion), differentiation is permissible according to the 'rational relationship' test, that is, where the discriminating provision is supported by a legitimate state interest.¹²⁹ Unsurprisingly, given the fact that core to any hate crime provision is an identification of victims to which it gives protection, it has been argued that hate crime statutes violate the equal protection clause of the US Constitution. Generally speaking, Jenness observes that Lawrence's 'racial animus' model has a 'considerably more difficult time than the discriminatory selection model marshalling appellate court approval'.¹³⁰

For example, the 'rational relationship' test was addressed in the context of hate crime statutes in *Oregon v Beebe*.¹³¹ It was argued by the defendant in the case that the law in question was unconstitutional on the basis that it provided greater protection to an individual assaulted 'because of his race, color, religion or national

¹²⁷ Scott Phillips and Ryken Grattet, 'Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law' (2000) 34(3) Law and Society Review 567, 584.

¹²⁸ See, for example, Jordan Blair Woods, 'Hate Crime in the United States' in Nathan Hall, Abbee Corb, Paul Giannasi and John Grieve (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2014).

¹²⁹ Phyllis Gerstenfeld, *Hate Crimes: Causes, Controls and Controversies* (3rd ed, Sage 2013) 11.

¹³⁰ Valerie Jenness, 'Hate Crime Canon and Beyond: A Critical Assessment' (2001) 12 Law and Critique 279, 283, 300.

¹³¹ 680 P 2d 11 (1984).

origin' than to a person assaulted for some other reason.¹³² The Court of Appeals rejected the argument:

'The legislature may legitimately determine that the danger to society from assaultive conduct directed toward an individual because of his race, religion or national origin is greater than the danger from such conduct under other circumstances. Assaultive behavior motivated by bigotry is directed not just at the victim, but in a sense toward the group toward which the behavior belongs. Such confrontations therefore readily – and commonly do – escalate from individual conflicts to mass disturbances. That is a far more serious potential conflict than that associated with the usual run of assault cases. There being a rational basis for the distinction, we hold that it is constitutionally permissible to punish otherwise criminal conduct more severely when it is motivated by racial, ethnic or religious hatred than by individual animosity.'¹³³

As Gerstenfeld comments, constitutional challenges on the basis of the equal protection clause have generally not been made in other cases 'probably because the standard for review is so lenient.'¹³⁴

Hate crime and the requirement for certainty

There are a number of cases emanating from the United States which concern the rule against vagueness in criminal statutes. A statute will be considered unconstitutionally vague if it is not specific enough to give persons of ordinary intelligence an understanding and adequate warning of the proscribed conduct.¹³⁵ The first case, *State v Stalder*¹³⁶ concerned the bias crime statute in Florida. The victim went to the home of the appellant to retrieve the earrings of a friend: upon requesting the earrings, the appellant yelled statements to the victim regarding the victim's Jewish heritage, and pushed him. Subsequent to the initial interaction, the appellant referred to the victim as a 'Jew boy' on a number occasions. Stalder was

¹³² *ibid* 13.

¹³³ *ibid* 13.

¹³⁴ Phyllis B. Gerstenfeld, 'Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behaviour' (1992) 10 Behavioural Sciences and the Law 259, 277.

¹³⁵ *Botts v Georgia* 694 S.E. 2d 512 (Georgia 2004) 514.

¹³⁶ 630 So. 2d 1072 (Florida 1994).

charged with simple battery, after which, according to subsection (1) of section 775.085 (the Florida hate crime statute), the penalty was subject to reclassification from a first degree misdemeanor to a third degree felony:

‘The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim.’

Amongst other things, Stalder argued that the statute in question was unconstitutionally vague. In considering the constitutionality of the statute, the Court first interpreted ‘evidences’ to mean ‘demonstrates’ prejudice and observed that the statute required three things:

- (1) The perpetrator must demonstrate prejudice, or bias;
- (2) The bias must be evidenced in the commission of a crime; and
- (3) The bias must be based on one or more of the enumerated characteristics of the victim.

There were, the Court found, two interpretations of the term ‘evidences’, one constitutional and one impermissibly vague. In ‘saving’ the provision, it found that the section applied only to bias-motivated crimes: ‘any crime wherein the perpetrator intentionally selects the victim because of the victims’ “race, color, ethnicity, religion, or national origin.”’¹³⁷ Importantly, the court found that were the statute to apply where an offence was committed for some reason other than prejudice, but where bias was evidenced during the course of the commission of the offence, it would be unconstitutional. The reason given was that in such a case, the bias would relate to the underlying crime, the court opined, in ‘only the most tangential way’ as the expression of bias and the underlying crime share only a ‘temporal framework’ and nothing more. Goodall observes that here, the Court was

¹³⁷ 630 So. 2d 1072 (Florida 1994), 12.

emphasising the distinction between 'a merely coinciding expression of racism from racist conduct which forms part of the commission of an offence.'¹³⁸

In *Botts v Georgia*¹³⁹ the State of Georgia hate crime statute was declared unconstitutional on the grounds of vagueness. Here, the appellants pleaded guilty to aggravated assault, but challenged the evidentiary basis for the sentence enhancement sought by the prosecution under the hate crime law. The statute in question provided that a sentence should be enhanced where the finder of fact determined beyond a reasonable doubt 'that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of bias or prejudice.'¹⁴⁰ The trial court found that the evidence showed beyond a reasonable doubt that the appellants had intentionally selected their victims because of bias or prejudice and duly enhanced their sentences. They appealed on the basis that the provision in question was unconstitutionally vague.

The Court agreed with the appellants that the provision in question fell foul of the Constitution given the absence of any specificity regarding the context to which the bias or prejudice in question would apply. The language, the Court found, was so vague and far reaching as to encompass 'every possible partiality or preference':¹⁴¹

'A rabid sports fan convicted of uttering terroristic threats to a victim selected for wearing a competing team's baseball cap; a campaign worker convicted of trespassing for defacing a political opponent's yard signs; a performance car fanatic convicted of stealing a Ferrari – any "bias or prejudice" for or against the selected victim or property, no matter how obscure, whimsical or unrelated to the victim it may be, but for which proof beyond a reasonable doubt might exist, can serve to enhance a sentence.'¹⁴²

¹³⁸ Kay Goodall, 'Conceptualising 'racism' in criminal law' (2013) 33(2) Legal Studies 214, 226.

¹³⁹ 694 S.E. 2d 512 (Georgia 2004)

¹⁴⁰ OCGA § 17-10-17.

¹⁴¹ 694 S.E. 2d 512 (Georgia 2004) 514.

¹⁴² 694 S.E. 2d 512 (Georgia 2004), 514-515.

A third case, *State v Pomianek*¹⁴³ concerned the constitutionality of NJSA 2C: 16-1(a)(3) a hate crime statute which provided that a defendant could be convicted of bias intimidation if a specified offence was committed in circumstances that caused the victim to reasonably believe that the offence was committed with a purpose to intimidate the victim because of their race, colour, religion, gender, disability, sexual orientation, gender identity or expression, national origin or ethnicity.¹⁴⁴ The statute was thus unique in the sense that it asked not whether the offence was bias motivated from the perspective of the defendant, but rather whether the victim reasonably believed that the defendant was so motivated. As the court observed, an innocent state of mind was no defence under the statute: ‘the defendant is culpable for his words or conduct that led to the victim’s reasonable perception even if that perception is mistaken.’ The New Jersey Supreme Court found the legislation unconstitutional on the grounds of vagueness:

‘In focusing on the victim’s perception and not the defendant’s intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law. That is so because a defendant may be convicted of a bias crime even though a jury may conclude that the defendant had no intent to commit such a crime ... Defendant was convicted not based on what he was thinking but rather on his failure to appreciate what the victim was thinking.’¹⁴⁵

In framing legislation in an Irish context, the particular relevance of this constitutional provision will be argued as specific relevance. The extent to which a ‘coinciding’ expression of prejudice will or should elevate an offence to a hate crime is one which will be considered particularly in chapter 5. Further, given the ambiguity associated with terms used to describe some group characteristics – ‘race’ in particular – attention will be paid to the manner in which characteristics are delimited in chapter 7.

¹⁴³ 110 A. 3d 841 (New Jersey 2015)

¹⁴⁴ 110 A. 3d 841 (New Jersey 2015).

¹⁴⁵ For further analysis of the case, see ‘Recent Cases’ (2016) 129 Harvard Law Review 867.

Towards an Irish definition

With the various descriptions, definitions and constitutional considerations taken into account, a useful definition in an Irish context, then, might be one which absorbs some commonly accepted characteristics of a hate crime and allows for clarity in what is being addressed. Schweppe, Haynes and Walters argue that at an EU level, there should be coherency in the conceptualisation of a hate crime:

‘[W]e assert that the European Union could usefully adapt the ODIHR definition of a hate crime: that is, that a hate crime is a criminal offence already recognised by the criminal law, which is combined with a hate element. It is most appropriate to define hate crime, at least for the purposes of the legal process, according to what we might refer to as the ‘lowest common denominator’ definition. On this basis, extremism should be conceptualised differently to hate crime; incitement to hatred offences should not be included in the definition; and anti-discrimination measures should equally be excluded.’

Thus, for the purposes of this thesis, I propose to conceptualise a ‘hate crime’ as a crime recognised by the Irish legal process which is committed with a hate element which is directed at the personal characteristics of the victim. The remainder of this thesis will address what Schweppe, Haynes and Walters refer to as the ‘construction’ of a hate crime, and will consider and explore international experiences and contexts to legislating against hate in order to develop this proposal. They observe that scholars have identified that there are three core questions whose relevance transcends the differences and commonalities in the construction of hate crime laws across EU Member States, all of which shall be addressed in this thesis:

- The formal recognition of the hate element as either part of an aggravated offence or through the sentencing process;
- The extent to which the hate element should be present in the offence – either as a motivation to the crime, bias selection of the victim, or as bias demonstrated through the course of the offence; which includes the question as to whether the crime needs to be wholly or partly motivated by hate;

- The range of victim groups which hate crime legislation should protect.¹⁴⁶

Prior to analysing how the construction of a hate crime should present itself in the Irish statute book, however, the more immediate question is whether Ireland *needs* hate crime laws, a question which the next chapter will address.

¹⁴⁶ See, for example, Jon Garland and Corinne Funnell, 'Defining hate crime internationally: issues and conundrums' in Jennifer Schweppe and Mark A Walters, *The Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016); Piotr Godzisz, 'Eastern crimes, western theories: Conceptualising the hate crime model in Central and Eastern Europe' (*International Network for Hate Studies*, 22 January 2015) <<http://www.internationalhatestudies.com/eastern-crimes-western-theories-conceptualising-hate-crime-model-central-eastern-europe/>> accessed 24 February 2018; Joanna Perry, 'Evidencing the case for "hate crime"' in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015); Kay Goodall, 'Conceptualising 'racism' in criminal law' (2013) 33(2) *Legal Studies* 215; Jon 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.

Chapter 3: Hate Crime in Ireland in the Absence of Legislation¹

Introduction

Having considered some of the theoretical and constitutional aspects to hate crime, the next question I will discuss is how hate crime is currently addressed in Ireland in the absence of specific legislation. This chapter will first explore current limited statutory responses to hate crime in Ireland, and then discuss how a hate or bias motivation has been considered in the context of the criminal process more generally. It will then set out current knowledge on the prevalence of hate crime in Ireland, and will explore the international context for the issue, considering also the statements and opinions from various international organisations regarding Ireland's response to hate crime. The chapter will seek to show that the absence of legislation in Ireland has led to what Perry has referred to as a legislative 'permission to hate',² and that it has contributed to a situation whereby the hate element of a crime is 'disappeared' from criminal proceedings throughout the process. The recent attempt to legislate by way of the Criminal Justice (Aggravation by Prejudice) Bill 2016 will finally be examined critically in this context.

The Prohibition of Incitement to Hatred Act 1989

In Ireland, the only legislative recognition of 'hate' is through the Prohibition of Incitement to Hatred Act 1989. This Act prohibits expressions of hatred, including the dissemination of graphic or textual materials, which have the intention of provoking hatred 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). Introduced in order to allow Ireland ratify the International Convention on Civil and Political Rights,³ and to address the broader anti-discrimination provisions of the United Nations Covenant

¹ Elements of this chapter have been already published in Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017); and Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

² Barbara Perry, 'Legislating Hate in Ireland: The View from Here' in Amanda Haynes, Jennifer Schweppe, and Seamus Taylor (eds) *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2016) 76.

³ Michael O'Flaherty, 'Implementation of the International Covenant on Civil and Political Rights – Ireland before the Human Rights Committee' (1993) 11 Irish Law Times 225.

on the Elimination of All Forms of Racial Discrimination,⁴ at the time of its enactment, it was relatively progressive, including sexual orientation as a protected characteristic prior to the decriminalization of homosexuality in 1993. The Act is deliberately limited to incitement to hatred and, as I have discussed in chapter 2, thus not directly relevant in the context of hate crime. That said, as the only piece of legislation in Ireland which expressly addresses hate crime, it provides a useful starting point when understanding the manner in which the criminal justice process addresses hate crime in Ireland.

The first general point to note in relation to the Act is that, even accepting its limited application, it has proven ineffective at combating even criminal expressions of hatred, with only a small number of convictions secured under the Act:⁵ it would appear from statistics produced by the Courts Service that there had been 44 prosecutions and only five convictions under the Act between 1989 and 2017.⁶ Members of the Gardaí have recognized the limitations of the Act, as was made clear by Haynes et al through their empirical research:

'Sure you can see from the amount of prosecutions taken, is it successful? No it's not. Has it been of benefit? Not really, like, you know? It takes a lot to get a charge out of it ... It isn't strong enough in relation to individual issues and problems...' (Member of An Garda Síochána)⁷

Schweppe and Walsh speculate that one reason for the low number of prosecutions under the Act is that, given that the Act requires the consent of the Director of Public Prosecutions prior to initiating a prosecution, offences under the Act are viewed as serious offences by members of An Garda Síochána, despite being capable of being

⁴ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 55.

⁵ European Commission on Racism and Intolerance, *Third Report on Ireland* (ECRI 2007). See also, Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008).

⁶ Conor Gallagher, 'Courts service reveals five convictions for hate crime since 1989' *The Irish Times* (Dublin, 19 July 2017).

⁷ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 51.

tried summarily.⁸ The reason for this, they assert, is so as to help protect private individuals from the abuse of the Act by others to pursue ‘trivial disputes or grievances’, but also to ensure consistency in prosecution policy.⁹

Daly further explains the lack of prosecutions by observing that the most common manner in which hate speech is expressed in Ireland today is in the context of ‘face-to-face verbal abuse’.¹⁰ The 1989 Act, he argues is:

‘particularly pointless in such cases, as prosecution under its provisions of this type of incident, which concerns the *expression* of hatred, but not incitement to hatred of others, generally results in acquittal.’¹¹

The second general point to be made in relation to the Act is that the expectations it generated – simply by being the only legislative statement in Ireland regarding hate, in whatever form, meant that individuals and organisations had what might be considered high hopes regarding its efficacy. By simply containing the term ‘hate’ in the legislation, an expectation existed amongst minoritised communities that the Act should address broader manifestations of hate than incitement. Taylor observes that this resulted in what he calls ‘... “an expectations gap” and “a frustration gap” between community aspirations from [the 1989] legislation and the reality of its limited application and implementation to date.’¹² This, he argues, potentially ‘undermines social cohesion, and a sense of the system working for all’.¹³ This is reflected in the findings of Schweppe et al., which found civil society organizations explicitly referencing the inadequacy of the 1989 Act and its limitations:

‘In broad terms, the Incitement to Hatred Act is inadequate. While it was critically important at the time, 1989, to have sexual orientation included ... it

⁸ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 56.

⁹ *ibid* 70.

¹⁰ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part II’ (2007) 17(4) *Irish Criminal Law Journal* 16.

¹¹ *ibid*.

¹² Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011).

¹³ *ibid* para 5.2.21.

*served and continues to serve as a symbolic Act only. It is not sufficient to address actual hate crimes targeting LGBT people.'*¹⁴

There are a number of reasons as to why the Act has been ineffectual, ranging from the language used in the Act to criminalise words or behaviour, to the range of victim groups it purports to protect. Some of these limitations will now be addressed.

'A group of persons'

Perhaps the core reason for the low prosecution rates under the Act is the fact that 'hatred' is defined as directed against a 'group of persons'. Schweppe and Walsh, writing about legal measures to combat racism and xenophobia, observe that this limitation is a weakness in the Act, limiting its capacity to address a 'very common form of racist behaviour', that is where the hatred is directed at another person on account of their actual or perceived characteristics – that is, a hate crime.¹⁵ O'Malley agrees that due to the requirement that the 'hatred' expressed is against a group, as opposed to an individual, it is likely that the number of prosecutions under the Act will remain low.¹⁶

'Threatening, abusive or insulting'

The 1989 Act requires that the words or behaviour in question are 'threatening, abusive or insulting'. Referring to *Brutus v Cozens*¹⁷ Keogh considers how the term 'insulting' is to be interpreted in the context of the Act. He suggests that, based on that case, while the term has a higher threshold than being merely causing resentment in people, or affronting them, there is no requirement that anyone actually be insulted, nor that the defendant intended to insult any particular person.¹⁸ Keogh submits that, on this basis, it is the tone, rather than the effects of the message, that are to be objectively assessed for their insulting character: 'material presented in a somewhat moderate manner, but with highly offensive

¹⁴ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free From Fear: Legislating for Hate Crime in Ireland – An NGO Perspective* (CUES 2014) 24.

¹⁵ *ibid* 60-61.

¹⁶ Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 223.

¹⁷ [1973] AC 854.

¹⁸ Conor Keogh, 'The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?' (2001) 6(3) Bar Review 178.

content, is likely to be excluded.’¹⁹ Daly observes that some courts have chosen to focus on the manner in which a message is delivered, with others focussing on content matter.²⁰ This indeterminacy, Daly argues, precludes the provision of adequate legislative guidance on the issue.²¹ Schweppe and Walsh agree that the term ‘threatening’ is unproblematic, given its use in the context of assault. However, because of their extensive and ill-defined scope, the use of the terms abusive or insulting ‘can have a chilling effect on the freedom of debate and the freedom to express one’s views.’²²

‘Intended to, or having regard to all the circumstances, is likely to, stir up hatred’

Described by Keogh as the ‘Achilles heel’ of the Act,²³ it is this requirement – that the defendant either intended to, or in the circumstances, was likely to, stir up hatred, that has arguably resulted in so few prosecutions under the Act. Byrne and Binchy ask whether it is sufficient that a few ‘cranks’ are likely to be stirred up, or whether there is an objective element to the requirement, concluding that the standard likely to be applied is essentially somewhere between the few ‘cranks’ and the objective standard of the hypothetical juror. Daly, however, argues that the ‘is likely to’ element of ‘stirring up’ facilitates convictions for cases in which the expression ‘is either not intended to be heard by others, or simply not intended or expected to incite others to hatred’, ultimately incorporating a threshold of negligence to a criminal act.²⁴

One of the few cases in which the scope of this element of the Act was addressed is ‘the O’Grady case’, where the defendant was a bus driver who refused to allow a Gambian man board the bus as he was eating a sandwich.²⁵ In so refusing him access, the bus driver, as Schweppe and Walsh observe, ‘subjected the individual to

¹⁹ *ibid* 178-180.

²⁰ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) *Irish Criminal Law Journal* 16.

²¹ *ibid*.

²² Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 59.

²³ Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) *Bar Review* 178.

²⁴ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) *Irish Criminal Law Journal* 16.

²⁵ There is no reported decision in the case, and it is discussed in Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008).

extremely derogatory remarks to the effect that he as a black man lacked the civilised standards of behaviour of the white Irish man.’²⁶ The conviction of the defendant was overturned on appeal by the Circuit Court on the basis that the only two witnesses to the incident were entirely supportive of the Gambian man. The Circuit Court found that an essential component of the Act – that is, that someone was incited to hate – had not been established.²⁷

The Law Reform Commission further observes that the Act has proven particularly ineffectual in combating online hate speech, perhaps for this reason.²⁸ It refers to the so-called ‘Traveller Facebook case’, in which the accused had created a Facebook page entitled ‘Promote the use of knacker babies for shark bait.’²⁹ The Commission notes that the case was dismissed in the District Court on the basis that there was reasonable doubt as to whether there had been intent to incite hatred against the Traveller community.³⁰ Indeed, Keogh observes that such is the application of the ‘stirring up’ requirement, a conviction will only be secured in cases where ‘racist material is sent between racists but not when the victim group is directly targeted.’³¹ Rather than stir up hatred in society, he notes, most right-minded people will be disgusted by the type of material the Act seeks to limit.³²

There has only been one reported judgment exploring the scope and application of the 1989 Act, and this was done in the context of an extradition request. In *Re the European Arrest Warrant Act 2003: Minister for Justice and Law Reform v Petrášek*,³³ a question arose as to the correspondence between the Czech law of ‘defamation of the ethnical (sic) group, race and persuasion’³⁴ and the 1989 Act. The warrant stated

²⁶ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 61.

²⁷ *ibid.*

²⁸ That said, Kane and O’Moore describe the Act as a ‘technologically neutral’ one, as appropriate to online expressions of hatred as it is to those occurring offline. Sinead Kane and Mona O’Moore, ‘The EU Directive for Victims of Crime: how it applies to victims of bullying’ (2013) 23(3) *Irish Criminal Law Journal* 83.

²⁹ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.245, 2.246.

³⁰ *ibid.*

³¹ Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) *Bar Review* 178, 181.

³² *ibid.*

³³ [2012] IEHC 212.

³⁴ [2012] IEHC 212, para 37.

that Petrášek verbally attacked a Romany family, and '[scolded them, and called black swines (sic), Negro swines three women (sic) ... He shouted at them that he would speak only with whites'.³⁵ In addressing whether correspondence existed between Irish law and Czech law in the case, counsel for the respondent stated that the facts did not satisfy the ingredient relating to intention, or the ingredient of stirring up hatred. The Court was not impressed with these arguments, and finding correspondence to the 1989 Act Edwards J stated:

'The conduct described speaks for itself in this Court's view, and an intention to stir up hatred in the case of the s.2 offence ... alternatively the creation of a likelihood that hatred would be stirred up in the case of the s.2 offence ... can all be inferred from the description of the underlying facts provided.'³⁶

Thus, while there did not seem to be any evidence that anyone was in fact 'stirred up', (the apparent prerequisite to a prosecution under section 2 as set out in previous cases and referenced by the Law Reform Commission), Edwards J nonetheless found that the facts, as presented, corresponded to section 2 of the 1989 Act.

Whether this signals an acceptance of a broader interpretation of the Act in the future remains to be seen, but the interpretation here is preferable to that in the earlier cases. Arguably, the judicial interpretation of the requirements as set out in the O'Grady and Traveller cases is flawed: on a strict reading, the Act does not require proof that any individual was incited, it simply requires that the defendant (for example) use words which 'are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.' It could be that the courts were relying on the decision of People (*Attorney General*) v *Capaldi*,³⁷ that is, that there is a requirement in incitement offences that the incitee has contemplated that which is incited. However, this interpretation has been

³⁵, *ibid* para 38.

³⁶ *ibid* para 42.

³⁷ (1949) 1 Frewen 95.

criticised,³⁸ and – more importantly – applies only to the common law offence of incitement. Thus, the interpretation of Edwards J in *Petrášek*³⁹ is to be preferred.

Whatever the true interpretation of this element of the Act, it is difficult to disagree with Daly who argues that the Act is ‘unacceptably vague, excessively broad in scope, and in a prosecutorial sense, effectively rudderless.’⁴⁰ McGonagle agrees, and goes so far as to say that those operative notions which underpin the Act ‘tread the very fine line separating potential for legislative flexibility from legislative uncertainty’: a fine line which, of course, has constitutional origins.⁴¹

Online hate speech

The Law Reform Commission has further analysed the utility of the Act in an online context.⁴² Given the fact that the internet, as the Commission observes, offers a ‘substantial means to promote hatred and facilitate hate speech’⁴³, if the 1989 Act were to have any effective application, it is perhaps in this context that it could be most readily utilised. The Commission notes that online hate speech is criminalised by the Act, but any difficulties already identified in terms of the efficacy of the Act offline are essentially compounded in an online context. Referring to the so-called ‘Traveller Facebook case’, the Commission recommends that the Act and the criminalisation of hate speech be subject to broad reform. This is particularly relevant in a context where, as the Commission observes, ‘[o]nce an abusive comment is made it can spread very fast, be viewed by many people and remain accessible long after the content was posted.’⁴⁴

Victim groups

Finally, a further limitation to the Act is the fact that it is restricted in terms of its protection of groups. By only naming race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation, the Act ignores incitements to hatred against other communities, most obviously

³⁸ See for example, Liz Campbell, Shane Kilcommins and Catherine O Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010), chapter 7.

³⁹ [2012] IEHC 212.

⁴⁰ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16.

⁴¹ Tarlach McGonagle, ‘Wresting (Racial) Equality from Tolerance of Hate Speech’ (2001) 23(1) Dublin University Law Journal 21.

⁴² Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016).

⁴³ *ibid* at para 2.245.

⁴⁴ *ibid* at para 2.247.

disabled people, intersex and transgender people. The exclusion of disabled people from the scope of the Act was described as a significant and notable absence in the legislation by Kilcommins et al.⁴⁵ Again, this gap in legislative protection is recognised by groups who advocate for these communities:

‘People with an intellectual disability are particularly vulnerable to violence or the threat of violence ... 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.’⁴⁶

Reform of the 1989 Act

In criminalising speech, a balance must be struck between the freedom of expression, as protected by Article 40 of the Constitution and Article 10 of the European Convention on Human Rights, and the rights of minoritised communities to be protected from attack and persecution. Currently, as McGonagle cogently argues, the Act ‘falls between two stools.’⁴⁷ In determining where to strike this balance in the context of the 1989 Act, Keogh argues that the legislation must be seen not just as infringing free speech, but as ‘promoting and protecting the values and principles of a free and democratic society.’⁴⁸ McGonagle equally recommends a ‘profound recalibration’ of the policy objectives underpinning the Act.⁴⁹

The Law Reform Commission recommended that online hate speech laws be reformed as ‘part of an overarching reform of hate crime’ rather than independently

⁴⁵ Shane Kilcommins, Claire Edwards and Gill Harold, ‘Victims of Crime with Disabilities in Ireland: Invisible Citizens within an Adversarial Paradigm of Justice’ (2013) 23(2) Irish Criminal Law Journal 45.

⁴⁶ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free From Fear: Legislating for Hate Crime in Ireland – An NGO Perspective* (CUES 2014) 21.

⁴⁷ Tarlach McGonagle, ‘Wresting (Racial) Equality from Tolerance of Hate Speech’ (2001) 23(1) Dublin University Law Journal 21.

⁴⁸ Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178.

⁴⁹ Tarlach McGonagle, ‘Wresting (Racial) Equality from Tolerance of Hate Speech’ (2001) 23(1) Dublin University Law Journal 21. See also, Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 164-171 for an assessment of reform options under the Act.

of any such all-embracing reform.⁵⁰ Daly reviews the 1989 Act, and the manner in which hatred and intolerance manifested in Irish society up to and including 2007. Critiquing earlier recommendations for reform, Daly recommends the introduction of specific legislative measures targeting offensive private communications, modelling the UK Malicious Communications Act 1988. Enacting specific legislation to address the more prevalent forms of hate speech, as well as hate crime, he argues, would 'do much more to safeguard minorities from hatred than enacting stringent incitement to hatred legislation, and would have the advantage of being more compatible with a strong right to freedom of expression.'⁵¹ This would allow amended incitement to hatred legislation to work, not as a 'quasi-public order provision' but one which serves symbolic and deterrent functions by focussing not on safeguarding public order, but rather protecting human dignity.

Whatever the outcome of the review and reform, it is vital that incitement to hatred and hate crime be considered separately. Indeed, while hate speech and incitement to hatred can be considered as part of the family of hate offences, the subject-matter of this thesis is restricted to hate crime as it is more narrowly understood, and not to hate speech. Understanding the context and content of the 1989 Act is important for this purpose, but it is to hate crime proper that the thesis will now turn.

Hate crime in the Irish criminal process

As is clear, hate crime is not specifically proscribed in any way in Irish criminal law. This next section will describe how various actors in the criminal process address and understand hate crime in the absence of legislation. It will seek to understand how hate crime is framed, defined and recognised in Ireland, from the point of recording a crime to the treatment of offenders. The research draws on empirical data published in two reports, *Out of the Shadows*,⁵² and *Lifecycle of a Hate Crime*.⁵³

⁵⁰ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.255.

⁵¹ Tom Daly, 'Reform of the Prohibition of Incitement to Hatred Act 1989 – Part II' (2007) 17(4) *Irish Criminal Law Journal* 16.

⁵² Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

⁵³ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

Recording hate crime

The first point of contact for victims with the criminal process is An Garda Síochána. By reporting a crime and making a statement, victims are in one sense central to the institution of criminal proceedings; however, once this initial stage has passed, victims have traditionally been side-lined by the criminal process. This means, as Walsh observes, that the role of the victim is relegated 'to the status of mere witness whose personal situation and interests are at risk of being side-lined in the contest between the State and the accused.'⁵⁴ This traditional role has, however, changed significantly in an Irish context following the implementation of the EU Victims' Directive in the Criminal Justice (Victims of Crime) Act 2017.⁵⁵ Prior to addressing the provisions of the Directive which relate to hate crime, however, policing practice in the context of hate crime will first be addressed.

Gardaí have a vital role in ensuring that a hate crime is formally recognised by the criminal process. This general policing principle was recognised in the Macpherson report, published in the aftermath of the murder of Stephen Lawrence in London.⁵⁶ The Report observes that the failure to recognise the central place that race and race relations should have played in the investigation of the murder played a part in the policing deficiencies under scrutiny in the Report.⁵⁷ A result of what the Report calls 'institutional racism',⁵⁸ this failure underpinned the investigation, and, in this context, the particular failure of many police officers to recognise Stephen Lawrence's murder as a racially motivated crime.⁵⁹ In order to mitigate against institutional racism impacting on the investigation or prosecution of a crime in the future, the Macpherson Inquiry recommended the adoption of a definition of a racist incident to be used across policing practices:

⁵⁴ Dermot Walsh, *Criminal Procedure* (2nd edn, Round Hall, 2016) 18-19.

⁵⁵ For an in-depth analysis of the traditional role of the victim in the Irish criminal process, see Shane Kilcommins, Susan Leahy, Kathleen Moore Walsh, and Eimear Spain, *The Victim in the Irish Criminal Process* (Manchester University Press 2018).

⁵⁶ William Macpherson, *The Stephen Lawrence Inquiry* (Cm 4262-I, The Stationery Office 1999)

⁵⁷ *ibid* para 6.21.

⁵⁸ The Inquiry defined institutional racism as 'The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.' William Macpherson, *The Stephen Lawrence Inquiry* (Cm 4262-I, The Stationery Office 1999) para 6.34.

⁵⁹ *ibid* para 6.45.

‘A racist incident is any incident which is perceived to be racist by the victim or any other person.’⁶⁰

Importantly, the Inquiry recommends that the definition be inclusive of crimes and non-crimes, and that both ‘must be reported, recorded and investigated with equal commitment.’⁶¹ Though the definition has been changed following the publication of the Report, the essence of its requirements remain the same: that it is a victim-oriented definition which requires the incident to be recorded as racist where it is perceived by the victim or any other person to be so motivated. This position is now supported and adopted by the European Commission on Racism and Intolerance, which in its General Policy Recommendations 11 on combating racism and racial discrimination in policing, defines a racist incident as ‘any incident which is perceived to be racist by the victim or any other person.’⁶²

In an Irish context, the process of formally flagging a crime as bias-motivated within An Garda Síochána rests primarily upon the assignment of a bias-related motivation when recording the crime on the system used to electronically record crimes, Police Using Leading Systems Effectively, more commonly referred to as PULSE. Garda HQ Directive No 188 of 2002 sets out the manner in which racially motivated incidents are to be recorded on PULSE. The Directive itself states the importance of recording racially motivated headline and non-headline offences in an ‘accurate and impartial’ manner to inform Garda management, government and the public as to the nature and extent of such offences in Ireland. The Garda Inspectorate Report notes that the definition used by An Garda Síochána for the recording of racist or homophobic crimes is: ‘any incident which is perceived to be racist or homophobic by the victim or any other person.’⁶³ It is clear that this definition is grounded in the Macpherson definition.

⁶⁰ *ibid* chapter 47, para 12.

⁶¹ *ibid* chapter 47, para 13.

⁶² European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 11: Combating racism and racial discrimination in policing* (ECRI 2007).

⁶³ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate, 2014) Part 6, page 45.

Though the definition has been in place since 2002, the 2014 Garda Inspectorate Report suggests that hate crime is not an issue with which members of An Garda Síochána are familiar.⁶⁴ During inspection visits, in which the Inspectorate engaged with approximately 1,000 members of the force and asked about investigating racist and homophobic crimes, ‘not one garda reported that they had ever recorded such a crime or investigated an offence.’⁶⁵

The Garda Inspectorate Report also refers to the roles of both Ethnic Liaison Officers and LGBT Liaison Officers, who both act in a liaison role with communities and – at least theoretically – assist in the investigation of racist and homophobic crimes. HQ Directive 42/2012 provides that the ELO/LGBT Officer has responsibility for liaising with representatives from all of the nine strands of diversity. In particular, ELO/LGBT Officers are responsible for

‘... assisting, where required in the investigation of racist and homophobic incidents and ensure appropriate support mechanisms are available to ethnic minority communities and the lesbian, gay, bi-sexual and transgendered (sic) community.’⁶⁶

Despite these efforts, it has been argued that police recording practices were not fully capturing the full extent of the problem of hate motivated crime in Ireland.⁶⁷ Haynes et al report in 2015 that ELO/LGBT Officers had varying degrees of knowledge as to their responsibilities, the communities they represent and even the manner in which hate crime could be recorded on the PULSE system:

‘While all of the interviewees were aware that it is possible to record a crime as racially motivated using the drop down motivations menu, there was less consistency in awareness of the other available prejudice-related categories.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ The Garda Inspectorate observes that, given the different communities and different training needs required for the engagement with these communities, the merging of the two roles be reviewed. Garda Inspectorate *Crime Investigation* (Garda Inspectorate, 2014), Part 6, page 46.

⁶⁷ Dermot Walsh and Michael Mulqueen, ‘Framing the Crime Prevention Discourse in Ireland: Borrowing The Appearance While Avoiding the Substance of the UN Guidelines’ (2009) 44(1) *Irish Jurist* 152.

Few AGS interviewees mentioned the categories of xenophobic or anti-Semitic motivations. None mentioned sectarian motivations. While there were generally high levels of awareness of the potential for homophobic crime, one ELO/LGBT officer was unaware that it was possible to record a homophobic motivation on PULSE.⁶⁸

Interviewer: Do you know if you can record a homophobic motivation?

Interviewee: No. Definitely not.

Interviewer: You can't?

*Interviewee: Could you flag it as homophobic? ... apart from the narrative? I don't think you can.'*⁶⁹

The failure of An Garda Síochána to accurately record hate crime is clearly established: Gurchand Singh, the Head of Analysis in An Garda Síochána, observed that the official figures:

*'... are not a reflection of the trends, extent, depth of hate crime in Ireland... [we cannot] assume that all incidents are reported to us. The challenge is knowing what [the] proportion of incidents reported to us are'*⁷⁰

In order to address these issues, the Garda Inspectorate in its 2014 Report recommended a review of the recording system to ensure that all crimes containing elements of hate or discrimination are flagged on PULSE.⁷¹ It also suggested the creation of a feature which would allow the accurate recording of the nine strands of the Diversity strategy.⁷²

⁶⁸ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 37.

⁶⁹ *ibid* 37.

⁷⁰ *ibid* 22.

⁷¹ The Commission on the Future of Policing echoed this recommendation, stating that there was an 'urgent need to address the quality of the crime data in Ireland, and the way in which police record crime investigations.' Commission on the Future of Policing, *The Future of Policing in Ireland* (Commission on the Future of Policing 2018), 22.

⁷² Garda Inspectorate, *Crime Investigation* (Garda Inspectorate, 2014) Part 6, page 45.

Implementing these recommendations, since late 2015 An Garda Síochána under PULSE 6.8 has changed the way in which the bias element is recorded. In this latest release, there is a new MO tab, 'Discriminatory Motive' which has a number of sub-categories including gender, anti-disability, ageism, transphobia, homophobia, anti-Semitism, sectarian, anti-Muslim, racism, anti-Roma, and anti-Traveller, thus expanding the scope of the recording mechanism beyond the nine strands of the Diversity strategy. Further, members are now *obliged* to respond to the question as to whether there is a discriminatory motive in the case every time a report is logged. This change in policy resulted in a dramatic increase in the numbers of recorded hate crime in the first half of 2016, with 308 crimes with a discriminatory motive being recorded in this period, up from 114 in 2014.⁷³ However, it is unclear what training (if any) has been provided in this context. It is entirely possible, for example, that the reason for the increase in recorded hate crime is a conflation by first line officers of, for example, an assault on a transgender person, and an anti-transgender assault. This distinction is crucial, and it is vital to be capable of establishing true hate crime figures in order to respond to the phenomenon appropriately. What is clear, however, is that in the absence of an understanding of hate crime, and the recording process, the hate element of a crime can be filtered out at this stage in the proceedings.

Prosecuting hate crime

Once a crime has been recorded as a hate crime and appropriately investigated, the next stage in criminal proceedings is the prosecution of the offence. Generally speaking, the Director of Public Prosecutions has issued guidelines on how the decision to prosecute should be taken for anyone so tasked, which are intended to ensure uniformity and consistency across the process. Hate crime is not mentioned explicitly anywhere in these guidelines. That said, some of the guidance provided is relevant to the prosecution of this type of offence.

⁷³ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 115.

In making the decision to prosecute any crime, a fundamental consideration is an assessment as to whether the prosecution is in the public interest.⁷⁴ In coming to this decision, the prosecutor will first ascertain whether there is enough evidence to support a *prima facie* case, and then consider the strength of the evidence to support that *prima facie* case.⁷⁵ Where there is, the prosecutor will then ask whether the public interest favours a prosecution, or whether there is any public interest reason not to prosecute. In assessing the strength of the evidence, factors to consider which are relevant in the context of prosecuting hate crime include:

- the reliability of witness evidence;
- the consistency of that witness evidence;
- whether the reliability of evidence could be affected by the ‘condition of the victim’;
- how likely the witness is to stand up to cross-examination; any previous convictions of the witness which might weaken the prosecution case;
- the ‘competency’ of witnesses;
- in the context of persons with an intellectual disability, whether they are ‘capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the Criminal Evidence Act, 1992’⁷⁶;
- reliability of identification evidence;
- where there might otherwise be doubts concerning in a particular piece of evidence, whether there is any independent evidence to support it.⁷⁷

Once the prosecutor has established that there is sufficient evidence, they then go on to assess if the public interest requires that a prosecution be pursued. The more serious the offence, the more likely it is that the public interest will dictate its

⁷⁴ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016) 12. Separate considerations apply in the context of the prosecution of children. See, Office of the Director of Public Prosecutions *Guidelines for Prosecutors* (4th edn, 2016) 21-22.

⁷⁵ Details as to how this assessment is made are available at pages 13-14 of the Guidelines.

⁷⁶ This section allows evidence to be given by a child or “a person with mental handicap” (sic) without them taking either an oath or affirmation. However, if they do give evidence which he or she knows to be false or does not believe to be true, section 27(2) provides that they shall be guilty of an offence and liable to be dealt with as if he or she had been guilty of perjury.

⁷⁷ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016) 14-15.

prosecution, though there are further aggravating and mitigating factors to be considered. Those aggravating factors relevant in the context of the prosecution of hate crime include:

- if the accused was in a position of authority or trust and the offence is an abuse of that position;
- where the accused was a ringleader or an organiser of the offence;
- where the offence was carried out by a group;
- where a weapon was used or violence threatened or the victim of the offence has been otherwise put in fear, or suffered personal attack, damage or disturbance. *The more vulnerable the victim the greater the aggravation*⁷⁸;
- where there is a marked difference between the actual or mental ages of the accused and the victim, and the accused took advantage of this;
- where the accused has previous convictions or cautions which are relevant to the present offence;
- where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct.⁷⁹

The latter two of these are of course relevant in the context of a legal system which does not record the hate element of an offence. In the context of hate crime, it is impossible to determine if the hate element is either relevant to the offence, or as part of a history of recurring conduct.

In addition to those factors affecting the seriousness of the offence, the Director then goes on to set out other matters that may arise in assessing whether the public interest requires a prosecution. Again, in the context of the prosecution of hate crime, the relevant factors include:

- the availability and efficacy of any alternatives to prosecution;

⁷⁸ Emphasis added.

⁷⁹ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016) 16.

- the prevalence of offences of the nature of that alleged and the need for deterrence, both generally and in relation to the particular circumstances of the offender;
- the need to maintain the rule of law and public confidence in the criminal justice system;
- whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender;
- the attitude of the victim or the family of a victim of the alleged offence to a prosecution;
- the likely effect on the victim or the family of a victim of a decision to prosecute or not to prosecute;
- whether an offender who has admitted the offence has shown genuine remorse and a willingness to make amends.⁸⁰

The Director further observes that the assessment of the criteria cannot be reduced to 'something akin to a mathematical formula.'⁸¹

In determining the charge to be brought, the prosecutor should only charge those offences justified by the evidence, and not over-charge with the intention of encouraging the accused to plead guilty to a lesser charge.⁸² The prosecutor should also avoid proffering a large number of charges from the same set of facts, though the Guidelines state that it is important to strike a balance between ensuring that the indictment is not overloaded, whilst also ensuring that the indictment adequately reflects the totality of the criminality involved in the case.⁸³ This is particularly relevant in a prosecution involving a hate crime: should, for example, section 2 of the Prohibition of Incitement to Hatred Act 1989, or a charge under the Public Order Act 1984 be typically included in this type of offence to try to capture the hate element of the crime? While the Guidelines list the types of offences which cannot be

⁸⁰ *ibid* 17.

⁸¹ *ibid*.

⁸² *ibid* 23.

⁸³ *ibid*.

prosecuted without consultation with the Office of the Director, hate-related offences do not feature here.

*Pre-trial discussions*⁸⁴

The Director of Public Prosecutions acknowledges that ‘pre-trial discussions concerning pleas’ occur, where an accused person will offer to plead guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges than those proffered. The Guidelines are clear that in such cases, due regard must be given to the rights of the victim under the Victims’ Directive, and in particular the rights of the victim to be heard during criminal proceedings, and to provide evidence.⁸⁵ Where charges are taken into consideration in the context of a guilty plea, importantly the right of the victim to be heard and to provide evidence in relation to them is preserved.

However, while stating that such agreements ‘must be consistent with the requirements of justice’, the Director goes on to state that such an offer should not be entertained unless:

- (a) the charge or charges which the defence indicate the accused will plead guilty to are appropriate having regard to the nature of the criminal conduct of the accused and the likely outcome of the case; and
- (b) there is evidence to support the charges.⁸⁶

Further, a plea should not be accepted if to do so would ‘distort the facts disclosed by the available evidence and result in an artificial basis for sentence.’⁸⁷ In determining whether or not to accept a plea, the DPP sets out a number of

⁸⁴ The term ‘plea bargaining’ does not officially exist in Ireland, and the DPP does not have any specific policies in relation to plea bargaining generally, or plea bargaining and hate crime specifically. Rather, the term ‘pre-trial discussions’ is used to describe those conversations between representatives for the prosecution and defence regarding the willingness of the accused to plead guilty, under what circumstances, and for what offences.

⁸⁵ *ibid* 38.

⁸⁶ *Ibid*

⁸⁷ *ibid*.

considerations which should be taken into account where relevant: none of these are particularly relevant to hate crime.⁸⁸

In research conducted by Haynes et al⁸⁹ interviewees claimed that in the majority of cases involving a bias element, the defence ‘would suggest to the prosecution that the individual would plead guilty as long as the bias motivation was not presented in evidence’:

‘But in terms of what does go on here discussions do go on between prosecution and defence as to what evidence will be offered, how much emphasis will be placed on different elements and I think my experience would be that where certain things are said and it’s most often this verbal commentary that would suggest a motivation borne up of prejudice or hatred that any defence lawyer would look very hard to get that excluded from the testimony the court hears prior to determining sentence. And certainly my experience is most police officers will leave it out if you ask them.’ (Barrister)⁹⁰

In a later piece of research by Haynes and Schweppe, again the issue of informal plea agreements resulting in the hate element of a crime being disappeared arose. Here, it was suggested by a majority of interviewees that it was preferable to secure a guilty plea in a context where the hate element was diminished or abandoned, rather than go to trial:

‘I think there would be a serious tendency ... with the prosecution authorities in Ireland to just convict ... accept the plea to the lesser offence. Based on my experience of dealing with a DPP in Ireland I don’t think they would go as far as

⁸⁸ The only factor in any way relevant in this context is ‘the accused’s background, history and previous convictions’ in a case involving an offender who has previously committed a hate motivated offence. However, as this is unlikely to be obvious from the defendant’s criminal record, it is unlikely to be a factor.

⁸⁹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

⁹⁰ *ibid.*

the CPS in Britain [which only allows the hate element of an offence to be pleaded out only in exceptional circumstances].’ (Solicitor)⁹¹

Thus, the absence of a specific policy in relation to hate crime can, at least in some cases, lead to its disappearance from the criminal justice process.

Role of the prosecutor in sentencing

At the sentencing stage, a prosecutor must ensure that the court has all available evidence relevant to sentencing, whether or not that evidence is favourable to the accused or not.⁹² The Guidelines state that the prosecutor must also ensure that the victim has the opportunity to exercise the right to be heard in accordance with Article 10 of the Victims’ Directive, and that the court has all relevant information and evidence regarding the impact of the offence on the victim.⁹³ The prosecutor must also provide the court with information regarding the accused’s previous convictions, ‘as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence.’⁹⁴ In the context of previous convictions, it is unlikely any previous hate-motivated behaviour will be presented to the court unless the prosecuting authority is personally familiar with the background to the case, given the inability of the system to recognise and record such behaviour.

The question as to the extent to which ‘circumstances in which the offence was committed’ would extend to evidence regarding a hate motivation which had not already been established in the course of the criminal trial or presented in the context of a guilty plea can be included is unclear.⁹⁵ As we will see, in England and Wales, the Crown Prosecution Service guidance is clear as to the relevance of ‘Newton Hearings’ in the context of prosecuting hate crime. Again, while the DPP Guidelines do not specifically mention hate crime, they do discuss the relevance of Newton Hearings, though they do not refer to them by that name. The Guidelines

⁹¹ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 152-153.

⁹² Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016) 30.

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ In the context of a guilty plea, it may be agreed between the parties that the evidence is either presented or not.

provide that, where there is a ‘significant’ difference between the factual basis upon which the guilty plea is based, and the case contended by the prosecution, ‘there is an adversarial role for the prosecution to seek to establish the facts upon which the court should base its sentence.’⁹⁶ Equally, where there is an agreement not to include an aggravating factor, ‘no inconsistent material should be placed before the sentencing judge.’⁹⁷

Newton hearings are rare in Ireland, and Walsh observes that it is ‘not the practice for the prosecution to call witnesses to give evidence in rebuttal of character evidence led by the defence.’⁹⁸ This practice might be particularly relevant in cases involving a hate element, as, from what we know in England and Wales, where a defendant is challenging a hate element, they routinely call witnesses to testify that the defendant is not racist (typically by showing that they have friends of different racialized backgrounds).⁹⁹

A prosecutor does not advise the court as to the appropriate sentence to be imposed in a case, but rather ensures that the court is aware of the range of sentencing options available to it, and should advise the court on ‘any authority or legislation’ that may assist the court in determining the sentence.¹⁰⁰ In this context, a decision of the Court of Appeal advising that a racist motivation is one which should be treated as an aggravating factor - such as *DPP v Elders*¹⁰¹ - may well amount to information that a prosecutor should provide to the court.¹⁰²

Sentencing hate crime

The sentencing process in Ireland is a discretionary one, with few limitations and even less guidance given either by the legislature or the appellate courts on sentencing issues: as O’Malley states, ‘Ireland’s sentencing system remains largely

⁹⁶ *ibid* 31.

⁹⁷ *ibid*.

⁹⁸ Dermot Walsh, *Criminal Procedure* (2nd edn, Round Hall 2016).

⁹⁹ See, Mark Walters, Susann Wiedlitzka, Abenaa Owusu-Bempah, with Kay Goodall, ‘Hate Crime and the Legal Process: Options for Law Reform’ (University of Sussex 2017) 125.

¹⁰⁰ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016) 30.

¹⁰¹ [2014] IECA 6.

¹⁰² That said, the prosecutor should not submit information to the court in relation to either the “sentencing court bands or ranges of sentencing” in the context of hate motivated offences, as the Court of Criminal Appeal or Court of Appeal have not given guidance in this context. Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016) 30.

discretionary, reflecting a commitment to individualised justice for criminal offenders.’¹⁰³ Walsh observes that the emphasis placed by Irish courts on the principle of proportionality has, until recently, ‘precluded the judicial promulgation of sentencing guidelines or scales for particular offences.’¹⁰⁴ Thus, Courts are fiercely protective of their discretion, and have traditionally been slow to impose any structure or guidance on sentencing practices in lower courts. 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.¹⁰⁵ Irish courts have yet to issue a guideline judgment to the effect that where an attack appears to have been motivated or aggravated by hate, that fact must be treated as an aggravating factor. Indeed, the term ‘hate crime’ has never been mentioned in a reported case in an Irish context to date.

Haynes et al conducted fieldwork with criminal justice practitioners to assess how sentencing hate crime operates in practice.¹⁰⁶ They conducted a survey and interviews, responses to which reflect a lack of clarity amongst, and considerable inconsistency between, criminal justice professionals regarding the response of the judiciary to hate crime. It is clear that some judges treat the hate element of a crime very seriously and will consistently and appropriately aggravate the sentence when it is present:

‘Well it’s straight away an aggravating factor. There is ... like what I’d say about this bringing in hate crime legislation and things like that it’s obviously an aggravating factor and it’s already treated by the courts as an aggravating factor.’¹⁰⁷

The researchers report, however, that a minority of interviewees and respondents held that a hate motivation will not typically be seen as an aggravating factor at sentencing, with this interviewee being adamant in their position:

¹⁰³ Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 1.

¹⁰⁴ Dermot Walsh, *Criminal Procedure* (2nd edn, Round Hall 2016) 1694.

¹⁰⁵ See, <http://www.irishsentencing.ie/> for the ISIS website.

¹⁰⁶ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

¹⁰⁷ *ibid* 53.

'Interviewer: Do you think that hate is currently treated as an aggravating factor? Interviewee: No. It is not. It certainly is not.' (Solicitor)¹⁰⁸

In their later research, Haynes and Schweppe analysed 42 specific cases which involved a hate element as described to them by criminal justice practitioners.¹⁰⁹ Those cases involved 19 in which the interviewee was acting for the prosecution, and 23 in which they were acting for the defence. In cases reported to the researchers by those acting for the prosecution, in eleven of the cases, the prosecutor was of the view that the sentence was aggravated due to the hate element, while in 6 of those cases, they were of the view that the hate element was not taken into account. In cases described by defence practitioners, the hate element 'aggravated the sentence just as often as it did not', with practitioners suggesting that in half the cases the hate element aggravated the sentence, while it was not taken into account in the other half.¹¹⁰

Thus, it is clear that in much the same way that police officers and prosecutors take what Schweppe et al describe as an 'individualised' approach to addressing a hate element of a crime during the process,¹¹¹ judges too are perceived as idiosyncratic in their approach to addressing the issue.

Case law: racism as an aggravating factor

It was only very recently that the Irish courts addressed the sentencing of racist crime in any way. The first written judgment in which the question as to whether a racist motivation is an aggravating factor was given in *Director of Public Prosecutions v Elders*.¹¹² In the case, the racist element was present at the beginning of a series of events which took place where the appellant said to the injured party: "'eff off" ... "eff off Packi bastards"'.¹¹³ The sentencing judge assessed the offence as being at the top

¹⁰⁸ *ibid.*

¹⁰⁹ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017), chapter 5.

¹¹⁰ *ibid* 194.

¹¹¹ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018) 81.

¹¹² [2014] IECA 6

¹¹³ *ibid* para 2.

end of seriousness, and that 'the racist element was an aggravating factor'¹¹⁴ and sentenced the appellant to a term of five years imprisonment, the maximum sentence available for that offence.

In assessing whether the sentence imposed was appropriate, Birmingham J discussed the aggravating factors:

'Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact.'¹¹⁵

While accepting the very serious nature of the offence, the Court of Appeal found that the sentencing court had failed to take appropriate account of the mitigating factors and suspended the final 12 months of the sentence, subject to an offer of €4000 compensation being paid to the injured party.

The second case in which this issue was addressed is *People (DPP) v Collins*.¹¹⁶ Here, the appellant observed the victim being approached by his girlfriend, after which he headbutted him, resulting in the victim falling and hitting his head off the ground. Though there was only one blow inflicted on the victim, he suffered severe injuries from it. The applicant appealed the sentence, one of the grounds being that the sentencing court 'expressed the view that the offence may have been racially motivated, when it is said there was no evidence to support that suggestion and that the more likely explanation was a misguided sense of chivalry...'¹¹⁷ It is particularly interesting to understand the grounds upon which the trial judge made this assessment, set out in the decision of the Court of Appeal:

¹¹⁴ *ibid* para 7.

¹¹⁵ *ibid* para 11.

¹¹⁶ [2016] IECA 35

¹¹⁷ *Ibid* para 10.

‘He was prompted to do this by a sentence in the probation report which quotes their client as saying ‘he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend’. By reference to this sentence the judge said that he felt that it was highly probable that the attack had some element of racism to an unspecified degree.’¹¹⁸

Thus, the judge apparently viewed the offence as being racially aggravated because the appellant described his perception of the ethnicity of the victim and his friend in one line of the probation report. It is unfathomable to think that this ‘evidence’ would be held to establish a racist motivation in any other jurisdiction. In the Court of Appeal, Birmingham J did not directly address the question as to whether the approach of the sentencing court was correct or not. Thus, his comments regarding the question of racist motivation in sentencing are strictly speaking, *obiter*, but none the less worth observing:

‘It is not clear what role, if any, this concern about a possible racist motivation had when it came to the selection of sentence. Undoubtedly it is the case that if an offence is racially motivated that would be regarded as an aggravating factor.’¹¹⁹

The third case in which a racist element was considered by the court is *DPP v Shattock*.¹²⁰ Here the appellant was convicted of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997 and was sentenced to three and a half years imprisonment with the final eighteen months suspended. He stopped to speak with the injured party and the cousin of the injured party, after which a group of young people arrived and started calling the injured party and his cousin ‘Paki’s (sic)’. The appellant threw a stick at the injured party which ultimately led to the injured party losing his eye. He had what the trial judge referred to as ‘perfect mitigation’ in terms of lack of previous convictions and remorse. Aside from a reference to the fact that the racist remarks were made by members of the group, there is no evidence that the sentencing court took that racist element into account

¹¹⁸ Ibid para 15.

