



Northern Ireland
**Council for
Racial Equality**

A BRIEFING PAPER

ON

**THE REVIEW OF HATE CRIME
LEGISLATION IN NI**

July 2019

INTRODUCTION

The Department of Justice announced the commissioning an independent review of hate crime legislation in Northern Ireland led by Judge Desmond Marrinan on 6 June 2019.

The Review will look at the following issues:

- A workable and agreed definition of a hate crime;
- Whether the current enhanced sentence approach is appropriate for Northern Ireland;
- Whether new categories of hate crime should be created for characteristics such as gender and any other characteristics which are not currently covered;
- The implementation and operation of the current legislative framework offences, in particular Part III of the Public Order (Northern Ireland) Order 1987 and make recommendations for improvements;
- How any identified gaps, anomalies and inconsistencies can be addressed in any new legislative guaranteeing human rights and equality; and
- Whether there is potential for alternative or mutually supportive restorative approaches to dealing with hate motivated offending.

The Review Team, which is led by Judge Desmond Marrinan, is supported by a reference group, comprising a core group of relevant experts, and a broader forum of key stakeholders. The Review Report will be expected to be published in May 2020 for consideration.

NICRE welcomes the decision to review the hate crime law which we do not have one but aggravated sentencing if found to have racial or religious motivated that will have mandatory enhancing sentencing¹. However, existing criminal offences dealing specifically with hate crime do not cover hostility or hatred. Moreover, the current law is not effective through different piece meal legislation, which is outdated on one hand, the sophisticated use of social media to promote hate speech and hate crime on the others.

What we need is, through this review process, to have a consolidated hate crime law to policing the area, and to work with victims to enhance their rights under the current EU law. The Review of the same law in England and Wales, as well as in Scotland, did not take the supremacy of the EU law in this area which is alarming. Their scope of review was narrower to whether to extend the existing hate crime law to other characteristics (grounds). Although the current EU law on hate crime does not include other four grounds in UK, the justification by extending it is through the Victims' Rights Directive and the equality principle as highlights by the EU Agency of Fundamental Rights².

The Criminal Justice Inspectorate published their third Thematic Report on Hate Crime in December 2017 highlights the following issues:

“In Northern Ireland during 2016, there were over eight hate incidents reported to the police every single day. These equated to almost six (5.94) recorded hate crimes. When population is considered, this figure is higher than the equivalent rate in England

¹ Criminal Justice (NI) (No. 2) Order 2004. It could download with the following link:

<http://www.legislation.gov.uk/nisi/2004/1991>

² FRA Opinion – 02/2013 Framework Decision on Racism and Xenophobia, Vienna 15 October 2013. It could download with the following link: https://fra.europa.eu/sites/default/files/fra-opinion-2-2013-framework-decision-racism-xenophobia_en.pdf

and Wales (5.47). Hate incidents perpetrated against people because they are perceived to be different in some way is much higher.”³

“The Department of Justice (DoJ) approach to hate crime was contained within its Community Safety Strategy but there were no effective links to an overarching Northern Ireland Executive Policy, such as ‘Together: Building United Communities’ (T:BUC) which would provide leadership at the highest level of government.

The legislative approach to hate crime was not directly comparable across the United Kingdom (UK). A review of hate crime legislation in Northern Ireland would establish whether changes are required. England and Wales had statutory hate crimes of assault and damage, enhanced sentencing powers and relevant public order offences. In Scotland, there was a statutory obligation for hate crime cases to be opened and recorded as such in court. Most reports of hate crime forwarded by the Police Service of Northern Ireland (PSNI) for prosecution decisions were in the ‘aggravated by hostility’ category with only a small number of the statutory public order hate crimes reported.”⁴

“Victims’ reviews on how offenders were dealt with were generally based on their wish for the offending behavior to be stopped. Victims were focused on the prevention of further instances of hate crime and favored restorative approaches, such as education on the benefits of cultural and other differences. Inspectors believe that this will only be achieved when a hate crime strategy, becomes an integral part of an overall Northern Ireland Executive social cohesion strategy, robustly led and monitored using outcome-based accountability measures.”⁵

When the Law Commission in England and Wales published their Hate Crime Review Report, the previous NICEM started to lobby DoJ, CJINI and the Human Rights Advisor of the Policing Board to bring the same review to Northern Ireland. Their Reports highlighted our issues and concerns.

Parallel at the same time, NICEM’s EU funded Good Practice Plus (GPP) project (2014-2016) was to train the police and the public prosecutor to work with victims of racial and religious hate crime and hate speech that based on the current EU law, in particular the Framework Decision on Racism and Xenophobia (Framework Decision)⁶, its first Review Report⁷ and the Opinion of the European Union Agency for Fundamental Right (FRA) on the impacts of the Framework Decision towards victims,⁸ as well as Victims Rights Directive⁹. The core part of

³ CJINI “Hate Crime – an inspection of the Criminal Justice System’s response to Hate Crime in Northern Ireland”, Criminal Justice Inspectorate of Northern Ireland, December 2017, paras 1, p 7. It could be download with the following link: <http://cjini.org/TheInspections/Inspection-Reports/2017/October-December/Hate-Crime>

⁴ Ibid, p 7-8

⁵ Ibid, p 8

⁶ Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, 28 November 2008. It could be download with the following link: <https://publications.europa.eu/en/publication-detail/-/publication/f015ed06-b071-41e1-84f1-622ad4ec1d70/language-en>

⁷ 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, Brussels, COM (2014)27 final. It could be download with the following link: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>

⁸ Ibid

⁹ Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision

the training to the police and public prosecutor was the EU law in this area, as well as shared implementation of the EU law, national policy and practice among Member States. PSNI was the partner in the GPP project and supported by the DoJ.

The Migrant Centre NI was also engaged with another EU funded project, as the previous partner of the GPP project, called G3P to extend the success of the GPP project to the Municipality of Turin (2017-2019). The timing of this project was crucial as the first female Mayor of Turin was elected under the Five Star Movement, the current far-right government in Italy. The project was also supported by DoJ to enabling the participation of the PSNI and the Public Prosecution Service (PPS) through Study Visit in Northern Ireland, Finland and the City of Turin between 2018 to 2019.

SUMMARY: SCOPING THE REVIEW ISSUES

- 1. International Human Rights Standards on Hate Crime**
 - 1.1 Definition of Racial Discrimination;**
 - 1.2 Intersectionality between race and other grounds;**
 - 1.3 The relevance of the definition of “Institutional Racism”;**
 - 1.4 CERD recommendations (see 1.8(a); (c) (d) & (e) in particular;**

- 2. EU Framework Decision and Victims Rights Directive could provide a comprehensive framework to our Review on Hate Crime**
 - 2.1 See FRA Opinion on the effectiveness and gaps of the Framework Decision based on the Victims Rights Directive and all other EU law, including the Treaty provisions;**
 - 2.2 The first Review Report highlights (paras. 2.21) incitement to violence and incitement to hatred and no legal provision in UK law on incitement of violence nor but have a legal definition on incitement to hatred. No provisions in the UK law under Article 1(c) & (d) regarding the denial, condoning and gross trivialisation of the crimes as defined in Art. 6, 7 & 8 of the Statute of the ICC and the Charter of the International Military Tribunal (crimes of genocide, crimes against humanity and war crime) directed against a group of persons or a member of the community.**

- 3. We have the highest hate crime rate in UK but we do not have corresponding legal protection to deter perpetrator in NI**
 - 3.1 A new Consolidated Hate Crime Law should have a good definition of “Hate Crime”. We support the current one that based on the recommendations by the MacPherson Report;**
 - 3.2 We need to incorporate the current Crime and Disorder Act 1998 on racially or religiously aggravated assaults and criminal damages with new updated on improvement into our new Consolidated Hate Crime Law, including Protection from Harassment (NI) Order 1997 on course of conduct.**
 - 3.3 We also proposed the Scottish model to place the public prosecutor under a duty to open the case when offences had been aggravated by hostility when they were brought before the court. And the NI courts will be obligated to record the offence in a way that showed it is aggravated.**