¹¹⁹ [2016] IECA 35, para 16.

¹²⁰ [2016] IECA 82.

in sentencing. The Court of Appeal said very little regarding the racist element, except to observe that the appellant was not the initiator of the racial abuse. That said, the Court did highlight the ‘seriousness’ of the offence in weighing up the aggravating factors.

These three cases are the only three reported cases in which a racist element was considered by the court. Thus, an analysis of the limited case law leads to a relatively clear conclusion that the Court of Appeal will treat a racist motivation as an aggravating factor, but that there is no *requirement* on the sentencing courts to do so. Further, the absence of clear legislative guidance has led to what might be described as a simplistic understanding of the concept by the courts. Empirical research on the issue suggests that a hate element is sometimes, but not always taken into account as an aggravating factor. It is also unclear the extent to which the racist element in practice tends to aggravate the sentence.

Case law: disablism as an aggravating factor

In *People (DPP) v Moran*,¹²¹ in an application for review of a sentence on grounds of undue leniency, it was argued by the Director that the sentencing judge failed to take sufficient account of a number of aggravating factors in sentencing the respondent. One of these factors was that the injured party who suffered from a ‘mental disability’¹²² and thus was, as the Director argued ‘vulnerable’, was subjected to a series of aggravated burglaries in his own home. Further, it was argued by the Director that the sentence ‘similarly did not reflect the fact that the respondent carried out the second and third aggravated burglaries being aware of his victim’s vulnerability and with a view to extorting money from him.’¹²³ In giving judgment for the Court of Appeal, while Sheehan J found that the sentence imposed was indeed unduly lenient, as the sentencing judge ‘failed to give sufficient weight to the many aggravating factors’,¹²⁴ neither the particular vulnerability of the victim nor the fact that the victim seems to have been targeted because of this vulnerability were explicitly mentioned as an aggravating factor.

¹²¹ [2015] IECA 141.

¹²² *ibid* para 11.

¹²³ *ibid* para 25.

¹²⁴ *ibid* para 36.

In *People (DPP) v DO'D (No 2)*¹²⁵ the court considered the imposition of a five year sentence on the accused following his conviction under section 5 of the Criminal Law (Sexual Offences) Act 1993.¹²⁶ The Court of Appeal was asked to consider *inter alia* whether the level of mental impairment of the injured party should have been treated as an aggravating factor in determining the sentence of the accused. On this issue, the sentencing court stated that the following was treated as an aggravating factor:

‘The fact that the injured party, obviously, was mentally impaired, and the level of mental impairment, and the level of support that she needed, and her particular circumstances and particular way that the mental impairment impinged on her ability to form any relationship.’¹²⁷

In considering what effect a ‘mental impairment’ should have in determining the sentence of the individual, Mahon J for the Court of Appeal stated that the issue was to be determined on an assessment of the level of mental impairment, as that factor bears on the culpability of the accused:

‘In general, the more mentally impaired a victim is, and consequently the more vulnerable he or she is, the greater will be the culpability of the offender. Conversely, the milder the victim’s mental impairment, the lesser the offender’s culpability will generally be.’¹²⁸

It is unclear whether this reasoning applies only to those cases involving a prosecution under section 5 of the 1993 Act, or if it applies to all cases involving an injured party with an intellectual/developmental disability. It does appear, however, that the degree of disability should be determinative of the extent of the aggravation, rather than an assessment as to what the motivation of the offender was in the case. Thus, while the courts have addressed the question of whether disability should be

¹²⁵ [2015] IECA 306.

¹²⁶ Section 5 provides for a specific offence of having or attempting to have sexual intercourse or committing or attempting to commit buggery on a person who is ‘mentally impaired’.

¹²⁷ [2015] IECA 306, para 5.

¹²⁸ *ibid* para 10.

treated as an aggravating factor, this is based on a presumption of vulnerability, rather than an assessment as to whether the offence was motivated by anti-disability.

Kilcommins et al¹²⁹ observe that there is little jurisprudence on the question, but that there is 'no reason why a sentencing judge in Ireland could not regard the fact that the crime was committed against a person with a disability as an aggravating factor'.¹³⁰ That said, there is, of course, nothing requiring a court to take it into account as an aggravating factor either. In this context, Kilcommins et al recommend that a statutory provision be introduced which 'provides that an offence committed against a vulnerable person such as a person with a disability may be considered an aggravating factor at sentencing stage.'¹³¹

Case law: level of proof required to establish aggravating element

It is not clear what level of proof is required in order to establish the racist element. In *DPP v Collins*¹³² the trial judge seems to have taken into account the fact that the offence 'may have been racially motivated'.¹³³ Birmingham J stated:

'He was prompted to do this by a sentence in the probation report which quotes their client as saying 'he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend.' By reference to this sentence the judge said that he felt that it was highly probable that the attack had some element of racism to an unspecified degree.'¹³⁴

The Court of Appeal did not take the opportunity to consider whether this amounted to proof of racist motivation on the part of the accused, nor whether such evidence was appropriate to consider as proof of a racist motivation. While the court did not explicitly criticise the sentencing judge for treating statements in the probation report as proof of a racist motivation to the offence, it did state that it was 'not clear'

¹²⁹ Shane Kilcommins, Claire Edwards and Tina O'Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (Irish Council for Civil Liberties 2013).
ibid. 51.

¹³¹ ibid 228.

¹³² [2016] IECA 35.

¹³³ ibid para 15.

¹³⁴ ibid.

what role, if any, this concern regarding a racist motivation had when it came to determining the sentence.

The case of *Shattock* is perhaps even more puzzling. There did not seem to have been any evidence established regarding racist language being used by the appellant, nor any evidence that he had a racist motivation, nor any evidence of the racist element being established through conspiracy or participation. To be fair, neither is there any evidence that the sentencing judge treated the racist element as an aggravating factor. Further, in the cases involving victims with disabilities, there was no assessment as to whether the offence was motivated by an anti-disability bias or any other factor.

Probation Service policy

There is no publically available information regarding how the Irish Probation Service address hate crime. In a European context, as McNally and McIlroy¹³⁵ observe, the Council of Europe's Council for Penological Co-operation (PC-CP) published draft guidelines in September 2015 for prison and probation services regarding radicalisation and violent extremism, including hate crime.¹³⁶ Describing the current approach of the Probation Service in Ireland to hate crime, McNally and McIlroy stated:

'In the absence of specific hate crime offences and related data, Probation Officers work with offenders whose offending is not defined as hate crime but effectively meets the criteria defined above as they do other offenders. The Probation Service does not, at present, have population data differentiating hate crime and related offending from other forms of offending. Hate or prejudice motivation in offending is, therefore, addressed where it is identified on a case-by-case basis as part of the individual assessment and case management plan. It is, unfortunately, not readily possible to calculate

¹³⁵ Gerry McNally and Eithne McIlroy, 'Probation Practice and Offending Motivated by Hate and Discrimination: An All-Ireland Perspective' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the island of Ireland* (Palgrave Macmillan 2017) 443. - 465

¹³⁶ European Committee on Crime Problems Council for Penological Co-operation, *Draft Guidelines for Prison and Probation Services Regarding Radicalisation and Violent Extremism* (Council of Europe 2015).

or differentiate in management reporting how many cases are hate or prejudice motivated.’¹³⁷

Further, there is no hate crime or degree of prejudicial attitudes ‘flag’ attached to individual cases enabling them to be readily identified in the population subject to supervision. However, they do observe that where a hate element is present, the Probation Officer will develop an intervention plan which will ‘identify specific actions to challenge and change these attitudes and behaviours.’¹³⁸

The Probation Service National Victim Services Team, established to meet the requirements of the Victims’ Directive, commits to:

- Provide a single point of contact on a regional basis for all victims, including hate crime victims, who contact the Probation Service for information on Court orders or Probation practice or expressing concern in relation to the harm they have experienced;
- Engage directly with victims, listen to concerns, respond appropriately and advise on relevant victim support services if required;
- Respond effectively to victim requests for a restorative justice intervention;
- Ensure that information is accurate, up to date and available electronically and in hard copy which facilitates victim access to the service;
- Ensure that all staff are aware of the service for victims and how it is accessed;
- Ensure that victim concerns are addressed in Service Policy/Guideline documents e.g. hate crime, domestic violence and report preparation;
- Liaise as appropriate with the Victims of Crime office and with designated victim support staff in the wider criminal justice system.¹³⁹

¹³⁷ Gerry McNally and Eithne McIlroy, ‘Probation Practice and Offending Motivated by Hate and Discrimination: An All-Ireland Perspective’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the island of Ireland* (Palgrave Macmillan 2017). 443- 465.

¹³⁸ *ibid.* 443 – 465.

¹³⁹ *ibid.*

In the context of restorative justice, the National Commission on Restorative Justice define it as ‘a victim sensitive response to criminal offending, which, through engagement with those affected by crime, aims to make amends for the harm that has been caused to victims and communities and which facilitates offender rehabilitation and integration into society.’¹⁴⁰ The Probation Service published *Restorative Justice Strategy: Repairing the Harm – A Victim Sensitive Response to Offending* in 2013. Informed by, amongst other things, the Victims’ Directive, the Strategy explicitly mentions ‘faith community’, ‘local community members’ and ‘national Non-Governmental Organisations’ as indirect stakeholders in the process.¹⁴¹ However, it does not specifically mention victims of hate crime or their particular needs at any point, despite the requirements of the Victims’ Directive in this context.

Conclusion

Given the very low number of reported cases on hate crime in Ireland (and the fact that the term ‘hate crime’ has never been used in a reported case) it is difficult to draw any conclusions on the approach that is taken by the judiciary in relation to hate crime. It can be said with some degree of certainty that the Court of Appeal will treat a racist motivation as an aggravating factor, but that there is no *requirement* on the sentencing courts to do so. The assessment of the court as to the degree of disability of the injured party where that is an issue will seem to determine the level of aggravation of the sentence: while in the context of racist crime, the Court of Appeal has treated the presence of racism in the case as an aggravating factor, it has not done so in the context of disablism. There does not seem to be any reported case in Ireland concerning religious (eg antisemitic or anti-Muslim) hate crime; or in relation to anti-LGB or anti-transgender hate crime. The lack of clarity regarding the level of proof required to establish or evidence a hate element, the extent to which the hate element needs to be engaged in an offence, and the extent to which the hate element aggravates the sentence are all issues lacking clarity in Irish criminal processes in the context of hate crime. Of course, a court can only convict or sentence on the basis of that which is put in evidence before it: the fact that hate crime is not adequately recorded, and that it can sometimes be seen as being

¹⁴⁰ National Commission on Restorative Justice, *Final Report* (Department of Justice 2009).

¹⁴¹ Probation Service, *Repairing the Harm: A Victim Sensitive Response to Offending* (Probation Service 2013) 6.

routinely ‘pleaded out’ of cases, leads to what Haynes et al call a ‘disappearing’ of hate crime from the Irish criminal justice process.¹⁴²

Prevalence of hate crime in Ireland

Given the lack of case law on hate crime, the absence of hate crime legislation in Ireland and, as we will see, a lack of understanding of hate crime within the criminal justice process, it is not possible to determine the prevalence of hate crime in an Irish context.¹⁴³ In the absence of adequate police responses to hate crime, figures are thought to be largely unrepresentative, and the absence of an appropriately funded third party monitoring process is also problematic. This section will present official police recorded data over a five year period. Three EU FRA reports disclose relevant information regarding antisemitic hate crime, and hate crime against the LGBT community. Three civil society organisations have also collected relevant data, which are discussed briefly.

Police recorded data

The official underreporting of hate crime is recognised internationally as a phenomenon, but this combined with a lack of understanding by the police of the issue has resulted in low levels of police recorded hate crime in an Irish context. Indeed, the Central Statistics Office has ceased to publish data on crimes committed with a discriminatory motive, given the problems perceived with the data it receives from An Garda Síochána.¹⁴⁴ That said, the expansion of victim categories, along with the fact that it is now mandatory for those recording crime to address whether the

¹⁴² ¹⁴² Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

¹⁴³ For an analysis of the need for robust and easily accessible evidence in a criminal justice context, see Mary Rogan, ‘Improving Criminal Justice Data and Policy’ (2012) 43(2) *Economic and Social Review* 303.

¹⁴⁴ Haynes and Schweppe describe the issues: “In Ireland, the Central Statistics Office have found ongoing quality issues with respect to police recorded crime data generally. For example in 2015 between 16 per cent and 17 per cent of crime reported to An Garda Síochána was not logged on the national crime incident recording system. These deficiencies have led to an official reluctance to publish crime data, including hate crime data, even on an aggregated and annual basis. As noted, publication of crime data in Ireland has been suspended since Q1 2017 pending the conclusion of quality reviews. With specific reference to data on “discriminatory motivations” the Central Statistics Office in Ireland warns users: “It is important to note that the levels of crime with a discriminatory motive recorded in Ireland are very low in comparison with figures in other jurisdictions.” Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 116.

crime was hate motivated, has had an impact on the recorded crime figures.¹⁴⁵ As we can see here, the numbers of recorded crimes with a discriminatory motive peaked in 2007, and slowly declined thereafter, with a low of 114 recorded in 2014:

	2006	2007	2008	2009	2010	2011	2012	2013	2014
Antisemitism	1	1	2	5	12	3	4	2	4
Homophobia	21	11	9	32	13	21	17	17	13
Racism	171	210	165	122	111	132	93	93	93
Sectarian	6	11	1	2	3	4	3	6	4
Total	199	233	177	161	139	160	117	118	114

Table 1: Police Recorded Data of Crimes with a Discriminatory Motive 2006-2014¹⁴⁶

As I have already noted, recording practices in this context were changed in November 2015, with the available identity categories being expanded to 11. Because of the change in the recording processes, data was not made available by the Central Statistics Office for 2015, but data for 2016 shows a rise in recorded crimes of this nature:

¹⁴⁵ As set out in Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 112.

¹⁴⁶ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 112.

Ageism	38
Anti-Disability	12
Anti-Muslim	13
Anti-Roma	* ¹⁴⁷
Antisemitism	*
Anti-Traveller	25
Gender related	31
Homophobia	28
Racism	152
Sectarianism	*
Transphobia	*
Total	308

Table 2: Police Recorded Data of Crimes with a Discriminatory Motive 2016¹⁴⁸

However, though the figures overall have increased, as Haynes and Schweppe state, the Central Statistics Office has advised caution in interpreting the data, noting that while in 2016 the overall figures increased, the overall number is quite low, and ‘with an increased number of more specific options available, the number of incidents for each motive type tends to be lower than prior to 2016.’¹⁴⁹ Given the issues associated with the data, the Central Statistics Office has ceased to publish data on crimes committed with a discriminatory motive since December 2016, leading to an official statistical vacuum on the issue.

EU FRA LGBT Survey

In its 2012 LGBT survey, the European Union Agency for Fundamental Rights (FRA) collected information on experiences of discrimination, hate-motivated violence and

¹⁴⁷ * indicates that there were between 1-3 crimes recorded in this category, but that the number of cases did not meet the Central Statistics Office’s minimum frequency rules for the purposes of reporting.

¹⁴⁸ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 115.

¹⁴⁹ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 115, citing Central Statistics Office, Crimes with a Discriminatory Motive: Information Note, May 2017.

harassment from persons who self-identified as being lesbian, gay bisexual or transgender.¹⁵⁰ The data revealed the extent to which respondents' experiences and perceptions varied according to their national context. The findings revealed that respondents in Ireland generally experience a social environment that is less inclusive of LGBT people and where they are more likely to be victims of violence, harassment and discrimination than in many states surveyed. This online survey, which was conducted across the 27 member states of the European Union, collected information from more than 93,000 persons aged 18 and over who identified as lesbian, gay, bisexual or transgender.¹⁵¹

The results of the survey show that 59% of Irish LGBT participants stated that the last incident of violence they had experienced in the 12 months prior to the survey being conducted happened partly or entirely because they were perceived to be LGBT.¹⁵² Ireland ranked 11th for the average number of violent incidents in the previous 12 months per 1,000 respondents at 294, above the European average of 262.¹⁵³ 24% of respondents were found to have experienced hate-motivated harassment in the preceding 12 months, again above the EU average of 19%.¹⁵⁴

EU FRA: Being Trans in the European Union

Drawing on the same data from the EU Lesbian, gay, bisexual and transgender (LGBT) survey, the FRA study *Being Trans in the European Union* represents the largest collection of empirical evidence of its kind to cast light on transgender persons' experiences in Ireland.¹⁵⁵ 13% of respondents from Ireland reported having experienced hate motivated violence, and 31% of respondents had experienced hate motivated harassment in the 12 months prior to the survey being conducted. Almost two-thirds (66%) of trans respondents stated that they avoided certain places and 43% of respondents stated that they avoided gender expression due to fear of assault, threat or harassment.

¹⁵⁰ European Union Fundamental Rights Agency, *European Union lesbian, gay, bisexual and transgender survey: results at a glance* (EUFRA 2013).

¹⁵¹ *ibid* 7.

¹⁵² European Union Fundamental Rights Agency, *European Union lesbian, gay, bisexual and transgender survey: main results* (EUFRA 2013).58.

¹⁵³ *ibid* 60.

¹⁵⁴ *ibid* 71.

¹⁵⁵ European Union Agency for Fundamental Rights, *EU LGBT survey: European Union lesbian, gay, bisexual and transgender survey: Main results* (FRA 2014)

EU Midis II

The European Union minorities and discrimination survey (EU-MIDIS) which was first published in 2008, the second wave of which is now concluded, addresses the lack of comparable data on manifestations of discrimination, racism, and related intolerances in Europe. Encompassing all 28 member states, and 25,000 participants, this research provides useful comparable data on the actual impact on the ground of EU and national anti-discrimination and equality legislation and policies. The first data on Roma and on Muslims have been selectively released but these parts of the research did not extend to Ireland.¹⁵⁶ Ireland ranked highest among the EU Member States in which respondents from a sub-Saharan background experienced 6 or more physical attacks due to their ethnic or immigrant background in the 5 years preceding the survey (21% of respondents compared to the EU group average of 9%).¹⁵⁷ 8% of respondents in Ireland reported having experienced 6 or more physical attacks due to their ethnic or immigrant background in the 12 months prior to the survey, compared to an EU group average of 2%.¹⁵⁸

Third party reporting to civil society organisations

A small number of Irish civil society organisations operate, or have operated, third-party reporting systems for hate crime and discrimination, in some cases for many years. The National Consultative Committee on Racism and Interculturalism (NCCRI), an independent expert body funded by the Department of Justice, began recording racist incidents in 2001 and continued to do so until 2008, when it ceased operation as a consequence of budget cuts.¹⁵⁹ During that time it enabled researchers to highlight the contrast between its records and the significantly smaller number of hate incidents recorded by An Garda Síochána.¹⁶⁰

¹⁵⁶ European Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey: Roma – Selected findings* (FRA 2016); European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey (EU-MIDIS II) Muslims – Selected findings* (FRA 2017)

¹⁵⁷ European Union Agency for Fundamental Rights, Second EU Minorities Survey; Data Explorer (FRA 2017) available at <http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-second-eu-minorities-discrimination-survey?mdq1=dataset>

¹⁵⁸ *ibid.*

¹⁵⁹ Catherine Joyce, 'Racism is on the Increase in Europe and Ireland is no exception', *Irish Examiner*, (Cork, January 2010).

¹⁶⁰ Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011) 18.

Following the disbandment of the NCCRI, in recent years three national organisations have operated recording mechanisms which have gathered data on hate crime - the European Network Against Racism Ireland (ENAR Ireland), the Transgender Equality Network Ireland (TENI) and the Gay and Lesbian Equality Network (GLEN).¹⁶¹ TENI and GLEN set up third-party reporting systems for trans and LGBT people in 2013 and 2014 respectively. TENI continues to collect data via its Stop Transphobia and Discrimination (STAD) reporting mechanism. ENAR Ireland has recorded data since 2013.

TENI's STAD mechanism recorded 74 transphobic incidents in the Republic during the period 2014-2016. Of those reports, 32 related experiences of non-crime hostile actions including discrimination, harmful digital communications and everyday microaggressions.¹⁶² The remaining 46 incidents detailed a total of 57 anti-transgender criminal offences occurring in the Republic between 2014 and 2016.¹⁶³ The offences are set out in the table below.

Crime classification	2014	2015	2016
Total reports to STAD	(20)	(19)	(7)
Aggravated sexual assault	1	0	0
Assault	5	6	7
Assault Causing Harm	1	0	1
Harassment	3	5	1
Possession of a Knife	0	1	0
Production of an Article Capable of Inflicting Serious Injury	0	0	1
Public Order	8	6	3
Rape	0	0	1

¹⁶¹ GLEN is in the process of being wound up.

¹⁶² Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017).

¹⁶³ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017) 22.

Sexual Assault	3	1	1
Threat to Kill or Cause Serious Harm	1	1	0

Table 3: Criminal Offences reported to TENI 2014-2016¹⁶⁴

GLEN began collecting data on homophobic, biphobic and transphobic crimes in December 2014 via their online reporting mechanism ‘stophatecrime.ie’. Eleven incidents, each relating to a single criminal offence, were recorded as occurring in or throughout 2015.¹⁶⁵ The offences are set out in the table below.

Crime classification	2015
Total reports to GLEN	(11)
Assault	5
Assault Causing Harm	1
Criminal Damage	1
Public Order	3
Sexual Assault	1

Table 4: Criminal offences reported to GLEN 2015¹⁶⁶

ENAR Ireland received 143 reports relating to incidents occurring in 2015 which bore the characteristics of criminal offences via its iReport third party monitoring system.¹⁶⁷ Of those reports, 133 involved a single criminal offence, seven described two criminal offences, two related to three criminal offences and one described four criminal offences. In summary, iReport received reports of 157 crimes occurring in 2015. The following table disaggregates the specific criminal offences identified by the Schweppe and Haynes in analyzing this data:

Crime classification	2015
Total reports to iReport	(143)
Assault	25

¹⁶⁴ *ibid.*

¹⁶⁵ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016) 26.

¹⁶⁶ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016) 26

¹⁶⁷ *Ibid* 14.

Assault Causing Harm	1
Breaking and Entering	1
Burglary	1
Communication Act	1
Criminal Damage	37
Demanding Money	0
False Imprisonment	0
Harassment	24
Making a False Report	1
Possession of a Knife	1
Public Order	58
Robbery	4
Sexual Assault	0
Threat to Kill or Injure	1
Trespass with a Knife	1
Violent Disorder	1

Table 5: Criminal offences reported to ENAR Ireland¹⁶⁸

International obligations in relation to hate crime

Ireland's failure to legislate against hate crime has repeatedly brought the State to the attention of a number of international organizations charged, inter alia, with ensuring the protection of minoritised communities. These bodies have in turn raised the omission with the Irish State in the context of its international obligations, and have, time and again, recommended legislative reform. One might have expected that the concerns raised by the international community would have provided the impetus required to ensure the Irish State act to legislate against hate crime. This, unfortunately, has not been the case to date.

Article 4 of the Framework Decision

The EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law ('the Framework Decision') was introduced in 2008. The stated purpose of the Framework Decision is to ensure that 'certain serious manifestations of racism and xenophobia are punishable by

¹⁶⁸ ibid 16.

effective, proportionate and dissuasive criminal penalties throughout the EU’, and further aims to ‘improve and encourage judicial cooperation’ in this context.

Article 4 of the Framework Decision addresses the issue of hate crime, and in this regard requires Member States 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.’ The Report on the implementation of the Framework Decision elaborates, stating that the Member States must ensure ‘that racist and xenophobic motives are *properly unmasked* and *adequately addressed*.’¹⁶⁹ The EU Fundamental Rights Agency (FRA) observes that this requirement under Article 4 reflects the rights of victims of racist crime as established and required by case law of the European Court of Human Rights.¹⁷⁰

It is important to observe the limitations of Article 4 of the Framework Decision. First, it addresses only racism and ‘intolerance’, and thus there is no obligation under the Framework Decision to recognise or address other manifestations of hate crime.¹⁷¹ This was highlighted by FRA in its Report, which compares the limited protections offered in the Framework Decision with the more expansive categories in the Victims’ Directive, and the Directive on Audiovisual Media Services (which includes discrimination based on ‘sex, religion or belief, disability, age or sexual orientation’).¹⁷² Second, the Framework Decision gives Member States absolute discretion in the manner in which the hate element is addressed, identifying two options: either by way of aggravating circumstances, or through enhanced penalties.

¹⁶⁹ European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law* (European Commission 2014) para 3.4. Emphasis added.

¹⁷⁰ European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* (FRA 2013).

¹⁷¹ See the section on the Treaty of the Functioning of the European Union, below, on other EU requirements in this regard.

¹⁷² European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* (FRA 2013), 8.

The Commission's Report suggests practices designed to strengthen the implementation of the Framework Decision, including:

- Authorities responsible for the investigation and prosecution of hate crime should have sufficient knowledge of relevant legislation and clear guidelines;
- Special police hate crime units;
- Special prosecutors' offices for hate speech and hate crime;
- Detailed guidelines for police, prosecutors and judges;
- Specific training for police, prosecutors and judges;
- Exchange of information between law enforcement officials, prosecutors, judges, civil society organisations and other stakeholders;
- Implementation of the Victims' Directive to protect victims of hate speech and hate crime to encourage reporting by victims;
- Reliable, comparable, and systematically collected data which allow for the assessment of the level of prosecutions and sentences;
- Public condemnation of racism and xenophobia by authorities, political parties, and civil society.

In their analysis of Ireland's compliance with Article 4 of the Framework Decision, Haynes and Schweppe have highlighted serious deficiencies across the process.¹⁷³ Indeed, Ireland is currently under examination by the European Commission for its failure to adequately implement the Decision.¹⁷⁴

The Victims' Directive and the Criminal Justice (Victims of Crime) Act 2017

While historically, the decision to prosecute was often made by the victim,¹⁷⁵ in the 19th and 20th century the role of the victim was reduced to reporting the crime itself and giving evidence as a witness in the case if needed. Thus, until recently, in the Irish criminal justice process, the victim was 'little more than an ordinary witness

¹⁷³ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

¹⁷⁴ See, ENAR Ireland, 'PETI Commission Petition Accepted' (ENAR Ireland 2016) <http://enarireland.org/wp-content/uploads/2016/07/PETI-commission-petition-accepted.pdf>

¹⁷⁵ Barry Vaughan and Shane Kilcommins, *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland* (Routledge 2008).

and a source of evidence against the accused.’¹⁷⁶ Victims had few rights, and their role in the trial process was limited.

However, this traditional ‘sidelining’ of the victim has been changing in the last number of years. Kilcommins et al¹⁷⁷ observe that victims are now no longer a ‘non-entity’ in the criminal justice process, but are rather stakeholders whose interests and opinions matter: however, they further acknowledged in 2013 that shortcomings in the criminal justice system remained ‘stubbornly persistent’, which relate to:

‘... the provision of information to victims, underreporting, attrition rates, the lack of private areas in courts, delays in the system, the lack of opportunity to participate fully in the criminal process, and inadequate support services.’¹⁷⁸

The Victims’ Directive sought to address these needs of victims of hate crime in the context of investigation and court proceedings, requirements which have been transposed by the Criminal Justice (Victims of Crime) Act 2017. Section 15(2) of the 2017 Act sets out the context for this assessment and provides:

‘A member of the Garda Síochána or an officer of the Ombudsman Commission, as the case may be, shall, when carrying out an assessment, have regard to the following matters:

...

(d) the personal characteristics of the victim, including his or her age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communications difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime;

(e) whether the alleged offence appears to have been committed with a bias or discriminatory motive, which may be related to the personal

¹⁷⁶ Vicky Conway, Yvonne Daly and Jennifer Schweppe, *Irish Criminal Justice: Theory, Process and Procedure* (Clarus 2010) 222.

¹⁷⁷ Shane Kilcommins, Claire Edwards and, Tina O’ Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (ICCL 2013).

¹⁷⁸ *ibid* 23.

characteristics of the victim, including such characteristics as are referred to in paragraph (d);

(f) the particular vulnerability of victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence or exploitation and victims with disabilities.’

The equivalent section of the Bill was amended at Committee Stage¹⁷⁹ to remove the words ‘the personal characteristics of the victim referred to in paragraph (d)’ and substitute ‘the personal characteristics of the victim, *including such characteristics* as are referred to in paragraph (d).’ This takes account of recommendations by the Hate and Hostility Research Group and the Irish Human Rights and Equality Commission that the legislation should make it clear that the experience of hate crime is not limited to those explicitly set out in the list of personal characteristics.¹⁸⁰

Section 19 of the Act provides that, where an offence has been assessed under section 15, and there are specific protection needs required for the victim, the Garda Síochána or the Director of Public Prosecutions can make an application to the court for special measures to be put in place, having regard to the specific protection needs of the victim. Section 15(2)(e) explicitly names victims of crimes committed with a bias or discriminatory motive as being, arguably, presumptively suitable for such protections. The special measures are set out in section 19(2) of the Act and include:

- (a) The exclusion of the public, any portion of the public or any particular person or persons from the court during criminal proceedings;
- (b) Directions regarding the questioning of the victim in respect of his or her private life;

¹⁷⁹ Amendment 82 to Criminal Justice (Victims Of Crime) Bill 2016
<<https://www.oireachtas.ie/documents/bills28/bills/2016/12116/B12116d-DCN.pdf>> accessed 8 January 2018.

¹⁸⁰ Hate and Hostility Research Group, ‘Submission on the Heads of the Criminal Justice (Victims of Crime) Bill 2015’ (HHRG 2015) 4; Irish Human Rights and Equality Commission, ‘Observations on the Criminal Justice (Victims of Crime) Bill 2016’ (IHREC 2017) 6
<<https://www.ihrec.ie/app/uploads/2017/02/Observations-on-the-Criminal-Justice-Victims-of-Crime-Bill-2016.pdf>> accessed 8 January 2018.

(c) Measures under part III of the Criminal Evidence Act 1992 enabling the victim to give evidence through a live television link or an intermediary or enabling a screen or other similar device to be used in the giving of evidence.

In its Victims' Charter, An Garda Síochána has committed to providing victims of crime with information regarding the progress of their case, including:

- respond quickly to calls and investigate complaints;
- give the victim the name, telephone number and station of the investigating Garda and the PULSE incident number;
- explain what will happen during the criminal investigation and keep the victim informed of the criminal investigation process, including writing to the victim when they charge/summon or caution a suspect in relation to the incident; and
- provide the victim with details about the Crime Victims Helpline and other support services;
- where a suspect is due to appear in court, provide the victim with details in relation to:
 - o whether the suspect is being held in prison or on bail and any conditions of the bail;
 - o the time, date and location of any court hearing;
 - o details of support the victim can avail of from voluntary organisations in relation to being a witness;
 - o details regarding when/if the victim can give a victim impact statement;
 - o details regarding court expenses payable; and
 - o the final result of the criminal trial.¹⁸¹

In order to support victims in a more meaningful way, a number of Victims' Offices have been established across the country, with the aim of ensuring a greater consistency of approach in terms of the services provided by An Garda Síochána to

¹⁸¹ An Garda Síochána, *Victims Charter* (An Garda Síochána 2010).

victims. A 2014 report of the Garda Inspectorate made further recommendations in relation to changes to be made in order to further support victims through the criminal process.¹⁸² It found that, despite the guarantees made in the Victims' Charter, there was generally poor follow-up with victims, and an inconsistent approach taken to updating victims. Problematically in the case of hate crime, there was found to be no garda policy or procedure for dealing with people who are repeat victims of crime.

In conclusion, although the Directive does not require legislation to be introduced which imposes a harsher penalty on the offender in the context of hate crime, nonetheless, it does require that such victims be treated in a particularly protective manner by the criminal justice process as a whole in the context of the investigation and prosecution of hate crime. On the face of it the legislation and prosecutorial guidelines appear compliant with the Directive. However, in order for the principles of the Act to be operationalised in practice, the criminal justice process itself must be attuned to the needs of victims of hate crime, and be articulate as to what a hate crime is.¹⁸³

EU Fundamental Rights Agency: Making hate crime visible in the European Union

In its seminal 2012 Report, *Making hate crime visible in the European Union: acknowledging victims' rights*, the European Union Agency for Fundamental Rights (FRA) defines hate crimes as 'violence and crimes motivated by racism, xenophobia, religious intolerance or by a person's disability, sexual orientation or gender identity.'¹⁸⁴ This definition is an example of what is commonly referred to as the 'animus model' of hate crime legislation.¹⁸⁵ The model requires that a form of bias, prejudice or identity-based hostility be present during the commission of a criminal offence. However, FRA not only conceptualises the problem of hate crime as an issue

¹⁸² Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) part 7.

¹⁸³ An Garda Síochána, 'Annual Report 2016' (*Garda.ie*, 2016) 12 <<http://www.garda.ie/Documents/User/Annual%20Report%202016.pdf>> accessed 8 January 2018.

¹⁸⁴ European Union Agency for Fundamental Rights, *Making hate crime visible in the European Union: acknowledging victims' rights* (FRA 2012) 7 <<http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>> accessed 24 November 2017.

¹⁸⁵ This can be compared to the discriminatory selection model under which hate crimes are defined as offences that are committed 'because of' or 'by reason' of the victim's characteristic/s. Frederick Lawrence, *Punishing Hate: Bias Crime Under American Law* (Harvard University Press 1999).

of inter-personal prejudice but also as a human rights issue. It highlights that where a Member State's 'criminal justice system overlooks the bias motivation behind a crime, then this amounts to a violation of Article 14 of the European Convention of Human Rights (ECHR).'¹⁸⁶ Hate crime, then, according to FRA, is not simply a matter of targeted victimisation that has significant individual and community impacts, but it is a phenomenon that undermines 'fundamental rights, namely to human dignity and with respect to non-discrimination.'¹⁸⁷

FRA observes that where victims of crime are unable or unwilling to seek redress against hate crime, many of these crimes will go unreported, and are therefore invisible to state agencies – ultimately meaning that the rights of such victims are unprotected. Importantly, the means by which the hate element of a crime is recognised across Member States can dictate the extent to which criminal justice processes are capable of addressing hate crime:

'Narrow legal definitions of what constitutes hate crime ... tend to lead to under-recording of incidents, which translates into low numbers of prosecutions, thereby affording victims of crime fewer opportunities for redress.'¹⁸⁸

FRA therefore recommends:

'Legislators should look into models where enhanced penalties for hate crimes are introduced to stress the added severity of these offences. This would serve to go beyond including any given bias motivation as an aggravating circumstance in the criminal code. The latter approach is limited in its impact because it risks leading to the bias motivation not being considered in its own right in court proceedings or in police reports.'¹⁸⁹

¹⁸⁶ European Union Agency for Fundamental Rights, *Making hate crime visible in the European Union: acknowledging victims' rights* (FRA 2012) 7.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid* 10.

¹⁸⁹ *ibid* 11. (*italics in original*).

FRA further states in its short 2012 factsheet that Member States in the EU must make hate crime ‘more visible and hold perpetrators accountable.’¹⁹⁰ It notes that despite the efforts of Member States’ to address hate crime, there have been ‘continued and renewed violations of the fundamental rights of people living within the EU’ through crimes motivated by prejudice. It holds that where crimes go unreported, unprosecuted, and are largely invisible to the criminal justice process, ‘the rights of victims may not be fully respected or protected, meaning that EU Member States are not upholding their obligations towards victims of crime.’¹⁹¹ FRA argues that to address these issues Member States need to adopt laws that oblige them to collect and publish statistical data pertaining to hate crime; law enforcement agencies and criminal justice systems should be alert to any indication of bias motivation; and courts rendering judgments should address bias motivations publicly.

FRA places great emphasis on data collection as a method of making hate crime visible, giving victims the opportunity to seek redress, and ensuring that Member States respond effectively to hate crime.¹⁹² In *Making hate crime visible*, FRA states that in order to ensure that these data are collected appropriately, ‘national law makers need to introduce clear-cut definitions in national legislation of what constitutes a hate crime.’¹⁹³ It drew a number of conclusions based on the analysis in the Report, set out in four categories of prioritisation:

- Acknowledging victims of hate crime;
- Ensuring effective investigation and prosecution;
- Convicting hate crime offenders;
- Making hate crime visible.

European Commission on Racism and Intolerance

The European Commission on Racism and Intolerance was set up by the first Summit of Heads of State and Government of the Council of Europe, and its statute

¹⁹⁰ European Union Agency for Fundamental Rights, *Hate Crime in Europe* (FRA 2012).

¹⁹¹ *ibid* 1.

¹⁹² *ibid* 2.

¹⁹³ European Union Agency for Fundamental Rights, *Making hate crime visible in the European Union: acknowledging victims’ rights* (FRA 2012), 10.

was adopted by the Committee of Ministers in June 2002.¹⁹⁴ As part of its country monitoring work, the European Commission on Racism and Intolerance (ECRI) examines each Member State on a cyclical basis, and it also issues General Policy Recommendations (GPR) on particular aspects of its work.

ECRI's fourth monitoring cycle ran from 2008 to 2013, and focused on implementation and evaluation. ECRI's fifth monitoring cycle began in the first semester of 2013, and is to last for five years. The thematic angle to the fifth round of monitoring focuses on four main themes: legislative issues (which should include the ratification of Protocol 12 of the European Convention on Human Rights; compliance with General Policy Recommendation (GPR) 7; and the existence of independent authorities as per GPRs 2 and 7); hate speech; violence; and integration strategies. Importantly, in the context of the fifth monitoring cycle, issues which arise in the context of themes such as hate speech or violence for members of the LGBT community are addressed.

GPRs 1 and 7: Criminal law provisions

ECRI's General Policy Recommendation (GPR) 1 defines the basic requirements for combating racism, xenophobia, antisemitism, and intolerance. In the context of hate crime, it provides that State Parties must ensure that national criminal law specifically counters 'racism, xenophobia, antisemitism and intolerance', inter alia, stringently punishing 'racist and xenophobic acts' by:

- Defining common offences of a 'racist or xenophobic nature' as specific offences; and
- Enabling the racist or xenophobic motives of the offender specifically to be taken into account.

Those two recommendations explicitly only to apply to racism and xenophobia. That said, the GPR goes on to provide that the general public should be made aware of the legislation combating racism, xenophobia, antisemitism, and intolerance – though then recommends that criminal prosecution of offences of a racist or xenophobic

¹⁹⁴ European Commission against Racism and Intolerance, *European Commission against Racism and Intolerance* (ECRI 2018).

nature should be given a high priority and ‘actively and consistently undertaken.’ It also states that accurate data and statistics should be collected and published on the number of ‘racist and xenophobic offences’ that are reported to the police, the number of cases prosecuted, the reasons for not prosecuting, and the outcome of cases prosecuted.

ECRI’s GPR 7 specifies the key aspects to be dealt with in national legislation to combat racism and racial discrimination. Again, this GPR explicitly only applies to this manifestation of intolerance (which explicitly includes religion), as opposed to some of the other GPRs which apply across all forms of racism and intolerance. In the context of the criminal law, paragraph 18 of the GPR explicitly states that the criminal law should penalise eight acts when committed intentionally, including public incitement to violence, hatred, or discrimination; public insults and defamation; threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; offences relating to the trivialisation or justification of genocide or crimes against humanity; the public dissemination of materials relating to hate speech offences; membership or leadership of a racist organisation; and racial discrimination in the exercise of a public office or occupation. It goes on to provide in paragraph 21 that, for all other offences (ie not hate speech offences), ‘the law should provide that ... racist motivation constitutes an aggravating circumstance.’ The explanatory memorandum to the GPR states that the law may further penalise ‘common offences’ committed with a racist motivation as specific offences.

GPR 4: National surveys on the experience and perception of discrimination and racism

ECRI’s GPR 4 recommends that governments of Member States take steps to ensure that national surveys on the experiences and perceptions of racism and discrimination from the point of view of victims are organised. The intention of these surveys is to recruit participants from minority groups, rather than to address the prevalence of intolerance in the general population, or perceptions of intolerance within the general population. In the Appendix to GPR 4, specific guidelines are set out, from which Member States should draw inspiration in developing such surveys. Importantly, the purpose of such surveys is to ‘gain a picture of the problems of racism and intolerance from the point of view of actual

and potential victims.’ Importantly, this GPR is not limited to experiences and perceptions of racism, but rather includes xenophobia, antisemitism, and other forms of intolerance. Further, the minority groups chosen to participate in such surveys should depend on ‘national circumstances, and may include ... immigrant groups, national minorities and/or other vulnerable groups.’

GPR 11: Combating racism and racial discrimination in policing

ECRI’s GPR 11 specifically addresses the role of the police in combating racism and intolerance. There are four themes to the recommendation: racial profiling; racial discrimination and racially-motivated misconduct by the police; the role of the police in combating racist offences and monitoring racist incidents; and relations between the police and members of minority groups.

Paragraphs 11-14 of the GPR relate to the third theme, regarding the role of the police in combating racist offences and monitoring racist incidents. Again, this only applies to these manifestations of intolerance, which do not explicitly mention religion. Paragraph 11 provides that the police should thoroughly investigate racist offences, including by fully taking the racist motivation of ordinary offences into account. Paragraph 12 recommends that a system for recording and monitoring racist incidents be put in place, which would also record the extent to which such crimes are ‘brought before the prosecutors and are eventually qualified as racist offences.’ Importantly, paragraph 14 of the Recommendation defines a racist incident as ‘any incident which is perceived to be racist by the victim or any other person.’ Paragraph 13 provides that victims and witnesses of racist incidents should be encouraged to report such incidents.

ECRI’s reports on Ireland

In the Fourth Monitoring Cycle, ECRI refers to the FRA observation that Ireland has a ‘good system for registering racist criminal offences.’¹⁹⁵ However, it encouraged the Irish authorities to improve these processes and the ‘follow-up given to them by the criminal justice system.’¹⁹⁶ It further observes that when a person reports that they have been the victim of a racist incident, they ‘will be informed by the Gardaí of the

¹⁹⁵ *ibid* para 21, referring to FRA, *Annual Report* (Council of Europe 2010) 121.

¹⁹⁶ *ibid* para 23.

designated Garda Ethnic Liaison Officer in their area.’¹⁹⁷ Commending the Garda Síochána Diversity Strategy and Implementation Plan 2009-2012, it recommends that Irish authorities :

‘continue their efforts to provide their law enforcement officials with training in human rights, focusing on the fight against all forms and manifestations of racial discrimination and xenophobia and on policing in a multicultural society, and make it a compulsory part of their initial and on-going training.’¹⁹⁸

In that Report, ECRI observed that it had already recommended in its Third Monitoring Report that Irish authorities include a provision in criminal law that allows for the racist motivation of a criminal offence to be considered as an aggravating circumstance at sentencing, and consider providing that racist offences be defined as specific offences. While Ireland’s response that the courts already have the power to take any specific motivation into account in sentencing was noted, ECRI observed that the fact that the power is discretionary ‘has been recognised by various stakeholders as a problem.’¹⁹⁹ ECRI observed that various sources show that the racist motivation was not consistently taken into account by judges when sentencing, but Ireland responded that it was ‘advised not to introduce aggravated offences as the convictions may be more difficult to obtain because the act and motive have to be proven.’²⁰⁰ ECRI recommended that Ireland assess the application of the criminal law provisions in order to identify any gaps that need closing or any improvements or clarifications that might be required, and particularly drew the attention of Ireland to GPR 7 in this regard.

UN Convention on the Elimination of Racial Discrimination

Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination requires States Parties to:

¹⁹⁷ *ibid* para 150. This observation has been challenged by Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

¹⁹⁸ *ibid* para 152.

¹⁹⁹ *ibid* para 25.

²⁰⁰ *ibid*.

‘declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group or persons of another colour or ethnic origin.’

States are additionally required under the Convention to ‘declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organisations or activities as an offence punishable by law.’ Importantly, Ireland has entered a reservation to Article 4(a) so as to ensure that, in implementing the Article, ‘the right to freedom of opinion and expression ... may not be jeopardised.’²⁰¹

In its 2006 Report, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern that existing legislative measures were insufficient to meet the standards of the International Convention on the Elimination of All Forms of Racial Discrimination. A year following the transposition deadline for the Framework Decision, the United Nations Committee on the Elimination of Racial Discrimination²⁰² highlighted its ongoing concern that ‘the legislative framework in the State party does not cover all the elements of Article 4 of the Convention, and that racist motivation is not consistently taken into account by judges in sentencing for crime (Arts. 2 and 4)’. The actions commended to the Irish State included that a racist motivation be ‘consistently taken into account as an aggravating factor in sentencing practice for criminal offences’. The Report twice highlights the importance of ensuring that where offenders are convicted of racist crimes they are ‘punished with appropriate penalties’.²⁰³

The Universal Period Review Process

Also in 2011, as part of the United Nations Human Rights Council’s Universal Periodic Review (UPR) process, observers recommended that Irish authorities take steps to challenge racism, xenophobia, religious intolerance, and racial profiling

²⁰¹ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16.

²⁰² Committee on the Elimination of Racial Discrimination, *Concluding observations on the Committee of Racial Discrimination: Ireland* (United Nations 2011) para 19.

²⁰³ *ibid* para 21 and 23.

through the introduction of legislation.²⁰⁴ The UN Human Rights Council also examined Ireland's compliance with the International Covenant on Civil and Political Rights. Article 20 of the ICCPR provides:

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

In response to the advance list of issues raised by the Human Rights Committee, Ireland communicated that the 1989 Act and Ireland's compliance with the Framework Decision was scrutinized on an ongoing basis by the Council of the European Union and the European Commission and as such, Ireland would ‘... consider any proposals made by the Commission that would enhance the existing protections in the 1989 legislation’ if it were required.²⁰⁵

One of the 20 issues addressed by the civil society coalition submission to the UPR Working Group concerned hate crime and discrimination. Endorsed by 63 organisations and three private individuals, the Report noted that none of the recommendations made and accepted had been implemented: there was no successor to the National Action Plan against Racism published; the State had failed to reform the Prohibition of Incitement to Hatred Act 1989; and there was no implementation of measures to promote reporting and recording of hate crime. The Report made three key recommendations:

- Legislate to introduce aggravated offences and enhanced sentencing where evidence of bias a motivating or demonstrable factor exists;
- Monitor the implementation of hate crime laws from inception, focusing on training, reporting, recording, investigation, prosecution, and sentencing;
- Mainstream a victim orientation throughout the criminal justice system.²⁰⁶

²⁰⁴ Human Rights Council, *Report of the Working Group on the Universal Periodic Review* (United Nations 2011).

²⁰⁵ Human Rights Committee, *List of issues in relation to the fourth periodic report of Ireland* (United Nations 2014).

²⁰⁶ Civil Society Stakeholder Report, *Your Rights. Right Now.* (ICCL 2015) 25.

A number of recommendations were made as part of the UPR process in the context of hate crime, which were partially accepted by the State. However, in only partially accepting those recommendations, the State once again repeated its position on hate crime, stating:

‘Where criminal offences such as assault, criminal damage, or public order offences are committed against a person based on their race, religion, etc, the trial judge can take aggravating factors (eg motivation based on a victim’s religion, race, etc.) into account at sentencing.’²⁰⁷

It further stated that the Government had ‘recently’ approved a review of the Prohibition of Incitement to Hatred Act 1989; that anti-racism initiatives would be taken under the new Integration Strategy; and that Ireland’s legislation was compliant with the provisions of ICERD.²⁰⁸

The European Court of Human Rights

Over the past two decades the European Court of Human Rights (ECtHR) has had numerous applications relating to hate crime. The role of the Court has been particularly important in cases where States Parties have failed to conduct effective investigations into hate crime or to take adequate measures to prevent such crimes.²⁰⁹ Domestically, the Convention is given effect in Irish law through the European Convention on Human Rights Act 2003, and section 3 of that Act requires that all organs of the State must perform their functions in a manner which is compatible with Convention obligations. The ECtHR has repeatedly held that States are under a positive obligation, at the point of investigation, to ensure that the hate element of a crime is unmasked and appropriately investigated.

²⁰⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Ireland – Addendum – Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (Human Rights Council 2016) 6.

²⁰⁸ *ibid.*

²⁰⁹ Jasmina Mačkić, ‘The European Court of Human Rights and Discriminatory Violence’ in Jennifer Schweppe and Mark A Walters (eds), *The Globalization of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016) 233.

In *Angelova and Iliev v Bulgaria*²¹⁰ the applicants complained that the authorities failed to carry out a prompt, effective, and impartial investigation in the context of a racially motivated murder committed against two members of the Roma community. The Court found there to be a violation of Article 2 in the case, as there had been a failure to effectively investigate the death of the victim promptly, expeditiously and with the required vigour, ‘considering the racial motives of the attack and the need to maintain the confidence of minorities in the ability of authorities to protect them from the threat of racist violence.’²¹¹ In the context of the application under Article 2 in conjunction with Article 14, the Court set out the obligations of States in this regard:

‘... when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.’²¹²

In *Milanović v Serbia* the Court made similar findings in the context of anti-religious violence.²¹³ In *Identoba v Georgia*²¹⁴ the Court considered State responsibilities in the context of homophobic violence. Here, the Court stated that there was a duty on authorities to ‘prevent hatred-motivated violence’ on the part of private individuals in the context of a peaceful protest, as well as to investigate the existence of a link between a discriminatory motive and an act of violence under Article 3 in conjunction with Article 14.²¹⁵

²¹⁰ *Angelova and Iliev v Bulgaria* App No 55523/00 (ECHR, 26 July 2007); see also *Šečić v Croatia* App No 40116/02 (ECHR, 31 May 2007). See also *Nachova v Bulgaria* App Nos 43577/98 and 43579/98 (ECHR, 6 July 2005) in which the racist violence was perpetrated by the police.

²¹¹ *Angelova and Iliev v Bulgaria* App No 55523/00 (ECHR, 26 July 2007) para 105.

²¹² *ibid* para 115.

²¹³ *Milanović v Serbia* App No 44614/07 (ECHR, 14 December 2010). In *Škorjanec v Croatia* App No 25536/14 (ECHR, 28 March 2017), the Court held that racially motivated offences extended to crimes committed against a victim who is associated or affiliated with a particular racial group.

²¹⁴ *Identoba v Georgia* App No 73235/12 (ECHR, 12 May 2015).

²¹⁵ See also, *Nachova and Others v Bulgaria* Apps Nos 43577/98 and 43579/98 (ECHR, 6 July 2005); *Identoba and Others v Georgia* App No 73235/12 (ECHR, 12 May 2005). See further, Jasmina Mačkić,

In its recent decision, *Balázs v Hungary*,²¹⁶ the Court explicitly referenced the OSCE/ODIHR resource guide, *Preventing and responding to hate crimes*, in its examination of the case, which involved an applicant who alleged that the anti-Roma assault perpetrated against him was not appropriately investigated by the State authorities. In this context, the Court stated:

‘Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ... The Court also reiterates the particular requirement for an investigation into an attack with racial overtones to be pursued with vigour and impartiality, having regard to the need to continuously reassert society’s condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.’²¹⁷

The Court particularly noted that where there is an allegation of a racist utterance on the part of law enforcement agents of the State, ‘it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives.’²¹⁸

Importantly, as Hanek observes, while having specific legislation which addresses the hate element of a crime is beneficial, the obligation to unmask the hate element applies even in the absence of such legislation.²¹⁹ It can be assumed that, while the

‘The European Court of Human Rights and Discriminatory Violence’ in Jennifer Schweppe and Mark A Walters (eds), *The Globalization of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016) 233.

²¹⁶ *Balázs v Hungary* App No 15529/12 (ECHR, 14 March 2016).

²¹⁷ *ibid* para 52.

²¹⁸ *ibid* para 61.

²¹⁹ Aleš Gíao Hanek, ‘International Legal Framework for ‘Hate Crimes: Which Law for the “New” Countries’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 467.

judgments to date have concerned only racist, homophobic, and anti-religious hate crime, given the fact that the obligations stem from an application under either Article 2 or 3 in conjunction with Article 14, such obligations should also then apply in the context of crimes committed against an individual because of their 'sex, race, colour, language, religion, political or any other opinion, national or social origin, association with a national minority, property, birth or other status', meaning that States should be aware of their obligations across a broad range of personal characteristics. However, it must be noted that the obligations under the ECHR do not extend to requiring States to introduce specific hate crime legislation.²²⁰

The Organisation for Security and Co-operation in Europe

While membership of the Organisation for Security and Co-operation in Europe does not give rise to legally binding obligations, its comprehensive interpretation of 'security' includes focus on tolerance and non-discrimination, minority rights, and policing. Its Ministerial Council Decision *Combating Hate Crimes*²²¹ acknowledges the harms of hate, and states that hate crimes are 'criminal offences committed with a bias motive'. It calls on participating States to do a number of things to ensure hate crime is addressed appropriately, including but not limited to the following:

- Collect, maintain and make public, reliable data and statistics on hate crime;
- Enact, where appropriate, specific, tailored legislation to combat hate crime, providing for effective penalties that take into account the gravity of such crimes;
- Take appropriate measures to encourage victims of hate crime to report their experiences, while also exploring the methods by which civil society organisations can contribute to this process;
- Introduce or further develop training for law enforcement, prosecution, and judicial officials dealing with hate crime;
- Explore ways to support victims of hate crime and give them access to counselling, legal and consular assistance, and effective access to justice;

²²⁰ *ibid.*

²²¹ Organization for Security and Co-operation in Europe, *Ministerial Council Decision "Combating Hate Crimes"* (OSCE 2009) <<http://www.osce.org/cio/40695?download=true>> accessed 26 February 2018.

- Promptly investigate hate crime, and ensure those convicted of hate crime are acknowledged and publicly condemned by the relevant authorities.

By way of supporting these aims, the OSCE Office for Democratic Institutions and Human Rights has produced a number of reports, guidelines and training programmes on the topic of hate crime, including Annual Reports on Hate Crimes in the OSCE Region; *Prosecuting Hate Crimes: A Practical Guide*; *Hate Crime Data Collection and Monitoring: A Practical Guide*; *Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region*; and *Hate Crime Laws: A Practical Guide*.

The response of the Irish state

Although, in 2007, the Irish State's response to international scrutiny of its legislative framework in relation to hate crime indicates an acknowledgement of shortfalls in its criminal law provisions, by the early years of the economic downturn this stance had changed to one of defensiveness and resistance to change. It appears that the Irish State does not accept the problematic nature of an absence of legislation on hate crime, in continuing to argue that the legal system is currently addressing hate crime appropriately.

In its 2009 *Combined Third and Fourth Reports by Ireland*, the Irish State responded to CERD's criticisms of the sufficiency of its legislative provisions in regards to racist crime by noting that it was not required to transpose the Convention into domestic law and argued that, in any case, its existing provisions were adequate.²²² The Irish State also drew on the conclusions of a report to argue that, as educative and other flanking measures would also be necessary to address racism, the criminal law should not be reformed. Schweppe and Walsh's report had in fact highlighted a concern '... that judges are at present *not* considering racism as an aggravating factor and indeed some feel it *cannot* be considered as an aggravating factor under present law'²²³ and recommended measures as part of a larger, holistic approach to

²²² Office of the Minister for Integration, *United Nations International Convention on the Elimination of All Forms of Racial Discrimination: Combined Third and Fourth Reports by Ireland* (Stationery Office 2009) 18.

²²³ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 4 (emphasis in original).

combating racism and xenophobia. Although Schweppe and Walsh²²⁴ recommended the introduction of legislation which would require a hate element to be treated as an aggravating circumstance at sentencing, the State argued that even this minimal reform would have ramifications for broader criminal law and as such stated that no plans were being made for the introduction of statutory provisions on aggravated sentencing.²²⁵ Further, in its follow-up observations to the UNCERD Report, Ireland stated, ‘the introduction of racially aggravated sentencing would involve a restructuring of penalties for basic criminal offences (assault or criminal damage, for example) to increase sentences and have wider implications for the criminal law’.²²⁶ Though this may be the case, such restructuring is routinely carried out where an aggravated version of an offence is introduced.

In its fourth and most recent report on Ireland in 2013, ECRI attributes statements to the Department of Justice, Equality and Law Reform which are ostensibly more defensive than in 2007. ECRI notes that the Department, having conducted a review of the 1989 Act, characterized the jurisdiction’s incitement to hatred provisions as ‘sufficiently robust’.²²⁷ More significantly, the Report notes the Department’s assertion that ‘... Ireland was in compliance with the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law²²⁸ by virtue of the provisions in its existing criminal law—Prohibition of Incitement to Hatred Act 1989 and public order legislation’.²²⁹ Clearly disagreeing with this assessment, ECRI again highlights Ireland’s failure to introduce aggravated offences or place aggravated sentencing on a legislative footing. The Commission reiterates the point that leaving the aggravation of sentences on the basis of racist

²²⁴ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008).

²²⁵ Office for the Promotion of Migrant Integration, *Information on Ireland’s follow-up to recommendations contained in the Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) following examination of Ireland’s combined 3rd and 4th periodic report by UNCERD* (Stationery Office 2014).

²²⁶ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination—Ireland: Addendum: Information received from the Government of Ireland on the implementation of the concluding observations* (United Nations 2012) 3.

²²⁷ European Commission against Racism and Intolerance, *ECRI Report on Ireland: Fourth Monitoring Cycle* (Council of Europe 2013) 12.

²²⁸ Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law 2008/913/JHA.

²²⁹ European Commission against Racism and Intolerance, *ECRI Report on Ireland: Fourth Monitoring Cycle* (Council of Europe 2013) 12.

motivation entirely at the discretion of the judiciary is insufficient. Citing a CERD report from 2011, ECRI adds the finding that ‘... according to various sources, the racist motivation was not consistently taken into account by judges when sentencing’.²³⁰

In March 2014, in response to the United Nations Human Rights Council’s UPR, the Irish State published an interim report, which again argued that existing legislation (the 1989 Act) was fit for purpose and that the established generic criminal law is sufficient to the task at hand. Furthermore, the State argued that the judiciary do consider racist or xenophobic motivations at sentencing, as robust measures were already in place in Ireland to challenge hate crime.²³¹ No evidence was presented to support these conclusions regarding sentencing practices. Equally, Ireland’s response to OSCE criticisms has been to argue that Ireland is fully compliant with its international obligations.

In responding to its obligations under Article 4 of the EU framework decision of 2008, Ireland has simply stated that ‘motivation can always be considered by the courts’.²³² It remains to be seen whether infringement proceedings will be taken against Ireland in this context following the investigation.

In summary, the response of Ireland has been to argue:

- Generic criminal offences are sufficient to combat hate crime and the courts do consider racist or xenophobic motivations at sentencing (though they have provided no evidence that this is the case);
- The criminal law alone would be insufficient to challenge hate crime which requires broader educative measures to combat it;

²³⁰ *ibid*13.

²³¹ Department of Justice and Equality, *University Periodic Review – Ireland: National Interim Report* (Stationery Office 2014).

²³² European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law* (European Commission 2014) 7.

- Introducing aggravated sentencing provisions would have broader ramifications for the criminal law, including a restructuring of penalties for basic offences.²³³

The State's position at an international level seems to suggest that the Irish criminal justice process, and Irish criminal law in particular, are so different to other systems that it is not possible to introduce hate crime legislation: not only that, but so particular is the system that it is capable of recognizing hate, protecting victims, and punishing offenders without specific hate crime laws. However, there does seem more recently to be some political retraction by the legislature from this position, and there have been recent indications that all-party support exists for the introduction of hate crime legislation. This was indicated in the Dáil debates at the second stage of the Criminal Justice (Aggravation by Prejudice) Bill 2016. While the Bill is problematic for a number of reasons, which will now be detailed, the debates surrounding the Bill give some indication as to how members of the Dáil frame the discussion and debate on hate crime.

Legislative response: The Criminal Justice (Aggravation by Prejudice) Bill 2016

In July 2016²³⁴ the Criminal Justice (Aggravation by Prejudice) Bill 2016, a private Members' Bill, was introduced by Fianna Fáil spokesperson on Equality, Immigration and Integration, Fiona O'Loughlin TD, along with Fianna Fáil Disability Spokesperson Mary Murphy-O'Mahony TD. In a statement regarding the introduction of the Bill, Ms O'Loughlin cited the need to bring Irish legislation in line with that of other countries with existing laws to address hate crime, giving the examples of Ireland's closest neighbours Northern Ireland, Scotland, England and Wales. She also cited police recorded data, stating that Ireland had a 'very real problem with hate crime.'²³⁵

²³³ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 9.

²³⁴ Fianna Fail, 'New Bill will help combat hate crime' (FiannaFail.ie, 24 July 2016) <<https://www.fiannafail.ie/new-bill-will-help-combat-hate-crime-oloughlin/>>

²³⁵ Ibid.

The Bill proposed to include as protected grounds race, colour or ethnic origin, disability, and sexual orientation or transgender identification. Disability was defined by reference to section 2 of the Disability Act 2005 and as including physical or mental impairment of any kind. Sexual orientation was defined as including ‘sexual orientation towards persons of the same sex or of the opposite sex or both;’ and transgender identity was defined as including ‘includes transvestism, transsexualism, intersexuality or having changed gender under the Gender Recognition Act 2015.’

The Bill was debated in the Dáil at second stage on the 4th of October 2016 and successfully passed to committee stage via a vote held on the 6th of October 2016. During the course of the debate, it became clear that while deputies were in favour of the concept of introducing hate crime legislation, the form of the proposed Bill fell short of what they believed appropriate. Indeed, not one speaker opposed the general objective of the Bill, or the introduction of hate crime legislation in principle. Most notably, the then Minister for Justice, Frances Fitzgerald TD, indicated that State policy on this issue might be shifting towards accepting that hate crime legislation should be introduced:

‘No one could disagree with the purpose of the Bill which aims to ensure that where an offence is committed against a person that is motivated by prejudice or hate relating to the victim's race, colour, ethnic origin, disability, sexual orientation or transgender identification, motivation will be taken into account for the purposes of determining sentence.’ (Minister for Justice Frances Fitzgerald, Fine Gael)²³⁶

Minister Frances Fitzgerald raised a significant number of technical concerns, which largely related to the suitability of what was essentially the adaptation of Scottish legislation to an Irish context. Along with a number of other deputies, she also criticised the limited range of characteristics protected, which notably excluded religion and membership of the Traveller community.

²³⁶ Dáil Debate, 4 October 2017, vol 923, col 1.

The Bill progressed to Committee Stage, and in briefing the Committee on the Bill, Deputy O'Loughlin stated that following consultation with stakeholders, she had tabled a number of 'significant and far-reaching amendments' to the original Bill.²³⁷ These changes included the expansion of the range of characteristics protected by the Bill, as well as the creation of aggravated offences. She also proposed that the title of the Bill be changed to the Criminal Law (Hate Crimes) Bill. Members of the Justice Committee were broadly supportive of the Bill. There has been no progression on the Bill since then.

Conclusion

That hate crime can be treated as an aggravating factor by sentencing courts in Ireland is without question. However, a court can only address a factor when it is presented to it: where a hate element has not been adequately recorded, investigated or prosecuted, the court will simply be unaware of its existence. In the absence of hate crime legislation, the hate element of a crime is often 'filtered out' or 'disappeared' from the process. This has been recognised internationally, and from recent pronouncements by the former Minister for Justice, it seems that the position of the State is moving towards acceptance of the need for a specific hate crime law. Other common law jurisdictions including our closest neighbours, Northern Ireland and England and Wales, as well as Canada have already recognized the need for legislation to address hate in its many manifestations. The next chapter will explore the means by which hate crime legislation can be framed, before the thesis turns to considering how this might best be done in an Irish context.

²³⁷ Joint Committee on Justice and Equality Debate, 12 April 2017.

Chapter 4 – Legislating Against Hate Crime – A Comparative Perspective

Introduction

Rosenberg observes that, for better or worse, ‘certain bias crimes represent a drastic doctrinal departure from a longstanding maxim of criminal law.’¹ The reason for this is that, traditionally, the motivation of the offender is addressed at sentencing, rather than being included in a substantive offence. That said, the manner in which ‘hate’ is addressed in legislation differs across jurisdictions. This chapter will discuss the various models that have been utilised, particularly discussing the legal frameworks in Canada, England and Wales, Northern Ireland, and the US. In developing hate crime legislation, a key question to be determined is whether the ‘hate’ element should be addressed through the introduction of aggravated offences or through providing that hate is an aggravating factor in sentencing. The first approach creates new – aggravated – forms of existing offences, by attaching the hate element to the base offence as well as (typically) providing a higher maximum penalty for the aggravated offence than for the base offence. The second approach provides through statute that where a hate element is present in a case, the court must or should treat that element as an aggravating factor in sentencing. There is no consistency across jurisdictions on this issue, with Canada and Northern Ireland approaching the question through a sentence enhancement provision, and England and Wales having two separate approaches depending on the category of victim targeted.

One of the justifications for introducing hate crime laws is the message they send to society that this type of behaviour is not acceptable. This chapter will begin by applying some of the theories central to arguments for and against addressing the hate element in legislation, through the lens of the threshold of criminality and theoretical justifications of punishment. It will then present legislative models for doing so in practice. Aside from theoretical concerns, a practical consideration which must be considered is, whether the legislation will ‘work’: that is, will the

¹ Michael T Rosenberg, ‘The Continued Relevance of the Irrelevance-of-Motive Maxim’ (2008) 57 Duke Law Journal 1143, 1173.

legislation be used to ensure that hate crime is appropriately investigated, prosecuted, and sentenced, or will the hate element of the crime remain 'disappeared'.

Hate crime and the threshold of criminality

Regardless of whether the aggravated offences model or the aggravated sentencing model is used, in terms of justifying such legislative developments, there are two key lenses through which academic literature addresses the question of the threshold of criminality. The first looks at the issue of moral blameworthiness: that it is morally repugnant for an individual to act out of prejudice, and that our criminal law should reflect that. The second approach views this behaviour through the lens of the harm principle: that legislation should reflect the (evidenced) increased harm that hate crime offending has on its victims.²

In the context of moral blameworthiness, it can be argued that hate crime offenders are more morally culpable than their non-biased counterparts. It is commonly accepted that prejudice-motivated crimes 'directly undermine democratic values and fundamental rights including dignity, respect and equality.'³ Hurd, however, argues that enhancing punishment for these reasons amounts to punishing the character of the person: those who commit hate crime do so because they are disposed to believe that certain groups are inferior, something which is outside the conscious control of the offender.⁴ Stanton-Ife rejects this argument: the criminal law, he states, does not punish individuals because of their thoughts but their actions – and in this context, for acting based on prejudice.⁵

² It is beyond the scope of this thesis to explore and examine the threshold of criminality in any detail, which has been extensively discussed by scholars and particularly applied in the context of hate crime expertly by and John Stanton-Ife, *Criminalising conduct with special reference to potential offences of stirring up hatred against disabled or transgender persons* (Law Commission, 2013).

³ Jennifer Schweppe and Mark Walters, 'Hate Crimes: Legislating to Enhance Punishment' in *Oxford Handbooks Online: Criminology and Criminal Justice* (Oxford University Press 2015), citing Gail Mason and Andrew Dyer, 'A Negation of Australia's Fundamental Values: Sentencing Prejudice-Motivated Crime' 36(3) *Melbourne University Law Review* 871 and John Stanton-Ife, *Criminalising conduct with special reference to potential offences of stirring up hatred against disabled or transgender persons* (Law Commission, 2013).

⁴ Heidi Hurd, 'Why Liberals Should Hate Hate Crime Legislation' 20(2) *Law and Philosophy* 215.

⁵ John Stanton-Ife, *Criminalising conduct with special reference to potential offences of stirring up hatred against disabled or transgender persons* (Law Commission, 2013).

In the context of the harm principle, hate crimes are now well established to ‘hurt more’,⁶ with empirical evidence indicating that hate motivated crimes are more likely to cause ‘heightened levels of harm, both in terms of physical and emotional trauma to the victim, when compared to non-hate offences.’⁷ Some research also indicates that hate crimes are more likely to involve increased levels of brutality: Cheng et al suggest that homophobic hate crime, for example, is more likely to be physical in nature, while also being correlated with the commission of more serious assaults.⁸

That said, there is not universal approval within the community of hate crime scholars for this approach. Al-Hakim and Dimock, for example, state that there is no empirical evidence supporting the claim for heightened levels of harm, and thus question the use of enhanced punishment in this regard.⁹ While it is accepted, as Schweppe and Walters observe, that it cannot be conclusively proven that hate crime always hurts more, ‘the increased *likelihood* of both individual and community harms ... justifies a higher level of punishment.’¹⁰

Theories of punishment and hate crime

In the context of Irish sentencing practices, the Irish sentencing process is ‘largely discretionary’ reflecting what O’Malley describes as a commitment to ‘individualised justice for criminal offenders.’¹¹ That said, the central consideration for any court when determining the sentence to be imposed is proportionality: that is, that the sentence imposed must strike a balance between the circumstances of the commission of the offence, and the circumstances of the offender.¹² While, as O’Malley observes, ‘[o]ther legitimate sentencing objectives such as deterrence and rehabilitation may be considered and given effect’, proportionality is the

⁶ Paul Iganski, *Hate Crime and the City* (Policy Press 2008).

⁷ Jennifer Schweppe and Mark Walters, ‘Hate Crimes: Legislating to Enhance Punishment’ in *Oxford Handbooks Online: Criminology and Criminal Justice* (Oxford University Press 2015).

⁸ Wen Cheng, William Ickes and Jared B Kenworthy, ‘The Phenomenon of Hate Crimes in the United States’ 43(4) *Journal of Applied Psychology* 761.

⁹ Mohammad Al-Hakim and Susan Dimock, ‘Hate as an aggravating factor in sentencing’ (2012) 15 *Criminal Law Review* 572.

¹⁰ Jennifer Schweppe and Mark Walters, ‘Hate Crimes: Legislating to Enhance Punishment’ in *Oxford Handbooks Online: Criminology and Criminal Justice* (Oxford University Press 2015).

¹¹ Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 1.

¹² *People (DPP) v C(W)* [1994] 1 ILRM 321.

determining and limiting principle.¹³ In the Final Report of the Strategic Review of Penal Policy, the Review Group recommended that the emphasis in punishment should shift to one in which, subject to the principle of proportionality, the rehabilitation and reintegration of the offender are core considerations.¹⁴

There is an extensive literature on the different models and rationales for sentencing and punishment, which typically categorise the primary theories as retribution or desert; incapacitation; deterrence and denunciation; and rehabilitation and restorative justice, and it is not proposed to explore these theories in any great detail, but rather to discuss them in the context of their application to hate crime specifically.

Retribution or desert

The principle of retribution states that we punish people because it is deserved, and is widely discussed in the literature.¹⁵ Therefore, retribution places a limit on the amount of punishment imposable for the particular crime: we punish the offender only for that crime he or she has committed.

Retributivists would also argue that punishment of offenders is justified for its preventative or declaratory function: the sentence sends a message to society that this type of behaviour is unacceptable – or as von Hirsch would have it, without the punishment of crimes, ‘it seems likely that victimising conduct would become so prevalent as to make life nasty and brutish, indeed.’¹⁶

Crocker notes that, when stated abstractly, no conflict appears to exist between hate crime statutes and retributive justice principles.¹⁷ However, he gives the example where an offender commits a crime based on secret animus, an animus which emerges only during the confession of the offender and of which neither the victim

¹³ Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 21.

¹⁴ Working Group on Penal Policy, *Strategic Review of Penal Policy: Final Report* (Department of Justice and Equality 2014).

¹⁵ See, generally, eg Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016); Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010); Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009).

¹⁶ As cited in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009) 103.

¹⁷ Lawrence Crocker, ‘Hate Crime Statutes: Just? Constitutional? Wise?’ (1992) *Annual Survey of American Law* 485.

nor the community were aware. He notes that here, the anguish felt by the community

‘... was not imposed upon the community by the crime itself, but by the legal process, and in particular by the hate crime law, which requires a focus on the racial element even if such an element is unmanifested on the face of the crime.’¹⁸

He concludes that, if the justification for penalty enhancements for hate crime laws is the impact on the victim and the community, then hate crimes must be framed in such a manner as to require manifestation of the hatred.¹⁹

Card considers hate in the context of other motives, and states that the notion that hate is a more serious fault in the offender than ‘normal offences’ captures the ‘popular cultural belief in a predominantly Christian society that hatred is necessarily bad, one of the worst motives, perhaps *the* worst motive, that anyone could have.’²⁰ Von Hirsch would agree, regarding desert as having a censuring function: ‘punishing consists of imposing a deprivation on someone, because he purportedly has committed a wrong, under circumstances and in a manner that conveys disapprobation of him for his wrong.’²¹

Incapacitation

Linked to retribution, the principle of incapacitation justifies punishment on the basis that we punish people to physically prevent them from being able to commit crimes, typically by imprisoning them. Generally, the problems with incapacitation as a rationale for punishment are clear: first, it gives rise to disproportionate sentencing, and secondly, it could be viewed as a form of preventative detention. From the perspective of hate crime, the operation of incapacitation as a justification for punishment is more problematic.

¹⁸ *ibid* 489.

¹⁹ *ibid*.

²⁰ Claudia Card, ‘Is penalty enhancement a sound idea?’ (2001) 20(2) *Law and Philosophy* 195, 209-210.

²¹ Andrew von Hirsch, ‘Proportionate Sentences: a Desert Perspective’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009) 116.

Generally speaking, in order to justify incarcerating an individual in order to prevent him from committing further crimes, the court will analyse whether the individual is likely to reoffend. Whatever difficulties exist in the context of predictive sentencing for ordinary crimes, from one perspective, for our true, hate motivated offender, the process is much more simple. If we have an offender who truly hates those from another group, and who believes that any prohibited conduct against them is justified, then we can say with reasonable certainty that without a radical shift in his mind-set, this intransigent prejudice will exist.²² However, on this basis, the incarceration of all 'racists' would be justified: an approach which cannot be countenanced from the perspective of the principle of proportionality – why would we treat hate in this manner, and not jealousy, rage, or sadism? In fact, incapacitation may exacerbate the feelings of bias towards the group, as 'it is because of that group that he is now incarcerated.'²³

The 'vivid danger' argument is one which might rebut this proportionality argument. Bottoms and Brownsword agree that to punish an offender for longer than he deserves violates the rights of the offender. However, they argue that where the offender presents a 'vivid danger' of seriously injuring other individuals, his rights can be overridden. Quite simply, the argument is that individual rights must be sacrificed for the greater good. This reasoning is commonly used to rationalise preventative justice in the context of bail refusal in the US, but of course would be unconstitutional in an Irish context.

In the context of hate crime, there is a much more specific target group in question: that is, that the offender is being incapacitated due to his threat to a particular group of potential victims. However, in order to justify this limitation on liberty rights, the court must be satisfied that first, there is a high degree of recidivism in hate offenders generally; second, that the particular offender falls into this category; and

²² Thus, the established issue relating to 'false positives' with incapacitation is less problematic in the context of hate crimes. See, Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009), 76-77 citing J Floud and W Young, *Dangerousness and Criminal Justice* (Heinemann 1981).

²³ *ibid.*

finally, that the offender poses a significant threat to a particular category of individuals. Gerstenfeld further notes that, in the US context, if the offender goes to jail, his hatred will more likely be reinforced, as jails and prisons are among ‘the most prejudice-ridden environments in America.’²⁴ Further, if the incarcerated individual is a member of such a group, his status within that group might be increased, sometimes to the point of being lauded as a hero, who is willing to be imprisoned in order to protect his belief system and that of his associates.²⁵ In any case, again, this sentencing rationale would not be compatible with the Irish Constitution.

Deterrence and denunciation

Another theoretical justification for hate crime laws is that of deterrence. The principle of deterrence has two aspects – first, we punish an individual so that he or she will not commit another crime (specific deterrence); secondly, we punish an individual to deter people in society generally from committing crimes (general deterrence).²⁶ As von Hirsch, Ashworth and Roberts note, there are generally three components to deterrence: certainty, severity and celerity.²⁷ Thus, they note, penalties will deter offenders to the extent that they are relatively certain to be imposed, sufficiently severe as to prove aversive and are imposed sufficiently soon after the offence occurs.²⁸ Importantly, however, they reason that as deterrence is a psychological mechanism, it is the subjective expectation of the individual in question regarding these values which matters.²⁹

As Card notes, Bentham justified higher penalties for more severe crimes on the basis that it is more socially important to deter the more severe crimes in the criminal code.³⁰ It has also been noted that the idea that awareness of possible

²⁴ Phyllis B Gerstenfeld, ‘Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behaviour’ (1992) 10 Behavioural Sciences and the Law 259, 280.

²⁵ *ibid.*

²⁶ See, generally, eg Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016); Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010); Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009).

²⁷ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009) 40.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Claudia Card, ‘Is penalty enhancement a sound idea?’ (2001) 20(2) Law and Philosophy 195.

punishment will inhibit offending 'carries great intuitive appeal.'³¹ In order for this principle to operate, however, the legislation must be effective in punishing hatred, which it will be shown, is problematic. If one believes that hate crimes are more severe than 'ordinary' crimes, then penalty enhancements for hate crimes are justifiable from this perspective. However, Card argues that, while the crime is morally worse because of its motive, it is not more harmful as a result, asking:

'If the penalty for assault is already based on the harmfulness of that offence as compared with other offences, why, from a deterrent point of view, should that penalty be enhanced in cases where the motive is hatred?'³²

Von Hirsch et al also argue that singling out a particular type of crime for enhanced punishment for deterrent ends '[disturbs] the rank order of penalties.'³³

If we are to accept the deterrence value of sentencing enhancements for hate crime based on their generally deterrent value, we must ask how the message is being sent to the general population. The argument in favour of exemplary offences then presents itself. Von Hirsch, Ashworth and Roberts note that if there an increase in a particular type of offence is anticipated, then the imposition of an unusually high sentence, or indeed, a series of unusually high sentences could be justified in order to deter potential offenders.³⁴

The primary concern, however, must be an examination as to how effective deterrence is, or could be, as a strategy to reduce incidents of hate crime. The principle presumes a rational actor: one who is aware of the potential punishment, and who weighs that punishment against the benefits of committing the crime itself. However, if we consider an 'opportunistic' offender, who uses hate language during the course of the criminal activity, the 'intention' to use such language was made

³¹ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009), 39.

³² *Ibid* at 208.

³³ Andrew von Hirsch, Anthony E Bottoms, Elizabeth Burney and Per-Olof Wikström, 'Deterrent Sentencing as a Crime Prevention Strategy' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts, *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009) 63.

³⁴ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009) 43.

during the course of an emotional state – a state which arguably impairs the offenders’ ability to consider the legal consequences of their action.³⁵ For our ‘hate motivated’ offender, the deterrence principle may well operate – but only to the extent that they are calculated in the manner with which they perpetrate the offence: they will potentially thus not use hate language during the course of the offence, and will not admit that they were motivated by hate after the commission of the offence, thus avoiding the sentence enhancement. While this may well act in deterring our offender from uttering hate language, it will not deter them from committing the offence in the first place.

A further concern regarding the potential deterrent effect of sentence enhancements for hate crime is the fact that the potential penalty is but one of a number of factors which an offender will consider prior to committing the offence. Von Hirsch, Ashworth and Roberts note that the opinion of the offenders’ family may well have a deterrent effect, if not a more powerful effect on the offender.³⁶ Criminologists have found that enhancing punishment rarely has any impact on general offending levels, and thus, punishment enhancers are arguably unlikely to have either individual or general deterrence value.³⁷ However, Iganski argues that the criminalisation of hate plays an important role in sending a message that committing a crime based on prejudice is unacceptable, and such laws help support social norms and behaviours that reject public expressions of hostility.³⁸ Mason argues that hate crime laws engage in a process of remoralisation, ‘that seeks to challenge norms and moral boundaries that sustain racial, religious, sexual and other hierarchies of difference’.³⁹ Schweppe and Walters observe:

‘In this sense, legislation may well help to diminish the pervasiveness of hate crime by repeatedly denouncing public expressions of identity-based

³⁵ *ibid* 45.

³⁶ *ibid* 46.

³⁷ Jennifer Schweppe and Mark Walters, ‘Hate Crimes: Legislating to Enhance Punishment’ in *Oxford Handbooks Online: Criminology and Criminal Justice* (Oxford University Press 2015).

³⁸ Paul Iganski, *Hate Crime and the City* (Policy Press 2008).

³⁹ Gail Mason, ‘The symbolic purpose of hate crime law: Ideal victims and emotion’ 18(1) *Theoretical Criminology* 75.

hostility through the expressive power of the law, regardless of whether [it] is supported by enhanced punishment.’⁴⁰

Indeed, Walters argues that where the bias element is addressed through sentencing only, rather than through an express offence, this message could be lost, or at least minimised.⁴¹ In an Irish constitutional context, O’Malley observes that a system which ‘purports to treat offenders as autonomous beings entitled to respect for their intrinsic worth and dignity, a purely instrumental approach to punishment is hard to defend.’⁴²

Denunciation sees the purpose of punishment as a form of censure: punishment is a way by which the state communicates both to the offender and to society that the behaviour in question was wrong. While there is some connection between denunciation and general deterrence, denunciation is motivated by intrinsically moral considerations. The European Commission on Racism and Intolerance (ECRI) in its seventh general policy recommendation uses the language of denunciation to justify the introduction of legislative measures which punish racist behaviour, stating they play ‘an educative function within society, transmitting the powerful message that no attempts to legitimise racism and racial discrimination will be tolerated in a society ruled by law.’⁴³ However, this message can easily be undermined where the legislation is ineffective in carrying its message to fruition. One of the primary justifications for enhancing the punishment for crimes which are motivated or aggravated by hate is that by doing so, we send the message that as a society, we do not accept this type of behaviour. However, as Solomon notes, social acceptance can exist even when laws prohibit the behaviour, ‘especially when those laws are ineffective or are not strictly enforced.’⁴⁴ While denunciation is closely linked to deterrence, deterrence, as O’Malley states, is ‘explicitly utilitarian with a

⁴⁰ Jennifer Schweppe and Mark Walters, ‘Hate Crimes: Legislating to Enhance Punishment’ in *Oxford Handbooks Online: Criminology and Criminal Justice* (Oxford University Press 2015)

⁴¹ Mark Walters, ‘Conceptualising ‘hostility’ for hate crime law: minding ‘the minutiae when interpreting section 28(1) of the Crime and Disorder Act 1998’ 34(1) *Oxford Journal of Legal Studies* 47.

⁴² Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 37.

⁴³ European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 7: National legislation to combat racism and racial discrimination* (ECRI 2002).

⁴⁴ Tamsin Solomon, ‘Problems in Drafting Legislation Against Racist Activities’ [1994] *Australian Journal of Human Rights* 7.

forward-looking goal' while denunciation 'may be motivated by intrinsically moral considerations.'⁴⁵

Rehabilitation and restorative justice

The primary purpose of the rehabilitative ideal is to effect changes in the behaviour of the offender. As O'Malley states, 'genuine' rehabilitation has two forward-looking goals, 'one concerned with the welfare of society and the other with the welfare of the offender.'⁴⁶ However, in order for a system to truly have rehabilitation at its core, it must be dedicated to its cause, and commit the significant resources that are required. In the last century, a central feature of the rehabilitative model was indeterminate prison sentences: thus, a court would impose, say, a sentence of up to 10 years imprisonment, with the parole board or its equivalent determining when the individual was fit for release back into society – having been rehabilitated.

Aside from the perennial concerns regarding resourcing, indeterminate sentences and intrusive practices, in the context of hate crime, there are further concerns regarding the rehabilitative model. First, in order for a prisoner to engage in the rehabilitative process, they must first consent to the process, and secondly engage in it. Second, there are those that would believe the rehabilitative model to be too 'lenient' leading to disproportionate sentences: what if our 'hater', having had the short, sharp shock of prison life, and engaging with the 'Other' is, by the standards of psychological practices, 'rehabilitated'. ? However, O'Malley notes that the issues can be avoided by acknowledging the distinction between 'rehabilitation as the justification for sentence and rehabilitation as in incident of sentence.'⁴⁷

To this stage, the theories of punishment have had one key absence: the victim. While in its incarnation, victims were central to criminal justice processes, through its development, the victim was pushed from centre stage to having a mere passing role in the process of prosecuting, convicting and sentencing an offender. The victims' movement has been quite active in the last two decades, however, and one of the by-products of this movement is the resurgence of restorative justice. That said, as von Hirsch, Ashworth and Roberts note, 'restorative theories are not

⁴⁵ Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 43.

⁴⁶ *ibid* 38.

⁴⁷ *ibid* 41.

necessarily victim-centred, and victim-centred approaches are not necessarily restorative.’⁴⁸

The first issue when it comes to hate crime is that restorative justice requires reparation to the victims of the crime: not just the primary victim, but all secondary victims; which in this context would include both the immediate community from which the victim comes, and wider society. There are two paradigms of restorative justice: one is the restitutive one, and the other models itself on conflict resolution. Van Ness refers to the purpose of criminal justice in this latter context as ‘the restoration into safe communities of victims and offenders who have resolved their conflicts.’⁴⁹ In the context of hate crime, as Schweppe and Walters observe, rather than combating expressions of hatred, regardless of their theoretical foundation, hate crime laws could have the effect of inciting further hostile emotions. In this context, Walters has argued that restorative justice is particularly well-placed to address both the causes and consequences of hate crime.⁵⁰

Efficacy of punishment

In considering theories of punishment in the context of hate crime, one of the core questions that is asked is, quite simply, whether it works: does introducing hate crime legislation have the effect of reducing its prevalence. Ashworth considers the Home Office figures of 1998 and those from the British Crime Survey. Noting that the cases which come to court are both qualitatively and quantitatively different from the ‘real’ amount of crime in society, he concludes that sentences deal with just over 2 per cent of actual offences committed.⁵¹ He opines, ‘if criminal justice policy makers expect sentencing to perform a major preventative function, they are looking in the wrong direction.’⁵² Further, he cautions that the preventative and other general effects of sentencing ‘should not be overestimated’ and any

⁴⁸ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Practice* (3rd edn, Hart Publishing 2009) 163.

⁴⁹ *ibid* 164.

⁵⁰ Mark Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014).

⁵¹ Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press, 2010) 22. He reaches this figure as follows: only 45% of offences are reported; of those, 55% are recorded as crimes; detection rate for that 24% is less than a quarter; of that 5.5%, just over half resulted in a conviction or a formal caution, of which one third were a caution. Thus, sentencers deal with just over 2% of offences, of which 0.3% result in a custodial sentence.

⁵² *ibid* 22.

assumption that crime rates 'stand in some hydraulic relationship to sentence levels, so that crime will go down if sentences go up and vice versa, seems wildly unrealistic.'⁵³ That said, he does note that sentencing as a process has considerable social significance.⁵⁴

If it is accepted that sentencing must have an underlying justification, we must then ask, what justification, or rationale, can be used to justify enhanced punishment due to the hostility, or motivation, behind the offence. Having a primary sentencing rationale generally has been criticised, due to the wide range of crimes and criminals.⁵⁵ Where we are dealing with one particular element of a range of crimes, however, this reasoning becomes less compelling. If it is hate, hostility or a hate motivation that is being punished, it is arguable that this element of the offence is sufficiently particular and precise to draw upon it a single rationale for punishment.

In England and Wales, the Criminal Justice Act 2003 provides that where a court is sentencing an offender, the court must have regard to:

- (a) The punishment of offenders;
- (b) The reduction of crime (including its reduction by deterrence);
- (c) The reform and rehabilitation of offenders;
- (d) The protection of the public; and
- (e) The making of reparation by offenders to persons affected by their offences.

Referred to as 'the worst of "pick-and-mix" sentencing' by Ashworth, he notes that the Sentencing Guidelines Council has blunted the impact of the section, advising that in considering the seriousness of the offence, the court must 'consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause, or might foreseeably have caused.'⁵⁶ Linked to this is

⁵³ *ibid* 22-23.

⁵⁴ *ibid* 74.

⁵⁵ *ibid* 76.

⁵⁶ *ibid* 78.

the impact of the conviction, and the attachment of a label on the offender. In the context of hate crime, this issue is perhaps particularly relevant.

The label of 'hater'

While much of the literature on hate crime focuses on the impacts of the victim, in addressing the question as to whether an aggravated offences or sentencing model should be introduced, attention must be drawn to the offender. In this context, we must ask when the criminal label of 'hater' can, or should, be applied to an offender. Criminological labelling theory articulates the manner in which social control processes – in this context, the criminal law – can lead to, rather than prevent, future offending. Lemert was of the view that there are two types of deviance: primary and secondary, the latter of which is a means of defence against societal reaction to the individual:

'When a person begins to employ his deviant behaviour or a role based upon it as a means of defense, attack, or adjustment to the overt and covert problems created by the consequent societal reaction to him, his deviation is secondary.'⁵⁷

Becker famously explained:

'deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender". The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label.'⁵⁸

Innes and Levi consider the labelling theory in the context of terrorism and terroristic offences, and in a passage which has particular relevance in the context of hate crime argue:

⁵⁷ Edwin Lemert, *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behaviour* (McGraw-Hill 1951), 76.

⁵⁸ Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press 1963), 9.

‘... the institutions of law and the processes of criminal justice they embody, create and sustain particular orders of reality that define certain acts and actors as “extremism” requiring interventions, whilst other ostensibly similar events are treated differently.’⁵⁹

In the context of hate crime, and hate criminal, it is this definitional aspect – and indeed the transformative impact of the definition – that is particularly relevant here. While the label of ‘criminal’ is problematic, Burney and Rose highlight that the label of ‘racist’ is much more problematic for offenders, who will routinely admit that they committed the basic criminal offence, but ‘were genuinely upset and indignant at the prospect of a ‘racist’ tag’ in the context of aggravated offences.⁶⁰ Defendants, they reported, differentiated between the label of criminal, and that of being a racist criminal, given the social opprobrium of such a label:

‘Whatever anyone’s overt or subconscious feelings on the subject, it is clearly socially unacceptable (except in a few circles) to be branded as a racist – the impact of a racially aggravated conviction is seen as a shaming event in a different class to a conviction for the matching basic offence.’⁶¹

Walters observes that if hate crimes carry enhanced penalties, it is essential that the additional element (ie ‘hate’) is proven before an offender is labelled and additionally punished as a *hate* offender.⁶² He highlights the potentially antagonistic effects that labelling might have on offenders, which can have an ultimately counter-productive effect: offenders feel victimised by a society which is prioritising the needs of the ‘Other’ over them, and gives sense to an even greater sense of grievance.⁶³ However, he dismisses these concerns, and the concern of criminologists generally of the effects of over-policing, by noting that ‘very few

⁵⁹ Martin Innes and Michael Levi, ‘Making and Managing Terrorism’ in Alison Liebling, Shadd Maruna, and Lesley McAra (eds) *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017), 458.

⁶⁰ 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), 91.

⁶¹ *ibid*

⁶² Mark Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014).

⁶³ *ibid* 27.

offenders accused of a hate offence are ever convicted or sentenced as 'hate offenders'.⁶⁴ Thus, he concludes, the concern that hate crime legislation in England and Wales will result in unfair labelling remains unfounded: rather, given the stark differences between police recorded hate crime and figures relating to convictions, Walters' concern is that 'the vast majority of hate offenders are not being confronted, punished, or rehabilitated by the criminal justice system at all.'⁶⁵

It is difficult to reconcile these two perspectives. I would argue that, rather than focus on the operation of legislation, and its 'success' rate (if we are to determine success by conviction rates) in determining if labels are appropriately given, we should instead ask, what level of offending deserves the label of 'hater'. For example, in England and Wales, a relatively low level of racist conduct (the 'demonstration' of hatred or hostility) is sufficient to elevate an assault to a racially aggravated one. Because this is an aggravated offence, the individual will be labelled as criminally racist, and their criminal record will reflect that. In determining the appropriate approach for an Irish context, we need to determine the level of biased behaviour that must be met before a label of, for example, criminal racist, or criminal homophobe will be applied, if an aggravated offence model is to be adopted.

If an enhanced sentencing model is adopted, while the prejudicial behaviour will be addressed by the court, and may result in a harsher sentence for the accused, the additional label of 'racist' or 'homophobe' will not be reflected in their criminal record. On one hand, this is positive: it allows for the rehabilitation of the offender, and for their behaviour to be addressed without being stigmatised with an additional label for the rest of their lives. However, without the label, the criminal record of the offender will not reflect their prejudicial behaviour, thus meaning that recidivistic conduct will not be recognised, and their behaviour will not emerge through police checking. By contrast, where an aggravated offences model is utilised, the hate element would be clearly stated on the offender's criminal record.

⁶⁴ *ibid.*

⁶⁵ *ibid* 28-29.

Having discussed some of the theoretical justifications for increased punishment for hate crime, as well as the impacts of the label of hate criminal, some examples of hate crime legislation in practice will now be presented, which utilise both an aggravated offences model as well as an aggravated sentencing model. England and Wales uses both models in its legislation, whilst Canada and Northern Ireland use different manifestations of the aggravated sentencing model. A snapshot of models adopted in a US context will also be presented.

Canada: enhanced sentencing

Introduced in 1995, 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.⁶⁶ The first of these factors, provided for in section 718.2(a)(i), 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 gender identity or expression, or any other similar factor' should be taken into account in sentencing.⁶⁷ In *R v Grey*⁶⁸ the Court stated that section 718.2(a)(i) was a reflection of Canadian values:

'The courts must be vigilant to preserve and sustain the freedoms enshrined in the *Charter* which reflect the moral compass of our Nation. Bias, prejudice or hate based on race, national or ethnic origin is anathema to the values that we cherish, cannot be tolerated and must be condemned.'⁶⁹

Prior to the adoption of the section, Canadian courts had clearly articulated the principle that evidence of a racial motivation should be treated as an aggravating factor, requiring that the sentence be enhanced. In *R v Ingram*,⁷⁰ the defendants

⁶⁶ The criminalisation of hate speech is provided for in sections 318, 319 and 430 of the Canadian Criminal Code (the advocacy of genocide, public incitement of hatred, and attacks on religious property and institutions respectively), and are considered by Abbee Corb, 'Hate and hate crime in Canada' in Nathan Hall, Abbee Corb, Paul Giannasi, and John DG Grieve (eds), *The Routledge international handbook on hate crime* (Routledge 2015)

⁶⁷ Abbee Corb, 'Hate and hate crime in Canada' in Nathan Hall, Abbee Corb, Paul Giannasi, and John DG Grieve (eds), *The Routledge international handbook on hate crime* (Routledge 2015) 278-288.

⁶⁸ [2013] ABCA 237.

⁶⁹ [2013] ABCA 237 at para [18].

⁷⁰ *R v Ingram and Grimsdale* (1977) 35 CCC (2d) 376 (Ont CA).

were convicted of assault causing bodily harm. The Court of Appeal of Ontario found that the racist nature of the offence had not been considered appropriately by the sentencing court, and increased the sentences imposed. In doing so, the Court articulated its reasons, and the view with which it held such forms of racist behaviour:

‘An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation ... The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance it.’⁷¹

In another case, *R v Lelas*⁷² the accused, a member of the Ku Klux Klan and a self-described racist, sprayed antisemitic symbols and slogans on and near a synagogue, on a Hebrew school, and on an automobile. In allowing a prosecution appeal against sentence, the Houldon JA observed:

‘When mischief is racially or religiously motivated and is done to cause emotional injury or shock to a particular segment of Canadian society, it calls for a far more severe penalty than mischief which is done merely to damage property ... The message must go out loud and clear that conduct such as that engaged in by the respondent will not be tolerated in Canadian society, and if it is engaged in, it will be met with a severe penalty.’⁷³

That said, the impact of section 718.2(a)(i) was more than simply a codification of the common law principle: in the first reported case in which the Court was asked to apply the section, *R v Miloszewski*,⁷⁴ the Court stated clearly that the section was ‘a direction to sentencing judges to give substantial weight to this aggravating factor as the section now reflects the will of the Canadians expressed by Parliament.’ Thus, rather than being simply an aggravating factor, the motivation will be a

⁷¹ Ibid [8].

⁷² (1990) 74 OR (2d) 552.

⁷³ Ibid [7].

⁷⁴ (1999) BCJ No 2710 (Prov Ct)

‘substantially’ aggravating one, as per *R v Zephyr Willson*.⁷⁵ Roberts and Hastings further observes other ‘benefits’ to the codification: first, it is more likely that hate crimes will be sentenced as hate crimes; and second, victims of crime benefit where the hate element is recognised at the sentencing stage.⁷⁶

Importantly, of course, the section does not create new criminal offences: it is a sentence enhancement provision, which applies only where an individual has been convicted of the base offence. As regards the operation of section 718.2(a)(i), the application of the section is quite limited in that it requires that the offence was *motivated* by bias, prejudice or hatred.⁷⁷ The maximum sentence available to the court was not changed, and remains the same as for the base offence.

Operation of the legislation

Aside from the Statistics Canada reports regarding police recorded hate crime, and reported case law, there is very little information available regarding how section 718.2(a)(i) is operating in practice. Corb observes that this is particularly the case in the context of ‘judicial practice and legal process’ relating to hate crime in Canada.⁷⁸ Lawrence et al observe that one of the reasons for this is that section 718.2(a)(i) is a ‘rarely used provision’.⁷⁹ Perhaps because of this, as I will show in the remainder of this thesis, case law which analyses the section is inconsistent, with no clear line of authority in a number of contexts regarding the operation of the section.⁸⁰

Northern Ireland: enhanced sentencing

The substance of legislative developments in the area of crime and criminal justice matters in England and Wales is often followed in Northern Ireland a few years later

⁷⁵ As cited in Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93, 106.

⁷⁶ Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93.

⁷⁷ Michelle S Lawrence and Simon 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.

⁷⁸ Abbee Corb, ‘Hate and hate crime in Canada’ in Nathan Hall, Abbee Corb, Paul Giannasi and John GD Grieve (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2015).

⁷⁹ Austin Lawrence with Julie Shugarman and Diana Grech, *Hate as an Aggravating Factor in Sentencing in Canada* (Department of Justice 2009) 17.

⁸⁰ See also, Austin Lawrence with Julie Shugarman and Diana Grech, *Hate as an Aggravating Factor in Sentencing in Canada* (Department of Justice 2009).

by domestic legislation which takes account of any local differences applicable in Northern Ireland.⁸¹ By 2004, however, the developments introduced by *the Crime and Disorder Act 1998* and the *Criminal Justice Act 2003* had still to be introduced in Northern Ireland.

On 12 February 2004 the Northern Ireland Affairs Committee announced an inquiry into Hate Crime in Northern Ireland.⁸² The subsequent Report noted that crime motivated by race, religion and sexual orientation was a substantial and growing problem in Northern Ireland.⁸³ The Criminal Justice Inspection for Northern Ireland in their 2007 Report⁸⁴ noted that while traditionally, Northern Ireland had a tradition of discriminating on grounds of religion, 'new divisions and lines of possible discrimination have opened up in recent years.'⁸⁵ Migrant groups, members of the Lesbian, Gay, Bisexual and Transgender community and those with disabilities had, they note, 'inherited the "scapegoat" role and are being targeted by people who previously have acted out their hatred on the other religious community.'⁸⁶

The draft Order embraced hostility based on religion and sexual orientation as well as race. It defined racial, religious and sexual orientation groups. 'Racial group' is defined as 'a group of persons defined by reference to colour, race nationality or ethnic or national origins and references to a person's racial background refer to any racial group into which he falls.' It is noted in the explanatory memorandum that this definition includes the Irish Traveller community. 'Religious group' is defined as 'a group of persons defined by reference to religious belief or lack of religious belief', while 'sexual orientation group' is defined as 'a group of persons defined by

⁸¹ The *Crime and Disorder Act 1998*, for example, was not extended to Northern Ireland 'because of the technical difficulties of doing so which made it impossible either to extend directly the provisions in their entirety or to introduce them by negative resolution procedure.' See Northern Ireland Office *Race Crime and Sectarian Crime Legislation in Northern Ireland: a Consultation Paper* (NIO 2002).

⁸² House of Commons Northern Ireland Affairs Committee, *'Hate Crime': the Draft Criminal Justice (Northern Ireland) Order 2004* (HC 615). The Northern Ireland Affairs Committee published its Report after the Draft Order had been published, but prior to the actual Order being published.

⁸³ *ibid.*

⁸⁴ Criminal Justice Inspection Northern Ireland, *Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland* (CJINI 2007).

⁸⁵ *ibid* 3.

⁸⁶ *ibid.* Of course, another explanation for the for the rise in figures might be higher levels of reporting and recording racist crime, as suggested by Committee on the Administration of Justice, *Response to the Race Crime and Sectarian Crime Legislation in Northern Ireland* (Committee on the Administration of Justice 2003) 4.

reference to sexual orientation and will cover heterosexual, homosexual and bisexual orientations.’ The draft Order also amended the Public Order legislation so as to include sexual orientation to the list of groups protected. Thus, inciting hatred or fear based on sexual orientation would be penalised by a maximum of six months imprisonment.

The Committee also referred to the fact that people with disabilities were omitted from the legislation. It referred to evidence from Mencap, which showed that ‘almost a quarter of those surveyed had been physically assaulted.’⁸⁷ It was argued by the Director of Mencap that attacks upon the disabled were directly comparable with attacks on other groups which were the object of hate crime. While the Government argued that attacks on the disabled were ‘motivated more by opportunity than hostility’, the Committee was ‘unimpressed’ with this line of reasoning.⁸⁸ The argument was also somewhat weakened in light of the fact that section 146 of the Criminal Justice Act 2003 applies ‘hate crime’ provisions to offences against the disabled in England and Wales. The Committee was of the opinion that

‘by not including hostility against disabled people within the Draft Order [the Government] is unintentionally encouraging the perception that disabled people in Northern Ireland are less deserving of specific legal protection than disabled people in England and Wales.’⁸⁹

It recommended that the Draft Order be amended to include appropriate protection from ‘hate crime’ to people with disabilities. In its assessment of the draft order the Northern Ireland Affairs Committee noted that its success would ‘depend in practice on the priority given to enforcing the proposed law by the police.’⁹⁰ It stated:

‘We are convinced that strong laws and effective police enforcement measures against “hate crimes” are required to sent the strongest possible

⁸⁷ House of Commons Northern Ireland Affairs Committee, *‘Hate Crime’: the Draft Criminal Justice (Northern Ireland) Order 2004* (HC 615), 5.

⁸⁸ *ibid* 6

⁸⁹ *ibid* 8.

⁹⁰ *Ibid*.

signal that such activity is completely unacceptable and will not be tolerated. We expect to see the problem tackled more vigorously in the future by the Police Service of Northern Ireland than appears to have been the case in the past.’⁹¹

The Criminal Justice (No 2) (Northern Ireland) Order 2004

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. Again, here the legislation is based on the model from England and Wales, providing 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 membership⁹² (or presumed⁹³ membership) of a racial group⁹⁴;
- (ii) The victim’s membership (or presumed membership) of a religious group⁹⁵;
- (iii) The victim’s membership (or presumed membership) of a sexual orientation group⁹⁶;
- (iv) A disability⁹⁷ or presumed disability of the victim.’⁹⁸

⁹¹ *ibid.*

⁹² ‘Membership’ includes association with members of that group, Art 2(5).

⁹³ ‘Presumed’ means presumed by the offender, Art 2(5).

⁹⁴ ‘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).

⁹⁵ ‘Religious group’ means a group of persons defined by reference to a religious belief or lack of religious belief.

⁹⁶ ‘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).

⁹⁷ Disability for the purposes of the legislation means any physical or mental impairment, Art 2(5).

⁹⁸ Article 2, Criminal Justice (No 2) (Northern Ireland) Order 2004 (SI 2004/1991, NI 15)

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. The Order also makes provision for an increase in the maximum penalties available for certain offences, but these increases apply generally, and are not limited to cases which are aggravated by hostility, as was made clear in *R v Massey and Hawkins*.⁹⁹

In *R v White*¹⁰⁰ the Court considered the role sectarianism plays in Northern Ireland and describes eloquently the context in which the legislation operates in that jurisdiction :

‘Sectarianism is the corrosive toxin that remorselessly eats away at the social fabric surrounding the main communities in Northern Ireland. Its manifestations include the crude daubing of slogans upon houses, schools and churches, the grotesque activities of those who orchestrate recreational rioting by children, social exclusion, harassment, physical eviction and community division. Over time, sectarianism has been cynically exploited by politicians and paramilitaries. It has both nurtured, and in turn, been re-invigorated by more than 30 years of terrorism. Like the ‘dreary steeples’ in Churchill’s famous speech, as the tide of terrorism abates sectarianism emerges oozing forth again to corrupt another generation.’¹⁰¹

Operation of the legislation

The Criminal Justice Inspectorate for Northern Ireland in its 2007 Report noted that there were 2,997 hate crime incidents recorded by the PSNI in 2005/2006.¹⁰² The PSNI use an adapted Lawrence definition of hate crime, which is ‘any hate incident

⁹⁹ [2008] NICC 2. 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.

¹⁰⁰ [2005] NICC 52

¹⁰¹ *ibid* para [4]

¹⁰² Criminal Justice Inspection Northern Ireland, *Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland* (CJINI 2007).

which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by prejudice or hate.’¹⁰³ Thus, while there were 2997 hate crime incidents reported, 880 of these did not have a crime, meaning that 2117 were progressed for investigation.¹⁰⁴ In this period, inspectors found that with the exception of one court venue, experienced court clerks were unaware of the provisions of Articles 2 and 5 of the 2004 Order ever being raised in a Court.¹⁰⁵ The Report suggests that a reason for this might be that the term ‘aggravated by hostility’ is difficult to prove, but accepts that there may be other reasons for this.¹⁰⁶

A follow up report was conducted by the Inspectorate in 2010.¹⁰⁷ While hate crime represents less than 2% of all recorded crime in Northern Ireland, sectarianism is responsible for 50% of this.¹⁰⁸ That said, it would appear from the Report that since the legislation was introduced, there have only been 13 occasions when the prosecutor has brought a hate element to the courts’ attention, and from those, only one occasion in which the Judge imposed an enhanced sentence.¹⁰⁹

Jarman observes that police detection levels for hate crime in Northern Ireland have ‘persistently’ remained lower than for hate crime offences in other parts of the United Kingdom.¹¹⁰ Further, Jarman notes that when contrasted to comparable offences in Northern Ireland, detections have also remained persistently low.¹¹¹ When traced through the system, the attrition of the hate element of the offence is pronounced. As McVeigh articulates, things that were being labelled a ‘hate crime’ by

¹⁰³ *ibid* 9.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* 34.

¹⁰⁶ *ibid* 34.

¹⁰⁷ Criminal Justice Inspection Northern Ireland, *Hate Crime: A follow-up inspection of hate crime by the criminal justice system in Northern Ireland* (CJINI 2010).

¹⁰⁸ Racism accounts for 39%, homophobia accounts for 7% and ‘faith, disability and transphobic crime’ accounts for the remaining 4%.

¹⁰⁹ 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.

¹¹⁰ Neil Jarman, ‘Acknowledgment, Recognition and Response: The Criminal Justice System and hate Crime in Northern Ireland’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017).

¹¹¹ *ibid*.

the PSNI 'were not being processed as such by the criminal justice system'.¹¹² Jarman describes the attrition process:

'In the five years from 2007-2008 to 2011-2012 the PSNI recorded 13,655 hate incidents, including 9,376 hate crimes. These translated into 4,689 cases where the PSNI had gathered sufficient evidence to pass a file to the PPS. However, the PPS decided that in 2,743 of these cases, there was insufficient evidence for the crime to be considered 'aggravated by hostility'... This left 1,946 files that were potentially prosecutable as a 'hate crime', culminating in just 71 successful prosecutions ... Twelve cases were successfully prosecuted under [the 2004 Order] ... A hate crime recorded by the PSNI had less than a one per cent chance of resulting in a conviction aggravated by hostility.'¹¹³

That said, the rates of recorded convictions have increased substantially since 2011-2012. For example, the Public Prosecution Service in its 2014-2015 report shows that 53 defendants received an enhanced sentence under the 2004 Order,¹¹⁴ and the 2015-2016 shows that in 89 cases, an enhanced sentence was recorded where the aggravating element was proven.¹¹⁵ Jarman speculates that this increase could be due to a number of factors: improvements in the quality of the evidence gathered; a greater awareness in the prosecution service and improvements in the preparation and presentation of cases; more effective 'joined up work' across the criminal process which allows cases to be tracked; and the increased attention given to the issue by the Department of Justice 'which holds the different criminal justice

¹¹² Robbie McVeigh, 'Hate and the State: Northern Ireland, Sectarian Violence and "Perpetrator-less Crime"' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017), 406.

¹¹³ Of the 71 prosecutions, the other 59 involved use of the Public Order (NI) Order 1987, the Protection from Harassment (NI) Order 1997 and the Criminal Attempts and Conspiracy (NI) Order 1983. Neil Jarman, 'Acknowledgment, Recognition and Response: The Criminal Justice System and hate Crime in Northern Ireland' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017), 61-62.

¹¹⁴ Public Prosecution Service for Northern Ireland, *Statistical Bulletin: Cases Involving Hate Crime 2014/2015* (PPS 2015).