- 3.4 We also proposed to have a legal definition on “Hate”, “hostility”, “incitement to violence” under the Framework Decision. These definition is including the “prejudice” elements.
4. The effectiveness of the enhancing sentencing under Criminal Justice (No. 2) (NI) Order 2004
 - 4.1 There are two categories under the PSNI recording and monitoring of hate crime that are outside the current law (Criminal Justice (No.2) NI Order 2004, these two are transgender and sectarianism. We proposed to include other grounds that based on the FRA Opinion on Framework Decision gender violence/misogyny, harassment and violence against different age groups, etc.
 - 4.2 Due to the current PSNI mind set is on the perception of crime rather than the hatred or hostility of the crime, we proposed the police officer under a duty to provide evidences that based on hatred or hostility in all recorded hate crime incidents and crime.
5. Incitement offences under Part III of the Public Order (NI) Order 1987
 - 5.1 The new Consolidated Hate Crime Law should have clear distinction between different levels of hate crime and their corresponding sentencing, from aggravated racial assault to incitement of hatred under anti-terrorist law and public order law. This is in line with the human rights concept of proportionality and creates less confusion among different part of the hate crime law.
 - 5.2 We also proposed to have an additional one on those hate crime committed by the paramilitary whether it is from NI or other jurisdictions with corresponding enhancing sentencing to demonstrate the seriousness of the crime to the general public. These includes their commissioning of the crime whether it is under their sanction or not as well as instructing and conspiring the third party, including minors, to commit the offences.
 - 5.3 We also proposed to have a safeguard provision to protect public servants when they are on duty to provide public services.
 - 5.4 In post-conflict NI, we need to implement what agreed under the GFA and other subsequent agreements in full, in particular tackling the legacy of the past. Until and unless we resolve this political issues, otherwise the hate crime and public order offences will remain the same.
6. Underreporting of Hate Crime and Hate Speech
 - 6.1 Both the UN Committee on Racial Discrimination (paras. 1.8(c) & (d)) and CJINI recommends the same to tackle serious underreporting, in particular Islamophobia.
 - 6.2 We also proposed to extend the bi-lingual advocate scheme to the Muslim group in NI in order to build trust and capacity building for the Muslim community to provide support to victims of hate crime and hate speech.
7. The current conviction rate (clearance rate) is lower than the rest of UK due to lack of evidence, insufficient evidence or not pass the public interest tests in the initial report submitted by the PSNI
 - 7.1 In addition to the proposed law to put the PSNI officer under a duty to collect evidence that based on hate and hostility, we also proposed to have a

guidance under the law on evidence collection on hate crime and hate speech.

7.2 We also proposed the PSNI officer should have a new training module on the new law to collection evidence on hate crime and hate speech.

8. The current Advocacy Support Scheme is not sufficient as outlined under the Victims Rights Directive

8.1 There is a gap regarding the provisions under the Directive on the rights of victim such as recognition, effective access to justice, participation in proceedings and to protection against repeat victimisation. These include provisions of assistance and victim support, the right of victims to legal advice, representation and legal aid or the protection of victims against secondary victimisation.

8.2 We also proposed a standardisation of the number of professional staff under the current advocacy scheme against the maximum number of victim.

9. Restorative Justice and/or other alternative to perpetrator of hate crime

9.1 We proposed to have sufficient resources to prepare both the victim and the perpetrator in advanced of the court hearing for the restorative justice to tackle low level of intimidation and hate crime, including anti-social behaviour.

10. Government lack of joint-up approach to tackle hate crime

10.1 Hate Crime Strategy as part of the Community Safety Strategy should have direct link to TBUC with outcome based accountability measures with which to monitor the effectiveness of these strategies should be developed, consulted on and agreed.