¹¹⁵ Public Prosecution Service for Northern Ireland, *Statistical Bulletin: Cases Involving Hate Crime 2015/2016* (PPS 2016).

agencies to account'.¹¹⁶ However, echoing Haynes and Schweppe's description of the 'disappearing' of hate crime in the current process in Ireland, McVeigh, argues that current legislation and policy are not effective across the criminal process:

'... the legislation does not frame racist violence appropriately; the police do not police it appropriately; the PPS does not process it appropriately; the courts do not penalise it appropriately and the official statistics do not record it appropriately.'¹¹⁷

The message that is thus being sent by the criminal justice agencies in Northern Ireland, McVeigh argues, is that while hate crime is a 'bad thing', it is not something which the criminal justice process is equipped to address. He concludes:

'Other criminal justice systems serious about addressing racist violence – including crucially the Republic of Ireland – should learn from the palpable failure of the Northern Ireland model. Northern Ireland provides a textbook example of now *not* to address hate crime.'¹¹⁸

It is difficult to argue with McVeigh's argument that, to be effective, hate crime legislation must be both operational and effective: the enhanced sentencing model in Northern Ireland, he suggests, is incapable of being either.

England and Wales: aggravated offences and enhanced sentencing

While legislators and courts in the United States have been grappling with concepts and constructions of hate crime for decades, they have a more recent pedigree in England and Wales.¹¹⁹ This is not to say that courts ignored a racially aggravating

¹¹⁶ Neil Jarman, 'Acknowledgment, Recognition and Response: The Criminal Justice System and hate Crime in Northern Ireland' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017), 65.

¹¹⁷ Robbie McVeigh, 'Hate and the State: Northern Ireland, Sectarian Violence and "Perpetrator-less Crime"' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017), 408.

¹¹⁸ *ibid* 413.

¹¹⁹ Neil Chakraborti and Jon Garland, *Hate crime: impact, causes and responses* (Sage Publications 2015).

factor at sentencing until the introduction of the legislation.¹²⁰ As Malik notes, case law dating before 1998 shows that courts could take, at the very least, a *racial* motivation into account at sentencing.¹²¹ He refers to *R v Ribbans*, *R v Duggan*, *R v Ridley*¹²² where it was stated:

‘We take the view that it is perfectly possible for the court to deal with any offence of violence which has a proved racial element in it, in a way which makes clear that that aspect invests the offence with added gravity and therefore must be regarded as an aggravating feature.’¹²³

As reports of racially motivated attacks increased in volume and severity throughout the 1980s and 1990s it was recognised that more robust remedial action was needed. The legislative vehicle for doing so was Part 2 of the Crime and Disorder Act 1998. It introduced the concept of the racially aggravated offence which carried a higher penalty than its non-racially motivated counterpart. As Malik notes, the Act does more than simply bolt on the aggravating factor to the existing offences: rather, ‘the new racially aggravated offences are aimed at conduct which causes harm of a *qualitatively* different type to that caused by the basic offences.’¹²⁴ Reflecting on the rationale behind the introduction of the provisions, Allen further observes that the idea was to send a strong message to the ethnic minority communities, police officers and the Crown Prosecution service, as well as to the public as a whole, thus reflecting the symbolic function of the law.¹²⁵

The Act, under sections 28-32, created new forms of racially aggravated offences, which include assault, assault occasioning actual bodily harm, malicious wounding/grievous bodily harm, harassment and stalking, as well as various public order offences (see table below). The Act was later amended to include religiously

¹²⁰ Maleiha Malik, ‘Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II’ (1999) 62 Mod L Rev 409.

¹²¹ *ibid.*

¹²² (1995) Cr App R (S) 698.

¹²³ *ibid* 702, as quoted in Maleiha Malik, ‘Race Crime: Racially Aggravated Offences in the Crime and Disorder Act Part II’ (1999) 62 Mod L Rev 409, 415.

¹²⁴ Maleiha Malik, ‘Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II’ (1999) 62 Mod L Rev 409, 419.

¹²⁵ Nick Allen, ‘Sending the Right Message: The Racial Attack Provisions of the Crime and Disorder Act 1998’ (1999) 8 Nottingham Law Journal 34, 40.

aggravated offences under the Anti-Terrorism, Crime and Security Act 2001. The Act does not use the term 'hate crime', but rather addresses the hate element by reference to the identity characteristics protected, for example in the creation in section 29 of 'racially or religiously aggravated assault'. Section 28 of the *Crime and Disorder Act* states:

(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below

if –

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

Following this definition, in the offences set out in sections 29-32, the maximum sentence available to the court in sentencing, for example, racially aggravated assault, is increased as compared to the sentence available on a non-aggravated charge. For some offences the penalty enhancement is substantial, as is evident in the table below. For example the offence of assault currently carries a maximum sentence of 6 months imprisonment which is increased by 400 per cent to 2 years imprisonment for cases aggravated by racial or religious hostility:

Section No	Offence	Max Penalty Non- Aggravated	Max Penalty Aggravated
OAPA, s 20	Malicious Wounding/grievous bodily harm	5 years	7 years
OAPA, s 47	Actual bodily harm	5 years	7 years
CJ, s 39	Common assault	6 months	2 years
CDG, s 1	Criminal damage	10 years	14 years

POA, s 4	Fear of provocation or violence	6 months	2 years
POA, s 4A	Intentional harassment, alarm or distress	6 months	2 years
POA, s 5	Harassment, alarm or distress	£1,000 fine	£2,500 fine
PHA, s 2	Harassment	6 months	2 years
PHA, s 2A	Stalking	6 months	2 years
PHA, s 4	Putting people in fear of violence	5 years	7 years
PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	5 years	7 years

Key: OAPA Offences Against the Person Act 1861

CDG Criminal Damage Act 1971

PHA Protection from Harassment Act 1997

CJ Criminal Justice Act 1988

POA Public Order Act 1986

Table 6: Offence type and maximum penalty (hate and non-hate aggravation) under Crime and Disorder Act 1998¹²⁶

The Crime and Disorder Act employs a hatred motivation model by incorporating ‘hostility’ as part of the necessary element of the offence. However, unlike many such models there are two distinct parts to the section which work to cover different levels of prejudice and their relationship to the crime. Subsection (b) uses the terms ‘motivated’ or ‘partly motivated’ and covers situations where there is evidence that the offender committed an offence because of (or partly because of) a hostility towards the victim’s identity. Subsection (a) incorporates a lower burden of proof. It states that the offender must have ‘demonstrated hostility’ during, before or directly after the commission of an offence. This will typically translate in court as simply proving that the offender used prejudicial language during the commission of the offence. Baroness Hale in the case of *Rogers*¹²⁷ clarifies the distinction between subsections (a) and (b) by noting that the former is concerned with the ‘outward

¹²⁶ Table adopted from Law Commission, *Hate Crime: The Case for Extending the Existing Offences – A Consultation Paper* (Law Commission CP 213 2014) 24.

¹²⁷ [2007] UKHL 8

manifestation . . . of racial hostility' (a largely objective test), while section 28(1)(b) is concerned with the 'inner motivation of the offender' (a subjective test).¹²⁸

It should also be noted at this point that legislation in England and Wales does not provide for specific offences where hostility is demonstrated towards a victim's sexual orientation, gender-identity or disability. Instead, section 146 of the Criminal Justice Act 2003 provides for sentencing provisions allowing judges to increase the penalty for an offender where there is evidence that proves he or she demonstrated hostility towards the victim based on the victim's sexual orientation, transgender identity and/or disability.¹²⁹ Importantly, there is no corresponding aggravated offence in the context of these protected characteristics. Further, the Criminal Justice Act 2003¹³⁰ provides that where a court is considering the seriousness of an offence other than one provided for in sections 29 to 32 of the Crime and Disorder Act 1998,¹³¹ and the offence is racially or religiously aggravated, the court must treat that as an aggravating factor, and state in open court that the offence was so aggravated.

In terms of the interrelationship between the two Acts, In *RG v DPP*¹³² May LJ discussed section 153 of the Powers of Court (Sentencing) Act 2003. The Court held that while, generally, issues of racial aggravation could be put before the court for the purposes of sentencing, either during the course of the trial or by way of a Newton hearing at sentencing, where there is a racially aggravated version of the offence available, it is not open to the prosecution to introduce evidence of a racial motivation at sentencing. In these circumstances, it seems that the more serious charge must be brought, as to introduce such evidence would amount to introducing an offence of a more serious nature than that for which the defendant had been convicted. There has been some discussion in the literature on this issue, with

¹²⁸ *ibid* para [6]. See further discussion on this issue in Mark Walters 'Repairing the harms of hate Canada' in Nathan Hall, Abbee Corb, Paul Giannasi and John GD Grieve (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2015) 400.

¹²⁹ Section 145 also provides for racial and religious aggravation for all types of offences.

¹³⁰ Originally provided for in section 82 of the Crime and Disorder 1998 Act.

¹³¹ Sections 29-32 of the Crime and Disorder Act 1998 provide for four distinct racially aggravated offences: aggravated public order; aggravated harassment; aggravated assault; and aggravated criminal damage.

¹³² [2004] EWHC 183

Taylor¹³³ suggesting that it is open to the court to apply section 145 of the Criminal Justice Act 2003 where the aggravated offence could have been (but was not) charged and Osusu-Bempah¹³⁴ preferring the view that the aggravated sentencing provisions can only be applied in cases where there is no aggravated version of the offence available.

Police recorded hate crime

Given the vital role of police in ensuring that a hate crime is formally recognised by the criminal process by recording and investigating the crime, and ultimately charging the suspected offender, the manner in which hate crime is recorded is worth noting. The Macpherson report was published in the aftermath of the Stephen Lawrence murder. The Report observes that the failure to recognise the central place that race and race relations should have played in the investigation of the murder played a part in the policing deficiencies under scrutiny in the Report.¹³⁵ A result of what the Report calls ‘institutional racism’¹³⁶, this failure underpinned the investigation, and, in this context, the particular failure of many police officers to recognise Stephen Lawrence’s murder as a racially motivated crime.¹³⁷ The Inquiry defined institutional racism as:

‘The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.’¹³⁸

In order to mitigate against institutional racism impacting on the investigation or prosecution of a crime in the future, the Macpherson Inquiry recommended the

¹³³ Robert Taylor, *Juvenile justice: Policies, programs, and practices* (McGraw-Hill Higher Education 2014).

¹³⁴ Abenaa Owusu-Bempah, ‘Prosecuting Hate Crime: Procedural Issues and the Future of Aggravated Offences’ (2015) 25(3) *Legal Studies* 443.

¹³⁵ William Macpherson, *The Stephen Lawrence Inquiry* (Cm 4262-I, The Stationery Office 1999).

¹³⁶ *ibid* para 6.34.

¹³⁷ *ibid* para 6.45.

¹³⁸ *ibid* para 6.34.

adoption of a definition of a racist incident to be used across policing practices, and particularly in the recording of racist crimes and incidents:

‘A racist incident is any incident which is perceived to be racist by the victim or any other person.’¹³⁹

Importantly, the Inquiry recommends that the definition be inclusive of crimes and non-crimes, and that both ‘must be reported, recorded and investigated with equal commitment.’¹⁴⁰ Though the definition has been changed since its adoption following the publication of the Report, the essence of its requirements remain the same: that it is a victim-oriented definition which requires the incident to be recorded as racist where it is perceived by the victim or any other person to be so motivated. As we will see in chapter 6, police recorded hate crime has also been utilised to recognise hate crime across a broader category of victims than the legislation explicitly protects.

Operation of the legislation

Burney and Rose note that defence lawyers emphasised the ‘vehemence’ with which racial aggravation was denied by defendants, highlighted in the fact that in 1999, Not Guilty pleas were entered for over 83% of racially aggravated offences, and for only 47% of substantive offences.¹⁴¹ In its recent Consultation Paper, the Law Commission observed that one of the problems identified in prosecuting hate crime is the fact that defendants will plead only to the non-aggravated form of the offence, leading to charges being downgraded or even dropped.¹⁴²

However, Grattet and Jenness observe that eventually, once the decision to prosecute goes ahead, the ratio of convictions falls within the range of other crimes, and prosecutors do not seem to struggle with securing the conviction, or,

¹³⁹ *ibid* chapter 47, para 12.

¹⁴⁰ *ibid* chapter 47, para 13.

¹⁴¹ 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) 89-90.

¹⁴² Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Commission 2014) 131.

presumably, the sentence enhancement.¹⁴³ Further, the issue of guilty pleas, which initially appears to have impacted on conviction rates, seems to ultimately abate.¹⁴⁴ In fact, for England and Wales, the conviction rate for racially and religiously aggravated offences is relatively high at 83.8%.¹⁴⁵ Grattet and Jenness observe that while prosecutions of hate crimes seem to proceed in a conservative manner initially, ultimately they resemble patterns for other crimes, something which they state is only to be expected as the concept becomes more settled and accepted.

In their recent study, Walters et al note that when a more holistic analysis of the process is examined, the very high conviction rates as set out by the Crown Prosecution Service are flattened somewhat.¹⁴⁶ They observe that prosecution outcomes for disability hate crime (73.13%) and religious hate crime (79.1%) are lower than homophobic and transphobic (82.98%) and race hate crime (84.07%).¹⁴⁷ The rate of guilty pleas also varies across categories, with only 63.44% guilty pleas for disability hate crime, and 74.27% guilty pleas for racist hate crime.¹⁴⁸

In terms of the level of sentence enhancement, following the introduction of the Crime and Disorder Act 1998, the Sentencing Advisory Panel published *Racially Aggravated Offences: Advice to the Court of Appeal*. It stated that in determining the sentence appropriate for such an offender, the Court should:

‘decide what would have been the appropriate sentence for the offence, if the racial element had not been present; *then*

(i) (if the appropriate sentence would have been a fine or a community sentence) consider whether the racial element is sufficiently serious to raise it from a fine to a community or custodial sentence, or from a community sentence to custody; *or*

¹⁴³ Ryken Grattet and Valerie Jenness, ‘The Birth and Maturation of Hate Crime Policy in the United States’ in Barbara Perry (ed) *Hate and Bias Crime: A Reader* (Routledge 2003).

¹⁴⁴ *ibid.*

¹⁴⁵ Crown Prosecution Service, *Hate Crime Annual Report 2016-2017* available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2017-0.pdf> 8.

¹⁴⁶ Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

¹⁴⁷ *Ibid* 60.

¹⁴⁸ *ibid.*

- (ii) (if the offence was already serious enough to merit a custodial sentence) add an enhancement within the range of 40%-70%, according to the seriousness of the racial aggravation; *or*
- (ii) (if the sentence selected for the aggravated offence is still a fine) add an enhancement within the range of 40-70% to the notional fine for the non-aggravated offence, bearing in mind the need for the total to remain within the offender's means to pay; *or*
- (iv) (if the sentence selected for the aggravated offence is a community sentence) *either* add a similar enhancement to, say, the number of hours community service the offender is asked to perform, *or* tailor the specific sentence to the circumstances of the offence, for example by combining a Probation Order including a requirement to attend a Racially Motivated Offenders Programme with a Curfew Order.

The guidelines are thus quite prescriptive, for example, advising that if the offence was already serious enough to merit a custodial sentence, the sentencing court should add an enhancement 'within the range of 40%-70%, according to the seriousness of the racial aggravation'.¹⁴⁹ The Court of Appeal considered this advice in the case of *Kelly and Donnelly*.¹⁵⁰ The Court accepted that the sentencing decision should be given in two stages: first, without the racial aggravation and then with the aggravating factor included. The justification for this approach was two-fold: first, for the purposes of transparency which would be of benefit to the public, and second, since it would assist the appellate court if the sentence imposed were to be appealed.

However, while the Panel was quite prescriptive on the amount by which each sentence should be increased, the Court of Appeal declined to accept this particular recommendation, preferring to leave it to the discretion of each individual sentencing court to determine the amount by which the sentence should be increased due to the aggravating factor. As Ashworth notes, however, the Court of

¹⁴⁹ Sentencing Advisory Panel, *Racially Aggravated Offences: Advice to the Court of Appeal* (SAP 2000).

¹⁵⁰ [2001] 2 Cr App R (S) 341

Appeal agreed with the Panel's list of proposed factors which would make the offence more serious, factors which include a pattern of racist conduct, membership of the racist group, deliberate humiliation of the victim and repeated or prolonged expressions of racial hostility.¹⁵¹ Factors which would make the offence less serious include the relative brevity of the racist conduct, and cases where there was no evidence of racial motivation and the racial abuse was minor or incidental.¹⁵²

In terms of the operation of the 1998 Act, Burney and Rose in their 2002 Report highlighted that, in terms of the structure of the offences, the device of linking the aggravated element to existing offences was generally accepted by criminal justice practitioners – but particularly police officers – as a 'convenient and workable formula' in the charging process.¹⁵³ Burney and Rose further highlight that, while prior to the introduction of the 1998 Act, judges and magistrates 'were supposed to sentence more heavily for a racist element', sometimes this did not happen.¹⁵⁴ However, a number of issues were highlighted with the manner in which the Act operated. Procedural issues were highlighted by Burney and Rose regarding the operation of the legislation as it went through the system. One issue in particular concerned the issue of alternative verdicts or alternative charges.¹⁵⁵ Another issue highlighted by Burney and Rose in 2002 was the fact that aggravated offences were frequently contested, with higher rates of guilty pleas for these offences than others.

More than ten years after the publication of the Burney and Rose Report, the Law Commission of England and Wales conducted a consultation process and then published a report on hate crime in that jurisdiction. In the context of the present discussion, the primary question was whether the aggravated offences should be extended to the grounds of hostility protected under the 2003 Act. The Law Commission highlighted that one of the primary advantages of having aggravated

¹⁵¹ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2010), 167.

¹⁵² *ibid.* See also, Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) for an analysis of how the sentencing uplifts operate in practice.

¹⁵³ 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) 15.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid* 17-18.

offences as compared to the enhanced sentencing model is the fact that the former carry a ‘unique descriptor’, reflecting the fact that aggravated offences are considered more serious than their basic counterparts:

‘The “aggravated” label is designed to carry and communicate a stigma which “stings” more deeply than the mere fact of conviction for the basic offence, even with an enhanced sentence.’¹⁵⁶

In this context, in its Consultation Paper, the Commission highlighted the fact that, with aggravated offences, the label will attach to the offender’s criminal record. The offences also, as the Commission highlights in its Report, can be seen as giving recognition to ‘the particular seriousness of hate crime, the greater culpability of its perpetrators and the greater harms it can cause.’¹⁵⁷ While in the Consultation Paper, the Commission seemed in favour of extending the offences, it took a more cautious view in its Report, ultimately suggesting that a wider review of the aggravated offences was necessary, but that in the absence of such a review, the offences should be extended to the crimes committed on the basis of sexual orientation, disability, and transgender identity, primarily for reasons based on ensuring equality across the grounds.

In its Report, the Commission discussed the arguments in favour of extending the offences under ten headings, the first of which related to the need to treat the protected characteristics equally. The other nine, however, addressed the function of aggravated offences in the criminal justice process:

1. Symbolic effects of ‘aggravated’ label and higher offences
2. Communicative effects of aggravated offences
3. Potential deterrent effects of aggravated offences
4. Public awareness, confidence and reporting
5. Improved investigative and prosecution approaches

¹⁵⁶ Law Commission, *Hate Crime: The Case for Extending the Existing Offences – A Consultation Paper* (Law Commission CP No 213) 68.

¹⁵⁷ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Commission No 348) 96.

6. Higher maximum sentences needed
7. Availability of undue leniency challenge
8. Greater 'fair labelling' potential than enhanced sentencing
9. Benefits of a trial of the hostility element

A number of arguments against the extension of the offences were also addressed:

1. Current offences unduly complex
2. Inter-relationship between offences and section 145
3. Other prosecution difficulties
4. List of offences may be inappropriate for new groups
5. Unnecessary as enhanced sentencing adequate response
6. Wider review required before any decision

Bakalis helpfully observes that there were two primary reasons the Commission was swayed in its view between consultation and report stage.¹⁵⁸ The first relates to the benefits of the proposed extension. While it was accepted that there may well be symbolic, communicative, and fair labelling benefits to the extension, it was also accepted that these benefits are speculative, and could potentially be achieved through the development of the enhanced sentencing regime. Second, and Bakalis suggests, most importantly, the consultation process brought to light a number of procedural and practical problems in relation to the operation of the aggravated offences which undermine their effectiveness:

'The unduly complex nature of the offences which allow for either the demonstration of hostility or the motivation of hostility causes problems in practice for prosecutors, and results in plea-bargaining, or the dropping or downgrading of aggravation charges. In many cases, it has also led to the aggravated charges not being brought in the first place as they are deemed too difficult to prosecute.'¹⁵⁹

¹⁵⁸ Chara Bakalis, 'Legislating against hatred: the Law Commission's report on hate crime' (2015) *Criminal Law Review* 192, 201.

¹⁵⁹ *ibid* 201-202.

Bakalis observes that the combined effect of these practical problems has led to aggravated offences not being used 'effectively', and not ultimately achieving the purposes for which they were designed.¹⁶⁰ These considerations are particularly instructive in determining the legislative approach in an Irish context.

As well as considering the question as to whether the range of aggravated offences should be extended, the Law Commission considered the operation of the enhanced sentencing system. Three primary issues were highlighted in this context: first, the fact that through this process, there tends to be a failure to identify and investigate hostility at the appropriate stage; second, that there is inconsistency in sentencing practice and problems with the manner in which Newton hearings operate; and finally, with the imposition of unduly lenient sentences. The first and third of these issues are related: it was highlighted to the Commission that, because of the failure to address the aggravating element at the earliest stages in the criminal process, the hostility was not put before the court and therefore could not be taken into account at sentencing.

The Commission observed that by addressing the aggravating element only through sentencing, there would be 'clarity and simplicity' in charging, because prosecutors would not have to decide whether to charge the offender with the basic offence or its aggravated counterpart. In the Consultation Paper, the Commission was of the view that an enhanced sentencing regime could provide an adequate response to hate crime if two proposals were introduced to enhance its efficacy: first, the introduction of a new sentencing guideline to address hostility; and second, a procedure whereby the application of the enhanced sentence on grounds of hostility could be recorded on the Police National Computer.

In the Report, the Commission highlighted the fact that consultees reported that where enhanced sentencing is the only means by which the aggravated element can be address, 'the police do not always actively seek evidence of hostility during

¹⁶⁰ *ibid* 202.

investigations.’¹⁶¹ Where the aggravated element was addressed, consultees reported that there were ‘inconsistent outcomes’, and consultees speaking both for victims and the defendant expressed concerns with the manner in which Newton hearings operate. In the context of the latter issue, victims were concerned that the aggravating element was not taken into account at sentencing, while those speaking on behalf of defendants were of the view that they could not adequately challenge the evidence during a Newton hearing in the same way that they can during a trial.

The Commission ultimately recommended that sentencing guidelines be introduced which would issue guidance on the approach to sentencing hostility-based offences, and that the use of enhanced sentencing provisions be recorded on the Police National Computer and reflected on the criminal record of the offender.

United States: a codified model

Given the fact that hate crime laws have their origins in the United States, as well as the constitutional context that the jurisdiction provides, it is finally useful at least to take a glimpse into the development of hate crime legislation in a US context. Jordan Blair Woods observes that as early as 1968, federal officers were given the power to investigate hate crime committed against individuals engaging in specific federally-protected activities.¹⁶² However, it was not until the 1980s that hate crime statutes proliferated throughout the US. Many of these new laws were based on the Anti-Defamation League (ADL) model statute drafted in 1981. The model legislation was aimed at combating institutional vandalism against houses of worship, cemeteries and public institutions.¹⁶³ The ADL’s current model has been modified and now provides that a person commits a bias-motivated crime if they violate a particular section of the penal code ‘by reason’ of the actual or perceived characteristics of their victim, it further requires that the degree of criminal liability be ‘at least one degree more serious’ than that imposed for the underlying offence.¹⁶⁴

¹⁶¹ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Commission No 348) 55.

¹⁶² Jordan Blair Woods, ‘Hate crime in the United States’ in Nathan Hall, Abbee Corb, Paul Giannasi, and John DG Grieve (eds) *The Routledge international handbook on hate crime* (Routledge 2015).

¹⁶³ Ryken Grattet Valerie Jenness, ‘Examining the boundaries of hate crime law’ in Barbara Perry (ed) *Hate and Bias Crime: A Reader* (Routledge 2003) 281.

¹⁶⁴ Anti-Defamation League, *No place for hate* (Anti-Defamation League 2012).

The Hate Crimes Prevention Act provides under 18 U.S.C. § 249 for a new federal criminal law which criminalises wilfully causing bodily injury, or an attempt to do so by use of fire, weapons or explosives, to a person because of the actual or perceived race, color, religion, national origin, sexual orientation, gender, gender identity or disability of the person. Again, it applies only in a limited number of contexts. On conviction, the offender is to be imprisoned for not more than ten years generally, or between ten years and life if death results from the offence (or there was an attempt to kill), or if the offence includes kidnapping (or its attempt), aggravated sexual abuse (or its attempt).

Given the limited jurisdiction of federal criminal law, most states have adopted hate crime statutes, with Wyoming the only state without any form of hate crime law.¹⁶⁵ The States which have implemented legislation are by no means uniform in their approach. The resulting picture of hate crime law in the US is haphazard, with some taking a very committed approach to hate crime enforcement, with others defining hate crime narrowly or taking what Henry refers to as a 'lackadaisical' approach to the issue, either defining hate crime very narrowly or having 'inaccurate, incomplete or non-existent' data collection mechanisms.¹⁶⁶ State legislatures also differ in terms of the characteristics identified and protected by such legislation¹⁶⁷ which, it has been suggested, reflects the role of social movements in the construction of hate crime laws.¹⁶⁸

Some, like the federal sentencing guidelines, are essentially sentence enhancement statutes, and are specific regarding what enhancement is appropriate in the context of hate crime. In Florida the statute essentially reclassifies offences (and thus raises the sentence available to the judge): for example, a misdemeanor of the second degree is reclassified to a misdemeanor of the first degree; a felony of the third

¹⁶⁵ Abbee Corb, 'Hate and hate crime in Canada' in Nathan Hall, Abbee Corb, Paul Giannasi, and John DG Grieve (eds) *The Routledge international handbook on hate crime* (Routledge 2015) 278-288.

¹⁶⁶ Jessica S Henry, 'Hate Crime Laws: A Critical Assessment' in Barbara Perry and Brian Levin (eds), *Hate Crimes Volume 1: Understanding and Defining Hate Crime* (Praeger 2009) 199.

¹⁶⁷ Jordan Blair Woods, 'Hate crime in the United States' in Nathan Hall, Abbee Corb, Paul Giannasi, and John DG Grieve (eds) *The Routledge international handbook on hate crime* (Routledge 2015).

¹⁶⁸ Ryken Grattet and Valerie Jenness, 'Examining the boundaries of hate crime law' in Barbara Perry (ed), *Hate and Bias Crime: A Reader* (Routledge 2003) 281.

degree is reclassified to a felony of the second degree and so on.¹⁶⁹ Some legislatures have created new substantive laws which are not tied to existing criminal offences at all. These laws are less popular, not least because they involve the reformulating of entirely new offences.¹⁷⁰

Other states move from prescription to discretion, depending on the severity of the offence: Vermont, for example, states that where a crime is maliciously motivated by a protected characteristic, and the maximum penalty for the underlying offence is a year or less, the enhanced sentence will be for not more than two years or a fine of not more than \$10,000 or both.¹⁷¹ However, it goes on to provide that in cases where the maximum penalty for the underlying crime is more than one year but less than five, the penalty shall be imprisonment for not more than five years or a fine of not more than \$10,000 or both: in cases where the maximum penalty for the underlying crime is five years or more, the sentence for the underlying crime will apply, though 'the court shall consider the motivation of the defendant as a factor in sentencing.'¹⁷² This movement from prescriptive sentencing for less serious crimes to a discretionary system for more serious ones is questionable. The defendant who commits the more serious offence may receive no hate-based enhancement at all, with the court only under an obligation to *consider* motive, but not under a requirement to enhance the sentence.¹⁷³

As I have shown, a number of models are utilised across the US, but given the fact that criminal law in those jurisdictions is predominantly codified, the models utilised provide little guidance for an Irish context, which is why the common law examples are potentially of more utility in the context of this analysis. That said, given that the origins of hate crime legislation are in the US, and particularly the constitutional context which such laws operate, reference to literature and legislative models are useful for the purposes of this thesis.

¹⁶⁹ FL ST § 775.085 (1992)

¹⁷⁰ See for example California Cal. Penal Code s 422.6(a) & (b)

¹⁷¹ Jessica S Henry, 'Hate Crime Laws: A Critical Assessment' in Barbara Perry and Brian Levin (eds), *Hate Crimes Volume 1: Understanding and Defining Hate Crime* (Praeger 2009)

¹⁷² Vt. Stat. Ann. tit. 13, § 1455

¹⁷³ Jessica S Henry, 'Hate Crime Laws: A Critical Assessment' in Barbara Perry and Brian Levin (eds) *Hate Crimes Volume 1: Understanding and Defining Hate Crime* (Praeger 2009)

Aggravated offences and enhanced sentencing in an Irish context

While there is no hate crime legislation in Ireland, there is precedent for the introduction of both aggravated offences, and aggravated sentencing. Aggravated offences are long-familiar in an Irish context with, for example, aggravated burglary and aggravated sexual assault on the statute books for decades. Aggravated burglary is provided for in section 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which provides that where burglary is committed where the defendant 'at the time has with him or her any firearm or imitation firearm, any weapon of offence or any explosive.' While the maximum sentence for burglary is fourteen years, the maximum sentence for aggravated burglary is life imprisonment, recognising the more significant and serious manifestation of the offence in the aggravated penalty. Aggravated sexual assault is provided for under section 3 of the Criminal Law (Rape) (Amendment) Act 1990 and provides that where a sexual assault involves 'serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted', thus recognising both the additional harm of the offence, and the impact of such harm on the victim. Again, while the offence of sexual assault carries a maximum term of imprisonment of between 10-14 years, depending on the age of the victim, the maximum sentence for aggravated sexual assault is life imprisonment.

In the context of sentencing, Ireland was described by Maguire as having 'one of the most unstructured sentencing systems in the common law world.'¹⁷⁴ O'Malley notes that while the notion of statutory sentencing guidance is often resisted as an unwarranted intrusion into the judicial role in the sentencing process, through the process of setting the maximum sentence for each offence, 'statutory guidance is the longest established, the most widely used and ... the most widely accepted method of structuring sentencing discretion.'¹⁷⁵

¹⁷⁴ Niamh Maguire, 'Sentencing' in Deirdre Healy, Claire Hamilton, Yvonne Daly, and Michelle Butler (eds), *The Routledge Handbook of Criminology* (Routledge 2015) 300-301.

¹⁷⁵ Thomas O'Malley, *Sentencing Law and Practice* 2nd edition (Thomson Round Hall Dublin 2006) 63.

Irish law also provides for a legislative suggestion or indeed, on occasion, a mandate to judges to treat certain factors as aggravating factors at sentencing.¹⁷⁶ A recent example is contained in the Domestic Violence Act 2018.¹⁷⁷ It could be argued, that given the approach taken in section 40, which utilises an aggravated sentencing model, a similar approach should be taken to hate crime. Section 40(1)-(4) provides:

‘(1) Where a court is determining the sentence to be imposed on a person for a relevant offence, the fact that the offence was committed by the person against a relevant person shall be treated, for the purpose of determining the sentence, as an aggravating factor.

(2) Subject to subsection (3), where subsection (1) applies the court shall impose a sentence which is greater than that which would have been imposed if the person against whom the offence was committed was not a relevant person.

(3) Subsection (2) shall not apply where the court considers that there are exceptional circumstances justifying it not applying that subsection.

(4) The sentence imposed as a result of the application of subsection (2) shall not be greater than the maximum sentence permissible for the relevant offence concerned.’¹⁷⁸

The legislation requires the court to consider the relationship between the parties as an aggravating factor, but then also requires the court to impose an aggravated penalty in the case, unless there are exceptional reasons for not doing so, and subject to the general sentencing limits in place for that particular offence. Thus, it sets an important precedent for addressing aggravating factors at sentencing in legislation, limiting judicial discretion in this regard, and requiring a higher penalty in these cases. Thus, legislative interference with judicial discretion in this regard seems legislatively palatable.

¹⁷⁶ Irish law provides for mandatory sentences in certain circumstances. For example, murder under section 2 of the Criminal Justice Act 1990 carries a mandatory life sentence. Mandatory minimum sentences are provided for under the Misuse of Drugs Act 1977.

¹⁷⁷ Other examples are contained in section 8 of the Criminal Justice (Offences Relating to Information Systems) Act 2017; section 4 of the Criminal Law (Human Trafficking) Act 2008; and section 71 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

¹⁷⁸ A ‘relevant person’ is defined in section 40(6) as either a spouse or civil partner of the person, or as someone who was in ‘an intimate relationship’ with the other person.

Conclusion

It is clear that there are both theoretical and procedural arguments in favour of, and against, the aggravated offences model as opposed to the enhanced sentencing model. It is also accepted that an enhanced sentencing model is easier to legislate for, and perhaps more in keeping with the manner in which an aggravated element is usually addressed in the criminal justice process, particularly where the aggravation relates to the offender's motivation. However, as ODIHR observes, 'a penalty enhancement, while easier to implement, may not fulfil the expressive function of recognizing and condemning a prohibited bias.'¹⁷⁹ The question as to which model would be more appropriate or preferable in an Irish context will be discussed in more detail in chapter 7 of this thesis.

¹⁷⁹ Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (ODIHR 2009) 36.

Chapter 5 – Naming the Hate Element of an Offence

Introduction

As we have seen, in recent years, the presence of hate crimes on statute books across common law jurisdictions has become unexceptional – indeed, Ireland is one of the only common law countries which does not address hate crime. Across the European Union, the vast majority of Member States have introduced hate crime legislation, though the form of such legislation varies, with different understandings and conceptions of what a ‘hate crime’ is influencing both the conceptualisation and construction of such laws.¹ Traditionally, the criminal law quite explicitly and deliberately has ignored the motivation of the offender. However, as Gadd observes, the introduction of hate crime laws in other jurisdictions has required the courts to engage in a determination not only as to whether defendants are guilty of the offence with which they are charged, but ‘also *why they committed them*.’² This is the case whether the hate element is included as an aggravating factor in the construction of the offence (in the case of aggravated offences) or where it is addressed through an aggravated sentencing provision.

We know that people commit hate crime in a number of different contexts: as Chakraborti and Garland observe:

‘Offences we label as hate crimes may sometimes have little to do with any entrenched prejudice or hate on the part of the perpetrator but may instead arise as a departure from standard norms of behaviour; or through an inability to control language or behaviour in moments of stress, anger or inebriation; or from a sense of weakness or inadequacy that can stem from a range of subconscious emotional and psychological processes.’³

¹ For an analysis of legislation in, for example, Latvia, Sweden, and the Czech Republic, as well as general European perspectives on hate crime, see, Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

² David Gadd, ‘Aggravating Racism and Elusive Motivation’ (2009) 49 *British Journal of Criminology* 755, 756.

³ Neil Chakraborti and Jon Garland, ‘Reconceptualising hate crime victimisation through the lens of vulnerability and “difference”’ (2012) 16(4) *Theoretical Criminology* 499, 506. See also, Mark Austin Walters, ‘A General *Theories* of Hate Crime? Strain, Doing Difference and Self Control’ (2011) 19 *Critical Criminology* 313.

This chapter will seek to explore how hate may most effectively be addressed through the criminal law. At this point, again it is important to state that ‘hate crimes’ are justified on the basis that they are ‘message crimes’. That is, that the legislature (or society) is sending a clear message that this type of crime is unacceptable. The commission of the base crime is already punished: it is the additional ‘animus’ which is to form the basis of the further punishment (in the case of enhanced sentence provisions) or conviction for the more serious offence (where aggravated offences are provided for in statute). The criminal law is, by necessity, a blunt and objective tool, limited as Devlin observes by the nature of the ‘machinery which operates it’.⁴ The question is whether the ‘motive’ of the actor can be accommodated in this objective context—or whether the traditional machinery of the criminal law has the capability to combat hatred. Further, while the term ‘motive’ is sometimes used to describe the ‘hate’ element of the offence, in the context of England and Wales at least, it is not just the motive of the offender that is of concern, but also whether the offender ‘demonstrated’ hatred or hostility towards their victim: so rather than viewing the evidence by reference to the subjective motivation of the offender, this ‘limb’ of the legislation in England and Wales, at least theoretically, assesses this element through an objective lens.⁵ Thus, the hate element of an offence can be aggravated either through the mens rea *or* the actus reus.

This chapter will first describe the traditional approach of the criminal law to both the actus reus and the mens rea. It will then discuss the manner in which hate crime legislation fits into these two models in England and Wales, Canada and Northern Ireland.⁶ It will finally consider which approach is of most utility in an Irish context.

⁴ Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 20.

⁵ See, however, Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process* (University of Sussex 2017) available at <http://sro.sussex.ac.uk/70598/3/FINAL%20REPORT%20-%20HATE%20CRIME%20AND%20THE%20LEGAL%20PROCESS.pdf> in which the authors observe that in practice, ‘prosecutors, barristers, judges, and perhaps most importantly, juries, are rejecting evidence of what might be considered an “objective” demonstration of hostility, having inquired into the defendant’s true intentions.’ *ibid* 130.

⁶ These two jurisdictions are addressed exclusively as they offer a comparison of two models: Northern Ireland reflects the Canadian position.

The elements of a criminal offence

The principle *actus not facit reum nisi mens sit rea* requires that in order for an individual to be deemed culpable of criminal behaviour, they must both possess a 'guilty mind', and have committed the guilty act. While the principle has been a fundamental part of the criminal law for a very long time, as McAuley and McCutcheon point out, 'lacking the precision desirable in a definition, [the principle is] best considered as the basis of an analytical skeleton on which the ingredients of criminal liability can be placed.'⁷ Generally speaking, the principle means that, for the purposes of the criminal law, the individual in question must have (1) the requisite guilty mind to commit (2) the criminal act which they committed.

Mens rea

From a layperson's perspective, the requirement that the offender has 'mens rea' simply means that the individual has the 'intention' to commit the act. However, intention at law has a different meaning to that which it carries in normal parlance. Charleton, McDermott and Bolger state that 'intention' requires 'that a person be proved to have acted with the purposes of causing the harm or circumstances outlawed.'⁸ This, however, is just one of the types of criminal guilty mind which exist: others include the standards of recklessness and gross or criminal negligence. Other types of crime carry the standard of either strict or absolute liability – where the requirement for a guilty mind is negated.

Ashworth observes that it is not helpful to refer to intention in the abstract: rather, it must be related to 'a particular object or consequence, which in a legal context means the intent specified in the indictment or information.'⁹ 'Desire', he argues, is not essential to intention, and attempting to detach the means from the end is unconvincing.¹⁰ Much has been written about mens rea, and the various standards of guilt in this context. This thesis does not propose to rehearse any of the discussions, but rather examine the question as to what relevance motive has to mens rea.

⁷ Finbarr McAuley and J Paul McCutcheon, *Criminal Liability: A Grammar* (Round Hall Sweet and Maxwell 2000) 113.

⁸ Peter Charleton, Paul McDermott and Marguerite Bolger, *Criminal Law* (Butterworths 1999) para 1.67.

⁹ Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn 2016) 171.

¹⁰ *ibid* 171-172.

Mens Rea and motive

While there is an obvious link between a criminal intention and a motivation to commit a criminal act, at law, the motive behind the commission of the crime is not relevant to the mens rea.¹¹ As Husak states:

‘[A]lthough a good motive might mitigate punishment (or [discourage] prosecution), and a bad motive might aggravate punishment (or [encourage] prosecution), it is a truism within orthodoxy that motive has no bearing on liability itself.’¹²

Rosenberg calls this the ‘irrelevance-of-motive maxim’.¹³ This is true whether the motive is a good one (for example, mercy killing; stealing food for a starving family; or damaging war planes to save lives in war zones) or a bad one (for example, sadism; opportunism; or revenge). Campbell, Kilcommmins and O’Sullivan observe, however, that ‘motive is relevant in the context of evidence, as if the prosecution can prove that the accused acted with a particular motive then this may add weight to the contention that he committed the crime.’¹⁴ Smith and Hogan also observe that, as evidence, motive is always relevant, and it is similarly important in the context at sentencing, where the judge will be ‘influenced by the culpability of the offender’s motive’.¹⁵ Quite simply, they state, ‘if the prosecution can prove that [the defendant] had a motive for committing the crime, they may do so since the existence of a motive makes it more likely that [he or she] did in fact commit it. People do not usually act without a motive.’¹⁶

Quill explains:

¹¹ Motive is, of course, relevant in the context of the limited defences of necessity and duress, which allows motive to be taken into consideration in certain circumstances.

¹² Douglas N Husak, *Philosophy of Criminal Law* (Rowman and Littlefield 1987) 144, as cited in Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142.

¹³ Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142.

¹⁴ Liz Campbell, Shane Kilcommmins and Catherine O’Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010) 162.

¹⁵ David Ormerod, *Smith and Hogan’s Criminal Law* (14th ed, Oxford University Press, 2017) 128-129.

¹⁶ *ibid.*

‘[W]hen X assaults Y in order to take Y’s money, X’s intent is to assault but his motive is to get money. The concept of motive explains why we did something while the concept of intent explains what we did. That is, motive speaks to the ‘ends’ of our actions while intent addresses the “means.”’¹⁷

In summary, he states, ‘motive drives intent and intent drives action.’¹⁸ Thus while the two are certainly related, the criminal law is clear that while a criminal intent to commit the act is required to convict someone of a criminal act, their motive is largely immaterial to the question of liability.

While the orthodox ‘irrelevance of motive’ doctrine has come under challenge in recent years,¹⁹ the problems with allowing motive to interfere with the traditional understanding of mens rea are highlighted by Smith and Hogan:

‘If a surgical operation, though dangerous to life, is clearly justifiable on medical grounds, a surgeon who performs it with all proper skill cannot be said to be guilty of attempted murder, or, if the patient dies, murder, because he hopes the patient will die so that he can marry his wife, or inherit his property, or so that the patient will avoid the thoroughly miserable life he will face if he survives.’²⁰

The problem, as Smith and Hogan see it, is down to the ambiguity of language when the issue of motivation is drawn into the fold of a criminal offence. They note that motive can mean anything from an emotion to a ‘species of intention’, though generally, it can be considered ‘a consequence ulterior to the mens rea and the actus reus, and thus no part of the crime.’²¹ The manner in which the language of motive is used in the law is not consistent, and for this reason, they argue that clarity is required.

¹⁷ Gavin F Quill, ‘Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration’ (2010) 58 Drake L Rev 181, 192.

¹⁸ *ibid* 193.

¹⁹ See, for example, Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 Duke L Journal 1142.

²⁰ David Ormerod, *Smith and Hogan’s Criminal Law* (14th ed, Oxford University Press, 2017) 128.

²¹ *ibid* 128.

That said, the case of *Steane*²² is interesting on this point. Here, the appellant was a British subject living in Germany during the Second World War, where he was forced by his old employers to produce films. He was charged and ultimately convicted of doing an act which was likely to assist the enemy with the intention of assisting the enemy. He argued on appeal that he never intended to assist the enemy, but rather was acting to save his wife and children. In quashing the conviction, Goddard CJ stated in the case:

'While, no doubt, the motive of a man's act and his intention in doing the act are in law different things, it is none the less true that in many offences a specific intention is a necessary ingredient and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of that act might if nothing else was proved, be said to show the intent for which it was done.'²³

However, it is more generally accepted that motive and mens rea are two separate considerations and while the two may be related, it is not a relationship of much legal substance. In *Chandler*²⁴ Radcliffe VC stated:

'All controversies about motives or intentions or purposes are apt to become involved through confusion of the meaning of the different terms and it is perhaps not difficult to show by analysis that the ideas conveyed by these respective words merge into each other without a clear line of differentiation.'²⁵

The appellants in the case took part in a demonstration at an airbase with the aim of immobilising the field, and were convicted under the Official Secrets Act 1911. The Act makes it an offence for 'any person for any purpose prejudicial to the safety or interests of the State' to approach a prohibited place. The appellants claimed that

²² *R v Steane* [1947] 1 All ER 813.

²³ *ibid* 816.

²⁴ *R v Chandler* [1964] AC 763.

²⁵ *ibid* 794.

their motive was to protect the interests of the State and its citizens. Their argument was dismissed on appeal, with the Court holding that motive did not impact on the purpose of their act. Reid LJ stated:

‘A person can have two different purposes in doing a particular thing, and even if their reason or motive for doing what they did is called the purpose of influencing public opinion that cannot alter the fact that they had a purpose to immobilise the base.’²⁶

In a case which perhaps has more resonance in the context of hate crime, in *Hyam*²⁷ the Court again discussed the interaction between motive and intent. The facts of the case are well known, and while the case has been overruled on the issue of intention, the remarks by the court in relation to motive are interesting. Here, Hyam set fire to the house of a woman who she saw as her rival in love, Mrs Booth. Hyam poured half a gallon of petrol into the letter box of Mrs Booth’s house, and set fire to it using a newspaper and a match. The fire ultimately resulted in the death of two of Mrs Booth’s children. Hyam argued that she did not intend to cause death or serious bodily harm (which would sustain a conviction of murder) but rather she simply wanted to frighten her rival into leaving the neighbourhood. Again, this case considers motivation as a mitigating, rather than aggravating fact, but the comments of Lord Hailsham of Marylebone are nonetheless illuminating on this issue:

‘It has been pointed out more than once that ‘motive’ has two distinct but related meanings. I do not claim to say which sense is correct. Both are used but it is important to realise that they are not the same. In the first sense ‘motive’ means an emotion prompting an act ... In this sense motive is entirely distinct from intention or purpose. It is an emotion which gives rise to the intention and it is the latter and not the former which converts an actus reus into a criminal act.

²⁶ *ibid* 790.

²⁷ *Hyam v Director of Public Prosecutions* [1974] 2 All ER 41.

It is, however, important to realise that in the second sense, too, motive, which in that sense is to be equated with the ultimate 'end' of a course of action, often described as its 'purpose' or 'object', although 'a kind of intention', is not co-extensive with intention, which embraces, in addition to the end, all the necessary consequences of an action including the means to the end and any consequences intended along with the end ... Thus, ... in a Victorian melodrama the villain's motive—in the second sense – or his 'end', his 'purpose', 'object' or 'intention' may have been to acquire an inheritance. But this does not excuse, and may involve, the intention to slay the rightful heir, or abduct his sister.'²⁸

Norrie, examining the relevance of motive in mens rea, argues that the real desire of the courts is to 'separate legal judgment from substantive moral issues'.²⁹ Rosenberg, discussing the distinction, argues that motive refers 'not to intended consequences, but to the reason those consequences are desirable to the actor...'.³⁰ At a later point, he again distinguishes intention and motive thus:

'Intention refers to the events the defendant sought to bring about whereas motive refers to a subjective reason the defendant desired to bring about those events.'³¹

Hall distinguishes between motive and intention in the following way:

'Intention ... refers to the objective effect which the law-breaker contrives to produce on others by his act or omission, and ... motive refers to the

²⁸ *ibid* 73. *Hyam* is typically discussed in the context of oblique, or indirect, intention, which was discussed in *MD* [2004] EWCA Crim 1391. For further discussion, see David Ormerod, *Smith and Hogan's Criminal Law* (14th ed, Oxford University Press, 2017) 118; see also Finbarr McAuley and Paul McCutcheon, *Criminal Liability* (Round Hall Sweet and Maxwell 2000).

²⁹ Alan Norrie, *Crime, Reason and History* (2nd edn, Cambridge University Press 2001) 58.

³⁰ Michael Rosenberg, 'The Continued Relevance of the Irrelevance of Motive Maxim' (2008) 57 *Duke L Journal* 1142, 1146.

³¹ *ibid* 1150.

subjective effect and its accompanying emotion which he desires to produce on himself.’³²

As Rosenberg notes, Stephen argues that there are three reasons why motive should not be seen as relevant to criminal liability:

1. Defendants’ motives do not affect the harm that their actions have on society;
2. It is impossible to determine a person’s motive with any precision; and because of this;
3. Even if it were possible for a legal concept to invoke a defendant’s motives (the concept of malice being the obvious one), judges would not be inclined to define it in this way.³³

Hall agrees with the irrelevance of motive doctrine, and argues that if the application of the doctrine results in inequitable outcomes, then these exceptional cases can be legislated for – though ‘without making reference to motive’.³⁴ Glanville Williams, on the other hand, essentially sees motive and intention as inter-reliant: ‘[m]uch of what men do involves a chain of intention ... and each intention is a motive for that preceding it.’³⁵

Generally, then, motive tends to be sidelined in the criminal law, and if it does play a part, it is used either from an evidentiary perspective, to prove intention, or more generally, at the sentencing stage as a mitigating or aggravating factor. However, as Glanville Williams notes, it can sometimes be difficult to determine the dividing line between motive and intention. All this said, it is rare for offences to include a nefarious motive as an element of the offence. In hate crime legislation, however, as

³² Jerome Hall, *General Principles of Criminal Law* (2nd ed 1960) as cited by Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142, 1153.

³³ James Fitzjames Stephen, *History of the Criminal Law of England* (1883) as cited and referred to in Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142, 1151.

³⁴ Jerome Hall, *General Principles of Criminal Law* (2nd ed 1960) as cited by Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142, 1155.

³⁵ Glanville Williams, *Criminal Law: The General Part* (1961) 48.

we will see, the motive of the individual will be directly placed at the heart of the offence, where aggravated offence provisions are used.

The mens rea of hate crime

In the context of hate crime, Lawrence explains that the mens rea for bias crimes 'involves motive and ordinarily serves a function similar to a required mens rea of purpose.'³⁶ Lawrence gives three reasons why, from the perspective of positive law, punishing motive in the context of hate crime is acceptable:

1. Motive often determines punishment – a defendant's motive will regularly feature in those factors which aggravate punishment;
2. Constitutionally, bias motive itself may serve as an aggravating circumstance;
3. Racial motivation is an essential ingredient to most civil anti-discrimination laws.

Lawrence's analyses of hate crime legislation guides much of the theoretical discussion of hate crime today. From a normative perspective, he goes on to consider the question of distinguishing motive from mens rea. On this, he states:

'The distinction between intent and motive does not hold ... because the decision as to what constitutes motive and what constitutes intent depends on what is being criminalized. Criminal statutes define the elements of the crime, and a mental state applies to each element. The mental state that applies to an element of the crime we will call 'intent', whereas any mental states that are extrinsic to the elements we will call 'motivation'. The formal distinction, therefore, turns entirely on what are considered to be the elements of the crimes. What is a matter of intent in one context may be a matter of motive in another.'³⁷

He goes on to give two examples of hate crime, which he sees as indistinguishable:

³⁶ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 95.

³⁷ *ibid* 108.

1. The perpetrator possesses a mens rea of purpose with respect to the assault, along with a motivation of racial bias; or
2. The perpetrator possesses a first-tier mens rea of purpose with respect to the parallel crime of assault and a second-tier mens rea of purpose with respect to assaulting *this* victim because of his race.³⁸

Where motive is incorporated into the criminal code, one of the primary problems in securing convictions has traditionally been proving that the motive is present—and that any ‘hateful’ conduct or language used in the course of the offence did not have any other, non-biased justification. Typically, the language or gestures of the offender will form the basis of the evidence put forward to establish the hostile motivation in this context. However, it could be argued, as highlighted by Lawrence, that a broad understanding of what constitutes a hate motivation may well lead to an application of strict liability principles which, in Ireland at least, are considered by the Courts with disapproval.³⁹

Quill addresses this issue and notes that, because of the logical and causative distance, it is ‘substantially harder to draw any confident inferences about internal motivation based solely on external evidence of the criminal acts involved.’⁴⁰ He states:

‘Because of the highly speculative nature of proving ‘hateful’ intent, courts should choose a cautious, narrow construction that requires high levels of bias causation as opposed to broad construction that accepts minimal bias causation or contribution as being sufficient to make ‘hate’ a ‘but-for’ cause. It is clear that situations can arise where there are dual motivations but where one element serves not as a ‘but-for’ cause but merely as a redundant factor. It is entirely possible for biased motivation to exist without this being either

³⁸ *ibid* 108.

³⁹ In an Irish context, courts generally require a subjective test for mens rea: see, for example, *CC v Ireland* [2006] IESC 33; [2006] 4 IR 1.

⁴⁰ Gavin F Quill, ‘Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration’ (2010) 58 Drake L Rev 181, 193.

necessary or sufficient to produce the assault. If there are nonbias motivations that in combination are sufficient to trigger the underlying crime, the bias factor is not necessary to produce the crime. Also, unless the bias factor is a very substantial motivating factor, it would also not be sufficient on its own.’⁴¹

Morcsch agrees, noting that absent an explicit admission as to a racist motivation, ‘prosecutors need to rely on circumstantial evidence’ to establish a hate motivation at trial.⁴²

Lawrence takes a different approach. He first highlights the problems which are inherent to the issue:

‘A result-oriented focus is particularly inappropriate for determining guilt in the context of bias crimes. In many cases, the harms associated with a bias crime depend entirely on whether the victim, the target group, and the society perceive the perpetrator’s bias motivation. But ... the community may mistakenly perceive a bias motive when none is present, and they might fail to perceive a bias motive that is in fact really there. A harms-based guilt standard might have some legitimacy in the civil context ... [but would] allow for the punishment of bias crimes solely for the harm caused, even if the offending act were utterly devoid of racial motivation, so long as the target community perceived the act to be racially motivated.’⁴³

Lawrence thus proposes a test which is based on the culpability of the offender, rather than one which is ‘based on the result of his actions’.⁴⁴ He discusses the problematic cases which arise in this context. The first is the ‘Clever Bias Criminal’, an offender who ‘articulates a nonbias motivation for an assault that was in fact

⁴¹ *ibid* 207.

⁴² James Morsch, ‘The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation’ (1992) 82(3) *Journal of Criminal Law and Criminology* 659.

⁴³ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 64-65.

⁴⁴ *ibid* 65.

motivated by bias.’⁴⁵ From an evidentiary perspective, he argues that this individual poses no problem which is insurmountable to the criminal justice system: while the prosecution will be difficult, he argues that this is not a problem unique to hate crime offenders. That said, he goes on to argue that even if the victim or community are unaware of the bias motivation, and thus ‘he has not caused the objective harms associated with bias crimes’, ‘actual harm has never been a sine qua non for guilt.’⁴⁶ He refers to the inchoate offence of attempted murder, noting that in this context, guilt is attributed on the basis of either the future dangerousness of the offender or his moral blameworthiness.⁴⁷

For the Clever Bias Criminal who acts much like a ‘mission offender’,⁴⁸ the only evidence that might link the offender to a bias motive could be previous bad acts, his possession of literature on, for example, white supremacy, or suchlike. From a fact finding perspective, Hall agrees that determining motive is difficult, noting that it may involve a ‘detailed case-history of the defendant’s past life.’⁴⁹ Without such evidence, however, it would be difficult to secure a conviction for the ‘hate’ element of the Clever Bias Criminal’s actions, as he asserts what Pezella calls a ‘pretextual non-bias’ motivation for his actions, even if they were in fact hate motivated.⁵⁰

Lawrence’s second model is the ‘Unconscious Racist’. The question posed is as follows:

‘Is guilt of a bias crime sufficiently established by a *mens rea* of unconscious bias motivation combined with conduct that in fact causes the resulting harm ordinarily associated with bias crimes?’⁵¹

⁴⁵ *ibid.*

⁴⁶ *ibid* 67.

⁴⁷ *ibid.*

⁴⁸ Frank S Pezella, *Hate Crime Statutes: A Public Policy and Law Enforcement Dilemma* (Springer 2016), 69.

⁴⁹ Jerome Hall, *General Principles of Criminal Law* (2nd ed 1960) as cited by Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142, 1155.

⁵⁰ Frank S Pezella, *Hate Crime Statutes: A Public Policy and Law Enforcement Dilemma* (Springer 2016), 69.

⁵¹ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 68.

In these circumstances, comparing the offender to a somnambulist, he decidedly states that this Unconscious Racist is not guilty of a bias crime for two reasons: first, because of the principle of voluntariness; and second, because of the evidentiary problems that would arise.⁵²

The third offender he considers is the Unknowingly Offensive Actor (UOA). As Lawrence describes this category of offenders, they act intentionally in a manner which:

- (a) is intended to cause the harm associated with a parallel crime; and
- (b) in fact causes the additional harm associated with a bias crime; but
- (c) is not intended to cause the harm associated with a bias crime.⁵³

The example given in this context is the teenagers who spray a swastika on a building associated with the Jewish community but who 'are unaware' themselves that the act has the effect of offending.⁵⁴ Thus, there is no bias motivation but rather the teenagers commit the crime 'for the 'thrill'.⁵⁵ As Pezella notes, these are 'perpetrators who do not specifically seek to offend the victims particularly or their community and are generally unaware that their conduct has this effect.'⁵⁶ Again, he decides that these offenders are not bias criminals. He then considers the negligent version of the UOA, who, despite saying that he didn't know of the offensive nature of the swastika, should have known.⁵⁷ On this, he states:

'By definition, the behaviour of the Unknowingly Offensive Actor (Negligent) does not reach the level of recklessness with respect to the elements of a bias crime. Reckless conduct is that which is taken with a *conscious* disregard of the likelihood of the harm. At most, he has behaved negligently.'⁵⁸

⁵² *ibid* 69.

⁵³ *ibid* 70-71.

⁵⁴ *ibid* 70.

⁵⁵ *ibid*.

⁵⁶ Frank S Pezella, *Hate Crime Statutes: A Public Policy and Law Enforcement Dilemma* (Springer 2016), 69.

⁵⁷ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 72.

⁵⁸ *ibid*.

Under Lawrence's theory, because a higher standard of mens rea than negligence is required in order to convict an offender of a bias crime, this offender, Lawrence believes, will not be convicted under bias crime statutes. Considering the three problematic offender types, Pezella states that they evidence the 'problems with discriminatory selection statutes', as only the clever bias criminal reflects 'both the motive and the conduct' that such statutes were intended to address.⁵⁹ That they cannot be prosecuted under such statutes is of course, true: however, the question whether it is problematic is a deeper one, which requires us to ask what type of offending we wish to capture in hate crime legislation.

Considering the standard for 'hate crime causality', in considering jurisprudence from both the Iowan and Californian courts, Quill argues that the standard has been set too low.⁶⁰ He states, 'only a very small quantum of speculative bias can result in a lengthy prison sentence that is completely separate from the full and just sentence assigned to the underlying crime.'⁶¹ The reason for this, he argues, is that legislation is not sufficiently specific in determining how close the causative link must be between the 'forbidden animus' and the underlying crime, leaving it to the judiciary to determine the 'quantum of motivational evidence required.'⁶²

All the legislation considered here provides that the degree to which the offender was motivated by the hatred is not relevant: if they were partially motivated by hostility to the victim it is sufficient for the purposes of liability. This causes immediate problems. First, as Quill notes, this could mean that a significant percentage, or even all, of intergroup crime could potentially be classed as hate crime.⁶³ While some legislation in the United States requires that the crime was committed 'in whole or in substantial part because of' hostility, the threshold in those statutes examined here seems much lower. Quill observes:

⁵⁹ Frank S Pezella, *Hate Crime Statutes: A Public Policy and Law Enforcement Dilemma* (Springer 2016), 69.

⁶⁰ Gavin F Quill, 'Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration' (2010) 58 Drake L Rev 181.

⁶¹ *ibid* 182.

⁶² *ibid* 187.

⁶³ *ibid* 198.

‘Once a mixed-motive construction is established for our causation standard, it raises the critical and difficult question of exactly how much bias must be found within the mix. If animus does not have to be the sole cause of the underlying crime, does it have to be the predominant cause, a substantial or significant cause, just a contributing cause, or only a barely existing or objectively possible cause?’⁶⁴

The standard which is utilised in legislation must be carefully formulated: too broad and the label of, for example, criminal racist, or criminal homophobe, will be applied too readily, and in some cases inappropriately. Too narrow, and the legislation will be toothless, and inoperable in practice. The question as to how the hate element is evidenced is key to this question, which will now be considered.

Evidentiary challenges to motivation-based offences

Quill notes that, given the philosophical concerns with ‘determining what is in another’s mind’, the problem is even more pronounced when we consider motivation from a legal perspective.⁶⁵ He argues, ‘[t]he inscrutability of “other minds” raises a daunting evidentiary challenge when motivation is allowed to become a pseudo-element in the definition of a criminal act.’⁶⁶

The argument could be made that judges and juries regularly consider the mental state of the defendant when considering their liability. This applies in the context of aggravated assault, or burglary for example. However, as Quill notes, in these contexts, ‘[s]tate of mind refers to culpability; it affects exactly what was done, not why it was done’ thus distinguishing between the actus reus and mens rea of the crime.⁶⁷

As we will see, for the most part, the ‘hate’ element of hate crime is proven by reference to external evidence: slogans, words used in the commission of an offence,

⁶⁴ *ibid* 199.

⁶⁵ *ibid* 191, referring to Adam Candeub, ‘Comment: Motive Crimes and Other Minds’ (1994) 142 University of Pennsylvania L Rev 2071.

⁶⁶ Gavin F Quill, ‘Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration’ (2010) 58 Drake L Rev 181, 191.

⁶⁷ *ibid* 194.

or words used after the offence referring to the victim. Quill notes that the animus can be the cause of the derogatory language without being the motive for the criminal activity: 'just because the crime and the epithets are relatively contemporaneous, does not mean that they necessarily sprang from the same motivational source.'⁶⁸ Thus, while the terms used by the defendant may be gravely offensive, and certainly show hostility towards the victim, this does not necessarily establish that the offence was one which was *motivated* by hostility. In this context, the 'demonstration' model utilised in England and Wales broadens the scope of the legislation to address this exact issue.

Actus Reus

While the 'hate motivation' of the offender is typically that which elevates a crime to a hate crime, in England and Wales, the 'demonstration' model, as we will see, also aggravates the crime through the actus reus. Thus, rather than looking at the motivation of the offender, in this context, the behaviour of the offender (usually in the form of language used) is under scrutiny. The reason that this is sometimes viewed as problematic is that, while the words used are, in every sense, 'acts', they are an external manifestation of the beliefs of the offender.⁶⁹

As McAuley and McCutcheon point out, the actus reus of an offence requires an 'external manifestation', even though this may be very slight.⁷⁰ The reason for this is to avoid punishing evil thoughts. By comparison, the actus reus for conspiracy – a crime which is, for the most part, internalised – is the making of the agreement, be it by spoken or written word, or even simply gesticulating.⁷¹ McAuley and McCutcheon explain the requirement:

'[It] was explained by older writers on the basis that it would be impossible to prove intent without its being demonstrated by an external act. A more

⁶⁸ *ibid* 196.

⁶⁹ For a detailed discussion of this concept, see Heidi Hurd, 'Why Liberals Should Hate "Hate Crime Legislation"' (2001) 20 *Law and Philosophy* 251; and the response to these arguments by Mohammad Al-Hakim, 'Making Room for Hate Crime Legislation in Liberal Societies' (2010) 4 *Criminal Law and Philosophy* 341.

⁷⁰ Finbarr McAuley and J Paul McCutcheon, *Criminal Liability: A Grammar* (Round Hall Sweet and Maxwell 2000) 117.

⁷¹ *ibid*.

recent explanation is a desire to prevent the criminal law from becoming excessively broad—the criminal sanction should be confined to those whose conduct causes or threatens to cause some harm to the public and should not extend to private “harmlessness”.⁷²

Another important point to note in the context of hate crime is that the guilty state of mind must ‘coincide temporally with the prohibited conduct.’⁷³ Thus, even though an individual may have strongly held and vociferously publicised racist views, if there is no evidence of such views being held and operative during the time of the attack, arguably he cannot be found guilty of a hate crime.

In terms of its application in the context of hate crime, Hall, distinguishing between legal and psychological understandings of motive, states: ‘It is doubtful whether one is responsible for his motives; but the crucial point for legal purposes is that action involves a choice.’⁷⁴ The question in this context, as I will show in the context of legislation as it operates in England and Wales, is the extent to which the speaking of words – oftentimes described as ‘everyday language’ – fits into the general framework of the criminal law.

Conclusion

Whether addressed through the mens rea or the actus reus of the offence, hate crime legislation is ubiquitous throughout the common law world. Two models of legislation in operation will now be considered: one which addresses aggravation through the mens rea, and one which addresses it through the actus reus. The ultimate question in this context is whether a limited test or more expansive one is appropriate in an Irish context.

Aggravated through the Mens Rea (1): Case Law from Canada

Introduced in 1995, section 718.2 of the Canadian Criminal Code provides that, when sentencing, a court should consider a number of factors and aggravate or

⁷² *ibid.*

⁷³ *ibid* 118.

⁷⁴ Jerome Hall, *General Principles of Criminal Law* (2nd ed 1960) as cited by Michael Rosenberg, ‘The Continued Relevance of the Irrelevance of Motive Maxim’ (2008) 57 *Duke L Journal* 1142, 1153.

mitigate the sentence accordingly.⁷⁵ The first of these factors, provided for in section 718.2(a)(i), 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 gender identity or expression, or on any other similar factor’ should be taken into account in sentencing. While an aggravated sentencing provision, and thus not formally part of the offence itself, as with all elements at sentencing, the bias, prejudice, or hatred must be established beyond a reasonable doubt by the prosecution,⁷⁶ and thus the manner in which the provision has been interpreted is important.

The application of section 718.2(a)(i) is quite limited in that it requires that the offence be *motivated* by bias, prejudice, or hatred. It was suggested that, despite the noble intent of the section, it is unworkable in practice given its narrow scope: the requirement to prove motivation was simply too high a standard to reach for the purposes of the criminal law.⁷⁷ Ferguson, however, argues that this criticism is ‘overstated’.⁷⁸ He argues that, in some cases, the motivation of the offender will be ‘unmistakably clear’ because of their words and actions.⁷⁹ In other cases, he argues, inferences as to the motivation of the offender can be drawn: something judges are familiar with in the context of all subjective *mens rea* offences. The manner in which the section has been applied and interpreted was detailed extensively by Lawrence and Verdun-Jones.⁸⁰

Establishing motivation

The requirement of a hate motivation means that the court must ensure that where, for example, the alleged proof of motive is words spoken by the offender during the

⁷⁵ The criminalization of hate speech is provided for in Sections 318, 319, and 430 of the Canadian Criminal Code (the advocacy of genocide, public incitement of hatred, and attacks on religious property and institutions, respectively) and are considered by Abbee Corb, ‘Hate and hate crime in Canada’ in Nathan Hall, Abbee Corb, Paul Giannasi, and John DG Grieve (eds) *The Routledge international handbook on hate crime* (Routledge 2015)

⁷⁶ Gerry Ferguson, *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code* (Department of Justice, Canada 2016).

⁷⁷ *ibid.*

⁷⁸ *ibid* 15.

⁷⁹ *Ibid.*

⁸⁰ 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.

course of the offence, the words must relate to and refer to that motive and not simply be expressions of belief. This point was made clear in *R v Wright*⁸¹ where the court stated that there must be proof beyond a reasonable doubt that the offence was motivated by one of the listed factors and that the objective of the 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'.⁸² That said, Lawrence and Verdun-Jones, in their analysis of case law applying section 718.2(a)(i) show that, while the courts maintain that evidence of motivation can be difficult to prove, it has been established or inferred by a number of factors, including words spoken by the offender; items in the possession of the offender; the conduct of the offender; and the fact that the offender is a member of a particular group.

In the context of language used by the offender, case law from Canada suggests that, while the words spoken by the offender can go to establishing a bias motivation on the part of the offender, the courts have carefully differentiated between offences in which language played a part in the offence, and those in which the language were 'referable to motive', the latter of which attracts the sentencing provision of the legislation.⁸³ A case decided prior to the introduction of the section, *R v Lelas* explained the reasoning for this position:

'... Lelas is not to be sentenced for his political or social beliefs, repugnant as those beliefs may be. The 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.'⁸⁴

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

⁸¹ (2002) 273 WAC 371.

⁸² *Ibid* para 10

⁸³ 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.

⁸⁴ (1990) 74 OR (2d) 552, [10]

motive. Here, the accused was an Aboriginal youth who attacked a Caucasian male and was charged with attempted murder. 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. In principle, it was thought that 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 would be no way in which motivation can be inferred, and the sentence will not be aggravated under the section. However, case law seems to have departed from this position, and the degree of motivation required to establish the link between the offence and the hate element has been interpreted in a liberal fashion.

It is not only words which can be used to prove motivation. In *R v Kandola*,⁸⁵ the Court set out the circumstances in which an offence can be shown to be aggravated by bias, prejudice or hostility on the basis of sexual orientation. In the case, a gay couple were holding hands on the street, and were referred to as 'faggots' a number of times as they approached a group, and following the exchange of words, Kandola (a member of the group) assaulted the victim rendering him unconscious, after which he again called him a 'faggot'. Kandola did not dispute the facts of the case, including the fact that he used the derogatory language in question. The Court detailed the circumstances taken into account by previous courts in determining whether an offence was aggravated by bias, prejudice or hostility based on sexual orientation:

'... whether there was anti-homosexual language uttered before, during or after the offence was committed; whether the offence was committed in a high-visibility, for lack of a better term, location where homosexuals are known to frequent; the lack of provocation; any lack of prior interaction between accused and victim; extreme or disproportionate violence; and

⁸⁵ [2010] BCSC 941.

finally, absence of any possible alternative explanation or motivation given the presence of some or all of the above-noted factors.’⁸⁶

The case of *R v Woodward*⁸⁷ is a case on point regarding the latter of these circumstances. Here, the accused was in a bar which was known to be frequented by gay men. During the course of the evening, his victim had approached him twice, offering to buy him a drink, and asking him to play a game of pool. When Woodward was leaving the bar, he went up to his victim and punched him in the face, knocking him unconscious and causing him catastrophic injuries. While being restrained by some other patrons of the bar, he was asked why he assaulted his victim. His response was, ‘He’s a faggot – he deserved it – the faggot touched me – I’m not a faggot – he deserved it.’⁸⁸ In applying section 718.2(a)(i), the sentencing judge stated, ‘I see no other possible explanation or motivation for Mr Woodward’s assault on Mr Dowrey than virulent homophobia.’⁸⁹

On appeal, Woodward argued that while he was motivated by homophobia, and that such motivation is an aggravating factor in sentencing, the context for this offence should be differentiated from the type of conduct at which the section was aimed:

‘... the primary focus of s. 718(2)(a)(i) is on offenders who single out victims in public places without any prior interaction, solely because of the victim’s personal characteristics ... [S]uch offenders are more blameworthy and, therefore, should be subjected to more severe penal sanctions than those whose conduct is *reactive as opposed to calculated*.’⁹⁰

Somewhat ironically, the Court found that the flaw in the argument was that Woodward engaged in exactly this course of conduct: he “targeted [the victim] because of his perception that [the victim] is gay and then sought to justify what he had done on that basis.”⁹¹

⁸⁶ [2010] BCSC 941, para [11].

⁸⁷ [2011] BCCA 251.

⁸⁸ [2011] BCCA 251, para [10].

⁸⁹ [2011] BCCA 251, para [17].

⁹⁰ [2011] BCCA 251, para [23].

⁹¹ [2011] BCCA 251, para [26].

In *R v Gholamrezazdehshirazi*⁹² there was no externally manifested evidence of a hate motivation during the course of the offence, against a victim he assumed to be Muslim. However, following his arrest the defendant told an officer that ‘Muslims had to worry about him because they had taken away his land and country.’⁹³ During the course of a psychiatric assessment following his arrest for the offence, it was established that the offender had ‘a conspiratorial delusion against Muslims’.⁹⁴ The Court found that the section applied, finding that the offender ‘based his actions on a bias or prejudice motivated belief that the victim was a Muslim with an Iranian background.’⁹⁵ His ‘personal bias against Muslims’, the Court found, played a ‘significant role’ in the assault.⁹⁶

Sandler categorises the type of evidence used by courts to determine the presence of a hate motivation in cases:

1. Statements made by the offender before or during the offence;
2. Statements made by the offender after the offence;
3. Offender’s membership in hate groups or adherence to hate-based ideology;
4. The type of property destroyed or vandalised;
5. The nature of the graffiti or vandalism;
6. The significance of the offence date;
7. The victims real or perceived membership in a minority group;
8. Targeting of the victim to the exclusion of non-minorities; and
9. The absence of an alternative motive.⁹⁷

Sandler notes, however, that in most cases in which the section has been applied, one or more of these indicators has been present, and the presence of statements of prejudice when not accompanied by another factor, or the absence of an alternative

⁹² [2008] ABPC 198.

⁹³ [2008] ABPC 198, para [7].

⁹⁴ [2008] ABPC 198, para [14].

⁹⁵ [2008] ABPC 198, para [42].

⁹⁶ [2008] ABPC 198, para [42].

⁹⁷ Julia Sandler, ‘Hate Motivation as an Aggravating Factor on Sentence: An Overview of the Legal Landscape’ available at https://www.law.utoronto.ca/documents/conferences2/CombatingHatred10_Sandler.pdf

motive, will usually not be sufficient to trigger the operation of the section. That said, there is very little consistency in the law, as Lawrence et al explain:

‘Slurs and epithets can provide evidence of hateful motivation in some cases (*JRB, Best, Meier*) or they are not allowed in others (*Arsenault, Baxter*). Physical symbols of hatred may be allowed as evidence of hate motivation (*Soles*) or they might not (*Trusler*).’⁹⁸

Roberts and Hastings suggest that, given the narrow way in which the section is framed, the defendant ‘can raise a litany of plausible alternative explanations’ for the offending behaviour, which would raise a reasonable doubt in relation to the motivation.⁹⁹ However, reported cases in which this line of argument was used does not seem to support their position. In *R v Van Brunt*¹⁰⁰ the defendant introduced evidence to establish that, while he had used racist remarks during the course of an assault, that he was not in fact racist, and that the language used was not motivated by racism. Van Brunt had been driving a car passed the victim, and the victim commented ‘nice car’. The defendant and the passenger of the car then parked the car, went back to the victim and the defendant assaulted him using a metal bar, hurling racial slurs at him such as, ‘What are you doing nigger?’ and ‘We’re going to fuck you up nigger’.¹⁰¹ The defendant introduced evidence to show that he was not racist: first, the report of a physician who noted that the defendant was an alcoholic, and:

‘His behaviour can be explained without a racial motivation ... It is very likely that Mr Van-Brunt, when drunk, could find a great many reasons for violent aggression against another person or he could initiate a fight for no apparent external reason whatever. I doubt his alleged assault was planned or well

⁹⁸ Austin Lawrence with Julie Shugarman and Diana Grech, *Hate as an Aggravating Factor in Sentencing in Canada* (Department of Justice 2009), 38.

⁹⁹ Julian V Roberts and Andrew JA Hastings ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93.

¹⁰⁰ [2003] BCPC 0559.

¹⁰¹ [2003] BCPC 0559, para [11].

thought out, but more likely the result of his disinhibition, his emotional turmoil and the effects of alcohol on his brain.’¹⁰²

Further, an African-Canadian friend of Van Brunt gave evidence that she was a friend of Van Brunt, and that he had never made racist remarks to her or to anyone else in her presence. The Court accepted this evidence, but stated that the question was not whether the defendant was racist, but rather whether the offence was motivated by racism. In finding beyond a reasonable doubt that the offence was motivated by racism under the section, the Court referenced the facts of the case, and the particular use of the word ‘nigger’ stating ‘It defies common sense to suggest that racism played no part in the selection of Mr Moore as the victim, and the severity of the assault.’¹⁰³ Thus, the fact that the defendant has shown no previous propensity towards racism was no defence in the case.

Similarly, in *R v Gray*¹⁰⁴ the appellant was found guilty of manslaughter of an ‘Aboriginal’¹⁰⁵ man. The appellant was of the view that petty crime was an issue in his neighbourhood, and that the crimes were committed by men of that ethnicity. He attacked two such men who were walking peacefully in his neighbourhood, and was ultimately convicted of aggravated assault and manslaughter in relation to the attacks. The appellant’s neighbour gave evidence in the case that his intent was to ‘clean up the neighbourhood’.¹⁰⁶ The appellant denied the charges at trial, and also denied having any animosity to Aboriginal people, given that his wife’s father and some of his friends were Aboriginal.¹⁰⁷ Despite this, the sentencing judge concluded that the appellant had a deep animus towards Aboriginal people.

On appeal, the Court again made it clear that the relevant inquiry:

¹⁰² [2003] BCPC 0559, para [28].

¹⁰³ [2003] BCPC 0559, para [48].

¹⁰⁴ [2013] ABCA 237.

¹⁰⁵ I use the ethnic identifier ‘Aboriginal’ here as it is the term used in the judgement.

¹⁰⁶ [2013] ABCA 237, para [6].

¹⁰⁷ [2013] ABCA 237, para [10].

‘... is not whether the Appellant harboured a racial animus towards Aboriginals, but rather whether the victims of his assaults were targeted because of their racial backgrounds.’¹⁰⁸

The Court found that the offences in this case were motivated by bias, prejudice or hatred, stating that it was ‘difficult to conceive of a clearer case of a racially motivated near murder and aggravated assault causing bodily harm.’¹⁰⁹

Causal links and the degree of motivation

It is clear that the biased, prejudiced or hateful motivation must relate to the offence itself. The question then is what degree of motivation is required for the purposes of the section: does the bias, prejudice or hate need to be the only factor, or a partial factor in the commission of the offence. Lawrence et al note that there is a ‘consistent refrain’ in academic literature and court decisions as to ‘what amount of hate motivation is required to consider a crime motivated by hate.’¹¹⁰

In analysing case law, Roberts and Hastings in their 2001 article found that in determining the degree of motivation required for the purposes of section 718.2(a)(i), there was considerable divergence in case law.¹¹¹ Writing in 2002, MacMillan et al argued that a partial motivation is sufficient for the purposes of section 718.2(a)(i) but acknowledged that the situation lacked clarity:

‘In our view, a hate crime can be motivated in whole or in part by bias, prejudice or hate. This is not a novel concept in sentencing, since judges have always taken into account numerous aggravating and mitigating factors at the time of sentencing. To suggest that, for the purposes of sentencing, an offence is only a ‘hate crime’ if it is established that bias, prejudice or hate is

¹⁰⁸ [2013] ABCA 237, para [17].

¹⁰⁹ [2013] ABCA 237, para [19].

¹¹⁰ Austin Lawrence with Julie Shugarman and Diana Grech, *Hate as an Aggravating Factor in Sentencing in Canada* (Department of Justice 2009), 38.

¹¹¹ Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93.

the sole motivating factor simply would be inappropriate and inconsistent with sentencing practices.’¹¹²

Nearly ten years later, Lawrence and Verdun-Jones found that there had been no movement towards an authoritative position on this issue.¹¹³ Roberts and Hastings observe, however, that the central position is that the offence must ‘have been *caused* by the offender’s hatred of or bias against one of the enumerated groups.’¹¹⁴ At the outset, they state the police forces across the country utilise a ‘partial motivation’ test for the purposes of classification. The question then is the relationship between that motivation and the underlying criminal offences for the purposes of the sentence enhancement.

In *R v Baxter*,¹¹⁵ in arguing that section 718.2(a)(i) did not apply in the case, the defendant argued that the offence was not motivated by racism, but rather that he was out of control and ‘ventilating anger on somebody who was close by’: thus, the victims were not chosen on the basis of their ethnicity, but rather were passing by, and just happened to be at the end of the vitriolic abuse hurled by the defendant. The Court accepted this argument:

‘I would characterize this particular assault as one which would have occurred had there been people of his own ethnic and cultural background present ... I read this section as requiring a predominant feature of the offence being ‘motivated by bias, prejudice or hate’. Having come to the conclusion that the predominant feature in this case is the personality disorder, fuelled by alcohol, and the situational lack of emotional control, I then conclude that this is not an offence ‘motivated by racism’ in a

¹¹² Craig S MacMillan, Myron G Claridge and Rick McKenna, ‘Criminal Proceedings as a Response to Hate: The British Columbia Experience’ (2002) 45 *Criminal Law Quarterly* 419, 452.

¹¹³ 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.

¹¹⁴ Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93, 112.

¹¹⁵ [1997] OF No 5811 (Prov Div) as discussed in Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93, 114.

predominant way, even though that is a feature of this activity as it continued.’¹¹⁶

Thus, the Court found, the bias, prejudice or hostility must be a *predominant* feature of the case. However, as Roberts and Hastings observe, there is nothing in the Code that suggests that this interpretation is required.

However, later case law seems to suggest that the courts have retreated from this strict position. In *R v Demelo*, the Court stated that the provision applied because ‘the facts *hinted* that the assault was imposed because of the sexual preference of the victim.’¹¹⁷ In *R v Garbara*, an ‘element’ of racism or prejudice was all that was required.¹¹⁸

In *R v Sandouga*¹¹⁹ the respondent threw a Molotov cocktail at a synagogue, setting it on fire. In doing so, he was acting out of frustration at events in the Middle East, and wanted to express his anger at the Jewish community. Though he stated that he did not *hate* Jews, his counsel conceded that his actions were an ‘expression of anger directed against the Jewish community.’¹²⁰ In considering whether section 718.2(a)(i) applied in the case, the Court found that his actions were directed against an identifiable religious group, and found that there was ‘a clear link between his enmity towards or prejudice against the Jewish people, and his commission of the crime.’¹²¹

In *R v Meier*, the requirement for even a relatively low standard of relationship between the bias, prejudice or hatred, and the offence, were dispensed with:

¹¹⁶ *ibid.*

¹¹⁷ [1999] OJ No 3952 (Prov Div) at [14] as cited in Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 Queen’s Law Journal 93, 115.

¹¹⁸ [2002] BCJ No 3120 (Prov Ct) as cited in 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.

¹¹⁹ [2002] ABCA 196.

¹²⁰ [2002] ABCA 196, para [17].

¹²¹ [2002] ABCA 196, para [18].

‘I am satisfied that in the course of committing these two offences, he uttered, which was admitted, racial slurs to Mr Richards which were obviously despicable and clearly showed a mind-set which is hardly complimentary to Mr Meier. Whether or not the crime itself was motivated by a racial issue is somewhat doubtful but ... the racial slurs were incidental to the act itself and certainly formed a part of it and constitutes an aggravating factor.’¹²²

The fact that the sentencing judge seemed to see the question as to the degree of motivation – if any – involved in the case as almost incidental to the question as to whether the racial comments could aggravate the sentence under section 718.2(a)(i) is somewhat of a concern. Indeed, this case seems to be one where, as we will see, in England and Wales the prosecution would have utilised the first limb of the section, the ‘demonstration’ of racial hatred; rather than having sought to establish that the crime was motivated by bias, prejudice or hatred.

In the 25 years since Roberts and Hastings published their analysis of case law, and in the six years since Lawrence and Verdun-Jones’ work, there has been no definitive statement from the Canadian Supreme Court on this issue. There have, however, been a small number of decisions of provincial courts as well as decisions of the superior-level courts of the provinces and territories, though none which develop the law in any meaningful way.

In *R v Stalker*¹²³ the Court found that the defendant stated ‘I don’t dance with brown guys’ just before punching the victim.¹²⁴ It was argued by the defence that what was said was not language which ‘carries hate’ and was rather a ‘thoughtless joke’.¹²⁵ The Court rejected this claim. It was found that all the factors set out in *Kandola*¹²⁶ were present in the case, and that the language did indicate prejudice against Indo-

¹²² [1998] OJ No 6005 (Ont Ct (Prov Div)) as cited in cited in Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 Queen’s Law Journal 93, 115.

¹²³ [2011] BCSC 1401.

¹²⁴ There was evidence tendered as to the fact that Stalker had been assaulted just prior to the event in question, and that the assault he was convicted for was retaliatory.

¹²⁵ [2011] BCSC 1401, [34].

¹²⁶ [2010] BCSC 941.

Canadians. In assessing whether the case should be considered under section 718.2(a)(i), the Court stated:

'I am satisfied that the Crown has proved beyond a reasonable doubt that prejudice against Indo-Canadian males was part of his motivation and, as such, it is an aggravating circumstance. However, it was my distinct impression that this prejudice was based not on hate, but on ignorance, and I am not satisfied that it was the only thing that motivated Mr. Stalker.'¹²⁷

The court found that the fact that the offender was motivated by prejudice to be an aggravating factor, though the Court found that the offence was only motivated 'in part' by prejudice. Thus, while other cases have found that once the offence is partly motivated by bias, prejudice or hatred, the section is triggered, here, Fisher J seemed to find that this lessened the aggravation. Her comments as to the fact that the prejudice was based 'upon ignorance rather than hate'¹²⁸ are even more difficult to explain, given the fact that the section itself refers to 'prejudice or hate' rather than 'prejudice based in hate'.

In *R v Crowchief*, the defendant pleaded guilty to assault causing bodily harm.¹²⁹ At sentencing, it was argued by the Crown that the sentence should be considered under section 718.2(a)(i). Just before the unprovoked attack on her victim, the defendant shouted 'I hate white people'. Referring to *Ingram*, *Simms*, *Van-Brunt*, and *Vrdoljak*, the Court observed that in all those cases, the bias, prejudice or hostility involved prolonged and specific racist commentary and targeting of victims. Here, the Court stated:

'... [T]here is no evidence either way about what the offender meant or whether as in the cited cases) she holds or promotes an ideology which would explain why this assault was aimed at this victim.'¹³⁰

¹²⁷ [2011] BCSC 1401, [38].

¹²⁸ [2011] BCSC 1401, [59].

¹²⁹ [2016] ABPC 151.

¹³⁰ [2016] ABPC 151, [15].

Van Harten J stated that, in the context of section 718.2(a)(i), he was not satisfied to the requisite standard of proof that the offence was ‘even in part, motivated by bias.’¹³¹ In so finding, however, he did indicate that a ‘partial’ motivation would suffice for the purposes of the section.

Law reform

Given the limited application of the Canadian section, it has been suggested, as I will show, that it be broadened, although this recommendation has not as yet been adopted. There is some divergence in the academic community as to the appropriate test that should be used, with MacMillan et al suggesting that ‘partial’ motivation is preferred, and Lawrence and Verdun-Jones recommending a narrower position, namely that hate should be shown to be a ‘significant contributing factor’ in the case. Lawrence and Verdun-Jones suggest that the broader test proposed by MacMillan et al would ‘stretch the reach of s. 718.2(a)(i) to include any case in which bias, prejudice or hatred was an element.’¹³²

Ferguson suggests that given the fact that the section is unclear as to the degree of motivation required – that is, whether it needs to be ‘solely, substantially, significantly or just a little’ motivated by hate – the section should be amended.¹³³ He suggests that the motivation should be a significant factor – or at least one which is more than trivial – in the commission of the offence.¹³⁴ He also suggests – although he admits this to be more controversial – that it should also be considered an aggravating factor where the offender is ‘reckless, willfully blind or penally-negligent in respect to the hate-causing effect of their offense’¹³⁵ thus essentially suggesting that the *mens rea* element be broadened.

Roberts and Hastings recommend that, rather than addressing the issue through the lens of the motivation of the offender, instead focus should be shifted to the ‘nature

¹³¹ [2016] ABPC 151, [16].

¹³² 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.

¹³³ Gerry Ferguson, *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code* (Department of Justice, Canada 2016).

¹³⁴ *ibid.*

¹³⁵ *ibid* 16.

of the hateful behavior.’¹³⁶ They suggest that the legislation be amended to include both foci, in a manner reflective of the Crime and Disorder Act 1998 in England and Wales. Robertson agrees that the ‘over-emphasis’ on the motivation of the offender, and the lack of attention to the ‘hateful circumstances surrounding the commission of an offence’ create what he describes as a ‘space of exception’ in the Canadian Criminal Code in which certain forms of bias crime are not recognised.¹³⁷ He suggests that, in considering the circumstances of the offence, the Court would interrogate both the evidence of verbal abuse as well as ‘the degree to which a reasonable person would understand such a crime as impacting the group to which the victim belongs.’¹³⁸

Aggravated through the mens rea (2): case law from Northern Ireland

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. Thus, the model utilised in Northern Ireland is the aggravated sentencing model, and as case law in the jurisdiction is scant, little can be drawn from analysing the two reported cases. In *R v White*¹³⁹ the offenders went to a house where the victim was present, having been told of his presence there by a relative. During the course of the assault, the victim was stabbed and beaten on the head with a heavy object.¹⁴⁰ The victim pretended to be dead, then escaped and secured his rescue.¹⁴¹ Coughlin J found that it was clear from the circumstances of the offence (that he was a Catholic in the ‘wrong place at the wrong time’) and from the words spoken during the assaults that it was a sectarian attack. However, the words used were not detailed in the judgment, and there was no analysis of any kind as to whether the Order operated in the case or not.

¹³⁶ Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001-2002) 27 *Queen’s Law Journal* 93, 116.

¹³⁷ Sean Robertson, ‘Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R v Cran*’ (2005) 50 *Criminal Law Quarterly* 482.

¹³⁸ *ibid* 484.

¹³⁹ [2005] NICC 52

¹⁴⁰ *ibid* para [2]

¹⁴¹ *ibid*.

In *R v Johnston and White*¹⁴² the victim was making his way home from work where the defendants interrupted him, engaged in chatter and then stated 'but you're a taig, you can't come through here'. Prior to the victim encountering the defendants, White had said, 'there's a fenian he won't walk through this park.' In the context of the operation of the legislation in the case, Babington J stated:

'It is quite clear to me that this matter falls within the provisions of Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 in that this offence was aggravated by hostility in that the defendants demonstrated hostility to the injured party as a result of his religion or perceived religion - see Article 2(3)(a)(iii). Furthermore I note that Article 2(3)(b) defines aggravation by hostility if the offence is motivated (wholly or partly) by hostility based on membership or presumed membership of, in this case, a religious group.'

The Court did not explain whether he felt the attack fell under the demonstration or motivation ground, stating:

'The injured party was savagely attacked by you both for the simple reason that you both considered him to be a catholic and that he should not have been where he was, simply making his way home after work carrying the groceries ... It is also clear that the religious aspect of this case appears to be the only reason why this injured party was attacked. Here not only was sectarian language used but it was made clear that as he was a catholic he could not go a certain route.'

Thus, case law from Northern Ireland does not seem to offer any insights into the manner in which the legislation operates. The courts in England and Wales have, however, had ample opportunity to analyse the law.

¹⁴² [2006] NICC 37. 'Taig' is a derogatory term for Catholics in Northern Ireland.

Actus reus or mens rea: England and Wales

As has been observed, Canadian legislation is relatively limited in its scope, where the 'hate' element only applies at sentencing stage where the offence was 'motivated' by bias, prejudice or hatred. By contrast, under the Crime and Disorder Act 1998, there are two means by which an offence itself can be aggravated by hate or hostility: first, where the offence is *motivated* by hatred or hostility, and second, where the offender, during the course of committing the offence, *demonstrates* hatred or hostility towards his or her victim.

Sections 29-32 create the racially or religiously aggravated offences, and section 28(1) of the Act defines what 'racially or religiously aggravated' means for the purposes of the Act:

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

Thus, as Smith and Hogan state, section 28 creates 'two separate forms of aggravating element': one which is actus reus-based (section 28(1)(a)), and the other of which is mens rea-based (section 28(1)(b)). Thus, as Walters suggests, section 28(1)(a) is an objective test, while section 28(1)(b) is a subjective one.¹⁴³

Though clear from a theoretical perspective at least, as Gadd and Dixon,¹⁴⁴ and Owusu-Bempah¹⁴⁵ note, the most immediate problem which faced the courts in

¹⁴³ Mark Walters, 'Conceptualising 'Hostility' for Hate Crime Laws: "Minding the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014) 34(1) Oxford Journal of Legal Studies 47.

¹⁴⁴ David Gadd and Bill Dixon, *Losing the Race: Thinking Psychosocially about Racially Motivated Crime* (Karnac 2011) 86.

¹⁴⁵ Abenaa Owusu-Bempah, 'Prosecuting hate crime: procedural issues and the future of aggravated offences' (2015) 35(3) Legal Studies 443.

England and Wales was the distinction between demonstrated hostility and hostile motivation, the two limbs of the offences under section 28(1).

A number of cases discuss the relationship between the two limbs of section 28(1). The first case in which the legislation was judicially considered, *DPP v Pal*¹⁴⁶ was an appeal by the DPP by way of case stated. While the case has been judicially questioned¹⁴⁷ the issues raised are of importance. The victim was of Asian appearance, and a caretaker at a community centre. He asked four youths to leave the centre, at which point the respondent stayed, and proceeded to assault the victim, calling him a 'white man's arse licker' and a 'brown Englishman'. The case was brought under section 28(1)(b) of the 1998 Act.¹⁴⁸ The justices in the case found that the language used was not motivated by racial hostility, as:

'Mr Pal was neither an articulate nor well-educated youth, and because of these considerations, when angered he used such words as were available to him in his limited vocabulary, rather than intentionally engaging in racial hostility.'¹⁴⁹

The language used by the appellant is of interest: he himself was of Asian origin, so it seems unusual that he would attack a member of his own racial group using racist language. However, the language used was done so in a manner which, as it was argued, accused the victim of betraying his own racial group, and 'acting as an Uncle Tom'.¹⁵⁰ The Court believed that Pal was not demonstrating hostility towards Asians, 'but towards [the victim's] conduct that night. Not racism, but resentment.'¹⁵¹ Holding that the language used did not amount to racially hostile language for the purposes of the legislation, Simon Brown LJ stated:

'If, of course, one white man were to say to another ... 'you nigger lover' ... upon seeing his victim rejoin a group of black friends at the bar ... then I have

¹⁴⁶ [2000] WL 191187; 3 February 2000 (High Court)

¹⁴⁷ See, *R v Rogers* [2007] UKHL 8; [2007] 2 WLR 280 discussed below.

¹⁴⁸ That said, the Court did state that the case could be put on appeal under section 28(1)(a).

¹⁴⁹ *DPP v Pal* [2000] WL 191187; 3 February 2000 (High Court) [6].

¹⁵⁰ *ibid* [10].

¹⁵¹ *Ibid* [11].

no doubt that the offence would indeed be made out on this particular basis ... [But it] is quite unreal to suggest on the basis of the facts found that the Respondent is anti white men....'¹⁵²

Considering whether the 'demonstration' limb had relevance in the context of the case, Simon Brown LJ went on:

'... I would wish to make it perfectly plain that I will reject also an argument put before us by the Respondent, to the effect that section 29(1)(a) has no application to: 'street arguments when insults may be thrown without thought being given to whether the same are racially abusive, which conduct is already covered by other offences.' Were it otherwise, this argument runs, 'as soon as one racial word is uttered—whatever the motivation—then there is no defence to the charge. That, of course, is not so. It will also be necessary for the prosecution to prove the demonstration of racial hostility, although the use of racially abusive insults will ordinarily, no doubt, be found sufficient for that purpose.'¹⁵³

It is not clear, however, when insults 'thrown without thought' become insults which attract a higher penalty, being ones which demonstrate hostility: this is, as we have seen, an issue which has attracted significant judicial consideration in Canada.

In *R v Saunders*¹⁵⁴ the appellant was convicted of racially aggravated assault causing actual bodily harm, and appealed his sentence. When the victim was parking his car, the appellant said, 'I don't like Pakis, fucking Pakis' and 'kick them out' after which he assaulted the victim, causing harm to him.¹⁵⁵ When arrested, he denied assaulting the victim, denied being a racist and said that the fight was not racially motivated.¹⁵⁶ The appellant had a string of previous convictions, some of which were for violent offences, but while Rose LJ stated, '[t]here was little doubt that the victim would

¹⁵² *ibid* [13].

¹⁵³ *ibid* [14]-[16].

¹⁵⁴ [2000] 1 Cr App R 458.

¹⁵⁵ *ibid* 459.

¹⁵⁶ *ibid* 460.

have been assaulted whatever his ethnic origins', he also said, that the appellant's behaviour was fuelled by drink 'and by resentment about the victim's origins.'¹⁵⁷ Considering section 28(1) of the 1998 Act, he stated, 'for a defendant's conduct to be within the section, there need be no demonstration of hostility provided the offence is partly motivated by hostility.'¹⁵⁸

Thus far, case law considered the limbs separately, with no clear judicial statement on their operation. However, in *RG and LT v DPP*¹⁵⁹ two youths, along with a group of other young people, periodically harassed members of a Somalian family, sometimes engaging in violence towards the family by way of assault and criminal damage. Consistent in this harassment was reference to 'Somalians', which, as the trial judge said was 'usually accompanied by abuse either in the form of words, (bitch, dirty, tramps, apes) or by gestures, including monkey noises'.¹⁶⁰ The family were also told to 'go back to their own country' and told not to speak their native language when in England.¹⁶¹ In her case stated, the trial judge stated:

'The activities of the group were motivated, at least partially, by hostility to the family being from Somalia. Although there might be other motivations ... given the period over which the harassment had continued and the constant reference to their country of origin in circumstances where hostility was demonstrated by the mood of the group, the language used and their actions, there could be no other reasonable explanation.'¹⁶²

On appeal, May LJ considered how both types of racial hostility set out under section 28(1) of the 1998 Act were to be applied. He stated:

'It is, in my judgment, evident from the wording of that section that section 28(1)(a) requires the prosecution to prove facts which indicated that the offender had demonstrated racial hostility at the time of committing the

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ [2004] EWHC 183 (Admin).

¹⁶⁰ *ibid* [7].

¹⁶¹ *ibid.*

¹⁶² *ibid* [11].

offence or immediately before or after doing so. That is not so much to indicate the offender's state of mind as to prove what he did or said so as to demonstrate racial hostility towards the victim...

By contrast, section 28(1)(b) is concerned with the defendant's motivation. The offence has to be wholly, or in part, motivated by racial hostility. That does concern the defendant's state of mind because motive is necessarily a state of mind. But the prosecution has to establish that state of mind and, no doubt, the evidence required to establish such a motive will often, perhaps usually, involve the kind of demonstration of racial hostility to which I have referred in relation to section 28(1)(a). The difference, however, is that section 29(1)(a) essentially requires proof of what the offender did, and what he or she did at the time of committing the offence or at a time closely related to it. Motive, in my judgment, is at least capable of being established by evidence relating to what the defendant may have said or done on another or other occasions.'¹⁶³

He further went on to state that the prosecution may rely in any case on both limbs of section 28(1), and that it was not necessary that the racially aggravated element of the offence be 'packed' into one or other limb of the sub-section. In the context of the case at hand, which was prosecuted under section 28(1)(b), May LJ found that it was entirely appropriate that the prosecution call evidence 'outside the immediate time span of the offences charged' as long as that evidence was 'probative of the motive of racial hostility' to which section 28(1)(b) applies.¹⁶⁴ He stated that he was in no doubt that the group was acting in a racially hostile way, 'and with that motivation within the terms of both sections 28(1)(a) and 28(1)(b).

In the case of *DPP v M*¹⁶⁵ the defendant was charged with an offence of racially aggravated criminal damage under section 30 of the Crime and Disorder Act 1998. After an argument with a chef in a kebab shop, the defendant went outside and damaged the glass at the front of the shop. During the course of the argument, and

¹⁶³ *ibid* [13]-[14].

¹⁶⁴ *ibid* [25].

¹⁶⁵ *Director of Public Prosecutions v M* [2004] EWHC 1453; [2004] 1 WLR 2758.

just prior to damaging the glass, the defendant ‘was swearing and saying things like “bastard”, “fuck” and “bloody foreigners”.’¹⁶⁶ In the trial court, the justices found that the actions were in fact due to annoyance following the argument, rather than being based on racial hostility.¹⁶⁷

On appeal, Auld LJ’s comments on the two limbs of section 28(1) are important. He referred to the opinion of the justices that the words used could be attributed to other reasons than those covered by section 28(1). On this point, he stated that the justices, ‘slipped from demonstrated racial hostility under section 28(1)(a) ... to motivated racial hostility under section 28(1)(b).’ He went on:

‘In suggesting, as a possibility, that the defendant’s behaviour was attributable to, that is motivated by, his annoyance over the dispute about payment for the food, and leaving the racial allegation itself as a mere possibility, the justices mistook the test of guilt that they should have had in mind. And they wrongly treated the two possible motivations as mutually exclusive rather than, as the mischief for which section 28 as a whole is intended to provide, capable of being complementary.’¹⁶⁸

Further, he found that the words used by the defendant were capable of justifying a conviction under either section 28(1)(a) or section 28(1)(b). Thus, Auld LJ, echoing May LJ in *RG and LT v DPP* did not view the limbs as separate tests, but rather two elements of a test which can be considered in tandem.

However, in *R v Rogers*¹⁶⁹ Baroness Hale makes an explicit point of differentiating the limbs of section 28(1). She explained that the difference between the two limbs of section 28(1) is that ‘one limb is ... concerned with the outward manifestation of

¹⁶⁶ [2004] 1 WLR 2758, 2759.

¹⁶⁷ On this latter point, in the case stated the justices clarified: ‘As we were only asked to rule on whether the racially aggravated element of the charge is made out, it appears to us that there are more salient explanations for the behaviour alleged by the defendant. It is we suggest possible that the actions attributed to the defendant were the result of annoyance following the dispute over payment for the food or a mindless act of violence (if the cognitive sciences recognise such a notion). We do not think the prosecution have elevated the allegation of racial aggravation beyond a mere possibility, a matter of conjecture rather than proof.’ *ibid* 2762.

¹⁶⁸ [2004] 1 WLR 2758, 2767.

¹⁶⁹ [2007] UKHL 8; [2007] 2 WLR 280.

racial or religious hostility, the other with the inner motivation of the offender.’¹⁷⁰ She found that the question as to whether the offence was motivated by hatred or hostility, or one in which hatred or hostility was demonstrated, was a decision to be made by the trier of fact in the case:

‘Whether the evidence in any particular case, taken as a whole, proves that the offender’s conduct demonstrated hostility to such a group, or was motivated by such hostility, is a question of fact for the decision-makers in the case.’¹⁷¹

Walters et al considered the operation of the motivation limb of the 1998 Act, and noted that it was rarely utilised, given the high threshold associated with the test by practitioners. Given these issues, they propose a new test, which is discussed below.

Demonstration of hostility

Given the fact that it appears to be relatively easier to secure a conviction under section 28(1)(a) of the Act than under the second limb of the section, it comes as little surprise that the vast majority of the case law concerns the application of section 28(1)(a). That said, the relative ease with which this element can be proven, and the manner in which ‘everyday language’ can elevate an ordinary crime to a racially aggravated one has been criticised: Burney and Rose observe that in some of the courts there is:

‘... a current of opinion, most often expressed by stipendiary magistrates and defence solicitors, that the law came down rather hard on people who, in the course of ‘normal working class mayhem’ as one person put it, uttered words which were part of their natural vocabulary.’¹⁷²

Leaving aside the rather classist nature of this statement, the question remains as to the extent to which this everyday language can be interpreted as a demonstration of racist or religiously aggravated hostility. The case law suggests that, while courts

¹⁷⁰ [2007] 2 WLR 280, 282.

¹⁷¹ *ibid.*

¹⁷² Elizabeth Burney and Gerry Rose, *Racist Offences: How is the Law Working?* (Home Office, 2002).

have been quick to point out that merely using such language does not necessarily mean that the offence will be so aggravated, it is difficult to defend against such a charge.

*DPP v Woods*¹⁷³ was a prosecution appeal by way of case stated. The respondent was convicted of racially aggravated assault under section 29 of the 1998 Act, and the question was whether the offence was 'racially aggravated' for the purposes of section 28(1)(a) of the Act, ie, whether the offender demonstrated hostility during the course of the offence. 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 a matter of dispute as to whether he had used the words 'you black bastard' during the course of the altercation, but the justices found as a matter of fact that he had.¹⁷⁴ 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.'¹⁷⁵

On the question of section 28(1)(a) of the Act, the Court first accepted that the perception of the victim towards the act of the perpetrator should be immaterial in the context of whether the crime was racially aggravated or not, stating:

'The fact that the person to whom the words were directed may have had a personality which enables him to take a resilient or broad shouldered view of the situation is irrelevant...'¹⁷⁶

¹⁷³ [2002] EWHC 85; [2002] WL 45110.

¹⁷⁴ *ibid* [5].

¹⁷⁵ *ibid* [6].

¹⁷⁶ *ibid* [10]

On the question as to whether any other motive could disengage the racial one, the 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.

In *DPP v McFarlane*¹⁷⁷ the respondent was acquitted of racially aggravated threatening behaviour. The victim, who was black, had parked in a disabled bay. The respondent, whose disabled father was in his car, arrived, at which point an altercation developed. During the course of the argument, the defendant called the victim a ‘jungle bunny’, a ‘black bastard’ and a ‘wog’.¹⁷⁸ The trial court found that the language used demonstrated hostility not towards the victim’s membership of a racial group, but rather, hostility towards the victim’s conduct—that is, parking in a disabled bay. On appeal, Forbes J found that the court erred in this conclusion, and

¹⁷⁷ [2002] EWHC 485; [2002] WL 237058.

¹⁷⁸ *ibid* [3].

that the case came under section 28(1)(a). The court particularly made reference to the fact that the victim was black and the defendant was white. Concluding, he stated that it was immaterial that the respondent may have had additional reasons for uttering the words he did—the fact that he so uttered them was sufficient for the purposes of the section.

The case of *Parry v DPP*¹⁷⁹ was an appeal by way of case stated from the dismissal of an appeal against conviction. The appellant had thrown nail varnish on the victim's door. When she discovered it, she phoned the police, who arrived approximately 20 minutes later. She suggested that the appellant (her neighbour) was responsible, and the police went to question him. Upon being asked if he knew anything about the incident, the appellant stated, 'no, those Irish cunts have been stealing my son's trainers from the front door.'¹⁸⁰ One of the police officers warned the appellant about his language, to which he responded, 'I can say what I like about those IRA bastards in my own home.'¹⁸¹ He later confessed to putting the nail varnish on the door, and was charged with racially aggravated criminal damage. He pled guilty to criminal damage but denied the offence of racially motivated criminal damage. It was argued that the word 'immediately' in section 28(1)(a) applied to the words before and after; that the statement was made at least 20 minutes after the damage was done to the door; and that as the victim was not present when the offensive language was used, it did not amount to a demonstration of hostility towards the victim. In the context of the first question, the court found that the subsection applies to 'words uttered or acts done in the immediate context of the substantive offence.' On this basis, the Court found, it was not open to the lower court to find that the remarks made were made 'immediately' after the offence. However, the Court did find that there was no need for the demonstration of hostility to be witnessed by the victim as long as 'the demonstration of hostility occurs in the immediate context of the offence.'

¹⁷⁹ [2004] EWHC 3112 (Admin).

¹⁸⁰ *ibid* [4].

¹⁸¹ *ibid* [5].

*R v Babbs*¹⁸² sought to define what the ‘immediate context of the offence’ means for the purposes of the subsection. Here, the appellant was convicted of racially aggravated assault, where the demonstration limb under section 28(1)(a) was utilised. While in the queue in a fast food restaurant, the appellant stated to the victim, ‘You’re living on the system. You’re conning the system. You foreign fuckers, you do not deserve to be here.’¹⁸³ A short time after – between 5-15 minutes – a fight broke out once more between the victim and the appellant, at which point the appellant headbutted the victim. The question was whether there was too much of a time delay between the racist words used, and the assault, for the offence to be considered racially aggravated. Distinguishing on the facts between the present case and *Perry*, the Court found that what is important in the context of section 28(1)(a) is that it is directed to the victim with the ‘relevant connotation.’ It went on:

‘The words used by the appellant were ... capable of colouring the behaviour of the appellant throughout the subsequent events. He evidenced hostility which ... could be said to have been based on race. The jury were perfectly entitled to conclude that the hostility shown later was based upon the same reasoning, if reasoning is the right description of it, that had been evinced in the words that the appellant had used earlier and, accordingly, that hostility based upon race was evinced over a continuing period from the moment that the words were first used to the moment that it exploded into the ultimate violence in question.’

Thus, while there has to be a relationship between the words used and the criminal act which makes up the base offence in the context of section 28(1)(a), it is not required that the two occur contemporaneously.

In *R v H(S)*¹⁸⁴ 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

¹⁸² [2007] EWCA Crim 2737.

¹⁸³ *ibid* [3].

¹⁸⁴ [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.

employee as a ‘monkey’¹⁸⁵ and a ‘black monkey’¹⁸⁶. 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 as a result of hostility towards the man because of his race as opposed to personal dislike or loss of temper or both’¹⁸⁷ or because of ‘hostility towards that individual rather than dislike or a desire to humiliate or insult.’¹⁸⁸ 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.’¹⁸⁹

On appeal, counsel made clear that the case concerned section 28(1)(a) demonstration of hostility, and not section 28(1)(b), which requires that the offence be motivated by hostility. Leveson LJ noted 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.¹⁹⁰ While it was argued that the authority of *M* had been overtaken by that in *Rogers*, 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.’¹⁹¹ He found that 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.’¹⁹²

As we can see, and as Walters observes, section 28(1)(a) cases are usually proven in court where there is evidence of verbalised or written prejudice used during the course of the commission of an offence.¹⁹³ However, there has been some concern

¹⁸⁵ *ibid* [7].

¹⁸⁶ *ibid* [10].

¹⁸⁷ *ibid* [16].

¹⁸⁸ *Ibid* [17].

¹⁸⁹ *ibid* [22].

¹⁹⁰ *ibid* [26]-[27], referring to *DPP v M*.

¹⁹¹ *ibid* [28].

¹⁹² *ibid* [29].