10.2 Civil Society should find a common solutions and should participate to deliver the solutions.

SCOPING THE ISSUES

1. What are the international human rights standards on Hate Crimes?

1.1 Hate crimes are not explicitly defined in international law or domestic law. To understand the term in a human rights context, the starting point is to understand the meaning of "racial discrimination". Article 1 of the International Convention for the Elimination of all Forms of Racial Discrimination defined " 'discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."¹⁰

1.2 The UN Covenant on Civil and Political Rights (ICCPR)¹¹ and the International

¹⁰ Article 1 (1) of the International Convention for the Elimination of All Forms of Racial Discrimination, UN ICERD, 1965. It could download from the following link:

<https://ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

¹¹ Article 20 and 26 are the key provisions on Hate Crime. It could download with the following link:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

Convention for the Elimination of all Forms of Racial Discrimination (ICERD)¹² are the main human rights standards on hate crime. Due to the indivisible nature of human rights and intersectionality of race and other grounds, racist hate crime will also frequently engage the rights protected under the other international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CPRD), and the UN Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions. These Treaties were signed and rectified by the UK Government which impose obligations to implement these Treaties in full. Due to common law system, these Treaties will not have direct legal effect, unless it is rectified through domestic law, such as the Human Rights Act 1998.

1.4 Within Europe, both the Council of Europe (CoE) and the European Union (EU) have addressed the issues of racism and hate crimes. The most relevant treaties of the CoE are the Framework Convention for the Protection of National Minorities (FCNM)¹³ and the European Convention of Human Rights (ECHR)¹⁴. Through the Human Rights Act 1998 (HRA) a majority of the rights and freedoms contained in the ECHR have been given domestic effect. This is the only human rights instrument incorporated directly into UK law.

1.5 “‘Racism’ in general terms consists of conduct or words or practices which advantage or disadvantage people because of their colour, culture or ethnic origin. It is more subtle form it is as damaging as in its overt form¹⁵.” “Racism is, therefore, not about objective characteristics, but about relationships of domination and subordination, about hatred of the ‘Other’ in defence of ‘Self’, perpetrated and apparently legitimated through images of the ‘Other’ as inferior, abhorrent, even, sub-human.”¹⁶ Whereas ‘Institutional racism’ consists of the collective failure of an organization 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.¹⁷”

1.6 In popular discourse, hate crime is used to incorporate acts of racism that may not necessarily a hate crime per se, such as name-calling or anti-social behavior. Such acts can be repetitive that may lead to criminal offence. Alternatively, they can prove indicative of underlying prejudices which may escalate over time if left unaddressed and thereby constitute a criminal offence. These acts are often referred to as ‘signal’ incidents.¹⁸ At the same time, the concept of ‘Institutional racism’ is also relevant simply it is about the organizational culture in which unwitting prejudices, ignorance and thoughtlessness whilst not deliberate or directed, will nonetheless, if left

¹² Ibid., Article 1, 4 and 5 are the key provisions on Hate Crime.

¹³ The main provisions are Article 4, 5 & 6. It could be download in the following link:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c10cf>

¹⁴ The main provisions are Article 8, 13 and 14. It could download with the following link:

https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁵ The Stephen Lawrence Inquiry (February 1999), paras 6.4. It could download with the following link:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf

¹⁶ Sandra Fredman (ed), “Discrimination and Human Rights- The case of racism”, Oxford, 2001, p 10

¹⁷ The Stephen Lawrence Inquiry, *ibid.*, paras 6.34

¹⁸ Innes, M., ‘Crime as a Signal, Crime as a Memory’, *Journal for Crime, Conflict and the Media* 1(2) 15-22, p 15.

unaddressed, risk decreasing the levels of trust and confidence amongst the victims of hate crime in general, racist hate crime in specific, and the communities to which they belong. Therefore, the behaviours and attitudes of staff within the criminal justice agencies and their contract out services to voluntary and community sector supporting victims of hate crime are particularly significance.

1.7 UN Committee on Racial Discrimination (CERD) in its Conclusion Observations of the UK

Periodical Report raised the following concerns on Racist Hate Crime and Hate Speech:

“The Committee is seriously concerned at the sharp increase in the number of racist hate crimes especially in England, Wales and Northern Ireland in the weeks prior to and following the referendum on the membership of the European Union held on 23 June 2016. In particular, the Committee is deeply concerned that the referendum campaign was marked by divisive, anti-immigrant and xenophobic rhetoric, and that many politicians and prominent political figures not only failed to condemn it, but also created and entrenched prejudices, thereby emboldening individuals to carry out acts of intimidation and hate towards ethnic or ethno-religious minority communities and people who are visibly different.

The Committee remains concerned that despite the recent increase in the reporting of hate crimes, the problem of underreporting persists, and the gap between reported cases and successful prosecution remains significant. As a result, a large number of racist hate crimes seem to go unpunished. It also remains concerned at the negative portrayal of ethnic or ethno-religious minority communities, immigrants, asylum-seekers and refugees by the media in the State party, particularly in the aftermath of terrorist attacks, as well as the rise of racist hate speech on the Internet. Notwithstanding these challenges, the Committee regrets that the State party continues to maintain its interpretative declaration on article 4 of the Convention (arts. 2, 4 and 6)¹⁹.”

1.8 The Committee recommended the followings:

“...that the State party, including the governments of Northern Ireland, Scotland, Wales, the British Overseas Territories and the Crown dependencies:

- (a) Investigate all reported acts of racist hate crimes, prosecute and punish the perpetrators with sanctions commensurate with the gravity of the offence, and provide effective remedies to victims;
- (b) Systematically collect disaggregated data on hate crimes, ensure that measures to combat racist hate crimes are developed with the meaningful participation of affected groups, and undertake a thorough impact assessment of the measures adopted to ensure their continued

¹⁹ CERD/C/GBR/CO/21-23, 26 August 2016 at paras. 15. It could be download in the following link: https://www.equalityhumanrights.com/sites/default/files/icerd- concluding_observations.pdf

effectiveness;

- (c) Adopt concrete measures, in consultation with affected groups, to increase the reporting of racist hate crimes by ensuring that the reporting mechanism is transparent and accessible, and that victims have trust in the police and the justice system;
- (d) Taking into account the Committee's general recommendation No. 35 (2013) on combating racist hate speech, adopt comprehensive measures to combat racist hate speech and xenophobic political discourse, including on the Internet, particularly with regard to the application of appropriate sanctions, and ensure that public officials not only refrain from such speech but also formally reject hate speech and condemn the hateful ideas expressed so as to promote a culture of tolerance and respect;
- (e) Take effective measures to combat racist media coverage, taking into account the Committee's general recommendation No. 35 (2013) on combating racist hate speech, and ensure that such cases are thoroughly investigated and, where appropriate, sanctions are imposed.²⁰

2 EU Framework Decision on Racism and Victims' Rights Directive could provide a comprehensive framework to our Review on Hate Crime

2.8 Unfortunately, the review of hate crime law in Scotland, and in England and Wales, did not have the EU legal dimension. The FRA with its terms of reference: Assessment of the impact of the Framework Decision.....on the rights of victims of crimes motivated by hatred and prejudice, including racism and xenophobia; Is there anything further that needs to be done at European Union level to better protect and acknowledge the rights of victims of crimes motivated by hatred and prejudice, including racism and xenophobia published its Opinion in 2013 provided an holistic and comprehensive review of the Framework Decision and identified current gaps in the Union law. There are also gaps in the UK as highlighted at the Commission's first Review Report on Framework Decision in 2014.

2.9 **The Recital (1) of the Framework Decision stating that “racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principle upon which the European Union is founded an which are common to the Member States.”²¹**

2.10 The Framework Decision contains two parts: the first and main component aims at harmonizing EU Member States' penal laws concerning the definition of criminal offences and sanctions, in particular certain forms of public expressions of racism and xenophobia, forms that are commonly referred to as 'hate speech'²² and 'negationism'.²³ Negationism refers to “publicly condoning, denying or grossly trivializing” genocide and other severe crimes as defined in particular documents.²⁴

²⁰ Ibid, paras 16.