¹⁹³ Mark Walters, ‘Conceptualising ‘Hostility’ for Hate Crime Laws: “Minding the Minutiae” when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998’ (2014) 34(1) *Oxford Journal of Legal Studies* 47.

regarding what might be called the over-reach of the section, to a point where the use of 'everyday language' has been criminalised.¹⁹⁴ Prior to discussing a potential approach to legislating in Ireland, a brief consideration of the case law in England and Wales regarding the second limb of section 28 is warranted.

Motivated by hostility

Case law on the application of the second limb of section 28(1) is relatively limited. Walters explains that the reason for this is that the evidentiary threshold for the sub-section is 'ultimately very high'.¹⁹⁵ Smith and Hogan observe that the legislation is thus an interesting example of where the motivation, rather than the intention, of the defendant are crucial in the substantive criminal law, rather than being treated as an evidentiary factor.¹⁹⁶

In *DPP v Green*¹⁹⁷, when the respondent was arrested, she came out with a string of racially abusive language towards her arresting officer: 'paki cunt'; 'you paki'; 'black bastard'; 'you paki black bastard'; 'you black cunt'; 'paki bastard'; 'you black bastard' and described his fellow officer as a 'white cunt'.¹⁹⁸ In seeking to defend a charge under the 1998 Act, the respondent sought to introduce evidence that she was not racist: first, her best friend, who was black, gave evidence that she felt the respondent had no racist tendencies; and second, the respondent had children of mixed ethnic origin.

Because of the fact that the respondent referred to one of the officers as a 'white cunt', the magistrates concluded that the respondent displayed the same type of hostility towards the two police officers, and thus the abuse was a 'continuation to her opposition to arrest' rather than a deliberate act of racial hostility.¹⁹⁹ On appeal, Rafferty J declined to agree with this position. She stated that it is quite true that an

¹⁹⁴ Elizabeth Burney and Gerry Rose, *Racist Offences: How is the Law Working?* (Home Office, 2002) 93.

¹⁹⁵ Mark Walters, 'Conceptualising 'Hostility' for Hate Crime Laws: "Minding the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014) 34(1) *Oxford Journal of Legal Studies* 47.

¹⁹⁶ David Omerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015).

¹⁹⁷ [2004] EWHC 1225; [2004] WL 1074457.

¹⁹⁸ *ibid* [3].

¹⁹⁹ *Ibid* [7].

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.’²⁰⁰

The comments by Maurice Kay LJ in relation to the punishment of motive are interesting. He stated:

‘An investigation of motive is unavoidable under section 28(1)(b), the statute so provides. However, it would be unusual to import a similar requirement where the statute does not expressly call for it. The search for a specific motive can be elusive and complex. That is why the establishment of criminal liability goes not generally require it.’²⁰¹

In *DPP v Howard*²⁰² the victims were off-duty police officers who were in the back garden of their home. Next door was the respondent, who while in his garden chanted ‘I’d rather be a Paki, I’d rather be a Paki, I’d rather be a Paki than a Cop.’²⁰³ The magistrates found that the respondent’s actions were not motivated either partly or wholly towards a racial group, but rather that the hostility was wholly motivated by the respondent’s dislike of his neighbours.²⁰⁴ On appeal by the prosecution, the Court found that while the choice of words ‘may indeed demonstrate that the *motivation for the offence*’ is in part hostility towards a racial group, given the facts of the case, there was an ‘abundance of evidence’ that the sole motivation was hostility towards the two off-duty police officers. The Court dismissed the appeal, cautioning:

‘... prosecutors should be careful not to deploy [the section] where offensive words have been used, but in themselves have not in any way been the motivation for the particular offence with which a defendant is charged. It

²⁰⁰ *ibid* [16].

²⁰¹ *ibid* [27].

²⁰² [2008] EWHC 608 (Admin).

²⁰³ *Ibid* [4].

²⁰⁴ In coming to this conclusion, the magistrates took into consideration the fact that the respondent had been convicted of a public order offence in relation to previous behaviour used against one of his victims.

diminishes the gravity of this offence to use it in circumstances where it is unnecessary to do so and where plainly it cannot be proved.’²⁰⁵

Kendall v DPP,²⁰⁶ decided the same year as *Howard*, also considered the extent to which the offence must be ‘wholly or partly’ motivated by hostility. Here, the appellant had put up posters, one of which had the words ‘Illegal Immigrant Murder Scum’ on it; another which had photographs of three black men; and a third with contact details for the British National Party. The three men pictured had been convicted of the manslaughter of a woman. She was convicted of the racially aggravated public order offence created under section 31 of the 1998 Act. While there was no evidence that the appellant was in fact motivated by racial hatred, the High Court on appeal found that it would ‘unquestionably’ have been open to the magistrates to conclude that the appellant had been aware that the posters were conveying the message that black people generally (rather than the three black men in particular) were ‘scum’.²⁰⁷

As Walters observes, the standard of proof required in the second limb is not easily reached, particularly when there are multiple motives which may influence the decision of the offender to commit an offence.²⁰⁸

Considering the current models

In determining the appropriate format of legislation for Ireland, we must ask how far we wish the criminal law to extend in terms of its operation. As we have seen, and as Walters observes, section 28(1)(a) cases are usually proven in court where there is evidence of verbalised or written prejudice used during the course of the commission of an offence.²⁰⁹ However, there has been some concern regarding what might be called the over-reach of the section, to a point where the use of ‘everyday

²⁰⁵ [2008] EWHC 608 (Admin) at para [12].

²⁰⁶ [2008] EWHC 1848 (Admin).

²⁰⁷ Ibid [12].

²⁰⁸ Mark Walters, ‘Conceptualising ‘Hostility’ for Hate Crime Laws: “Minding the Minutiae” when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998’ (2014) 34(1) Oxford Journal of Legal Studies 47.

²⁰⁹ *ibid*.

language' has arguably been criminalised.²¹⁰ Indeed, once this 'everyday language' is used in the context of a criminal offence, as Walters notes, '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 racist.'²¹¹ The question then, is, when this 'everyday language' includes the phrase 'Black bastard', and is used in the context of a criminal offence, if it qualitatively changes the offence to become one which is racially charged. As I have noted, Roberts and Hastings, focusing on the 'harm' of hate, argue that such expressions of racism cause additional harm, and thus should be considered as aggravating the offence.²¹² Walters agrees that the first limb is not just about recognising the fact that hate crime offenders are more culpable, but also about acknowledging the harm caused by hate crime.

Walters considers the question as to whether offenders who 'unthinkingly' demonstrate hostility should fall within the meaning of the first limb, particularly in a context where many such offences are preceded by interpersonal disputes, and where alcohol is often a factor.²¹³ He notes that applying a 'completely' objective construction to the first limb could result in the unfair labelling of an offender as a 'hate crime' offender, where that individual is unaware that their behaviour might be perceived as racist. That said, he admits that in practice, it would be difficult for an offender to establish that they were not aware of the racist nature of their acts.

Mason and MacIntosh refer to these hostile interjections to a criminal offence as 'incidental prejudices', defined by them as being where prejudice:

'... tends to be impulsively expressed in the heat of the moment, often in the context of a pre-existing conflict between the offender and the victim or

²¹⁰ Elizabeth Burney and Gerry Rose, *Racist Offences: How is the Law Working?* (Home Office, 2002) 93.

²¹¹ Mark Walters, 'Conceptualising 'Hostility' for Hate Crime Laws: "Minding the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014) 34(1) *Oxford Journal of Legal Studies* 47, 67.

²¹² Julian V Roberts and Andrew JA Hastings, 'Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*' (2001) 27 *Queen's Law Journal* 93.

²¹³ Mark Walters, 'Conceptualising 'Hostility' for Hate Crime Laws: "Minding the Minutiae" when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998' (2014) 34(1) *Oxford Journal of Legal Studies* 47.

during the commission of an offence that is motivated by another rationale, such as robbery.’²¹⁴

They note that the Australian courts have rejected the suggestion that such ‘incidental prejudices’ aggravate an offence unless the court is also ‘convinced that such prejudice is a motivating force for the offence.’²¹⁵ Goodall would agree with this proposition, arguing as she does that a focus on the harm of hate, promoted by Roberts and Hastings, ‘is insufficient to constitute the background justification for an enhanced and nominate penalty for racist crime.’²¹⁶ Mason and MacIntosh argue that the imposition of a harsher penalty in cases where prejudice is a ‘trivial’ factor should be avoided, and that in determining liability, courts should ask ‘whether prejudice makes a substantial contribution to the offender’s motive.’²¹⁷ Basing her ‘constitutive animus’ model in the *mens rea* of the offence, Goodall argues:

‘So long as an offender flung out his racist insult intending it at that moment to diminish his victim on that ground – then it is an integral part of his conduct, not any mere ulterior intent nor unintended by-product. His act is thus a constitutive element of the crime.’²¹⁸

From an Irish perspective, of course, a subjective test would apply, which would clearly place the emphasis on the intention of the offender rather than the response of the victim. Agreeing with Goodall, and preferring a more objective model, Mason suggests that the moral culpability of the offender should be considered, rather than the harm inflicted on the victim.²¹⁹ Walters suggests that a mixed model, incorporating an objective element be utilised: that, in order for the *mens rea* of the offence to be satisfied, the offender should be ‘at least *aware* that his expression is

²¹⁴ Gail Mason and Kristin MacIntosh, ‘Hate Crime Sentencing Laws in New Zealand and Australia: Is there a Difference?’ (2014) *New Zealand Law Review* 647, 661.

²¹⁵ *ibid* 662.

²¹⁶ Kay Goodall, ‘Conceptualising “racism” in criminal law’ (2013) 33 *Legal Studies* 215, 235.

²¹⁷ Gail Mason and Kristin MacIntosh, ‘Hate Crime Sentencing Laws in New Zealand and Australia: Is there a Difference?’ (2014) *New Zealand Law Review* 647, 678.

²¹⁸ Kay Goodall, ‘Conceptualising ‘racism’ in criminal law’ (2013) 33(2) *Legal Studies* 215, 237.

²¹⁹ Gail Mason, ‘The Hate Threshold: Emotion, Causation and Difference in the Construction of Prejudice-Motivated Crime’ (2014) 23(3) 293.

likely to be perceived by other right-minded individuals as being one of racial or religious hostility.’²²⁰

Malik considered the scope of hate crime in the context of racially aggravated offences in England and Wales just after the introduction of the 1998 Act:

‘[T]he insistence on subjectivism ensures that only the most serious forms of racist conduct, which are without doubt an expression of conscious racial hatred and not just prejudice or discriminatory attitudes, are regulated by the criminal law.’

The discriminatory selection model

To this point, the jurisdictions under consideration have utilised a model which looks to the motivation of the offender, or requires evidence of a demonstration of hatred on the part of the offender, and thus are broadly understood as utilising the racial animus model. However, despite the relatively broad nature of the legislation in England and Wales, which allows for the mere demonstration of hatred to elevate an ordinary crime to an aggravated one, as I have shown, Walters et al observed through their empirical study that the motivation test is ‘almost impotent’ in addressing aggravated offences, and that there are particular issues regarding the application of either model to disability hate crime in particular.²²¹ For this reason, they propose the use of the so-called ‘discriminatory selection’ model, as described by Lawrence and used widely in the United States. The case of *Wisconsin v Mitchell*²²² concerned an assessment of the discriminatory selection model. Mitchell was convicted of aggravated battery with his sentence enhanced due to the biased nature of his crime under Wis Stat §939.45. The legislation allowed for a sentence enhancement where the defendant ‘intentionally selects the person against whom the crime ... is committed ... because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person...’ In considering the case,

²²⁰ Mark Walters, ‘Conceptualising ‘Hostility’ for Hate Crime Laws: “Minding the Minutiae” when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998’ (2014) 34(1) Oxford Journal of Legal Studies 47, 67.

²²¹ Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process* (University of Sussex 2017).

²²² 505 U.S 476 (1993).

Lawrence notes that the distinction between the two models he espouses was 'largely lost' in the decision.²²³ He explains, however, that the statute in question, 'proscribed not expression but conduct – the conduct of intentional discriminatory selection of a victim.'²²⁴ He argues:

'The Court's lack of focus on the specific nature of the bias crime statute under review in *Mitchell* perhaps stemmed from the fact that it was not persuaded by the argument that the statute impermissibly punished motive rather than conduct or intent. The exact nature of the motivation punished by Wisconsin was therefore not deemed to be of great relevance. Had the Court focused on the statute itself, it would have seen that the bias crime law it was upholding was directed solely at the discriminatory selection of the victim.'²²⁵

Lawrence explains that the racial animus model is one which is typically adopted by bias crime scholars and law enforcement agencies.²²⁶ He explains:

'This model is consonant with the classical understanding of prejudice as involving more than differential treatment on the basis of the victim's race. [It] requires that the offender have committed the crime with some measure of hostility toward the victim's racial group and/or toward the victim because he is part of that group.'²²⁷

However, he notes that most US states are not very easily classified as either one model or the other: they use the 'because of' or 'by reason of' formulation.²²⁸ He observes that California, for example, uses the formula in the following way, where a penalty will be enhanced if certain crimes are committed '*because of* the [victim's] race, color, religion, ancestry, national origin, or sexual orientation.'²²⁹ This formula,

²²³ Frederick Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999) 31.

²²⁴ *ibid* 33.

²²⁵ *ibid* 34.

²²⁶ *ibid* 34.

²²⁷ *ibid* 34-35.

²²⁸ *ibid* 35.

²²⁹ *ibid* 35. Emphasis in original.

he notes, was upheld by the Washington Supreme Court in *Washington v Talley*²³⁰ where the Court stated that ‘the statute punishes the selection of the victim, not the reason for the selection ... The statute is triggered by victim selection regardless of the actor’s motives or beliefs.’²³¹ As Lawrence notes, the Court identified the statute with the discriminatory selection model.²³² Thus, according to the Washington Supreme Court, the formula finds that the choosing of the victim is part of the actus reus of the offence, rather than part of the mens rea. Rosenberg, referring to a similar finding in *State v Stalder*²³³ observes that in that case, the court ‘stripped the motive element from the statute by determining the existence of prejudice by reference to the defendant’s intended consequences.’²³⁴ However, Lawrence is of the opinion that the ‘because of’ formula which does not require maliciousness is ‘at least not inconsistent’ with the racial animus model, as they ‘permit a court to interpret the mental-state requirement that an offender has acted *because of* the race of the victim as a requirement of racial animus.’²³⁵

While the discriminatory selection model is in some ways persuasive, as being more in tune law than the two models already discussed with the traditional requirements of the criminal, and its concern with mens rea rather than motive, Lawrence gives two examples which show the overarching nature of the model.²³⁶ First, the ‘Purse Snatcher’, who only grabs handbags from women, as he believes that it is easier to do this than to pick the pocket of a man. The second, the ‘Violent Show-Off’, targets his victim not because he has any issues with them (and is indeed indifferent to them) but rather because to target a minority group will impress his friends. Both these perpetrators would be guilty under the discriminatory selection model, but

²³⁰ 122 Wn.2d 192.

²³¹ *ibid* 201. As cited in Frederick Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999) 37.

²³² Frederick Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999) 37.

²³³ 630 So 2d 1072 (Fla 1994).

²³⁴ Michael T Rosenberg, ‘The Continued Relevance of the Irrelevance-of-Motive Maxim’ (2008) 57 Duke Law Journal 1143, 1175. In the case, the Supreme Court of Florida interpreted the bias crime statute narrowly, defining a ‘bias motivated crime’ as ‘any crime wherein the perpetrator intentionally selects the victim *because of* the victim’s race, color, ethnicity, religion, or national origin.’ As quoted, *ibid*.

²³⁵ Frederick Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999) 37.

²³⁶ *ibid* 73-74.

not under the racial animus model. The Purse Snatcher, at least, Lawrence argues, is no more culpable than an ordinary thief, thus leading him to the conclusion that the discriminatory selection model is flawed.²³⁷ The Violent Show-Off, he argues, is different: '[a]lthough the racially discriminatory dimension of the Violent Show-Off's act is unconnected to the *purpose* of his conduct, he does act with *knowledge* of his friend's prejudice.'²³⁸

Ultimately, Lawrence argues that the racial animus model of bias crimes 'more appropriately defines a bias crime' than the discriminatory selection model.²³⁹ That said, he does agree that there is a place for the discriminatory selection model:

'Many cases of discriminatory victim selection are in fact also cases of racial animus ... This demonstrates the continued significance of discriminatory selection in a bias crime regime that embraces the racial animus model. Discriminatory selection may often act as persuasive evidence for racial animus that may not be proven by any other means ... If discriminatory selection of the group can be shown, animus can often be inferred.'²⁴⁰

However, he goes on to argue that, while discriminatory selection can be evidence of racial animus, if there is in fact no animus apparent in the case, discriminatory selection 'ought not be used as a surrogate for racial animus and should not be punished.'²⁴¹

Walters et al argue that the discriminatory selection model should be adopted in England and Wales in order to bridge the 'justice gap' that exists. This approach, Walters et al argue, is both broader and narrower than the current legal framework in operation in that jurisdiction:

²³⁷ *ibid.* Lawrence argues that because the Purse Snatcher does not act with any animus towards his victim's group, and 'the culpability of the violent misogynist is directly related to the factors that make bias crimes more serious than parallel crimes, whereas the culpability of the Purse Snatcher does not implicate those factors.' *ibid* 75.

²³⁸ *ibid* 75. Emphasis in original.

²³⁹ *ibid* 79.

²⁴⁰ *ibid* 79.

²⁴¹ *ibid.* He goes on to argue that discriminatory victim selection could, in and of itself, be a 'lower grade' of bias crime rather than true cases of racial animus.

‘Group selection models are broader because they may capture cases where no outward manifestation of prejudice or bias is demonstrated by the offender. In other words, the provisions may include incidents where no hatred or hostility is verbally expressed during the commission of the offence. However, they are also narrower than the current “demonstration of hostility” provisions because the prosecution needs to prove the reason underlying the offender’s behaviour, in this case, that the offence was committed because of the victim’s identity.’²⁴²

The purpose of the proposed reform, they argue, is to address in particular the issue of disability hate crime, though they do note that it would also address other forms of targeted violence. They state:

‘Despite a myriad of criminal justice inquiries, CPS guidance, research reports, and the lobbying efforts by disability groups, it is clear that judges and many enforcement agencies refuse to comprehend discriminatory selection of disabled victims as evidence of hostility. It is likely that this is due to the word “hostility” itself. Scholarly discussions that aim to illustrate how targeting perceived vulnerability can also amount to a form of identity-based hostility, are unlikely to be applied in practice.’

The basic question to be asked under the proposed formulation is, “but for’ the victim’s protected characteristic, would the offence have been committed?” I would argue, however, that without an external manifestation of the alleged prejudice, the proposed reform would almost seem to presumptively apply in all offences involving a crime against a member of a minoritised community – or at least crimes against those individuals perceived by the investigators, prosecutors, judges and jury to be ‘vulnerable’, where the trier of fact engages in a speculative exercise when determining the reason the offender committed the act. If this approach is adopted, it would, I would argue, widen the net even further than it currently stands – acting, as Lawrence cautions against, as a ‘surrogate’ for evidence of animus, which further

²⁴² *ibid*, 202.

raises the question already raised as to the correct and appropriate labelling of offenders.

This proposal was considered in the Bracadale Report, which argues that by defining hate crime as including crimes committed against an individual because of their vulnerability, the concept of hate crime is diluted, and it loses its 'symbolic power'.²⁴³ Lord Bracadale also observes that it is difficult to differentiate between those cases in which the offender targets the individual because of their perceived vulnerability, and those cases in which the vulnerability is associated with the reason that the crime succeeds. His third argument is, to my mind, the most cogent one:

'There is also the danger that this approach could have practical difficulties and raise false expectations. It would be difficult for prosecutors to prove an intention to select a victim on grounds of an identity characteristic and the number of cases caught might be significantly less than hoped for.'²⁴⁴

I would argue that, rather than address the issue by adopting a new test which is unworkable in practice, the issues which are quite rightly observed by Walters et al would more properly be addressed by expanding the definition of 'hate' beyond the traditional 'bias, hostility or prejudice' to include reference to 'contempt'. I am not persuaded by Lord Bracadale's assertion that the inclusion of crimes which seek to capitalise on the vulnerability of a particular group (in particular disabled people) in the category of hate crime dilutes the concept: rather, I believe that such crimes should be considered hate crime as the offender clearly sees the victim as 'other', and there is a dehumanising aspect to their behaviour. However, rather than address this in the manner proposed by Walters et al, I would suggest that rather than limiting the definition, as the legislation in question does, to 'hate and hostility', including a wider range of attitudes, such as prejudice is preferable. By including 'contempt' to address disability hate crime, the problems identified by Walters et al

²⁴³ Alastair P Campbell (Lord Bracadale), *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Scottish Government 2018) 20.

²⁴⁴ Ibid 20.

might more easily addressed, without widening the net of criminality for all offenders to address this particular type of offending.

Conclusion

The question as to which model should be utilised to address hate crime is a core consideration in framing legislation. The question remains, should the statutory provision be limited only to those individuals whose behaviour can be clearly observed as being motivated by hatred, or should it be so broad as to include those individuals who commit a crime using language they consider descriptive but which is in fact objectively offensive. Ultimately, as Burney asks, it is difficult to see how far the criminal law should go in exerting a 'corrective influence on dissonant social relations.'²⁴⁵ This question is core to determining the legislative approach to be taken, and is considered further in chapter 7 of this thesis.

²⁴⁵ Elizabeth Burney, 'Using the Law on Racially Aggravated Offences' 2003 Criminal Law Review 28.

Chapter 6 – Protecting from Hate: Victim Characteristics and Identity Groups¹

Introduction

The final question to be addressed in the context of developing hate crime legislation in an Irish context is the breadth of protection it offers to minoritised communities. Legislatures worldwide experience the same problem in drafting or amending hate crime statutes: whether it is possible to discriminate between victim groups in legislation which seeks to protect them; and which groups are worthy of legislative protection.

Victims, the criminal justice process and hate crime legislation

Traditionally, the only role for the victim in the criminal justice process was as a witness for the prosecution. However, the discipline of victimology has developed prominence in recent years, and as a result of calls for change in the role of the victim, many accommodations have been made for victims in the process.² Indeed, the Criminal Justice (Victims of Crime) Act 2017 has dramatically changed the way in which the criminal justice process sees victims, and enhances the rights of victims, from the point of reporting their experience as a victim of crime throughout the process, up to and including the sentencing stage.

However, in developing legislation, and when considering the role of victims in the context of hate crime, the perspective is a little different. Rather than considering the role of victims in the criminal justice process as a whole, we are instead considering a more contentious issue: the ranking of victims in a legislative context. As Chakraborti and Garland note:

‘The increased standing for victims clearly has implications for the development of hate crime, for it is within this context that we have begun to

¹ Elements of this chapter have already been published in Jennifer Schweppe, ‘Defining Characteristics and Politicising Victims: A Legal Perspective’ (2012) 10 *Journal of Hate Studies* 173.

² Vicky Conway, Yvonne Daly and Jennifer Schweppe, *Irish Criminal Justice: Theory, Process and Procedure* (Clarus Press 2010) 221. See also, Shane Kilcommins, Susan Leahy, Kathleen Moore Walsh, and Eimear Spain, *The Victim in the Irish Criminal Process* (Manchester University Press 2018); Valerie Jenness, ‘From Symbolic Law to Criminal Justice Practice: Hate Crime Policy, Policing and Prosecution’ in Michael Tonry, *Handbook on Crime and Public Policy* (Oxford University Press 2009).

appreciate the differential impact of certain forms of crime upon particular groups of victim. Indeed, this would appear to be one of the key underlying premises of hate crime: that crimes motivated by hatred or prejudice against certain groups of people deserve particular attention.’³

In terms of the victims’ movement, hate crime could be considered the ultimate victim-led offence. While generally speaking, crimes are ranked in severity by assessing the objective severity of the offence (assault, assault causing harm, assault causing serious harm⁴), hate crimes are treated differently due to the motivation of the offender, the subjective experience of the victim, and/or the impact the crime has on the community with which the victim identifies. Hate crime legislation requires the explicit naming of groups which the state deems worthy of protection: and by necessity, the exclusion of groups which are not so worthy. Perry and Dyck observe that legislation such as this which omits to name groups requiring protection ‘raises questions about the particular group’s legitimacy and place in society; in some cases they explicitly define their “outsider” status’.⁵

Who are victims of hate crime?

Perry defines hate crimes from a criminological perspective in this way:

‘Hate crime ... involves acts of violence and intimidation, usually directed toward already stigmatized and marginalized groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterize a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the “appropriate” subordinate identity of the victim’s group. It is a means of marking both the Self and the Other in such a way as to reestablish their “proper” relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.’⁶

³ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage Publications 2009) 14.

⁴ Sections 2-4 Non Fatal Offences Against the Person Act 1997.

⁵ Barbara Perry and Ryan Dyck, “I Don’t Know Where it is Safe”: Trans Women’s Experiences of Violence’ (2014) 21(4) *Critical Criminology* 49.

⁶ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) 10.

More concisely, she encapsulates her definition later as, 'violence motivated by negative interpretations of difference and the demonization of the Other.'⁷ What is very useful about this definition, as Chakraborti and Garland observe, is the recognition that hate crime is not a static problem, but is 'historically and culturally contingent, the experience of which needs to be seen as a dynamic social process involving context, structure and agency.'⁸ For the purposes of enacting legislation, however, the concept of 'Othering' is too vague to withstand judicial scrutiny. Nonetheless, the definition is useful for legal purposes, including as it does the key elements of any hate crime: violence, or some form of criminal conduct; against a victim; who was targeted due to his or her affiliation to a stigmatised and marginalised group.

From a legal perspective, Lawrence sought to determine which status characteristics should be included in hate crime statutes and which should not. He proposed a two stage process: first, to determine the characteristics which are appropriate for consideration; and second, how the legislature should, or could, distinguish between these groups for the purposes of enacting hate crime legislation.⁹ The first question asks whether the members of the group self-identify as such members. Lawrence admits that this first stage will identify a great many numbers of groups, some of which have no place in a bias crimes statute. He argues, however, that this stage, 'where we seek characteristics that yield self-regarding groups, we should be expansive.'¹⁰

The second stage, then, requires the legislature to determine which of these self-identifying groups should be included in the bias crimes statute. These, he states, 'are the characteristics that implicate social fissure lines, divisions that run deep in the social history of a culture.'¹¹ In the context of the United States, for example, he highlights race and racial discrimination: 'the greatest American dilemma has its

⁷ *ibid* 11.

⁸ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage, 2009) 6.

⁹ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 12.

¹⁰ *ibid*.

¹¹ *ibid*.

roots in slavery, the greatest American tragedy.’¹² He further observes that ‘race, color, ethnicity, religion and national origin’ are all examples of such national social fissure lines.¹³ Having established those national fissure lines, then, he goes on to note that particular jurisdictions may include characteristics particular to its social and historical context. While this approach has merits, it lacks a normative basis, and allows legislators to effectively discriminate, for valid or less meritorious reasons, between victim groups. It also potentially means that legislators would generally be reactive in their approach to hate crime legislation.

The ‘breadth of the protected classes’

Hate crimes differ from ‘ordinary crimes’ in a number of ways, but perhaps one of the most compelling differences, from a victim’s perspective, is that they were chosen as a victim, not because of who they are, but rather because of their membership of, or perceived membership of, a particular group. As Perry notes, for the perpetrator of such violence, the specific victim is immaterial, and the victims interchangeable.¹⁴ Blake observes that central to bias crimes is the ‘fungible’ or interchangeable of the victim.¹⁵ This de-individualisation of the victim plays a central role in bias crimes. That said, the group from which the individual is from, or is perceived to be from, is deliberately chosen because of the ‘hatred’ of that group. Bowling and Phillips remark that this targeting, rather than being picked at random from the population as a whole, creates feelings of hostility and tension, which make both the victim and the community feel vulnerable to future attacks.¹⁶

Determining which victim groups should be protected by legislation, however, is a highly problematic process. Grattet and Jenness observe that including a group within the legislation serves to demarcate the ‘enhanced vulnerabilities’ of some

¹² *ibid.*

¹³ *ibid.*

¹⁴ Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge 2001) 10.

¹⁵ Michael Blake, ‘Geeks and Monsters: bias crimes and social identity’ (2001) 20(2) *Law and Philosophy* 121. He notes, ‘A hate crime committed against a gay man ... is a crime committed not in virtue of any particular aspect of the victim in question, but simply in virtue of his sexuality; for the purposes of the biased criminal, one gay man is as suitable as another ... [He] is attacked not because of *who* [he] is, but because of *what* [he] is.’ At 123-124.

¹⁶ Benjamin Bowling and Coretta Phillips, *Race, Crime and Justice* (Pearson Education 2002) 121.

people, and inscribe victim statuses to some minority groups and not others.¹⁷ Further, as Perry notes, the definition is relative, and historically and culturally contingent – what, she says, is a hate crime today could be ‘standard operating procedure’ in another time or place.¹⁸

Chakraborti further notes that limiting the application of hate crime legislation to certain groups and not others ‘is a process fraught with danger, as this requires difficult judgements to be made regarding who should be deserving of “special protection”.’¹⁹ Jacobs and Potter note that while offenders probably have conscious or unconscious prejudices against people who are, for example, rich, poor, successful or drug addicts, these prejudices would not turn an ordinary crime into a hate crime.²⁰ ‘By contrast’, they note, ‘racial, religious, and gender prejudices are widely and vigorously condemned.’²¹ By choosing those crimes which are more widely condemned, then we as a society are making a judgment on which victims deserve more protection, or which ground of discrimination is more heinous. It is this process, preferring one ground of discrimination over another, which is the problem faced by legislatures.

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 than those included in any one statute. Those listed victim characteristics common to most jurisdictions include race, ethnicity, sexual orientation and disability. Perry describes the ‘breadth of the protected classes’, which are culturally and socially dependent.²² A list of protected classes across a wide range of hate crime legislation in the United States includes:

- Age

¹⁷ Ryken Grattet and Valerie Jenness, ‘Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference”’ in Barbara Perry (ed) *Hate and Bias Crime: A Reader* (Routledge 2003) 284.

¹⁸ Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge 2001).

¹⁹ Neil Chakraborti, ‘Crimes Against the “Other”: Conceptual, Operational, and Empirical Challenges for Hate Studies’ (2010) 8 *Journal of Hate Studies* 9.

²⁰ James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998).

²¹ *ibid.*

²² Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge 2001) 7-8.

- 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
- Social status

Grattett and Jenness observe that there have been two ‘tiers’ of categories of hate crime in the United States. The first (or core) tier, they note, in 1988 ‘represented a legal response to the most visible, recognizable, and stereotypical kinds of discriminatory behaviour’, including crimes against individuals on the basis of their race, religion, colour and national origin. The so-called ‘second tier’ of hate categories, emerging in the late 1990s, included sexual orientation, gender and disabilities. They explain the movements:

‘The respective unfolding of these clusters of statuses—the core and the second tier—reflects the history of various post-1960s civil rights movements in the United States. Race, religion, color, and national origin reflect the early legal contestation of minorities’ status and rights ... Because the gay and lesbian movement, the women’s movement, and the disability movement reflect a ‘second wave’ of civil rights activism and ‘identity politics’, sexual orientation, gender and disability, respectively, have only

recently been recognised by policy-makers responsible for the formulation of hate crime law as legitimate axes around which hate crime occurs.’²³

The range of potential protected classes is thus very broad, from the traditionally protected groups (race, colour, national origin), developing into Grattett and Jenness’ second wave, with the capability of a third wave of potential protected groups emerging today. The question is whether we can distinguish normatively between potential victim groups to determine which are deserving of legislative protection through hate crime legislation.

Determining victim classes in hate crime legislation is an essentially political process – controversially, Jacobs and Potter go so far as to say that the primary purpose of hate crime laws is to ‘bolster the morale and strategic position of certain identity groups.’²⁴ Thus, the problem is not simply one of categorisation of victims, but is exacerbated by the politics of this categorisation. However, there is much more to this issue than simply politics. By singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection—legal protection which has an enormous impact on the offender during the sentencing stage. When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind.

Critics of hate crime legislation argue that once a single group is protected under the statute, there is no end to the number of groups who will seek protection in this way.

²³ Ryken Grattett and Valerie Jenness, ‘Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference”’ in Phyllis B Gerstenfeld and Diana R Grant (eds), *Crimes of Hate: Selected Readings* (Sage Publications 2004) 277-278.

²⁴ James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998) 73. It would also appear that, certainly in those jurisdictions with limited victim categories, those included are not necessarily done so on the basis of any policy reasons but rather on the basis political judgment and lobbying. In Northern Ireland, for example, MENCAP lobbied for the inclusion of the disabled community in the 2004 Order. Most ironically from a policy perspective, in Ireland 1989 when it was illegal to engage in consensual homosexual acts, sexual orientation was included in the categories of victims in the Prohibition of Incitement to Hatred Act. Similarly, the travelling community was so included despite the refusal of the Irish government to recognise the community as a separate ethnic group.

As Dickey notes, referring to the growth in hate crime legislation in the United States:

‘As the laws raced through the legislatures around the country, there were few voices of dissent. In the lexicon of magic political words, being against hate is abracadabra. Can you imagine a candidate trying to defend against a 30-second commercial accusing him or her of being “soft on hate”?’²⁵

Hall observes that the mere process of creating categories of protected groups is problematic. The exclusion, he states, of any one group gives the message that their victimisation is of less importance than any single group included; while including every single possible group renders the legislation meaningless.²⁶ Jacobs and Potter observe that hate crime laws are enormously appealing to politicians:

‘[E]xcept for the inclusion of sexual orientation, politicians faced a no lose proposition. By supporting hate crime legislation, they could please the advocacy group without antagonizing any lobbyists on the other side (there were none) and without making hard budgetary choices. The hate crime laws provided an opportunity to denounce two evils—crime and bigotry—without offending any constituencies or spending any money.’²⁷

There are two ancillary problems here: first, as identified by Garland, groups which are socially marginalised and stigmatised often lack recourse to political power.²⁸ Without this access, they will be further marginalised in any legislative measure introduced to combat hate crime. Secondly, whilst oftentimes legislators will be happy to expand the ambit of hate crime legislation for political purposes, they can also limit its extent for the same purposes. This occurred a number of times in the United States, where politicians argued against the inclusion of sexual orientation as

²⁵ Fred Dickey, ‘The Definition of Hate Crimes Should Not Be Expanded’ in Roman Espejo (ed) *What is a Hate Crime* (Greenhaven, 2002) 44.

²⁶ Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013).

²⁷ James B Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998) 67.

²⁸ Jon Garland, ‘Difficulties in defining hate crime victimization’ (2011) 18(1) *International Review of Victimology* 25.

a protected category in hate crime legislation.²⁹ Excluding groups for political purposes can have the effect of further marginalising the individuals and reinforcing public prejudices against the group. The question then, is, how to draw a legislative line between groups which are protected and those which are not.

Determining protected characteristics

In determining which victim groups are worthy of protection, oftentimes, legislatures will seek to establish which characteristics are so fundamental as to be 'immutable' and thus requiring protection. In seeking to determine the 'moral fault lines' in hate crime – that is, where we draw the lines between protected and unprotected identities – Blake³⁰ first refers to the United States Federal Violent Crime Control and Law Enforcement Act.³¹ The Act identifies the following as deserving protection: race, colour, religion, national origin, ethnicity, gender and sexual orientation. These, he argues are significant because they 'represent aspects of the person which are either immutable or, at the very least, exceptionally difficult or costly to change.'³² These, he argues, reflect to some degree, those classifications in 'constitutional law'.³³ However, O'Keefe argues that 'immutability' is not the sole factor in determining protected groups in hate crime legislation – religious belief, marital status and political affiliation, which are all protected to some degree in legislation are, as she quite rightly argues, mutable. Lawrence examines both gender and sexual orientation as characteristics which are often considered by State legislatures in the context of hate crime. His discussion on the latter is interesting: he notes that the argument for excluding sexual orientation 'has been couched in terms of whether homosexuality is an immutable characteristic the way race, color, ethnicity, or national origin are.'³⁴ He finds this argument to be flawed in a number of ways, not least because:

²⁹ See, Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 19.

³⁰ Michael Blake, 'Geeks and Monsters: bias crimes and social identity' (2001) 20(2) *Law and Philosophy* 121, 124.

³¹ Violent Crime Control and Law Enforcement Act of 1994, 42 USC §13701.

³² Michael Blake, 'Geeks and Monsters: bias crimes and social identity' (2001) 20(2) *Law and Philosophy* 121, 125.

³³ *ibid.*

³⁴ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999) 18.

‘The problem is that this same argument could be made with respect to religion, one of the classic bias crimes characteristics ... The reason that religion ... is protected by virtually all bias crimes statutes is that we deem it unreasonable to suggest that a Jew or Catholic might just choose to avoid discrimination by giving up her religion.’³⁵

Thus, while immutability of characteristic seems to be one way of determining the characteristics which ought to be included in bias crimes statutes, as it would be quite impolitic for a legislature to suggest that religion is mutable it will not be used as a solution for determining victim characteristics for bias crimes statutes. To suggest that a person’s sexual orientation is mutable is simply factually incorrect.

Black takes a broader perspective. Rather than being persons who are merely linked by ‘some personal attribute’, social groups instead ‘offer their members means by which they might understand their place in the social world.’³⁶ These groups are then in this way differentiated from ‘mere aggregates’.³⁷ However, when he explores this ‘self-identification’ aspect in more detail by reference to two social groups – ‘geeks’ and homeless people, he observes that this definition is no longer feasible. Because these individuals are identified as members of the group from the outside, they will be targeted as such, regardless as to whether they in fact identify with the group, or even want to be associated with it. He argues:

‘Reducing someone to a single aspect, making them a fungible victim in virtue of one characteristic, would seem as morally problematic when the victim does not identify with that characteristic as when the victim uses that characteristic as the foundation of how they see their place in the world.’³⁸

These remarks are particularly applicable in the context of the ‘disabled community’: while an individual may be labelled as ‘disabled’ for the purposes of the

³⁵ *ibid* 19.

³⁶ Michael Blake, ‘Geeks and Monsters: bias crimes and social identity’ (2001) 20(2) *Law and Philosophy* 121, 125.

³⁷ *ibid*.

³⁸ *ibid*, 134.

legislation, they may not in fact view themselves in this way. Blake rejects the narrow conception, preferring instead to favour a wider categorisation of hate crime. This approach, he argues, would include attacks based on the perception of social difference and vulnerability more generally³⁹ and acts of violence based on stereotyping and hierarchy whether from within or outside a group.⁴⁰ This, he argues, would not require the victim to identify with the group in order for the crime to be considered as one which reflects and perpetuates bias.⁴¹

Others prefer to determine the ambit of hate crime laws to include only those who, historically, have been the victims of oppression – again, in the United States, it is argued, violence against gay people and the disabled, for example, is not a badge or incident of slavery.⁴² Whether the history of racism should be determinative, however, is questionable. As Jacobs and Potter argue, first, on this basis, anti-white prejudice would not be treated as a hate crime; and secondly, they ask why history of a condemnable motivation should be the basis for more punishment, while other criminal motivations, such as greed, lust or politics not be regarded as being politically based.⁴³ Godzisz observes that, in a Polish context, the understanding of hate crime is grounded in the genocide of ethnic minorities on Polish lands in the 20th century, during the Holocaust and anti-Jewish programs after the war.⁴⁴ Thus, he explains, the hate crime provisions which exist in the penal code are based in the ‘Never Again’ movement, and explain the reluctance of the state to expand the protection to other categories – though in Poland, politicians seem to ignore the inclusion of the disabled and members of the LGBTQI communities in the Holocaust.

³⁹ This, he suggests, would include groups to which the victim does not identify, such as the homeless, and groups whose only identifier is social oppression.

⁴⁰ This, he suggests, would include, for example, African-American students who seek scholastic achievement and are subject to attack on the basis that they are ‘acting white’.

⁴¹ Michael Blake, ‘Geeks and Monsters: bias crimes and social identity’ (2001) 20(2) *Law and Philosophy* 121, 137.

⁴² *ibid.*

⁴³ James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998) 80.

⁴⁴ Piotr Godzisz, ‘Racing Race: Should Sexual Orientation Be Protected by Hate Crime Laws? Lessons from Poland’ (2015) 1 *Think Pieces: A Journal of the Joint Faculty Institute of Graduate Studies*, University College London ‘UCLfacesRACEISM: Past, Present, Future 10.

Chakraborti notes that another solution is to restrict the ambit of the protection to minority groups.⁴⁵ While he accepts that this solution as a whole has some merit, he argues that if we accept this position, it would mean that members of majority groups could not be protected under the legislation, no matter how persuasive the evidence that an attack was based on prejudice or hate.⁴⁶ Further, if we limit the protection afforded by the legislation to only those classes of traditionally marginalised groups, it could be argued, as Jacobs and Potter do, that it would be possible:

‘... to exclude from the definition of hate crime those crimes motivated by minority group members’ prejudice against whites on the ground that such prejudices are more justified or understandable, and the crimes less culpable, or less destructive to the body politic than crimes by whites against minorities.’⁴⁷

However, to do so, they argue, would be difficult to construct, and arguably violate the constitutional guarantee of equal protection.⁴⁸ Wolfe and Copeland refer to ‘groups of people who generally are not valued by the majority society, who suffer discrimination in other arenas, and who do not have full access to remedy social, political and economic injustice.’⁴⁹ This definition, however, fails to account for crimes motivated by hate against the majority population – and again, requires a politically subjective assessment as to the relative merits of individual social groupings. Mason and Dyer suggest that while hate crime legislation is *primarily* concerned with groups who have a history of oppression in society, what they refer to as ‘harmless groups’ which don’t have a history of oppression should be also

⁴⁵ Neil Chakraborti, ‘Crimes Against the “Other”: Conceptual, Operational, and Empirical Challenges for Hate Studies’ (2010) 8 *Journal of Hate Studies* 9.

⁴⁶ *ibid* 18.

⁴⁷ *ibid* 17.

⁴⁸ *ibid*.

⁴⁹ L Wolfe and L Copeland, ‘Violence against women as bias-motivated hate crime: defining the issues in the USA’ in M Davies (ed) *Women and Violence* (Zed Books, 1994) as quoted in Nathan Hall *Hate Crime* (2nd ed, Routledge 2013) 2.

included within the ambit of legislation.⁵⁰ Further, where a 'minority community' approach is taken, gender is precluded as a protected category.

Another approach to take is to address the issue by way of an evidence base. Chakraborti and Garland suggest that an approach which focuses on vulnerability and difference would allow for a broader protective approach. Acknowledging the limitations of a focus on vulnerability, they suggest that allowing it to be a determining factor highlights the 'heightened level of risk posed to certain groups or individuals that can arise through a complex interplay of different factors, including hate, prejudice, hostility, unfamiliarity, discomfort or simply opportunism or convenience.'⁵¹ This approach, from a theoretical perspective at least, is compelling. It allows for the gradual development of a framework which is adaptable to emerging, or newly recognised forms of 'othering', such as crimes against the homeless, the elderly, or alternative subcultures. However, as Mason observes, when applied in the context of the criminal law, it would result in child sex offenders being deserving of protection also, which she argues is an 'untenable' outcome.⁵² She suggests that the starting point for determining protection should be the lens of social inequality:

'a conceptualization of difference that is neither so wide as to be neutral (eg to include benign characteristics such as eye colour as a victim attribute) nor so narrow as to be restricted to pre-determined attributes with well-established histories of structural oppression (eg to minority group categories of identity).⁵³

⁵⁰ Gail Mason and Andrew Dyer, "A Negation of Australia's Fundamental Values": Sentencing Prejudice-Motivated Crime' (2013) 36 Melbourne University Law Review 871.

⁵¹ Neil Chakraborti and Jon Garland, 'Reconceptualising Hate Crime through the Lens of Vulnerability and Difference' (2012) 16 Theoretical Criminology 499, 506.

⁵² Gail Mason, 'Victim Attributes in Hate Crime Law' (2014) 54 British Journal of Criminology 161. See also, Gail Mason, 'The symbolic purpose of hate crime law: Ideal victims and emotion' (2014) 18(1) Theoretical Criminology 75.

⁵³ Gail Mason, 'Victim Attributes in Hate Crime Law' (2014) 54 British Journal of Criminology 161.

This approach, she suggests, is an ‘account of difference that has limits’, thus ensuring that child sex offenders are not brought within the protection of hate crime legislation.⁵⁴

Walters et al, recently suggest a five-pronged approach to determining protected categories which would address Mason’s concerns.⁵⁵ The first of these – which requires an evidence base – is, according to their test, definitive, and required before moving on to the second stage of consideration.⁵⁶ Taking an evidence-based approach to the issue, they suggest, requires the legislature to consider whether there is ‘sufficient evidence of “hate” (i.e. prejudice, bias, identity-based hostility).’⁵⁷ The criminal law, they state, ‘must not be forward-looking in preventing harms that we think might occur sometime in the future.’⁵⁸ While this approach is certainly instinctively attractive, there is no indication as to what level of evidence is required, nor whether there any jurisdictional or regional limitations on the use of such evidence. For example, in an Irish context, there is no systematically collected ‘evidence’ to suggest that disabled people are targeted because of their disability thus requiring their exclusion from legislation. While there have been studies done, as referenced above, by the Fundamental Rights Agency in relation to anti-LGBT and racist hate crime, in an Irish context the latter is limited only to those individuals who identified as being from a sub-Saharan background. If we were to accept that Ireland might draw on an evidence base from other countries – such as, for example, England and Wales, where there is evidence in relation to hate crime against sex workers/prostitutes, or members of alternative subcultures, we run the risk of being accused of not taking the cultural context of hate crime into account: indeed on this basis, members of the Traveller community would be excluded from legislation.

⁵⁴ *ibid.*

⁵⁵ Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

⁵⁶ The process suggested is, first, whether there is evidence of hate; second, that affects an identifiable group of individuals; third, which risks enhancing the levels of harm experienced by those individuals and others like them; fourth, that undermines societal commitments to the principles of equality, dignity and respect of others; and fifth, which requires re-criminalisation as a necessary means of aiding the prevention of the conduct. Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 210.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

While, as I suggested, adopting an ‘evidence base’ to the determination of protected categories is an instinctively attractive approach, it is one which I argue cannot be adopted – at least at the initial stages of developing legislation – creating as it does a vicious cycle whereby an absence of evidence results in the absence of legislative protection and further marginalisation. Indeed, even where legislation is established, requiring an evidence base means that those groups who are most marginalised and vulnerable in society are least likely to be in a position to either lobby for the collation of evidence or collect it themselves, resulting in the entrenchment of their exclusion.

Al-Hakim suggests that the determination of victim groups should be made by focusing on political conceptions of ‘disadvantage’: he suggests that this lens links already protected groups, and allows the introduction of new groups (specifically the homeless) without, as he argues, having to ‘incorporate the high-risk, potentially vulnerable, self-identified Richie Riches’ of society.’⁵⁹ He argues:

‘... under such an approach, hate crime legislation should not be understood as protecting identity groups qua identity group but rather in terms of the disadvantage such identification highlights. This fits better with the malleable nature of hate crime legislation and its continuous adaptive need to properly address and reflect the facts on the ground.’⁶⁰

A final approach is to take an already pre-determined list of characteristics, such as those which exist in anti-discrimination legislation, and apply it to hate crime legislation. This approach, as Schweppe argues, places human rights and civil liberties at the core of victim protection criteria.⁶¹ Bakalis suggests that utilising those characteristics already present in anti-discrimination legislation will provide a normative basis for hate crime legislation.⁶² Anti-discrimination legislation, as she

⁵⁹ Mohamad Al-Hakim, ‘Making a Home for the Homeless in Hate Crime Legislation’ (2015) 30(10) *Journal of Interpersonal Violence* 1755, 1772.

⁶⁰ *ibid* 1776.

⁶¹ Jennifer Schweppe, ‘Defining Characteristics and Politicising Victims: A Legal Perspective’ (2012) 10 *Journal of Hate Studies* 173.

⁶² Chara Bakalis, ‘The victims of hate crime and the principles of the criminal law’ (2017) *Legal Studies*.

argues, protects those groups which 'require the strong arm of the law to enable them to lead free and equal lives.'⁶³ Thus, those groups protected by equality legislation will not only be 'different', thus encompassing the Chakraborti and Garland framework, but also those that have been systematically oppressed, and at risk of unequal treatment without the added protection of the law. That said, she does not advocate a mindless adoption of equality protections to the criminal law in the context of hate crime legislation: rather, she proposes a further stage which assesses whether the group named requires the extra protection afforded by the criminal law, required, she observes, by the principle of minimum criminalisation. She proposes assessing each characteristic on the basis of an evidential need for protection. This will result, as she admits, in legislation with a relatively limited number of characteristics protected. She argues, however, that an open or inclusive approach is not attractive, and that her approach will not necessarily result in unequal protection to victims if the operational and expressive functions of hate crime legislation are decoupled.

Bakalis' approach is instinctively a good one: where legislation exists, the purpose of which is to address inequality, it is to that legislation that we should turn when determining the breadth of the protected classes in hate crime legislation. However, at least in an Irish context, equality legislation is relatively old: neither gender identity nor gender expression are explicitly named, despite the very obvious need for the explicit inclusion of trans people in hate crime laws.⁶⁴ Further, in the absence of meaningful data, it is difficult to determine an evidence base for such inclusion in an Irish context.

That said, from an international perspective, a number of sources could be cited to similarly inform the process of determining the range of victim groups protected. FRA recommends that hate crime legislation should reflect the range of protected

⁶³ *ibid*, 16.

⁶⁴ See, for example, Amanda Haynes and Jennifer Schweppe, 'LGB and T? The Specificity of Anti-Transgender Hate Crime' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017); Broden Giambrone, 'Transphobic Hate Crime: Making the Invisible Visible' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017); Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobic and Discrimination – Report 2014-2016* (TENI 2017).

groups identified in the Charter for Fundamental Rights, namely 'sex, 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, or sexual orientation.' The characteristics identified in the Treaty for the Functioning of the European Union, are, 'sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.' Those identified in the European Convention on Human Rights, under which there are obligations to address a hate element at the investigation stage, are 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' Thus, once again, the dated nature of international treaties leaves the question remaining as to how legislation should be developed. Further, once we move away from equality legislation to include one 'deserving' group, it is difficult to justify not including other targeted communities.

In its Preamble, the Victims' Directive provides that victims of crime should be treated in a 'respectful, sensitive and professional manner without discrimination' on a number of grounds, such as:

'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.'

This list, adapting and updating as it does those characteristics provided for in the Charter of Fundamental Rights, is particularly useful, highlighting as it does a range of characteristics which may impact on the manner in which an individual is treated by the criminal justice process, though not all are, naturally, appropriate for inclusion in hate crime legislation. Section 15(2)(e) of the Criminal Justice (Victims of Crime) Act 2017, in transposing the Directive includes the following protected characteristics:

‘... age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communications difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime...’

Regardless of the approach taken, on a practical level, Mason notes that, following decisions by governments to expand hate crime legislation to include, for example, sexual orientation and disability as protected groups, there have been calls for legislation to be ever more inclusive, and to protect victims who are ‘vulnerable to violence because of their perceived difference but are less obvious candidates for protection because they do not have a collective social identity, a history of human rights recognition or the backing of an influential advocacy group.’⁶⁵

One such group of victims was highlighted through the English case of Sophie Lancaster, a young woman who was murdered because she was a member of an alternative subgroup, the so-called ‘goth’ community. Garland refers to her murder, who the trial judge believed was targeted ‘solely because their appearance was different’ and labelled the murder a hate crime.⁶⁶ 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.⁶⁷ Garland notes that the trial judge stated, ‘This was a hate crime against these completely harmless people targeted because their appearance was different to yours.’⁶⁸ As to the social identity, or defining characteristics of Goths, Garland notes that Goths have both created and sustained a distinctive and tight-knit subculture which ‘permeates almost every aspect of their daily lives and that stays with them for decades.’⁶⁹ He states:

⁶⁵ Gail Mason, ‘Victim Attributes in Hate Crime Law’ (2014) 54 British Journal of Criminology 161, 171.

⁶⁶ Jon Garland, ‘The Victimisation of Goths and the Boundaries of Hate Crime’ in Neil Chakrabarti (ed), *Hate Crime: Concepts, Policy, Future Directions* (Willan 2010) 41.

⁶⁷ *ibid.* 47.

⁶⁸ *ibid.* 46.

⁶⁹ *ibid.* 43-44.

‘Contemporary Goth activity therefore operates mostly autonomously from mainstream and other stylistic subcultures, reinforcing the significant sense of collective affiliation between Goths *and their distance from “conventional others”*.’⁷⁰

Further, he notes that due to their appearance, which makes them easily identifiable as ‘other’, they are an ‘outgroup’ prone to victimisation.⁷¹ In summary, Garland notes:

- Goths are members of a distinct social outgroup;
- Goths are repeatedly targeted as victims of abuse;⁷²
- The attack in question here was a stranger-crime;
- The crime had an impact on the social confidence of the victim’s community.⁷³

These four elements satisfy most tests of victimhood in the context of hate crime. While Garland accepts that there may be difficulties in how these issues are defined at law, he concludes:

‘To be targeted due to one’s difference, in whatever form this may take, and the fear this may cause, could well be the most important facet of these discussions. If this is the case, then some academic definitions of hate crime may need to be rethought.’⁷⁴

To incorporate ‘goths’ into legislation, three options are available. First, have all-encompassing legislation which lists all characteristics possible; second, allow triers of fact to determine if a hate crime was committed against an individual on the facts; or third, exclude certain characteristics on the basis of legislative expediency and

⁷⁰ *ibid* 44. (Emphasis added).

⁷¹ *ibid* 45.

⁷² Garland goes on to observe that the murder of Sophie Lancaster was part of a ‘distinctive nationwide pattern of victimisation of Goths’. Jon Garland, ‘The Victimisation of Goths and the Boundaries of Hate Crime’ in Neil Chakraborti (ed), *Hate Crime: Concepts, Policy, Future Directions* (Willan 2010) 47.

⁷³ *ibid* 47.

⁷⁴ *ibid* 54.

operational feasibility – essentially, an exclusionary means to an inclusive end. Prior to addressing this thorny question, the three jurisdictions under consideration will now be addressed. What is important to note is that in both England and Wales and Northern Ireland, there are differences in the way that police record hate crime, and how it is framed in legislation. This is an issue to which I will return.

England and Wales

In England and Wales, sections 29 to 32 of the Crime and Disorder Act 1998 define a number of offences as racially and religiously aggravated offences. For the purposes of the sections, section 28(4) provides that ‘racial group’ is defined as ‘a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins’. ‘Religious group’ means ‘a group of persons defined by reference to religious belief or lack of religious belief.’