²¹ Ibid., 5, p 1

²² Article 1(1) (a) and (b)

²³ Article 1(1) (c) and (d)

²⁴ See Article 1(1) (c) and (d) of the Framework Decision with reference to genocide, crime against humanity and war crimes, as defined in the Statute of the International Criminal Court; see also crimes as defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.

- 2.11 The second component is Article 4 of the Framework Decision which obliges EU Member States' criminal justice agencies to take into consideration any racist or xenophobic motivation behind a criminal offence. This provision relates to the right of victims of crime to have courts render visible, i.e. 'unmask' any discriminatory motives of offenders.²⁵ The crucial difference in comparison to the first component is that Article 4 of the Framework Decision does not oblige EU Member States to incriminate or punish any particular behavior. Only if the Member State decide to criminalize certain conduct, does this decision come with the requirement, and corresponding right of victims, that state authorities be ready to distinguish between offences per se and offences committed with a discriminatory motive.
- 2.12 A crime is committed with a discriminatory motive if it is based on the contempt, disdain or rejection of individuals to whom a certain label, like those listed in Article 21 of the Charter of Fundamental Rights of the European Union (Charter) on no-discrimination, is thought to apply.²⁶
- 2.13 The Framework Decision on racism obliges EU Member States' to adopt criminal law definitions covering all conduct under Article 1 and 2 of the Framework Decision. Article 4 obliges EU Member States to ensure that the racist motives behind offences are not overlooked but that criminal justice system give them appropriate attention. This provision reflects the crucial right of victims of crime as required by well-established case law of the European Court of Human Rights (ECtHR)²⁷
- 2.14 Article 8 obliges EU Member States to ensure that investigations do not depend on a report or an accusation made by a victim. "While this provision clearly and importantly aims to unburden victims, it is also expressly limited to victimization under Article 1 and 2 of the Framework Decision. Hence, it does not extend to victims of bias-motivated crime in the sense of Article 4 of the Framework Decision" (FRA Opinion, p.7)
- 2.15 The Framework Decision pays less attention to the rights of victims, in particular the Victims Rights Directive which was adopted in October 2012 and had transposed to EU Members States by November 2015, **comprehensively covers the rights of victims of crime to: recognition; effective access to justice; participation in proceedings; and to protection against repeat victimization. They include provisions ensuring the effectiveness of investigation and prosecution, the rights of victims to the provision of assistance and victim support, the right of victims to legal advice, representation and legal aid or the protection of victims against secondary victimization. None of these rights are mentioned in the Framework Decision nor the Victims Rights Directive transposed all in Northern Ireland, such as the right of victims to legal advice, representation and legal aid or the protection of victims against secondary victimization.**
- 2.16 The limitations of the Framework Decision on Racism and Xenophobia relates to crimes committed with a racist or xenophobic motivation and also crimes motivated by bias against certain religious groups, but it does not relate to other characteristics

²⁵ European Court of Human Rights (ECtHR), Nachova and Others v. Bulgaria, Nos. 43577/98 and 43579/98, 6 July 2005.

²⁶ For further analysis, see FRA (2012), Making hate crime visible in the European Union: acknowledging victims' rights, Luxembourg, Publications Office of the European Union, p 18-24, available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf

²⁷ See FRA (2012), Making hate crime visible in the European Union: acknowledging victims' rights, Luxembourg, Publication Office, pp. 15-24. It could be download in the following link: https://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf

protected by Article 21 of the European Charter of Fundamental Rights²⁸. The Victims Rights Directive, in contrast, deals with all forms of discriminatory motivations on equal footing.

2.17 The new Treaty of Lisbon introduced a new horizontal obligation for the EU legislator in Article 10 of the Treaty of the Functioning of the European Union (TFEU): “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation²⁹.” The EU has, therefore, to engage in fighting discrimination based on all of the grounds as listed in Article 19 of the TFEU, including in the context of criminal law.