The Criminal Justice Act 2003 provides under section 145 that where a court is considering the seriousness of an offence other than one provided for in sections 29 to 32 of the Crime and Disorder Act 1998, and the offence is racially or religiously aggravated, the court must treat that as an aggravating factor, and state in open court that the offence was so aggravated. A similar provision applies under section 146 where the aggravation is based on hatred or hostility towards the victim on the basis of their sexual orientation, disability, or transgender identity. There is no definition of sexual orientation in the legislation, and disability is defined as ‘any physical or mental impairment’. Transgender identity is defined as ‘being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.’ The latter two definitions here can be seen as quite restrictive and problematic in their definition, an issue which has been highlighted by the Law Commission.

Case law on this issue has addressed the interpretation of the term ‘race’ and ‘racial group’ in the legislation. The issue generally was summed up by the Lord Chief Justice in *R v Rogers*⁷⁵ where he stated:

⁷⁵ [2006] 1 WLR 962. The House of Lords decision in this case is discussed below.

‘The very width of the meaning of racial group for the purposes of section 28(4) gives rise to a danger that charges of aggravated offences may be brought where vulgar abuse has included racial epithets that did not, when all the relevant circumstances are considered, indicate hostility to the race in question.’⁷⁶

In *R v White*⁷⁷ the appellant was convicted of using racially aggravated, threatening, abusive or insulting words or behaviour contrary to section 4 of the Public Order Act 1998 and section 31 of the Crime and Disorder Act 1998. During the course of the interaction, the defendant accepted that he referred to the complainant as a ‘stupid African bitch.’⁷⁸ It was argued by Mr White that while the phrase was unpleasant, it did not involve an ‘imputation of membership of a “racial group”’ within the meaning of section 28.⁷⁹

In rejecting this argument, Pill LJ stated:

‘The word [‘African’] bears different meanings in different contexts and in different countries. What does emerge from the [cases] ... is ... that the court is not tied to the precise definition in any dictionary. The statutory language is intended to be given a broad, non-technical, meaning. Moreover words are to be construed as generally used in the jurisdiction of England and Wales. In our judgment, the word ‘African’ does describe a ‘racial group’ defined by reference to race. In ordinary speech, the word ‘African’ denotes a limited group of people regarded as of common stock and regarded as one of the major divisions of humankind having in common distinct physical features. It denotes a person characteristic of the blacks of Africa, to adopt a part of the definition in the dictionary.’⁸⁰

⁷⁶ *ibid* [24].

⁷⁷ [2001] 1 WLR 1352.

⁷⁸ *ibid* 1354.

⁷⁹ *ibid* 1355. Counsel argued that the term was ‘capable of covering individuals from Cairo to the Cape and does not describe a group of people of common descent or origin.’ *ibid*.

⁸⁰ *ibid* 1357. Interestingly, the Court went on to distinguish between the term ‘African’ which it thought did have a racial connotation, and the term, ‘South American’ which it found, in England and Wales at any rate, did not, due to the ‘range of physical characteristics in the populations of that

It was also argued by the appellant that as he self-identified as African, criminal liability could not arise under the section, as it was not intended to cover intra-racial hostility. This argument received very short shrift with the Court; Pill LJ stating, that while it would be unusual for such an event to occur, there was no basis in law ‘for holding that such hostility cannot in law be shown.’⁸¹

In the case of *DPP v M*⁸² the defendant was charged with racially aggravated criminal damage under section 30 of the Crime and Disorder Act 1998. After an argument with a chef in a kebab shop, the defendant went outside and damaged the glass at the front of the shop. During the course of the argument, and just prior to damaging the glass, the defendant ‘was swearing and saying things like “bastard”, “fuck” and “bloody foreigners”.’⁸³ In the trial court, the justices did not think that the term ‘foreigners’ constituted a racial group for the purposes of the 1998 Act. On appeal, Auld LJ gave judgment for the Court. He noted at the outset that the case involved demonstrated racial hostility, under section 28(1)(a) of the 1998 Act. On the first issue, he found that looking at the operation of section 28:

‘... in the context of racial hostility directed by someone in this country to someone whose, or whose family’s, origin is not in this country, it is inescapable that the word ‘foreigner’ may, depending on the context, qualify as demonstration within section 28(1)(a) of a ‘group of persons defined *by reference* to race ... or national origins’ within the definition in section 28(4), a minority, albeit now a substantial minority, in national terms in the population of the country.’⁸⁴

In the *Attorney General’s Reference (No 4 of 2004)*⁸⁵ the defendant was charged with racially aggravated assault, under section 29(1)(c) of the Crime and Disorder Act

continent, and the absence of prominence of any one group, is such that the use of the expression ‘South American’ does not bring to mind particular racial characteristics.’ *ibid* 1358.

⁸¹ *ibid* 1358.

⁸² *Director of Public Prosecutions v M* [2004] 1 WLR 2758.

⁸³ *ibid* 2759.

⁸⁴ *ibid* 2766.

⁸⁵ [2005] 1 WLR 2810.

1998. The defendant brought her child to see Dr N, who the court noted was of Asian origin. The defendant was unhappy with the assessment by Dr N of her child, and with any alternate options Dr N gave her in relation to diagnosing the problem. He suggested she find another doctor to which she replied, 'I can't find another doctor; all the good doctors are taken up by asylum seekers and I am left with an immigrant doctor.'⁸⁶ At the close of the trial proceedings, the Court found that the language used did not come within the ambit of section 28 of the 1998 Act. The Court stated, 'it does not seem to me that the fact that someone is non-British and an immigrant to this country, can possibly be said to make such a person a member of a racial group...'⁸⁷

Again, Auld LJ gave judgment for the Court. He began by referring to arguments made on behalf of the Attorney General who contended that the 'plain intention of [section 28(4)] was that it should have wide application.'⁸⁸ On this, counsel referred to statements made by the Secretary of State in the context of the Race Relations Act 1976. He also referred to a statement by the Home Secretary made at the report stage of the 1998 Act, as follows:

'We are determined that no perpetrator of racist attacks should escape conviction and punishment because of the perpetrator's ignorance about the victim's racial group ... Our amendments make it clear that, whatever racial group the perpetrator believes the victim to be from, an offence will be racially aggravated if racial hostility or motivation is proved ... The Bill does not protect some groups and not others; it protects everyone from racist crimes.'⁸⁹

Ultimately, it was argued that a narrow interpretation of the section in question would lead to an absurdity in the manner in which the Act operated, on the basis that some language—in this case, the term 'immigrant'—would fall outside the ambit of the Act, even though it was demonstrably hostile to the victim due to their

⁸⁶ *ibid* 2813.

⁸⁷ *ibid*.

⁸⁸ *ibid* 2814.

⁸⁹ As cited *ibid* 2814.

membership of a racial group. Auld LJ referred to both the *White* and *M* cases, and opined that, if anything, the broad term ‘foreigner’ referred to a broader racial group than ‘immigrant’ did in the context of racially aggravated offences.⁹⁰ He went on:

‘Whether [the defendant’s] use of the term ‘immigrant doctor’ towards Dr N was only an allegation of non-Britishness or was part of a demonstration by her of hostility to him within the terms of section 28(1)(a) of the 1998 Act because she perceived his non-Britishness to derive from his race and/or his colour and/or his nationality and/or his ethnic or national origins involved a question of fact for determination by the jury on the facts of the case.’⁹¹

The Court ultimately found, ‘the judge erred ... in ruling as he did that someone who is an immigrant to this country and, therefore, non-British cannot as such be a member of a racial group within section 28(4) of the 1998 Act.’⁹²

In *R v Rogers*⁹³ the appellant was riding a mobility scooter on his way home from a public house. He tried to get past three Spanish women, after which an altercation took place, and he then ‘pursued [the women] in an aggressive manner’ into a local kebab house where they had taken refuge.⁹⁴ The question in the case was whether the use by the appellant of the terms ‘bloody foreigners’ and telling them to ‘go back to their own country’ was capable of amounting to the demonstration of hostility based on their membership of a racial group under the 1998 Act. It was accepted that, had he referred to the three women as ‘bloody Spaniards’, ‘or any pejorative word associated with natives of the Iberian peninsula’, he would have been guilty.⁹⁵ It was argued, however, that for the purposes of the section, hostility must be demonstrated to members of a particular racial group, rather than to ‘foreigners’ as a whole – that ‘mere xenophobia ... does not fall within the ordinary person’s perception of hostility to a racial group’.⁹⁶ Hale LJ refuted this claim, stating that the

⁹⁰ *ibid* 2817.

⁹¹ *ibid*.

⁹² *ibid* 2818.

⁹³ [2007] 2 WLR 280.

⁹⁴ *ibid* 282-283.

⁹⁵ *ibid* 283.

⁹⁶ *ibid*.

definition of a racial group encompasses 'both nationality (including citizenship) and national origins.'⁹⁷ Disposing of the arguments of counsel, she stated:

'Whether the group is defined exclusively by reference to what its members are not or inclusively by reference to what they are, the criterion by which the group is defined—nationality or colour—is the same.'⁹⁸

It is interesting to note that in a number of these cases, the court referred to the interpretation of the Race Relations Act 1976 in the context of anti-discrimination laws. Hale LJ in *Rogers* stated that this is advantageous in that it 'helps to reduce argument about whether particular terms of abuse which are generally considered racist are or are not covered.'⁹⁹ Thus, by referring to 'bloody foreigners' the defendant was capable of being convicted under the legislation. Justifying the more flexible approach to statutory interpretation which she expounded, she referred to the purpose of the legislation:

'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 'other'. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions 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. This is just as true if the group is defined exclusively as it is if it is defined inclusively.'¹⁰⁰

Thus, a broad and inclusive approach is taken to the statutory interpretation of the Act in England and Wales: whether such an approach could be adopted in an Irish context is discussed below.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid.* The example she gives is: 'does 'Paki', for example, demonstrate hostility towards everyone who might hail from the Indian subcontinent or only towards citizens of Pakistan?' *ibid.*

¹⁰⁰ *ibid* 283-284.

Northern Ireland

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. The offence is aggravated by hostility if the hostility is based on membership of a racial group, a religious group, sexual orientation group or disability of the victim. Article 2(5) of the Order sets out the definitions:

‘disability’ means any physical or mental impairment;

‘religious group’ means a group of persons defined by reference to religious belief or lack of religious belief;

‘sexual orientation group’ means a group of persons defined by reference to sexual orientation.

Interestingly, the Order states that the definition of ‘racial group’ is to have the same meaning as that utilised in the Race Relations (Northern Ireland) Order 1997, anti-discrimination legislation. Racial group is defined in that legislation in Article 5(1) as ‘a group of persons defined by reference to colour, race, nationality or ethnic or national origins’. Article 5(3) of the Order explicitly states that the definition includes the Irish Traveller community, and excludes a group of persons defined by reference to religious belief or political opinion. In what could be seen as a ‘belt and braces’ approach, Article 3A further states that the phrase ‘race or ethnic or national origins’ includes origins within the Irish Traveller community.

Police recorded classes: expanding the legislative regime

While legislation in England and Wales is relatively limited in terms of the scope of protected classes, various police forces have expanded their working definitions of hate crime to allow for recording of hate crime and incidents across a broader range of characteristics. Often in response to a local event, hate crime and incidents such as these will be tracked by officers and treated as hate crime to the point of prosecution.

For example, following a spate of attacks which left six sex workers/prostitutes dead between 2000 and 2005, police in Liverpool implemented what is now known as the 'Merseyside model'.¹⁰¹ In 2006, Merseyside Police announced that all crimes against sex workers/prostitutes were to be treated as hate crimes. Ellison and Smith state that the decision, accompanied by the setting up of a special unit between the Merseyside Police and the Crown Prosecution Service, had 'staggering' results.¹⁰² Again, while there was no legislative statement regarding such crimes, Ellison and Smith observe that, because of the financial and human resources dedicated to the investigation and prosecution of hate offences, 'in 2010, the Merseyside Police had an 84 per cent conviction rate for those who committed violent acts towards sex workers and a 67 per cent conviction for rape.'¹⁰³

In April 2013, the Greater Manchester Police announced that it would be recording attacks on members of 'alternative subcultures' as hate crimes, following discussions with the Sophie Lancaster Foundation.¹⁰⁴ Similarly, the Nottingham Police started recording misogynistic hate crime in 2016. From April to December 2016, there were 79 reports of misogynistic hate crimes and incidents made to the police.¹⁰⁵ In that time, it handled 79 cases, 31 of which were categorised as hate crime.¹⁰⁶ These offences included harassment, kidnapping, possession of weapons and causing fear, alarm or distress.¹⁰⁷

In Northern Ireland, the legislation is more limited than that in operation in England and Wales, but again the police have adapted their recording policies to allow for a broader categorisation of hate crimes and hate incidents. Indeed, prior to the

¹⁰¹ Graham Ellison and Lucy Smith, 'Hate Crime Legislation and Violence Against Sex Workers: Lessons in Policy and Practice' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017).

¹⁰² *ibid* 197.

¹⁰³ *ibid* 197-198.

¹⁰⁴ Jon Garland and Paul Hodgkinson, "'F**king Freak! What the Hell Do You Think You Look Like?': Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime' (2014) 54(4) *British Journal of Criminology* 613.

¹⁰⁵ Nottinghamshire Police, 'Request under the Freedom of Information Act 2000' available at <https://www.nottinghamshire.police.uk/sites/default/files/documents/files/009280%20-%202016.pdf>

¹⁰⁶ *ibid*.

¹⁰⁷ Jean Mackenzie, 'Misogyny hate crime statistics revealed' *BBC News* (London, 19 September 2016) available at <http://www.bbc.com/news/uk-england-nottinghamshire-37405732>.

introduction of the 2004 Order, the police began to record racist hate incidents in 1996, and homophobic incidents in 2000.¹⁰⁸ The 2004 Order does not extend to gender identity or gender expression, but in 2006, the PSNI started recording transgender hate incidents in response to what Jarman describes as in response to ‘in part ... a small but growing number of complaints of transphobic behaviour and in part as an outcome of growing engagement with trans communities.’¹⁰⁹

Thus, while legislation itself may be limited, police services can in practice extend at least the operational definitions of hate crime to include otherwise unprotected characteristics. Instinctively, this approach seems progressive: it allows police forces to adapt definitions and allocate resources in response to local or regional manifestations of hostility. It also allows hate crime to be recognised across a broader categorisation of characteristics than legislation prescribes, thus being more responsive to victim needs, acknowledging their experiences as victims of hate crime. However, the disadvantages of police forces developing categories in the absence of legislative policy are highlighted by Mason et al who argue that it will either result in an overly narrow and prescriptive definition which will exclude “messy” cases that do not fit a legal category even though they may cause public outrage’, or an over-inclusive range of categories, which ‘give precedence to victim perceptions and can exaggerate the nature and extent of the problem as well as [creating] unrealistic expectations.’¹¹⁰

Canada and the ‘proviso’

In an effort to avoid the problem of an overly-restrictive set of legislative definitions, a number of jurisdictions have included a ‘proviso’ in legislation, which allows triers of fact to treat an offence as a hate crime where they believe the victim was targeted because of their membership of a group. In the OSCE Report *Challenges and Responses to Hate-Motivated Incidents in the OSCE Region*¹¹¹, it is noted that the

¹⁰⁸ Neil Jarman, ‘Acknowledgement, Recognition and Response: The Criminal Justice System and Hate Crime in Northern Ireland’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017).

¹⁰⁹ *ibid* 53.

¹¹⁰ Gail Mason, Jude McCulloch and Jane Maree Maher, ‘Policing hate crime: markers for negotiating common ground in policy implementation’ (2016) 26(6) *Policing and Society* 680, 687.

¹¹¹ OSCE/ODHIR, *Challenges and Responses to Hate-Motivated Incidents in the OSCE Region* (ODIHR 2006).

problems around defining the protected class in hate crime legislation is avoided, again by including 'other similar factor' after the traditional list of victims. In one sense, this argument has significant merit: legislation lists those characteristics deemed to be most worthy of protection, and allows the trier of fact to label a crime as hate motivated where it chooses to do so. The criminal law has proven itself capable of identifying core personal characteristics through the operation of the defence of provocation.¹¹² Traditionally, when the defence of provocation was argued, law in England and Wales required the 'reasonable man' (against whose temper the provoking remark will be tested) to be endowed with the characteristics of the accused that the jury thought 'would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.'¹¹³ Characteristics which were found to be relevant in this context include:

- Age
- Gender
- Race
- Ethnic Origin
- Sexual orientation
- Religious affiliation
- Physical infirmity
- Drug addiction
- Criminal record
- Paedophile tendencies
- Mental infirmity¹¹⁴

Thus, no matter how distasteful or socially unacceptable the 'personal characteristic', the jury would consider the provoking event from the perspective of an individual endowed with such characteristics.

¹¹² The defence of provocation was abolished by section 56 of the Coroners and Justice Act 2009 and replaced with the partial defence to murder of 'Loss of Control' in section 54 of the Act. However, the discussion on the development of the defence, and some of its criticisms are relevant in this context.

¹¹³ *DPP v Camplin* [1978] AC 705, 718. The Irish test for provocation is a purely subjective one: see, *DPP v MacEoin* [1978] IR 27; *DPP v Curran* [2011] IECCA 95.

¹¹⁴ See, Law Reform Commission, *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP27 2003); Law Reform Commission, *Report on the Defences in Criminal Law* (LRC 95 2009).

While in England and Wales and Northern Ireland, operational definitions of hate crime expand the scope of, at least, recorded hate crime beyond its legislative boundaries, in Canada, the legislation allows for other, unspecified, characteristics to be protected. Section 718.2(a)(i) of the Criminal Code provides that where there is evidence that an 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 gender identity or expression, *or on any other similar factor*, that this should be considered an aggravating factor in sentencing. This phrase, ‘any other similar factor’ – to which I will now refer as ‘the proviso’ has also been used in other hate crime legislation, such as section 9(1)(h) of the Sentencing Act 2002 in New Zealand, and section 21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999 in New South Wales.¹¹⁵

Roberts and Hastings speculated on how the ‘any other similar factor’ element should be interpreted, referring to the media example of a criminal attack on a physician who was engaged in performing abortions.¹¹⁶ They first determined the ‘common element’ in the enumerated characteristics in section 718.2(a)(i), and noted that as both ascribed and choice-based factors are included, ‘the only common element is that they relate to groups or communities rather than individuals.’¹¹⁷ Thus, they argued that the provisions in question apply where the attack is aimed at ‘an entire community’ rather than an individual: ‘it matters little whether the community is defined by occupation, belief or lifestyle.’¹¹⁸ This approach seems sensible, being sufficiently broad to incorporate a Sophie Lancaster-type attack, while simultaneously limiting the application of the section to only those crimes which would truly be considered ‘hate crimes’.

In the context of the application of section 718.2(a)(i) in the Courts, there have been very few cases concerning the meaning of ‘other similar factor’. Indeed, Lawrence

¹¹⁵ See generally, Gail Mason and Kirstin MacIntosh, ‘Hate Crime Sentencing Laws in New Zealand and Australia: Is There a Difference’ (2014) *New Zealand Law Review* 647.

¹¹⁶ Julian V Roberts and Andrew JA Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ [2001-2002] 27 *Queen’s Law Journal* 93.

¹¹⁷ *ibid* 123.

¹¹⁸ *ibid*. They ultimately argue that section 718.2(a)(1) should apply in the context of the attack against the doctor, as the attack was ‘directed at the group of physicians’ and thus carries ‘a threat to other individuals’. *ibid* 124.

and Verdun-Jones note that, with one exception, no ‘other similar factor’ has been recognised.¹¹⁹ The exception they mention is in one of two related cases, *R v JS*¹²⁰ and *R v Cran*¹²¹ where the Court considered whether section 718.2(a)(i) applied.¹²² In the first case, the Crown had stated that there was no way of establishing that the case constituted a ‘hate crime’ for the purposes of the section. Romilly J disagreed. He stated:

‘It strikes me that this section contemplates hatred against “peeping toms” and/or “voyeurs” as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but it is a sexual lifestyle all the same.’¹²³

On this reasoning, then, Romilly J believed that (deviant) sexual lifestyles were of a ‘similar’ nature to one’s (immutable) sexual orientation. However, he went on to state that, as a gay man was attacked in an area frequented by gay men (a fact which was known to the defendant), ‘I fail to see why it cannot be regarded as a “gay bashing”.’ This reasoning does not sit easily with the earlier statement: on this basis, the defendant knew (or ought to have known) that the victim was gay, and that the motivation for attacking him was his homosexual orientation, rather than the fact that he was a peeping tom.

In *Cran*, the Court was faced with exactly the same facts, and the question again was whether the defendant should be subject to the enhanced penalty provisions. Humphries J first observed that the Crown did not rely on or refer to section 718.2(a)(i) in either the instant case or either of the cases before the youth court.

¹¹⁹ 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.

¹²⁰ [2003] BCPC 442.

¹²¹ [2005] BCSC 171. See also, Sean Robertson, ‘Spaces of Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in *R v Cran*’ (2005) 50 *Criminal Law Quarterly* 482.

¹²² In one further case, *R v Cornakovic* [2004] OF No 4081; 67 WCB (2d) 340, the Court stated that an ‘abiding bias or prejudice against Judges’ was ‘closely allied to the aggravating factor identified in section 718.2(a)(i) of the *Criminal Code*.’ However, the Court did not elaborate on why it believed this to be the case, nor does it appear to have taken this prejudice into account in the actual sentencing of the defendant.

¹²³ [2003] BCPC 442, para [50].

She observed that there was no evidence before the Court that the motive for the attack was the sexual orientation of the victim. In fact, she stated that the motive for the attack seems to have been the defendant's desire to attack 'peeping toms'. Humphries J stated, 'there is ... no basis on the evidence before the court to equate 'peeping toms and voyeurs' to gay people in the mind of Ryan Cran in the absence of evidence and in the face of evidence to the contrary.'¹²⁴

Lawrence and Verdun-Jones note that, whilst Romilly J articulated 'an analogous ground' for the application of the legislation, Humphries J applied a 'strict construction' of the language used in the section, as she was unwilling to extend the protection in the legislation to a group 'in the absence of evidence linking the group targeted by the accused to one of the groups listed in the section itself.'¹²⁵ Neither of these approaches is particularly useful. To say that 'peeping toms' – ie, sexual predators – are an 'analogous group' to the gay community is both offensive and harmful to that latter community. However, to restrict the ambit of the legislation as narrowly as Humphries J did means that the section will have rather limited application.

Perhaps a more appropriate way for Humphries J to assess the question was, first, to ask if Cran attacked the victim because of his perceived membership of a group, regardless of whether that group had protected status or not. Second, then, the court should ask whether that group is deserving of inclusion in section 718.2(a)(i) – or to use Roberts and Hastings' approach, to determine if peeping toms constitute a community. However, determining if a group should be protected by asking if they are the same as, or even analogous to, a protected group (the 'equation' of peeping toms and gay people) is not, it is argued, an appropriate approach. Rather, once it is established that the individual was attacked due to some characteristic they share with an identifiable social group, the presumption should be that the case falls within the ambit of section 718.2(a)(i).

¹²⁴ Ibid para 10.

¹²⁵ 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, 37.

In what could be called the ‘sister’ provision to hate crime legislation, section 15 of the Canadian Charter of Rights and Freedoms provides for the guarantee of equality and ‘in particular’ prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The development of the ‘analogous grounds’ provision is useful in this context. In *Andrews v Law Society of British Columbia*¹²⁶ the Court noted that the enumerated grounds applied to ‘the most common and probably the most socially destructive and historically practised bases of discrimination’.¹²⁷ While of some utility, this test could be considered quite narrow. Unsurprisingly, the Supreme Court of Canada took a different approach to the test in *Miron v Trudel*.¹²⁸ Here, the Court rejected the ‘historical disadvantage’ test, and while recognising the utility of what the Court in *Andrews* said, McLachlin J stated:

‘[A]nalogous grounds cannot be confined to historically disadvantaged groups; if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. Nor is it essential that the analogous ground target a discrete and insular minority; this is belied by the inclusion of sex as a ground enumerated in s. 15(1). And while discriminatory group markers often involve immutable characteristics, they do not necessarily do so ... All these and more may be indicators of analogous grounds, but the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.’¹²⁹

Thus, rather than restricting the application of section 15 only to those groups which are determined to have been the subject of historical discrimination, the

¹²⁶ [1989] 1 SCR 143.

¹²⁷ In determining which ‘analogous’ grounds should be protected, the Court referred to the judgment of Huggessan JA in *Smith, Kline and French Laboratories v Canada (Attorney General)* [1987] 2 FC 359. Here, the Court stated that, in determining whether discrimination is based on analogous grounds, the question was whether the group was stereotyped, or the subject of historical disadvantage.

¹²⁸ [1995] 2 SCR 418.

¹²⁹ *Ibid* para [149].

development of ‘analogous grounds’ is quite open, and instead has at its heart the human rights and civil liberties of individuals.¹³⁰

In Australia, the ‘proviso’ is also used in section 21A(2)(h) of the New South Wales Crimes (Sentencing Procedure) Act 1999 and was considered in *Dunn v R*¹³¹. The section utilises the ‘such as’ proviso, and then lists ‘people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability.’ The sentencing court found as a matter of fact that a significant factor in the motivation of Dunn’s commission of the offences was his feelings towards the victim, whom he believed was a paedophile, and in so finding, applied the aggravating provision. On appeal, Dunn argued that the trial judge erred in applying the provision, *inter alia*, on the basis that his animus was not directed at any ‘particular group’. In rejecting the argument, the Court of Criminal Appeal interpreted the ‘such as’ proviso and the section as a whole broadly:

‘Applying s21A(2)(h) it is clear that the offences come fairly and squarely within it. The offence was motivated by a hatred or prejudice against [the victim] solely because the applicant believed him to be a member of a particular group, ie paedophiles. The examples given in parentheses are merely that, ie examples, they do not comprise an exhaustive list of the groups envisaged by the subsection.’¹³²

Thus, rather than applying the ‘reasoning by analogy’ which the Canadian court applied, the New South Wales legislation was developed by asking whether the victim belonged to a defined ‘social group’. This extension is not without its critics: Mason argues that the groups named in the legislation all have something in

¹³⁰ Analogous or non-enumerated grounds of discrimination have been found to exist in the context of citizenship, employment status, place of prosecution, litigants against the Crown, residency, membership in military, parental status, sexual orientation, marital status and immigrant status. See, Mary C Hurley, *Charter Equality Rights: Interpretation of section 15 in Supreme Court of Canada Decisions* (BP-402E, Library of Parliament 2007) 17-31.

¹³¹ [2007] NSWCCA 312

¹³² [2007] NSWCCA 312 para [32].

common: they have all been subjected to ‘unjustified prejudice and discrimination.’¹³³ In contrast, she argues, paedophiles:

‘... can be distinguished from groups conventionally protected under hate crime law on the basis that moral condemnation of their conduct is far from unjustified; their sexual conduct inflicts a clear and identifiable harm upon others...’¹³⁴

In defining victim groups in legislation, the use of a proviso, such as in Canada and New South Wales, is tempting, allowing as it does the courts to recognise hate crime for what it is in circumstances which were not envisaged by parliament. However, it is a long standing rule of statutory construction that criminal legislation must be clear, precise and certain. The next question, then, is how this principle might impact upon the development of lists of protected groups in hate crime legislation.

The requirement for certainty and Irish constitutional considerations

The principle of certainty is encapsulated in the latin principle, ‘nulla crimen sine lege certa.’ Stemming from the constitutional right to a fair trial in Irish law, it was discussed in *King v Attorney General*.¹³⁵ In this case, the court considered the Vagrancy Act 1824 and, considering the provision in the context of the right to a fair trial, along with the guarantee of equality and the personal rights afforded to citizens in the Constitution, Henchy J stated:

‘... the ingredients of the offence and the mode by which its commission may be proved are so *arbitrary, so vague, so difficult to rebut* ... so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so *prone to make a man’s lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge* ... so out of keeping with the basic concept

¹³³ Gail Mason, ‘Hate Crime Laws in Australia: Are They Achieving Their Goals?’ (2009) 33 Criminal Law Journal 326, 338. See also, David McDonald, ‘The Politics of Disgust: Paedophilia, Retributive Violence and the Im/Possibilities of Hate Crime’ (2013) Crime Justice and Social Democracy 123.

¹³⁴ Gail Mason, ‘Hate Crime Laws in Australia: Are They Achieving Their Goals?’ (2009) 33 Criminal Law Journal 326, 337.

¹³⁵ [1981] 1 IR 233

inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond a reasonable doubt that he has deviated from a *clearly prescribed standard of conduct...*

Two elements of this passage are particularly important in the context of hate crime legislation. First, the statutory provisions must be clear and precise. Second, prosecutorial discretion should not reach to the determination as to whether a particular act is lawful or unlawful: the legislative regime should be clear exactly what constitutes a criminal act and what does not. The court in *People (Director of Public Prosecutions) v Cagney*¹³⁶ stated the principle concisely:

‘From a legal and constitutional point of view, it is a fundamental value that a citizen should know, *or at least be able to find out*, with some considerable measure of certainty, what precisely is prohibited and what is lawful.’

Prendergast notes that the principle has its basis in the constitutional principles of non-retroactivity, equality, and due process, and observes, the principle maximises the right liberty, in that it ensures that ‘you can be confident that refraining from crossing the clearly marked and avoidable boundaries of criminality liability will leave you free of criminal punishment.’¹³⁷ The Law Reform Commission adds that the principle has further constitutional underpinnings in Article 25, Article 15.2.1, and Article 40.3.¹³⁸

In recent years, the courts have considered the constitutionality of both pre- and post- independence legislation, and have declared a number of statutory provisions unconstitutional.¹³⁹ It is my contention that the principle of certainty impacts on the

¹³⁶ [2008] 2 IR 111.

¹³⁷ David Prendergast, ‘The Constitutionality of Strict Liability in Criminal Law’ (2011) 33(1) Dublin University Law Journal 285, 312.

¹³⁸ Law Reform Commission, *Harmful Communications and Digital Safety* (LRC 116 – 2016).

¹³⁹ See, for example, *Dokie v Director of Public Prosecutions* [2011] 1 IR 805; *Douglas v Director of Public Prosecutions* [2013] IEHC 343; *McInerney v Director of Public Prosecutions* [2014] IEHC 181.

formation of hate crime legislation in the context of the protected classes in three key ways.¹⁴⁰ First, in the context of provisos generally; second, in the context of provisos and aggravated sentencing provision; and finally in the context of naming protected characteristics more generally. In this context, it is particularly important to consider Prendergast's words of caution:

'Some over-deterrence, resulting from vague definition, is not as problematic in some areas as it is in others. We should, for instance, be more concerned about the threat of criminal sanction overly deterring or chilling the expression of ideas and opinions than about inhibiting exuberant car-driving on public roads.'¹⁴¹

Given the place of free speech arguments and concerns in the context of hate crime legislation, it is arguable that precision and certainty is particularly relevant.

Certainty: provisos and reasoning by analogy

Aside from the concerns raised above regarding the operation of the proviso and the potential for it to be used to protect 'victim groups' which were not necessarily foreseen by the legislature, such as paedophiles, another issue arises in relation to the requirement for certainty and the inclusion of a proviso in this context. As we have seen, courts have taken two approaches to developing the protected classes through the proviso: either through reasoning by analogy, or by determining whether the victim belonged to a defined 'social group'. The court in *R v Goldstein; R v Rimmington*¹⁴² specifically spoke to the question of reasoning by analogy, and the extension of the criminal law. It stated:

'Article 7 precludes the punishment of acts not previously publishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence. The law may be clarified and adapted to new

For a discussion of *Douglas* see, David Prendergast, 'Douglas v DPP and the Constitutional Requirement for Certainty in Criminal Law' (2013) 50(2) Irish Jurist 235.

¹⁴⁰ The principle of certainty is relevant in the context of hate crime legislation generally in further contexts, discussed in chapter 7.

¹⁴¹ David Prendergast, 'Douglas v DPP and the Constitutional Requirement for Certainty in Criminal Law' (2013) 50(2) Irish Jurist 235.

¹⁴² [2005] UKHL 63.

circumstances which can reasonably be brought under the original concept of the offence. But any development must be consistent with the essence of the offence and be reasonably foreseeable, and *the criminal law must not be extensively construed to the detriment of the accused, for instance by analogy.*¹⁴³

It is thus argued that, regardless of the test to be applied in this context (ie, whether the court takes the approach of reasoning by analogy, or determining whether the victim belonged to a social group), legislating in this format would not pass constitutional muster in an Irish context – and arguably, may be legally suspect for these reasons in jurisdictions in which it operates. It could, of course, be argued, that an approach which reasons by analogy that to extend, for example, the ground of sexual orientation in order to protect trans people would be ‘reasonably foreseeable’ as per the test in *Rimmington*, given the ubiquitous association of ‘T’ with ‘L, G, and B’. However, defendants would, I believe, have a cogent argument to make that even this extension is an ‘extensive’ construction of the criminal law which would operate to the detriment of the accused, particularly given Prendergast’s caution in the context of the principle of legality in the context of free speech. Further, whilst the ‘T’ is typically associated with ‘LG and B’, gender identity and sexual orientation are two very different things. Thus, in terms of an Irish legislative approach, a ‘proviso’ is not appropriate.

Certainty: sentencing provisions

In the case of *People (Director of Public Prosecutions) v Geraghty*¹⁴⁴ the Court was clear that in the same way that the principle of certainty applies in the context of the construction of a criminal offence, it applies equally in the context of sentencing principles:

‘The principle of legality is at the heart of the criminal justice system. This implies that a citizen is entitled to order his or her affairs based on a system of clear rules and penalties which prescribe criminal conduct and the penalties which apply thereto.’

¹⁴³ Ibid para [35].

¹⁴⁴ [2014] IECA 2

Thus, the same level of scrutiny applies in the context of penalties as apply to rules: the 'proviso' thus would not be constitutionally appropriate in an Irish context, and the definitions of protected classes would need to be similarly clear.

Certainty: protected characteristics

If we accept that a 'proviso' is not legislatively palatable in an Irish context for constitutional reasons, the next issue which arises in the context of the requirement for certainty is the naming of protected characteristics, and the extent to which these can be sufficiently precise. In this context, what I see as two particularly problematic named characteristics, based on case law and legislation from other jurisdictions, will be explored for illustrative purposes: 'race' and 'religion'.

The certainty of 'race'

The concept of 'race' is a social construct rather than a biological or physiological fact. As Lawrence et al state:

"The terms "race", "ethnicity", "colour", and "nationality" are usually conflated in common sense understandings of ethno-cultural diversity ... All four of the categories are social identity categories. Although the categories often reference physical traits and ancestral heritage, particularly "race" and colour, they are not determined by any "biological essence, but a result of discursive, thoroughly material – and human – social processes.""¹⁴⁵

Legislating for a social construct, then, is inherently problematic. As we have seen, in England and Wales, 'racial group' is defined in the legislation as 'a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.'¹⁴⁶ The question as to whether prejudicial language is used in the course of an offence has, as we have seen, been discussed in courts in England and Wales. For example, as I have already shown, in *R v White*¹⁴⁷ the court considered whether the term 'African' fell within the definition of 'racial group', as cited above.

¹⁴⁵ Austin Lawrence with Julie Shugarman and Diana Grech, *Hate as an Aggravating Factor in Sentencing in Canada* (Department of Justice 2009), 21.

¹⁴⁶ Section 28(4) of the Crime and Disorder Act 1998.

¹⁴⁷ [2001] 1 WLR 1352

The approach taken by the Court here would, I believe, not be one which would be followed in an Irish context. First, in the context of criminal legislation, terms should be precise and interpreted in a narrow, rather than broad, context. Second, while the word 'African' can with some certainty be said to refer to people from the African continent, it does not refer to people of a 'racial group': to interpret it in such a way could, arguably, be considered racist in and of itself. The terms 'American' or 'European' would not be interpreted in this way - indeed, in *White*, it was asked whether the term 'South America' referred to a racial group. It did not, the Court found:

'Due to the range of physical characteristics in the populations of [South America], and the absence of prominence of any one group, is such that the use of the expression 'South American' does not bring to mind particular racial characteristics.'¹⁴⁸

In this context, the lower courts have sometimes taken a restrictive interpretation of the term, with the superior courts taking a more expansive view. For example, in *DPP v M*¹⁴⁹ in the trial court, the justices did not think that the term 'foreigners' constituted a racial group for the purposes of the 1998 Act.

Going further, in *Attorney General's Reference No 4 of 2004*, the court stated that it is for a jury to decide whether the words used amounted to a demonstration of hostility – thus potentially allow a trier of fact to expand the definition by analogy to characteristics not explicitly mentioned in the legislation. Whether there is a difference between race and racial group, on the one hand, and racist on the other is perhaps a different issue. One may not have to accept that race is anything other than a social construction to agree that racism is alive in society, and that an individual is racist. Perhaps, if rather than define the legislation in a protective way (ie, referring to racial groups) it is defined in the negative (ie, referring to 'racist' motivations), the legislation moves towards precision and away from uncertainty.

¹⁴⁸ [2001] 1 WLR 1352, 1358.

¹⁴⁹ *Director of Public Prosecutions v M* [2004] EWHC 1453; [2004] 1 WLR 2758.

The certainty of 'religion'

While the question as to how 'racial group' is to be understood in the context of criminal offences has been examined by the courts in England and Wales, the question as to how 'religious group' is to be interpreted has not been scrutinised in that jurisdiction to the same degree. Further, as Burney and Rose observe, an 'awkward distinction' was created when the definition of 'ethnicity' in the 1998 Act borrows from anti-discrimination law, and thus includes Jews and Sikhs, but not Muslims.¹⁵⁰ This issue was addressed somewhat through the inclusion of hate or hostility against a religious group in the 1998 Act, but this alone highlights issues regarding the need for clarity in the criminal code. The simple question is, what is a religion? One option in an Irish context would be to restrict it to those bodies self-identifying as having a religious purpose which are registered and regulated under the Charities Act 2009. This would mean, for example, that expressions of hostility against an individual because they are a Scientologist would not fall within the boundaries of the legislation. A second option is to utilise the definition of religious body as provided in the Civil Registration Act 2004, which defines 'religious body' as 'an organised group of people members of which meet regularly for common religious worship: again, not helpful given the fact that 'religious worship' is not defined anywhere in the Act. A third option is to provide that the legislation applies to 'organised' religion – thus meaning that, for example, bias against an individual because they are Satanist or Wiccan would not fall within the legislation.

In England and Wales, the Law Commission has used a rather tautologist definition, stating that the question as to whether a cult or group is captured under the legislation 'will depend on whether their beliefs are religious in nature.'¹⁵¹ The Report refers to the decision of the Supreme Court in *R (Hodkin) v Registrar General of Marriages*,¹⁵² in which the question was whether scientology was a religion in the context of marriage ceremonies. The Court found that it was, defining religion in this context as:

¹⁵⁰ 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).

¹⁵¹ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348 2014) 23.

¹⁵² [2013] UKSC 77.

‘... a spiritual or non-secular belief system ... which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents who they are to live their lives ... [it] may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can be gained from the senses or from science.’¹⁵³

While perfectly applicable in the context for which it was written – that is, state regulation of marriage – this philosophical definition has no place in a criminal statute. It could be argued that where a term is undefined in the criminal statute, and requires clarification, lessons and instruction can be drawn from other pieces of legislation – in this context, perhaps, the Civil Registration Act 2004. That said, the question as to whether a court could consider definitions of a term utilised in civil legislation to determine the extent or definition of a criminal provision is not entirely clear: I would argue that, if it is not clear whether the behaviour of a defendant falls within the scope of the legislation, then they cannot be criminalised for their actions. Where the legislation is not, on its face, clear and precise, it surely fails for violating the principle of certainty.

Conclusion

In legislating against hate crime, states by definition create hierarchies of victims in hate crime statutes, through which the criminal justice process may be said to discriminate arbitrarily between social groups. Numerous attempts have been made to provide a normative basis for determining the ‘in groups’ and ‘out groups’ to be protected in hate crime legislation, many of which have merit, but none of which are definitive, and all of which require to some degree the either exclusion of commonly targeted communities, or the inclusion of groups which, arguably, should not be included in such legislation, such as paedophiles. While policing practices can ensure that at least some protection is afforded to other minoritised communities, where a group is not explicitly named in legislation, this can have an exclusionary and revictimising effect. In other jurisdictions, there are ways and means through which

¹⁵³ [2013] UKSC 77, para [57] as cited in Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348 2014) 24.

this can be addressed such as the 'similar factor' proviso, or through judicially developed definitions, and in chapter 8, I will apply these considerations in developing an approach to the question in this jurisdiction.

Chapter 7: Is there a need for hate crime legislation in Ireland?

Introduction

Hate crime is impacting on the lives of minoritised communities every day in Ireland, whether as direct or indirect victims. This penultimate chapter will outline some of the issues explored throughout this thesis in analysing hate crime legislation as it operates in other common law jurisdictions, as well as some of the more conceptual issues that the question of legislating for hate crime raises. I will also address the question as to whether hate crime legislation is considered necessary by criminal justice practitioners, as well as outlining some practical aspects of the Irish criminal justice process which deserve attention in determining whether legislation is required. Thus, this section will consider the purpose of hate crime legislation incorporating the views of Irish criminal justice practitioners, and then ask how this can be achieved in the context of the constitutional requirement for certainty in an Irish context, exploring this issue from a number of contexts which arose in this thesis. It will go on to consider due process and labelling considerations, asking whether, in the absence of legislation, the law is adequately respecting and protecting the rights of offenders. It is axiomatic that we cannot simply adopt and transplant the legislative and policy approach of another jurisdiction to an Irish context, and the particular nature of the Irish criminal justice process in the context of hate crime will be discussed, followed by some considerations of support mechanisms that might be considered in a post-legislative framework.

The purpose of hate crime legislation

As I showed in chapter 1, one of the key purposes of hate crime legislation is to send a message to society that criminal acts perpetrated due to prejudice or bias are not acceptable; and also, to send the message to victims that they are believed, and that their experiences are recognised by the criminal justice process. By criminalising racist behaviour, the legislature is sending a clear message that it will not be tolerated in any form in society, thus reducing racism generally. Munro notes that since the introduction of hate crime legislation in Britain, certainly the 'cruder manifestations of discrimination such as colour bars in pubs or openly

discriminatory advertisements' have been eliminated.¹ He refers to Bhikhu, who is of the opinion that there has been 'significant progress in racial integration and harmony' since the 1960s, and that 'the lead given by the law' has been an important factor in producing it.²

Perry agrees that hate crime legislation is useful.³ She notes,

'... 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 to be tolerated.'⁴

Levin and McDevitt state, 'A strong prison sentence sends a signal to would-be hatemongers everywhere that should they illegally express their bigotry, they can expect to receive more than a mere slap on the wrist.'⁵ Thus, the retributive effect of harsher punishments can be expected to act as a deterrent to would-be offenders. In response to this argument, however, Dickey argues:

'[People who commit 'hate crimes'] can be punished by laws that were adequate long before hate crimes statutes sprang up, and by judges who have always had the powers to consider motive when fixing punishment. The idea that a separate set of hate crime laws would somehow dissuade them from doing what they do is as weak as the no-quaint idea that capital punishment lowers the murder rate.'⁶

Bowling and Phillips agree, asking whether aggravated offences should exist, and note that while racist violence (the focus of their research) is an area that deserves,

¹ Colin Munro, 'Race Laws and Policy in the United Kingdom' in Zig Layton-Henry and Czarina Wilpert (eds) *Challenging Racism in Britain and Germany* (Palgrave Macmillan 2003) 181.

² *ibid* 181.

³ Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge 2001).

⁴ *Ibid* 229.

⁵ As quoted in James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press 1998) 89.

⁶ Fred Dickey, 'The Definition of Hate Crimes Should Not Be Expanded' in Roman Espejo (ed) *What Is a Hate Crime?* (Greenhaven Press 2002) 50.

and indeed demands attention, it remains to be seen whether tackling this issue through the criminal law is effective.⁷ They ask whether such laws improve or exacerbate the issue, or have no effect at all, asking whether the Crime and Disorder Act 1998 was more 'symbolic than substantive.'⁸ However, as Walters et al have shown, and as discussed earlier in this thesis, though there is a distinct and problematic 'justice gap' in England and Wales in relation to the ability of the criminal justice process to address hate crime, the 1998 Act can in no way be deemed merely symbolic.⁹ Further, while the dissuasive or remedial effects of hate crime legislation have yet to be established, what we do know from empirical studies into the Irish process is that, without legislation, hate crime will simply remain 'disappeared' from the process.¹⁰ The Irish criminal justice process is blind to hate crime, and unless it is specifically legislated for, it is my view that it will remain in the shadows of the process, resulting in behaviour of offenders going unchecked and unresolved.

In the context of the experiences of victims, we can recognise the severe harms caused by hate crime through the introduction of legislation. Weisburd and Levin state that hate crime victims suffer greater emotional and psychological injury than other crime victims: 'Because the violence is so brutal, the degradation so complete and the vulnerability so omnipresent, bias crime victims exhibit greater psychological trauma than nonbias victims.'¹¹ Jacobs and Potter however question the validity of this statement, based as it is on a survey of hate crime victims which did not compare their injuries with non-hate crime victims. Their argument, however, is now refuted by the data from the Crime Survey of England and Wales, which explicitly measures the differential impacts of hate crime as against ordinary crime. Further, if we accept Harel and Parchomovsky's fair protection paradigm, that

⁷ Ben Bowling and Coretta Phillips, *Race, Crime and Justice* (Pearson Education 2002).

⁸ *ibid* 122.

⁹ Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

¹⁰ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

¹¹ Steven Weisburd and Brian Levin, 'On the Basis of Sex: Recognizing Gender-Based Bias Crimes' (1994) 5 *Stanford Law and Policy Review* 21, 25, cited in James Jacobs and Kimberley Potter, *Hate Crimes* (Oxford University Press 1998) 82. Jacobs and Potter question the validity of this statement, based as it is on a survey of hate crime victims which did not compare their injuries with non-hate crime victims.

is, that the law needs to recognise and respond to structural inequalities, then introducing hate crime legislation is arguably key to protecting the rights of victims of minoritised communities.¹²

Taslitz¹³ argues that any criticism of hate crime legislation can be countered by three claims:

- (1) The psychological and moral need for individualised justice is undermined when victims are harmed because they are treated as members of a category rather than as unique beings;
- (2) In an especially dangerous way, hate crime contributes to a racist culture that creates subordinate status for marginalised groups and raises the risk of physical harms, such as further assault; and
- (3) Racist assaults rely on a despised theory of human worth that has been rejected by our modern constitutional culture.¹⁴

In its current form, Irish law does not recognise these legitimate claims, and thus has arguably contributed to the development of a society in which there is, as Perry claims, ‘at least a tacit permission’ for hate crime in Ireland.¹⁵

In two major pieces of research on the manner in which hate crime is addressed through the criminal justice process, Haynes and Schweppe sought to obtain the perspectives of criminal justice practitioners¹⁶ on whether hate crime legislation would be a useful addition to the statute book in an Irish context.¹⁷ Interviewees spoke to a number of benefits that the introduction of legislation might bring which

¹² Alon Harel and Gideon Parchomovsky, ‘On Hate and Equality’ (1999) 109 Yale Law Review 507.

¹³ Andrew E Taslitz, “Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong” (1999) 40 Boston College Law Review 739.

¹⁴ *ibid* 742.

¹⁵ Barbara Perry, ‘Legislating Hate in Ireland: The View from Here’ in Amanda Haynes, Jennifer Schweppe, and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2016) 76.

¹⁶ The term ‘criminal justice practitioners’ includes solicitors, barristers, and members of An Garda Síochána.

¹⁷ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015); Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017). See chapter 1 for a description of the methodology utilised, and the number of interviewees.

reflected theoretical considerations in this regard, and included: first, recognising the needs and experiences of victims; second, the practical benefits of introducing legislation in ensuring that the hate element would be addressed through the process; and finally, the educative function of hate crime legislation. This garda neatly summed up these arguments:

'I've sat down with the people who are victim of racist abuse, it's horrendous like. And they carry it through with them and d'you know ... it's hugely upsetting. More than a regular public ... it's not just regular threatening, abusive language it's much deeper than that. And that should be reflected in the investigation as well. How that impacted on the person. And that should be brought in and presented to the judge then. To give more weight than the ordinary, just threatening, abusive and insulting behaviour.' (Garda)¹⁸

As we have seen, aside from the traditional role of the criminal law in relation to penal sanctions, hate crime legislation is accepted internationally as having a particularly educative role, in that the message is being sent to society that it is unacceptable for people to criminally target individuals based on their personal identity, a message which is supported by penal sanctions. This was recognised by practitioners:

'I clearly believe the law has an educative role in society and in terms of addressing issues like racism you know ultimately the law is not going to make everybody like Travellers but it certainly will control whether or not you can spread shit on their caravans. And that to me is important.' (Barrister)¹⁹

'We determine that some things are harmful to society and we legislate against them and if they hit the point where we determine that they are sufficiently

¹⁸ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 98.

¹⁹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 70.

harmful the legislation should be criminal legislation. No difficulty with that.'
(Barrister)²⁰

Not only did practitioners speak to the educative role of legislation in society, but the educative function in the professions was also highlighted by some, tying into the theme of what practical benefits the introduction of legislation would bring:

'There is one way of looking at this that suggests that none of it is necessary because it can be accommodated by the system. But I also, that's why I'm giving you that awful lawyer's answer of on the one hand. But on the whole I wouldn't be opposed to this idea because of the educative value ... when something is spelled out as being wrong and spelled out as being an aggravating factor it's probably more helpful in educating people than just to assume that the lawyers and the judges are going to apply it in a certain way. When in fact they may not.' (Barrister)²¹

From a practical perspective, gardaí in particular highlighted the absence of legislation as a reason why the hate element of a crime was not always addressed:

'Because there isn't actually legislation there it takes a secondary role to the actual, the facts and the proofs that actually need to substantiate where it actually does sort of get recorded under legislation because that's the primary function by the time it moves towards actually prosecution, you can only prosecute what's actually legislative work.' (Garda)²²

'You need a box of tools. You need something to operate with. The job of the police is to land perpetrators in a court room. You have to have tools to do that ... ok. But one of the tools that was absolutely missing for us was that whole idea of ... you know ok it was just an assault because it's far more serious. It was

²⁰ *ibid.*

²¹ *ibid* 70.

²² Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 130.

an assault because that person happened to be gay, Traveller or whatever.'
(Garda)²³

Those opposed to the introduction of such legislation gave three reasons: first, that the hate element of a crime can already be addressed through legislation; the second that it would create complexity within the process, including lower rates of guilty pleas; and the third that it would be stigmatising for offenders, with reference made to the need for rehabilitation rather than punishment in this context.

The first reason was challenged by another practitioner, who acknowledged that while the process may well be capable of addressing the hate element, the introduction of legislation would still be beneficial from a practical perspective:

'I struggle to think of a case in which I would be greatly assisted by having any alteration of the law. But on the other hand, I would also see that perhaps if you're looking at it from the victim's point of view or groups of victims ... it might be greater solace if there was some sort of legal mechanism about which it could be more readily complained.' (Barrister)²⁴

The second reason was recognised but challenged by two practitioners who were of the view that complexity should not be a reason to avoid legislating:

'... just because there may be difficulties in it doesn't mean it shouldn't be done ... You know, I think as long as the principle is established then we can work out the difficulties or we can put appropriate safeguards in place.' (Barrister)²⁵

Regarding the argument of stigmatisation and labelling, as will be discussed in the next section, the Irish criminal justice process applies the label of 'criminal racist' already, and sometimes without just cause. Regarding rehabilitation, it is of course impossible for a process to address a particular form of offending where it is not

²³ *ibid.*

²⁴ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 68.

²⁵ *ibid.*

recognised in the criminal process. While the Probation Service addresses this form of offending where it is recognised, McNally and McIlroy observe:

‘Unlike sex offending, where there is a schedule of specific offences and legislation, there is no hate crime or degree of prejudicial attitudes “flag” attached to individual cases enabling them to be readily identified in the population subject to supervision.’²⁶

Thus while individual probation officers may indeed recognise this type of offending individually, there is no systematic way of ensuring that those who commit crimes with a hate element are appropriately served through rehabilitation. It is argued here that legislation would allow the label of hate to be applied appropriately, and allow for offenders – and most problematically – recidivistic offenders – to be identified and their behaviour addressed.

It is my view that the arguments for introducing hate crime legislation outweigh those against, particularly when we consider two particular issues which will now be addressed: first, the constitutional requirement for certainty, and second, the need for the label of criminal racist, or criminal homophobe, to be applied only where appropriate.

The constitutional requirement for certainty

As I have discussed in this thesis in chapter 6, the constitutional requirement for certainty requires a number of things from criminal legislation: first, the statutory provisions must be clear and precise; second, prosecutorial discretion should not reach to the determination as to whether a particular act is lawful or unlawful: the legislative regime should be clear exactly what constitutes a criminal act and what does not; and finally, the same level of scrutiny applies in the context of sentencing

²⁶ Gerry McNally and Eithne McIlroy, ‘Probation Practice and Offending Motivated by Hate and Discrimination: An All-Ireland Perspective’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017), 450.

provisions and practices as apply to laws.²⁷ It is my view that by addressing the hate element of a through judicial discretion at the sentencing stage, Irish law may be vulnerable to a challenge in this regard.

Currently in Irish law, it is not clear what level of proof is required in order to establish a hate element. In *DPP v Collins* the trial judge seems to have taken into account the fact that the offence ‘may have been racially motivated’.²⁸ Birmingham J stated:

‘He was prompted to do this by a sentence in the probation report which quotes their client as saying ‘he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend.’ By reference to this sentence the judge said that he felt that it was highly probable that the attack had some element of racism to an unspecified degree.’²⁹

The Court of Appeal did not take the opportunity to consider whether this amounted to proof of racist motivation on the part of the accused, nor whether such evidence was appropriate to consider as proof of a racist motivation. While the court did not explicitly criticise the sentencing judge for treating statements in the probation report as proof of a racist motivation to the offence, it did state that it was ‘not clear’ what role, if any, this concern regarding a racist motivation had when it came to determining the sentence.

O’Malley is of the view that Irish courts are ‘clearly entitled’ to take evidence that a crime was motivated by hatred or prejudice as an aggravating factor for two reasons: first, the court in *DPP v Elders*³⁰ made it clear that the circuit court judge ‘very properly’ highlighted the fact that the racist dimension was an aggravating factor in the case; and second, he states that the constitutional principle of proportionality in sentencing requires that courts consider the circumstances of the

²⁷ See generally , David Prendergast, ‘The Constitutionality of Strict Liability in Criminal Law’ (2011) 33(1) Dublin University Law Journal 285, 312; Law Reform Commission, *Harmful Communications and Digital Safety* (LRC 116 – 2016).

²⁸ *DPP v Collins* (2016) para [15].

²⁹ *ibid.*

³⁰ [2014] IECA 6.

offender and the circumstances of the offence into account in determining the appropriate penalty to be imposed in the case – which, he believes, could rightfully be considered to require courts to consider a hate motivation also. While the *Elders* case is limited to the racist motivations of the offender, O'Malley speculates that a religious, disablist, or homophobic motivation would rightfully be considered equally aggravating.

However, along with the principle of proportionality, courts must also consider the principle of certainty and legality in sentencing. While most commonly litigated in the context of the criminal offence itself, the requirements of accessibility and foreseeability also apply in the context of the specification of penalties. In *People (Director of Public Prosecutions) v Geraghty*³¹ the court stated:

'The principle of legality is at the heart of the criminal justice system. This implies that a citizen is entitled to order his or her affairs based on a system of clear rules and penalties which prescribe criminal conduct and the penalties which apply thereto.'³²

Indeed, once the contexts and circumstances of hate motivated crime are considered, it is my opinion that the applicability of the principle of certainty becomes compelling in cases involving a hate element. Two specific core elements to a hate crime deserve particular mention in this context: first the range of victim categories to which this discretion applies (as discussed in chapter 6); and second, the manner in which the hate element is evidenced. When we consider the requirement for certainty in the context of hate crime, it is my view that a compelling argument can be made for finding judicial discretion used in this context unconstitutional.

The first issue to be addressed in this context is the range of protected characteristics to which the discretion apparently applies. As I have observed, the courts have been clear that racism should be considered an aggravating factor. In

³¹ [2014] IECA 2; see also, (2013) 57 EHRR 21, page 1053 as cited in Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 61.

³² [2014] IECA 2.

this context, two questions arise, which I discussed in chapter 6 of this thesis: first, what is 'race' and what is 'racism'? For example, it is unclear whether 'race' encompasses hostility addressed at an individual because of their national origin.³³ It is also unclear if it includes hostility directed towards an individual where there may be an intersection of cultural and religious identity as in anti-Muslim or antisemitic hate crime. Second, the range of core characteristics that should be considered as aggravating an offence is not clear. While O'Malley is of the view that a broad range of protected characteristics could be considered as worthy of protection, the legal basis for doing so is not clear. For example, it is not clear whether the focus is on the hostility or personal characteristics, either of which could result in all personal characteristics being protected including ones which would not typically be considered worthy of protection in the context of hate crime, such as the colour of a person's hair, or the fact that they are a paedophile.³⁴

The second question which the principle raises is the extent to which the hate element should be instrumental in the offence. For example, in England and Wales, a hate element will aggravate an offence where the offence is either motivated by hostility, or where there is a hate element demonstrated towards the offender during the course of the offence. It is unclear whether Irish courts require the higher standard of motivation, or if simple demonstration of hostility would suffice to move the offensive language from simply being part of the fabric of the case to being considered an aggravating factor. Thus, if the offender uses offensively descriptive language during the course of an assault, the question remains as to whether that should be considered an aggravating factor, or if there should be evidence that the offence was motivated by prejudice. If the latter, again it is unclear if prejudice should be the only motivating factor, or if partial motivation suffices. Indeed, when we look at those cases in which a label of criminal racist (discussed below) has been applied, I argue that Irish courts are currently displaying a rather unsophisticated

³³ See, for example, *R v White* [2001] 1 WLR 1352 in which the court asked whether the word 'African' described a 'racial group' as per the 1998 Act.

³⁴ See *Dunn v R* [2007] NSWCCA 312 in which the court in New South Wales found that hate crime legislation should be extended to protect an individual who was attacked because the offender believed he was a paedophile.

approach to this issue, allowing the label of ‘racist’ to be applied in circumstances in which it is arguably unwarranted and legally inappropriate.

When we consider other factors which are considered aggravating elements, the question as to whether the aggravating element is present is typically a question of fact: was there a weapon used during the course of the offence; did the offender abuse a position of trust; was the offence committed while the offender was on bail; what was the relationship between the victim and offender; and statutory tests specify how the facts are to be proven.³⁵ Establishing a hate motivation is not quite so simple, and while we may instinctively believe that a racist element should be considered an aggravating factor, it is my view that that itself is such an unclear and abstract concept that aggravating a sentence on that basis through judicial discretion alone in the absence of a statutory provision might be in violation of the requirement for certainty. I am of the opinion that that it is only by introducing hate crime legislation that this uncertainty can be addressed. As well as constitutional requirements regarding certainty, there are also due process implications regarding hate crime legislation, which will now be addressed.

Labelling and hate crime

In much the same way that it is important to ensure that the hate element of a crime is recognised where it is present in a case, it is also just as, if not more, important to ensure that where there is no evidence presented to support evidence of a hate motivation, the case is not treated as such by the sentencing court. As I have argued, in devising and formulating hate crime legislation, one of the key concerns should be to ensure that the label of, for example, criminal racist, or criminal homophobe is used appropriately. Thus, it should be applied where it is clear that a hate element crime was present, ensuring that judges cannot ‘look around the corners of the case’ and see a hate element where it is not in evidence.³⁶ It is my view that, unfortunately, this is not the case as the law currently operates in Ireland.

³⁵ See more generally, Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 208-226.

³⁶ This term was used by a criminal justice practitioner in Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

In *Lifecycle of a Hate Crime: Country Report for Ireland*, the authors detail three cases (of 42 in total) in which criminal justice practitioners asserted that there was no evidence of a racist element presented to the court, but the cases were treated as having a hate element which was treated as an aggravating factor by the court at sentencing.³⁷ In one of these cases, the reason for the absence of evidence was – as recounted by prosecuting solicitor – that the victim ‘didn’t have a great understanding of English’, so could not understand what the defendant said to them during the course of the attack.³⁸ In a further two cases where defence barristers asserted that there was no evidence of a hate motivation presented to the court, they described the response of the judge at sentencing to the case:

‘it was quite clear the judge took it as a grossly aggravating factor.’³⁹

‘The judge absolutely tore into him for what had occurred and told him it was a disgrace...’⁴⁰

Reported case law supports these findings. In case of *People (DPP) v Collins*⁴¹ we see the sentencing court explicitly reading a racist element into the case on the basis of ‘a sentence in the probation report which quotes [the accused] as saying ‘he ... says he watched two foreign nationals cross the road to his girlfriend.’⁴² On the basis of this description of the victims as ‘foreign nationals’, the court aggravated the sentence on the basis of a racist motivation. The case was then reported in national media with headlines such as ‘Man gets eight years for “racist” headbutt attack’⁴³ and ‘Eight years for man who left barber fighting for his life in “racist” attack’.⁴⁴ That an individual can be labelled as a criminal racist due to his description of the victims as ‘foreign nationals’ is deeply concerning. Similarly, as I have already noted, in

³⁷ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

³⁸ *ibid* 191.

³⁹ *ibid* 196.

⁴⁰ *Ibid*.

⁴¹ [2016] IECA 35

⁴² *ibid* para [15].

⁴³ Liam Heylin, ‘Man gets eight years for “racist” headbutt attack’ *The Irish Examiner* (Cork, 18 June 2015).

⁴⁴ Ralph Riegel, ‘Eight years for man who left barber fighting for his life in “racist” attack’ *The Herald* (Dublin, 18 June 2015).

Shattock,⁴⁵ there did not seem to have been any evidence established regarding racist language being used by the appellant, nor any evidence that he had a racist motivation, nor any evidence of the racist element being established through conspiracy or participation. Nonetheless, the case was reported in national media with headlines such as ‘Teen jailed for racist assault that resulted in law student losing sight in eye’⁴⁶ and ‘Dublin teenager jailed for two years for racist attack’.⁴⁷ Perhaps most ironically, however, the hate element will not be reflected in the criminal record of those individuals who are found to have committed an offence with a hate element.

It is my view that, in the same way that the introduction of hate crime legislation can ensure that the hate element of a crime is not filtered out of the process, it can also ensure that there are clear boundaries around which behaviour is considered sufficiently ‘hateful’ to be classed as ‘criminally hateful’. In the absence of such legislation, judges seem free to ‘look around the corners’ of a case, and assign the label of ‘racist’ to individuals in the absence of any evidence to substantiate the claim. That this is permitted to happen is simply unacceptable, and in itself should provide ample reason for the introduction of hate crime legislation. Having looked at the theoretical and legal justifications for introducing hate crime legislation, the final issue which remains to be considered are practical ones, through an examination of the Irish criminal process.

Practical aspects of the Irish criminal justice process

From a strictly doctrinal and policy perspective, the Irish criminal justice process is capable of addressing the hate element of a crime. Gardaí are already required to address the question as to whether a discriminatory motive was present in every recorded crime, and have a range of categories under which they can record such crimes. However, as I have shown in Chapter 3, in the absence of any formal training or Garda Directives relating to the new protected characteristics, the number of

⁴⁵ *Director of Public Prosecutions v Shattock* [2016] IECA 82.

⁴⁶ Declan Conlon, ‘Teen jailed for racist assault that resulted in law student losing sight in eye’ *Irish Independent* (Dublin, 17 April 2015).

⁴⁷ [No author identified] ‘Dublin teenager jailed for two years for racist attack’ *The Irish Times* (Dublin, 17 April 2015).

crimes recorded as having a discriminatory motive is low.⁴⁸ Further, in the absence of any formal policies on investigation, the hate element is typically deprioritised in favour of the proofs required for the primary offence.⁴⁹ There are no explicit prosecution policies in place to address hate crime, and at a prosecutorial level, there is evidence to suggest that the hate element will be deprioritised to secure a guilty plea.⁵⁰

From a prosecutorial perspective, there are no official policies regarding the prosecution of hate crime, or when a guilty plea can be accepted. At sentencing, while the decision in *DPP v Elders*⁵¹ provides some basis for the assertion that a racist element to a crime should be considered as an aggravating factor in sentencing, this position does not appear to be consistently adopted in sentencing practice generally. Further, and perhaps more concerning, research conducted has shown that judges have aggravated sentences on the basis that a crime was racially motivated where there was no specific evidence presented in the court to establish that fact. Thus, while the legal process is, on the face of it, capable of addressing hate crime, as Haynes and Schweppe have shown, the Irish criminal process does not acknowledge the hate element of a crime, with the hate element often being 'disappeared' or 'filtered out' through the process.⁵²

The impact this has on the victims of hate crime cannot be underestimated: hate crime is shown internationally to be one of the more underreported crimes, a position also reflected in an Irish context.⁵³ Where victims do not trust in the

⁴⁸ For a detailed analysis of the issues regarding police recorded data, see, Jennifer Schweppe and Amanda Haynes, 'Recording Hate Crime: Technical Solutions in a Training Vacuum' European Law Enforcement Research Bulletin (forthcoming).

⁴⁹ See, Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

⁵⁰ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015); Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

⁵¹ [2014] IECA 6

⁵² Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015); Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

⁵³ See, for example, Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (Transgender Equality Network Ireland 2017); Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015)

process to recognise their experiences, they are less likely to report their victimisation.⁵⁴ The EU Fundamental Rights Agency states that work needs to be done to ensure that victims trust that the process ‘will lead to recognition of their suffering and the prosecution of perpetrators.’⁵⁵ As Schweppe, Haynes and Walters observe:

‘Failures on the part of the legal process to appropriately address hate crime have deleterious implications for direct victims’ trust in the system, but may also reduce their trust in the state and in majority society. These effects also manifest among the minoritised communities which share the characteristics targeted. The detrimental impacts of a failure to appropriately address hate crime through the criminal justice process are therefore experienced at the level of the individual, community and society.’⁵⁶

As well as the implications for victims, the fact that the hate element of a crime is not adequately addressed through the Irish criminal justice process also has implications in relation to state obligations under international agreements. In particular, it is at least arguable that Ireland is not compliant with its obligations under Article 4 of the EU Framework Decision, an issue which is currently the subject matter of a preliminary investigation following a successful application to the Petitions Committee of the European Parliament by ENAR Ireland.⁵⁷ Further, the evidenced absence of thorough investigative processes for hate crime in Ireland is arguably contrary to state obligations under the European Convention on Human Rights. It is worth recalling how the European Court of Human Rights articulated state obligations regarding hate crime in the criminal process in this context:

‘Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the

⁵⁴ OSCE/Office for Democratic Institutions and Human Rights, *Hate Crime Data Collection and Monitoring Mechanisms: A Practical Guide* (OSCE 2014) 11.

⁵⁵ European Union Agency for Fundamental Rights, *Combating hate crime: Encouraging reporting and improving recording* (EUFRA 2014)

⁵⁶ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018), 133.

⁵⁷ See, ENAR Ireland ‘PETI Commission Petition Accepted’ (ENAR Ireland 2016) <http://enarireland.org/wp-content/uploads/2016/07/PETI-commission-petition-accepted.pdf>

specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ... The Court also reiterates the particular requirement for an investigation into an attack with racial overtones to be pursued with vigour and impartiality, having regard to the need to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.'⁵⁸

Where there is an allegation of a racist utterance on the part of law enforcement agents of the State, 'it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives.'⁵⁹ Where a criminal justice process is essentially blind to hate crime, and key actors within the process appear to lack an understanding of the issue, it is difficult to see how that process could respect and vindicate the rights of victims of hate crime under the Criminal Justice (Victims of Crime) Act 2017.

Considerations for the implementation of legislation

Almost regardless of the form hate crime legislation takes, it is generally the case that there is a delay between the enactment of such legislation and what could be seen as a successful implementation of the law through successful prosecutions and sentence enhancements. A number of reasons have been postulated for this. First, there are various obstacles faced by the police when enforcing hate crime laws. The collation of evidence, including the additional proof of hate-motivation, is certainly not without its difficulties.⁶⁰ The successful investigation of hate crime is dependent upon an array of situational and definitional/technical factors that must first be identified by police officers. Such factors include the consideration of multiple motivations, a lack of certainty of the facts as presented to them, and the level of frequency of similar incidents in any given area.⁶¹ The failure to identify hate

⁵⁸ *ibid* para 52.

⁵⁹ *ibid* para 61.

⁶⁰ Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013).

⁶¹ *ibid* 129.

incidents has, in the past, been linked to pervasive institutional prejudices within police forces⁶² which can result in a general lack of due care and attention when attending to such cases.⁶³ In England and Wales, efforts have been made to rectify previous inadequacies in responding to hate crime, including the introduction of police manuals on how best to identify and respond to such incidents.⁶⁴

Even in cases where the police collate and present adequate evidence to prosecution services, it has been argued that prosecutors still tend to look for the 'perfect case' when a new statute is enacted, for fear that if they lose the first case it will render the legislation ineffective for later cases.⁶⁵ The reason this can particularly be the case for hate crime legislation is that, as I have stated earlier, the requirement to prove the hate motivation of the offender is somewhat unusual in criminal law and imposes an additional set of burdens on the prosecution.⁶⁶ Levin and McDevitt note that prosecutors tend to look for a case in which there are clear references made about the motivation for the crime; that such references are made in front of reliable witnesses; and that the offender has previously engaged in a pattern of bias-motivated violence.⁶⁷

Allied to these factors is the low level of guilty pleas which are generally associated with hate crime charges.⁶⁸ Again in England and Wales, Burney and Rose note that defence lawyers emphasised the 'vehemence' with which racial aggravation was denied by defendants, highlighted in the fact that in 1999, not guilty pleas were entered for over 83% of racially aggravated offences, and for only 47% of

⁶² William Macpherson, *The Stephen Lawrence Inquiry* (Cm 4262-I, The Stationery Office 1999).

⁶³ See Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013) 129.

⁶⁴ College of Policing, *Hate Crime Operational Guidance* (College of Policing 2014).

⁶⁵ Jack Levin and Jack McDevitt, *Hate Crimes Revisited: America's War on Those who are Different* (Westview Press 2002) 183.

⁶⁶ Ryken Grattet and Valerie Jenness, 'The Birth and Maturation of Hate Crime Policy in the United States' in Barbara Perry (ed), *Hate and Bias Crime: A Reader* (Routledge, 2003); Valerie Jenness, 'Hate Crimes' in Michael Tonry (ed), *The Oxford Handbook of Crime and Public Policy* (Oxford University Press 2012).

⁶⁷ 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)

⁶⁸ James Jacobs and Kimberley Potter, *Hate Crimes* (Oxford University Press 1998); 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)

substantive offences.⁶⁹ In its recent Consultation Paper, the Law Commission observed that one of the problems identified in prosecuting hate crime is the fact that defendants will plead only to the non-aggravated form of the offence, leading to charges being downgraded or even dropped.⁷⁰

However, as discussed previously (in chapter 3), Grattet and Jenness observe that eventually, once the decision to prosecute goes ahead, the ratio of convictions falls within the range of other crimes, and prosecutors do not seem to struggle with securing the conviction, or, presumably, the sentence enhancement.⁷¹ Further, the issue of guilty pleas, which initially seems to have impacted on conviction rates, seems to ultimately abate.⁷² In fact, for England and Wales, the conviction rate for racially and religiously aggravated offences which were prosecuted is relatively high at 83.8%.⁷³ Grattet and Jenness observe that while prosecutions of hate crimes seem to proceed in a conservative manner initially, ultimately they resemble patterns for other crimes, something which they state is only to be expected as the concept becomes more settled and accepted.

As set out in Chapter 3, the European Commission published its Report on the implementation of the Framework Decision in 2014, and suggested practices designed to strengthen the implementation of the Framework Decision, including:

- Authorities responsible for the investigation and prosecution of hate crime should have sufficient knowledge of relevant legislation and clear guidelines;
- Special police hate crime units;
- Special prosecutors' offices for hate speech and hate crime;
- Detailed guidelines for police, prosecutors and judges;
- Specific training for police, prosecutors and judges;

⁶⁹ 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) 89-90.

⁷⁰ Law Commission, *Hate crime: the case for extended the existing offences* (CP 213 2013) 131.

⁷¹ Ryken Grattet and Valerie Jenness, 'The Birth and Maturation of Hate Crime Policy in the United States' in Barbara Perry (ed), *Hate and Bias Crime: A Reader* (Routledge, 2003)

⁷² *ibid.*

⁷³ Crown Prosecution Service, *Hate Crime Annual Report 2016-2017* available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2017-0.pdf> 8.

- Exchange of information between law enforcement officials, prosecutors, judges, civil society organisations and other stakeholders;
- Implementation of the Victims' Directive to protect victims of hate speech and hate crime to encourage reporting by victims;
- Reliable, comparable, and systematically collected data which allow for the assessment of the level of prosecutions and sentences;
- Public condemnation of racism and xenophobia by authorities, political parties, and civil society.⁷⁴

The Commission on the Future of Policing in its recent report recognised that policing 'must be fair to all in order to have legitimacy'.⁷⁵ It stated that the exercise of police powers in relation to minorities, as well as the priority given to protecting such minorities from harm, 'and investigating crimes motivated by hate and prejudice' should be closely monitored.⁷⁶ In this context, the Report recommended the establishment of a Human Rights Unit, which would have particular responsibilities in the context of the development a Human Rights Strategy, delivering guidance and policing aimed at protecting the most vulnerable in the criminal justice system and the re-establishment of the Strategic Human Rights Advisory Committee. Schweppe et al further note that training or policies developed should not only detail the manner in which a hate crime should be investigated, prosecuted, and sentenced, but also seek to sensitise all relevant individuals to the direct and indirect impacts of hate crime.⁷⁷ This issue was particularly observed in an Irish context, where Haynes and Schweppe noted:

'... the most common issue that [police] stated should be included in training was the human impact of hate crime. This, [police] felt was required not only to ensure members of the force were aware of the potential impacts of the

⁷⁴ European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law* (European Commission 2014) para 3.4. Emphasis added. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>>.

⁷⁵ Commission on the Future of Policing, *The Future of Policing in Ireland* (Commission on the Future of Policing 2018).

⁷⁶ *ibid* 12.

⁷⁷ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

crime on its victims, but also to raise awareness more generally of the phenomenon, as well as ensuring that it is appropriately recognised during court proceedings.’⁷⁸

The advantages of specialist units for police officers and prosecutors was also highlighted by the European Commission,⁷⁹ and Schweppe et al observed that where dedicated units are set up, ‘the hate element of a crime is more rigorously assessed and addressed through the criminal justice process.’⁸⁰

In the absence of all these supporting measures and mechanisms, any legislation introduced might be slow to be implemented, and poorly understood by criminal justice practitioners. Thus, while the introduction of hate crime legislation is the initial priority, in order to overcome the evidenced obstacles to implementing legislation, it is my view that clear policies with aligned training must be introduced. As suggested by the European Commission, this training should be shared across the criminal process, to ensure consistency:

‘The exchange of information and good practices by bringing together law enforcement officials, prosecutors and judges, civil society organisations and other stakeholders can also contribute to better implementation.’⁸¹

These measures would allow for a holistic approach to addressing hate crime in the Irish criminal justice process.

⁷⁸ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

⁷⁹ European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013) 14

<<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>>.

⁸⁰ Jennifer Schweppe, Amanda Haynes and Mark A Walters, *Lifecycle of a Hate Crime: Comparative Report* (ICCL 2018).

⁸¹ European Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law’ [COM(2014) 27 final of 27.1.2014’ (2014) 3.4. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> Emphasis added.

Conclusion

That hate crime is occurring on a daily basis in Ireland is beyond question, and members of minoritised communities suffer some of the highest levels of targeted violence in Europe. However, the criminal justice process is, in my view, unable to address this behaviour, resulting in it going unchecked and uncorrected. I argue that the introduction of hate crime legislation in Ireland is justified and indeed required both from a philosophical and a practical perspective. It is my opinion that the absence of hate crime legislation in Ireland has a number of consequences including:

First, the process is blind to hate crime, leaving offending behaviour remaining unaddressed;

Second, victims do not have trust in the process to recognise their experiences;

Third, victims are unable to avail of their rights under the Victims' Directive as victims of hate crime;

Fourth, certain perpetrators have been unfairly branded as 'racist' by the court, and resultantly, the media;

Fifth, we cannot recognise those individuals who have committed a crime with a hate element for the purposes of rehabilitation, or to identify recidivistic behaviour;

Sixth, the message that is being sent, at least tacitly, is that while we do not condone such behaviour, nor do we explicitly condemn it.

Thus, I argue that there are arguments from the perspective of both due process concerns and victims' rights perspectives for introducing hate crime legislation. It is sometimes said that there is a presumptive tension between these two perspectives: one cannot uphold victims' rights without infringing on the due process rights of defendants.⁸² I argue that in the context of hate crime legislation in Ireland, the two perspectives coincide. In the context of due process rights, generally speaking the constitutional requirement of certainty, and as concerns regarding appropriate

⁸² At its most basic, these tensions were discussed by Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pennsylvania Law Review* 1. See also, for example, Balance in the Criminal Law Review Group *Final Report* (Department of Justice 2007).

labelling are relevant. In an Irish context, given the rather laissez-faire approach of the Irish courts to determining and establishing a hate element, these concerns are particularly relevant. From a victims perspective, the arguments are well-rehearsed, and it is my opinion that in order to recognise and provide redress, the process must be capable of recognising the offence, and be instructed to address it.

All that said, in introducing hate crime legislation, we must engage in a careful balancing exercise. On the one hand, we must have legislation which is capable of addressing hate crime in practice: if the legislation is toothless, it will have created a false sense of hope and security in victims, which would result in their being further disenfranchised, disillusioned, and ultimately perhaps further marginalised. On the other hand, we must ensure that we use the label of hate crime carefully and only where justified: by throwing the legislative net too wide, we risk labelling and penalising those individuals who are not truly 'racist' or 'homophobic', and ultimately criminalising what might be described as '(offensive) everyday language'. The final chapter of this thesis will now seek to determine how that balance should be struck.

Chapter 8: Moving towards legislating against hate crime

Introduction

If it is accepted that hate crime legislation should be introduced, the next question to be addressed is how that legislation can be constructed in a manner suitable for an Irish context. At the outset, it must be recognised that legislation should not and cannot be expected to resolve the issue of hate crime. Section 42 of the Irish Human Rights and Equality Commission Act 2014 creates a positive duty on public bodies to eliminate discrimination, promote equality of opportunity and treatment of staff and persons to whom it provides services, and protect the human rights of members, staff, and the persons to whom it provides services. This obligation is particularly relevant in the context of An Garda Síochána, though in the absence of the strategic plan which is required under section 42(2) of the Act, it is difficult to see how the organisation sees itself as complying with what is referred to as ‘the section 42 obligation’.

My analysis of this issue will draw upon the issues raised in earlier chapters, addressing them in a context which learns from the experiences of other jurisdictions. It will also be mindful of the Irish criminal law, criminal justice and constitutional contexts, both in terms of doctrinal approaches and of practical impacts, drawing on qualitative research published on the issue.¹

In constructing hate crime legislation, as I observed in chapter 2, scholars have identified the key issues which need to be addressed as:

- The formal recognition of the hate element as either part of an aggravated offence or through the sentencing process (as discussed in chapter 4);
- The extent to which the hate element should be present in the offence (as discussed in chapter 5);
- The range of victim groups which hate crime legislation should protect (as discussed in chapter 6).

¹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

To this list, I would add one more consideration, that is:

- The definition of 'hate' for the purposes of the criminal law.

What is the hate in hate crime?

As observed in chapter 1, there are varying global and disciplinary understandings and conceptualisations to the term 'hate'. Indeed, Sullivan questions the very idea of putting an emotion, 'hate', into the criminal law. He writes,

'For all our zeal to attack hate, we still have a remarkably vague idea of what it actually is ... For all its emotional punch, 'hate' is far less nuanced an idea than prejudice, or bigotry, or bias, or anger, or even mere aversion to others ... sentiment is a poor basis for law, and a dangerous tool in politics.'²

In England and Wales and in Northern Ireland, the term 'hostility' is used in the legislation. The Canadian Criminal Code uses the phrase 'bias, prejudice or hate' in section 718.2. In its 2013 Consultation Paper, the Law Commission of England and Wales considered the use of the term 'hostility' in its legislation, noting that the broader term 'bias' could be more useful in the context of such legislation, being, 'a potentially broader signifier for an attitude towards a group or a particular victim, which could encompass deliberate selection by an offender due not only to hatred or hostility, but also to the victim's perceived vulnerability or inability to resist or defend against the crime.'³

From an operational perspective, Walters notes that criminal legislation rarely defines prejudice or bias, and instead it is generally left to the jury to determine whether it was present during the commission of a crime based on common or dictionary understandings of the term.⁴ In this context, Burney and Rose are of the opinion that when interpreting the term 'hostility', a jury 'would probably accept

² Andrew Sullivan, 'Hate Crimes Are Not A Serious Problem' in Roman Espejo (ed) *What is a Hate Crime?* (Greehnaven Press 2002), 21.

³ Law Commission *Hate crime: the case for extended the existing offences* (CP 213 2013).

⁴ Mark A Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014) 7.

that, while clearly a less strong word than “hatred”, “hostility” must imply a degree of animosity, rather than mere prejudice.⁵ The Law Commission observed in its 2014 Report that there is no definition of the term ‘hostility’ in the Crime and Disorder Act 1998, and that there is no standard legal definition:

“The ordinary dictionary definition of “hostile” includes being “unfriendly”, “adverse” or “antagonistic”. It may also include spite, contempt or dislike.”⁶

It also observed in its 2014 Report that in the context of disablist hate crime in particular, there may be problems distinguishing between offending which is motivated by hostility towards disability, and ‘crimes which target a disabled person because their disability is perceived as making them less able to resist, and thus more vulnerable to a particular type of crime, on the other.’⁷ In its guidance on disablist hate crime, the Crown Prosecution Service advises that while there is no definition of ‘hostility’ in the Act, ‘consideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike.’⁸

Moving towards an Irish definition, Haynes et al observe in their empirical study of practitioners’ perspectives on the need for, and form of, hate crime legislation, that there was little consistency in the views expressed by criminal justice professionals as to what form of legislation would be most appropriate.⁹ Most interviewees, however, were of the view that utilising the term ‘hate’ might be inappropriate as being too strong, with a meaning not commonly understood in criminal law. Aside however from a general view that the term hate would be inappropriate, solicitors and barristers were not in agreement as to what phraseology would be appropriate:

⁵ 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) 14.

⁶ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Commission 2014) 19.

⁷ *ibid* 159.

⁸ Crown Prosecution Service, ‘Disability Hate Crime and other crimes against Disabled people - prosecution guidance’ available at <https://www.cps.gov.uk/legal-guidance/disability-hate-crime-and-other-crimes-against-disabled-people-prosecution-guidance>.

⁹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

*'I don't think hostility gets it across at all. I think that's way too woolly.'*¹⁰

*'I think would hostility not be easier to potentially prove than bias, hatred or prejudice... I think hostility ... you don't need to get into the person's brain.'*¹¹

A further concern in relation to this issue is one referred to in chapter 5 as highlighted by Walters et al and discussed by the Law Commission in the context of hate crimes committed against those groups who are perceived to be vulnerable:

*'[A] problem that can arise ... is the difficulty of distinguishing between offending motivated by hostility towards disability, on the one hand, and crimes which target a disabled person because their disability is perceived as making them less able to resist, and thus more vulnerable to a particular type of crime, on the other.'*¹²

Criminal justice practitioners in the Haynes et al study also spoke to this issue:

*'It seemed to me that he had just assumed that because of all of her disabilities there was no way she'd be able to speak against him and if she did she wouldn't be believed.'*¹³

*'It's not so much they hate the disabled as they recognise their inability to talk or perhaps be believed. Particularly if it's an intellectual disability.'*¹⁴

Thus, legislation has to capture the range of manifestations of hatred, from both a definitional and operational perspective. Drawing on the comparative analysis, I would argue that a broad definition of hate be included in the legislation. I would also argue that – as discussed in chapter 5 – the particular manifestation of disablist

¹⁰ *ibid* 74.

¹¹ *ibid*.

¹² Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Commission 2014) 159.

¹³ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 75.

¹⁴ *ibid*.

hate crime can be recognised and addressed at this point, by including ‘contempt’ in the definition of hate crime. Thus, I argue, ‘hate’ could usefully be defined in legislation as including ‘hate, hostility, bias, prejudice and contempt.’

Recognising the hate element: aggravated offences or enhanced sentencing

As discussed in chapter 4, one of the core issues which needs to be addressed in the context of legislating is whether it is better to tackle hate crime through an aggravated offence model, or through an enhanced sentencing regime. We have seen in, for example, through the Law Commission’s recent Report in England and Wales that the aggravated offences model produces a more effective response by the criminal justice process as compared to those offences in which the hate element is addressed only at sentencing.¹⁵ The qualitative research conducted in an Irish context indicates that the process most consistently recognises named offences: put simply, it was argued, addressing hate crime through sentencing provisions will not ensure that the hate element of a crime will be consistently addressed from the point of recording through to sentencing.¹⁶ The research concluded 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.

Interviewees in Haynes et al’s research gave a number of reasons as to why aggravated offences would operate better in practice than aggravated sentencing provisions. These were largely practical in nature, including that an aggravated offence model would provide for a clear set of proofs to guide gardaí and prosecutors in investigating and prosecuting a hate crime. It was also argued by practitioners that this would give a sound legal basis for including the hate element in a prosecution, and minimise the possibility of such evidence being challenged. Solicitors and barristers in that research also noted that the absence of legislation ‘means the hate element of a crime is being ignored by the criminal justice process , and by introducing legislation, it will ensure that the hate element is addressed.’¹⁷

¹⁵ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Commission No 348)

¹⁶ *ibid.*

¹⁷ *ibid* 78.

Finally, criminal justice practitioners generally spoke to the need for legislation to allow for the recognition of a recidivistic racist – without an aggravated offence model, it would not be possible, it was felt, for the system to recognise reoffending in the absence of personal knowledge of the offender.

In that 2015 research, a minority of criminal justice practitioners argued against the introduction of aggravated offences. The reasons they gave against introducing such offences were twofold: first, that they would be difficult to prosecute; and second, that the hate element would be pleaded out.¹⁸ A minority of barristers and solicitors were in favour of introducing aggravated sentencing provisions as opposed to aggravated offences. The primary reason given for this was that it would be a more simple and more practical way to deal with the bias element.¹⁹ Two members of An Garda Síochána also advocated a sentence enhancement regime over a law providing for substantive hate aggravated offences. Both members reasoned that aggravated sentencing would require the production of less strenuous proofs than those required for a substantive offence.²⁰ However, some of those legal professionals who were in favour of introducing aggravated offences also spoke to an inability on the part of the law to fetter judicial discretion in the context of sentencing.²¹ More fundamentally, the primary reason given by practitioners for not introducing hate crime legislation into the criminal law is that in their view, the law is currently fully equipped to deal with the issue, though it is argued that this point has been rebutted by the research conducted by Haynes and Schweppe.²²

While the other arguments all have merit, and certainly an aggravated sentencing option would be more simple, both in terms of the legislative construction and its operation, we have seen from England and Wales that an aggravated offences model is the only means by which it can be consistently ensured that the hate element of a crime will be effectively addressed.

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

As I have discussed in chapter 4, the Domestic Violence Act 2018 provides important precedent for limiting judicial discretion in the context of aggravated sentencing provisions. That said, in that legislation, in order for section 40 to operate, there are no additional proofs, or additional elements that have to be established in such cases, except that the crime was committed against a 'relevant person'. A 'relevant person' is defined in section 40(6) as either a spouse or civil partner of the person, or as someone who was in 'an intimate relationship' with the other person. Presumably, this 'intimacy' can be challenged, but the question will not typically require additional investigative or prosecutorial processes: the relationship will generally either exist or it will not. This contrasts with the issue of a hate element as an aggravating factor, whereby the additional element must be recognised at the earliest stages of, and all the way through, the criminal process in order for it to be addressed. As we have seen, from an understanding of the Irish criminal process, as well as by looking to other jurisdictions, in the absence of a specific charge, this is unlikely to happen.

Thus, while the Domestic Violence Act 2018 is particularly useful as a legislative precedent in the context of aggravating penalties, it is my view that addressing hate crime only through a similarly aggravating provision will not be as effective in practice as introducing aggravated offences. Experiences from other jurisdictions as discussed in chapter 4 show that a scheme which utilises aggravated offences is more likely to succeed in having the hate element recognised, and the majority of criminal justice practitioners interviewed by Haynes and Schweppe agree that without a dedicated charge, the additional element will be lost.²³ Haynes et al observe that aggravated offences:

'... 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

²³ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015); Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

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.’²⁴

Thus, it is argued that only with the introduction of aggravated offences is a systematic and system-wide approach to addressing hate crime possible.

The question as to which offences should be included in such legislation also requires consideration. It can be argued that the list should include those types of offences most commonly perpetrated against the protected groups identified in the legislation. We have seen in England and Wales, for example, that while racist hate crime most commonly takes the form of offences against the person, criminal damage, and public order offences, in the context of disablist hate crime, fraud and forgery offences, robbery, burglary, and theft and handling offences are more common:

Offence	Racial and religious hate crime	Homophobic /transphobic hate crime	Disability hate crime
Homicide	0.06%	0.00%	0.55%
Offences against person	76.45%	59.23%	48.01%
Sexual offences	0.25%	1.34%	3.64%
Burglary	0.34%	0.28%	8.72%
Robbery	0.58%	1.13%	6.73%
Theft and handling	1.69%	1.69%	12.14%
Fraud and forgery	0.08%	0.07%	6.40%
Criminal damage	3.27%	3.94%	2.87%
Drugs offences	0.60%	1.20%	0.44%
Public order offences	15.11%	29.79%	9.27%

²⁴ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015) 81.

Table 7: Crown Prosecution Service data²⁵

The inclusion of aggravated forms of sexual offences might be particularly controversial, given the difficulties associated with the prosecution of such offences in the absence of an additional factor. However, given that literature suggests that the crimes of sexual assault and corrective rape are particular manifestations of hate crime within the LGBTQI community in particular, these acts should be capable of being recognised in any hate crime legislation.²⁶ I would suggest that consideration be given to including a broad range of aggravated offences in legislation, which would allow the different manifestations of hate across the different protected communities be recognised.

Naming the hate element: demonstration, motivation, or discriminatory selection

If it is accepted that the introduction of an aggravated offences scheme would be preferable to the introduction of aggravated sentencing provisions, the next issue which needs to be addressed is the manner in which the hate element may be incorporated into the offence. As I have shown, while in Canada the legislation requires that a hate motivation be established in order to enhance a sentence under section 718.2(a)(i), in England and Wales and in Northern Ireland, the legislation provides that where the offence was either motivated by hatred or hostility, or where hatred or hostility were *demonstrated* during the course of the offence, the aggravated element is established. A third approach, which adapts the ‘discriminatory selection’ model through use of the ‘by reason of’ test has recently been suggested by Walters et al as a means of addressing the evidentiary element in legislation.²⁷

²⁵ As set out in Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017), 57.

²⁶ Laura C Hein and Kathleen M Scharer, ‘Who Cares If It Is a Hate Crime? Lesbian, Gay, Bixesexual, and Transgender Hate Crimes – Mental Health Implications and Interventions’ (2013) 49 *Perspectives in Psychiatric Care* 84.

²⁷ Mark Walters, Susann Wiedlitzka, Abenaa Owusu-Bempah, with Kay Goodall, ‘Hate Crime and the Legal Process: Options for Law Reform’ (University of Sussex 2017).

The question as to which test would be appropriate for an Irish context was discussed with criminal justice practitioners by Haynes et al.²⁸ Practitioners were initially unsure as to the distinction, being unfamiliar with the terminology as applied in a UK context:

'I'm not comfortable with this expression demonstrated because I don't really know what it means.' (Barrister)²⁹

'... if there is a hate motivated crime and then there is demonstration of hostility—I would have thought that the demonstration of hostility is the proof of the hate motivation because you are getting intent ... So I think the actual—the assumption that you could find the definition of hate motivation crime or whatever it is that is satisfactory, that would almost be a subset, or one of the subsets of a demonstration of hostility but without the demonstration of hostility, you couldn't really find it to be a hate motivated crime. It seems to me that they are two ways of looking at the one thing.' (Barrister)³⁰

In addressing the question as to which formulation should be used in the legislation, some practitioners considered a hate motivation to be very difficult to prove to the standard required in a criminal trial:

'I think motivation is always going to be difficult to prove beyond reasonable doubt depending on your evidence. In the hypothetical example of a shaven headed white person who's wearing an SS uniform and has swastika tattooed on every visible piece of skin being prosecuted for badly assaulting a black man while screaming racial abuse at the man – motivation would probably be quite easy to prove. But rarely do you get cases that are that obvious.' (Solicitor)³¹

However, the level of the threshold was thought to be appropriate by this barrister:

²⁸ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *Out of the Shadows: Legislating for Hate Crime in Ireland – Preliminary Findings* (ICCL 2015).

²⁹ *ibid* 83.

³⁰ *ibid*.

³¹ *ibid*.

'I think it's harder to show motivation ... in comparison just say somebody said x whilst doing y. There might be many reasons for somebody saying x inadvertent or otherwise I don't know but to actually prove motivation I think it's harder so if I'm looking at it with my defence hat on or with my constitutional hat on I think I'd prefer that.' (Barrister)³²

Garda interviewees were less concerned about the requirement to prove motivation, particularly if it could be inferred from the content of speech or text.

'Interviewee: You just look for the presence of bias indicators with the offence, sometimes it's subjective, sometimes it's black and white.'

Interviewer: Subjective indicator?

Interviewee: You call someone a queer before you punch them in the face.'

Interviewer: Black and white?

*Interviewee: "Queers out" written on someone's front door.'*³³

*'... you're investigating the incident anyway and what ... arises in it would be dealt with in the statement I would hope anyway. It shouldn't be that much harder. ... when you're proffering charges there might be an additional charge to be proffered and that's probably the only extra work that would be involved. I don't see it as being a huge insurmountable part of it.'*³⁴

It is my opinion that it is this element of construction that is the most controversial and difficult aspect of hate crime legislation, as it determines the breadth of the conduct which is captured by the statute. For reasons outlined in chapter 5, I do not believe that the discriminatory selection model would be useful in an Irish context. Restricting the legislation only to those cases in which the conduct was either wholly or partly motivated by hate might be considered too high a threshold: certainly, the experience from England and Wales suggests that it is difficult for prosecutors to establish that the crime was so motivated, even where the offence need only be

³² *ibid.*

³³ *ibid* 84.

³⁴ *ibid.*

‘wholly or partly’ motivated by hatred or hostility. In Canada, the provision also seems to be under-utilised, though the circumstances in which motivation can be established are more clearly defined in legislation. That said, where the ‘demonstration’ test is utilised, the legislation might be considered to be overly-broad, including categories of offenders who should not be labelled as, for example criminally homophobic. The difference between the two types of offending captured under both models was summarised by this solicitor in Haynes et al’s research:

‘[A]ny lawyer defending I think would be able to make quite a compelling argument that a person who commits a crime of opportunity versus a person who plans it some way in advance is lower on the scale of offending and therefore should face a lighter penalty and I think the same rationale would have to apply to someone who exhibits unacceptable abusive behaviour towards a person based on race or sexual orientation or gender or religious beliefs in the spur of the moment or the heat of the moment rather than someone who goes out with a petrol bomb or a baseball bat or you know a paint can with the intention of inflicting damage or injury because the person is black or Asian or gay or Sikh or Muslim or whatever, I think there’s two very different classes of offender within those categories.’ (Solicitor)³⁵

Indeed, in that research, a significant number of practitioners argued that the demonstration model is too low a threshold for an aggravated offence:

‘I have to say I can see the argument for motivation being an aggravating circumstance. I must say I’m just not convinced about [the demonstration model].’ (Barrister)³⁶

Further, section 15(2)(e) of the Criminal Justice (Victims of Crime) Act 2017 requires the assessing officer (that is, a member of An Garda Síochána or an officer of the Garda Síochána Ombudsman Commission), when making their assessment of the victim’s needs, to have regard to whether the alleged offence ‘appears to have

³⁵ *ibid.*

³⁶ *ibid.*

been committed with a bias or discriminatory motive, which may be related to the personal characteristics of the victim.’ The legislation does not refer to a lower threshold, although of course this is simply for the purposes of identifying victim needs, so criminal proof of a bias motive is not required at this point.

It is perhaps this distinction – that different models are used at different stages – that might guide us in formulating the legislation. In England and Wales, there is what could be described as a hierarchy of victims, with racist and religiously aggravated hate crime being addressed through aggravated offences, and disablist hate crime, for example, being addressed through aggravated sentencing. What I propose is a hierarchy of *hate*, which recognises the relative severity of the different manifestations of hate crime in the criminal law. Thus, in the context of aggravated offences, where the label of, for example, criminal racist, or criminal homophobe, will follow that offender on their criminal record, I believe it is more appropriate for the more limited model of ‘motivation’ to be used, whereby an offence will be so aggravated where it is established that the crime is either partly or wholly motivated by racism. Where the hate element utilises the ‘demonstration’ of hatred model, the scope of which is broader, and which captures a wider category of behaviours than the motivation model, I believe that it is more appropriate for this to be addressed at sentencing, where the label of ‘hate criminal’ will not attach, at least on the criminal record of that individual. It will, however, be reflected in the sentencing decision of the court, which will ensure that the hate element is addressed formally by the criminal justice process. It is my view that this compromise position has the ability to both address offending behaviour, but respect the rights of offenders.

The range of protected identities

While from a legal perspective, the manner in which the hate element is evidenced is perhaps the most controversial task, from a political perspective, the question as to which identity groups are named tends to be that which dominates debates.³⁷ As has

³⁷ See, for example, James Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford, 1998); Jon Garland, ‘Difficulties in defining hate crime victimization’ (2011) 18(1) *International Review of Victimology* 25; Frederick Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press 1999); Piotr Godzisz and Dorota Pudzianowska, ‘Do Some Identities Deserve More Protection than Others? The Case of Anti-LGB Hate Crime Laws in Poland’ in

been outlined in chapter 6, there have been many attempts to create a normative framework through which the determination of victim categories can be made, none of which are completely satisfactory. In determining what approach should be taken to deciding what the range of protected identities in legislation should be, the primary consideration – as with all other aspects of the statutory framework – should be to ensure that it is ‘culturally contingent’. That is, that the legislation not only understands and draws from good international practice and guidance, but it is appropriate to and suitable for an Irish context. Most obviously, this would require the explicit and specific naming of the Irish Traveller Community in legislation, one of the most historically disadvantaged and marginalised groups in Irish society.

Adapting Bakalis’ suggestion of looking at equality legislation as a means of identifying those groups most likely to be discriminated against, I have expanded this to analysing other pieces of relevant legislation. It is my view that, at least in an Irish context, there are three relevant legislative sources upon which we can draw for inspiration and guidance: equality legislation; the Prohibition of Incitement to Hatred Act; and the Criminal Justice (Victims of Crime) Act 2017. Given the fact that An Garda Síochána currently records hate crime across a range of protected characteristics,³⁸ its recording categories are also worth considering in this context. The relevant categories of protected groups may be listed as follows:

	Equality Acts	Incitement to Hatred Act	Victims of Crime Act	AGS Recording
Age/Ageism	x		x	x
Antisemitism				x
Anti-Muslim				x
Anti-Roma				x
Anti-Transgender				x
Colour	x	x		
Communications difficulties			x	

Jennifer Schweppe and Mark Walters (eds), *The Globalisation of Hate: Internationalising Hate Crime?* (Oxford University Press 2016).

³⁸ Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017) 113.

Disability	x		x	x
Ethnic or national origin	x	x		
Ethnicity			x	
Family status	x			
Gender	x		x	x
Gender expression			x	
Gender identity	x ³⁹		x	
Health			x	
Marital status	x			
Member of the Traveller community	x	x		x
Nationality	x	x		
Race/racism	x	x	x	x
Religion	x	x	x	
Sexual orientation/homophobia	x	x	x	x
Sectarianism				x

Table 8: Protected Grounds in Irish legislation and policy

We can also look to European sources for guidance. At this level, we can see similar divergences in the characteristics named across the Treaty on the Functioning of the European Union, the European Union Charter on Fundamental Rights, the European Convention on Human Rights, and the EU Victims' Directive.

	TFEU	Charter	Convention	Victims' Directive
Age	x	x		x
Any other opinion (other than political)		x	x	x
Association with a national minority			x	
Belief	x	x		x

³⁹ Neither the Employment Equality Acts 1998-2015 nor the Equal Status Acts 2000-2015 explicitly recognise gender identity as a protected characteristic, but the definition of 'gender' has been interpreted so as to include gender identity. See Fergus Ryan, 'Employment' in Orlaith O'Sullivan, Equality and Identity: Transgender and Intersex Experience in Ireland (TENI 2013).

Birth		x	x	x
Colour		x	x	x
Disability	x	x		x
Ethnic origin	x	x		x
Gender				x
Gender identity				x
Gender expression				x
Genetic features		x		x
Health				x
Language		x	x	x
Membership of a national minority		x		x
National origin			x	
Other status			x	
Political opinion		x	x	x
Property		x	x	x
Race		x	x	x
Racial origin	x			
Religion	x	x	x	x
Residence status				x
Sex	x	x	x	
Sexual orientation	x	x		x
Social origin		x	x	x

Table 9: Protected grounds in Europe

While the range of protected groups differs in both the Irish and European contexts, in examining the tables, we see key characteristics emerge, being replicated across a range of models. From analyzing these eight sources, we can put the protected categories into groups, some of which are similar, or overlap. The first group relates to the ‘race’ and ethnicity ground; the second, to the religion ground; the third, disability; the fourth, gender; the fifth, sexual orientation; and the sixth, age. Some characteristics, I argue, are too unclear to be included in legislation, which are discussed below.

Race and Ethnicity including race, colour, ethnic origin, ethnicity, language, national origin (incl nationality), racial origin, residence status, membership of the Roma community, membership of the Traveller community.

Religion including religion or belief

Disability including health, and communications difficulties

Gender including sex, gender identity and gender expression

Sexual orientation

Age

Thus, a list of characteristics in legislation might include, 'race, ethnicity, religion, disability, gender, sexual orientation, and age' which each characteristic being defined more expansively in the interpretation section where required. However, given the particular context of anti-Traveller prejudice in Irish society, I would argue that anti-Traveller and anti-Roma hate be explicitly named in legislation. Indeed, as Irish Travellers are not recognised in legislation as a distinct ethnic group, a failure to explicitly name the group may either result in their exclusion, or cause difficulties in other contexts were they to be included in a definition of 'ethnic group' in legislation. Further, while 'gender' has been interpreted in Equality legislation as including gender identity and gender expression, I argue that in order to avoid uncertainty, such characteristics should explicitly be named, which also allows for the marginalised and excluded trans community to be explicitly protected. Thus, the (alphabetised) list might read: "age, disability, ethnicity, gender, gender expression, gender identity, membership of the Roma community, membership of the Traveller community, race, religion, sex, and sexual orientation.'

As mentioned, it is my view that some of the named characteristics are too vague for inclusion in criminal legislation, namely those relating to political or any other opinion, membership of a national minority, birth, genetic features, and social origin. The 'proviso' of 'other status' is equally unsuitable in an Irish context given the constitutional requirement of certainty, as discussed above.

This process of in/exclusion leaves four characteristics remaining: property, family status, marital status, and sectarianism. Other categories mentioned in the

discussion above include sex workers/prostitutes, members of alternative subcultures, and the homeless. Three approaches can be taken to these groups. The first is to definitively exclude them, with only those core groups protected in legislation. The second is to have a limited range of groups protected in the legislation, with more expansive police recording categories. The third is to take a progressive approach to the issue, with legislation initially being narrowly framed, with further groups being added at a later point.

While all of the approaches to delimiting the protected groups above have some merit, none are definitively more or less meritorious. That said, we could draw from them to develop what I refer to as ‘protection indicators’ which would guide us in deciding whether a group be included in legislation or not. Drawing on the literature, and the definition of minoritised community adopted in this thesis, I argue that such protection indicators should include an analysis of the following:

- Whether the group in question is a minoritised group in society;
- Whether it is possible to legally define the group in a manner which is consistent with the principle of certainty;
- Whether the group is one whose position in society is characterised by relative economic, cultural, or social disadvantage;
- Whether there is evidence that the minoritised group in question is one which suffers a heightened level of risk of targeted violence directed towards their group.

I would suggest that the first two of these protection indicators should be definitive, that is whether protected groups constitute a minoritised community in society; and whether that group can be precisely defined in legislation. Beyond these first two, these are useful protection indicators, which should be treated as a guide to *indicate* but not *determine* whether a group should be protected or not.

When we apply the protection indicators to our remaining characteristics, property, family status, marital status, sectarianism, sex workers/prostitutes, members of alternative subcultures, and the homeless, we are guided as to whether the group is

one which is indicated to be more likely to be in need of inclusion than exclusion. The first and determinative characteristic – that is, whether the group in question is a minoritised community in society – excludes property, family status, and marital status. The second determining protection indicator would exclude members of alternative subcultures. Moving on, there is evidence to suggest that sex workers/prostitutes experience targeted violence, but none to suggest that members of alternative subcultures or the homeless do in an Irish context; that said, homeless people clearly suffer economic, social and cultural disadvantage in society.⁴⁰ For this reason, of these groups, I would suggest the inclusion of sex workers/prostitutes and the homeless.

It is my view that while a legal analysis can provide a framework for the development of legislation which includes the core key identity groups named, other groups should be assessed by way of an examination of the protection indicators which I have proposed. While these protection indicators will not and cannot definitely determine whether a group should be included in legislation or not, they can guide policy makers as to whether such groups should be included.

Conclusion

Despite increasing pressure from international organisations such as the UN Committee on the Elimination of Racial Discrimination and existing obligations under the EU Framework Decision and the European Convention on Human Rights, the Irish state has steadfastly failed to introduce hate crime legislation. The same arguments put forward against its introduction have been put forward on several occasions by the State, and again as recently as July 2018, where the Minister for State for Equality, Immigration, and Integration stated that hate crime is not an issue in Ireland:

⁴⁰ For an analysis of whether such groups should be included in legislation see, for example, Mohammad Al-Hakim, 'Making Room for Hate Crime Legislation in Liberal Societies' (2010) 4 Criminal Law and Philosophy 341; Graham Ellison and Lucy Smith, 'Hate Crime Legislation and Violence Against Sex Workers: Lessons in Policy and Practice' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017).

‘Other countries in which there is hate crime legislation in place have major problems, but we do not. I hear what the Senator is saying about what would happen if we were to start digging, but on the face of it, we have a lot of which to be proud.’

This official rejection of the lived experiences of minoritised communities in Ireland, fails to understand the very real impact of hate crime on the day to day lives of people in Ireland. From a comparative perspective, these experiences have been understood across jurisdictions for decades: as early as the 1980s in the United States, and in the late 1990s in England and Wales. Internationally, the European Union, Council of Europe, and United Nations have equally recognised the harmful and divisive nature of hate crime, and sought to encourage States Parties and Member States to address it through policy and legislative measures. Ireland, however, remains an outlier in this regard.

Hate crime is occurring in Ireland, but unfortunately, as it currently stands, the criminal justice process is largely unable to address it. Further, offenders are sometimes being branded as criminally racist without any evidence that their crime was racially motivated. Hate crime legislation does not just ensure that the rights of victims and offenders are protected, however. The law has an important declaratory function to play in addressing hate crime as it symbolises a country’s commitment to challenging prejudice and discrimination, while simultaneously upholding the rights of all groups of people to be free from targeted violence and abuse. It is my view that, in this jurisdiction, legislation should be introduced to ensure that a message – and an appropriate message – is being sent by statute that hate crime is unacceptable in this state.

It is my view that this message can be made through the introduction of hate crime legislation. This legislation could usefully be based on the aggravated offences model, which should be restricted to those crimes in which the crime was established to be motivated wholly or partly by hate (as broadly defined). In order to recognise and address other forms of targeted hostility, in my view, the legislation should further provide that, apart from those specified aggravated offences, in the

context of prosecution for any other offence where hate (so defined) is demonstrated during the course of the offence, this should be considered an aggravating factor at sentencing. I further believe that the legislation should be inclusively protective, including six core characteristics drawn from similarly protective legislation, but also explicitly protecting the Traveller and Roma communities, the trans community, as well as sex workers/prostitutes and the homeless. That said, legislation should not and cannot be introduced in a vacuum. The implementation of other policies and measures would also be necessary in order to render the legislation effective, and to ensure that the incidence of hate crime can effectively be addressed.

In May 2015, Ireland declared itself through the referendum on marriage equality to be 'loving, equal, fair, generous, and inclusive'.⁴¹ While in the main, this is the case, the experience of members of minoritised communities points to isolation, structural prejudice, marginalisation, and – sometimes – targeted violence. It is my belief that in the same way that the Irish people 'sent a message' of inclusion and respect on 22 May 2015, the Irish state should send a similar message: that the rights of members of minoritised communities to access to justice, safety, and security are to be respected, and that any attempt to criminally interfere with these rights will be addressed.

⁴¹ These were the values used by the Yes Equality campaign on its first billboard campaign to describe Ireland, calling for a yes vote on May 22nd.

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