2.18 Article 83(1) of the TFEU refers to “the definition of criminal offences” in “areas of particular serious crime”. Since any offence, in theory, can be committed. Nevertheless, hate crime neither refers to a type of offence, nor to an area of crime in the sense of Article 83(1) of the TFEU. Many areas of crime listed in Article 83(1) of the TFEU may occur as hate crimes. It should be noted that many other relevant offences and areas of crimes are not listed in this TFEU article. This cannot imply that the EU is excluded from fighting discriminatory motivation in the context of such non-listed criminal offences or areas of crime. Since a discriminatory motivation is unmasked and properly addressed is the right of a victim, all policies and measures aimed at meeting this right can be based on Article 82(2) (c) of the TFEU. This makes EU legislator to ensure that not only one ground of discrimination is covered but also all of the other grounds as listed in the horizontal clause in Article 10 of the TFEU.

2.19 Due to the limitation of the Framework Decision, Article 82(2) (b) (c) of the TFEU can form the legal base for a great number of EU actions that could help to better protect and acknowledge the rights of victims of crimes motivated by hatred and prejudice, including racism and xenophobia. In addition, there is much room for EU Member States to further improve the situation of such victims in areas falling within the scope of EU law.

2.20 The Review Team and its Reference Group should consider using the EU legal framework of the Lisbon Treaty, Charter, and relevant Directive to extend the protection to other protected ground or grounds not in the current hate crime law, including political opinion/sectarian, gender violence or misogyny and age related harassment and hate crime.

2.21 The first Review Report of the Commission highlighted the following gaps in transposed the Framework Decision to the UK law:

- Regarding public incitement to violence or hatred, UK legislation expressly mentioned only hatred as argued by UK Government that the concept of violence to be effectively covered by the term hatred
- UK have provided no detail information whether incitement of hatred and violence cover both individual and member of the group.³⁰
- When the victims of incitement are defined by reference to race, colour, religion, descent, or national or ethnic origin, UK mentioned all the grounds except descent.

²⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

²⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

³⁰ By case law, we cover both individual and member of the group by drawing analogy of the equality law

- The Framework Decision oblige UK Government to have criminal law on the public condoning, denial and gross trivialization of the crimes defined in Article 6, 7 and 8 of the Statute of the ICC (crimes of genocide, crime against humanity and war crimes), directed against a group of persons or a member.....We do not have one in this regard.
- We also do not have the public condoning, denial and gross trivialization of the crimes defined in Article 6, 7 and 8 of the Charter of the International Military Tribunal.

2.22 The Review Team and its Reference Group should examine all these gaps in terms of FRA's Opinion and the first Review Report on Framework Decision to ensure that we have all the EU law protection. Moreover, the EU legal framework is also the best justification to extend the current law to all other ground or grounds.

3 We have the highest hate crime rate in UK, but we do not have corresponding legal protection to deter perpetrator in Northern Ireland

3.1 There is an opportunity in this Review to put the current piecemeal law related to hate crime and hate speech into a **consolidated "HATE CRIME" law**³¹. The starting point is to have a **good definition of "hate crime"** which is understood by the victims as well as the officers of the criminal justice system.

3.2 The PSNI and PPS have a common definition, endorsed by the Criminal Justice Board, which defined **hate crime as: "...any incident/criminal offence which is 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**³²." However, **existing criminal offences dealing specifically with hate crime do not cover hostility or hatred in respect of all five grounds.**

3.3 This definition was recommended by the Stephen Lawrence Inquiry.³³ The application of this definition as the sharp end of the system, dealing with reporting, recording, investigating, assessing and prosecuting, is critical in defining how hate crimes progress to final destination. The application of existing legislation during the trial stage sets the scene for later procedures implemented by the Probation Board of Northern Ireland (PBNI), the Youth Justice Agency (YJA) and the Northern Ireland Prison Service (NIPS) as appropriate. **Therefore, NICRE recommend use the current legal definition in addition to new protected ground/grounds to the new consolidated hate crime law.**

3.4 In England and Wales, aggravated circumstances under certain offences were

³¹ The legislative position regarding hate crime is complex and not directly comparable with similar jurisdiction in the rest of the UK, the Republic of Ireland (RoI) or further afield in the rest of Europe. These include overarching legislation (Northern Ireland Act 1998 section 75; and Human Rights Act 1998); Specific statutory hate crime (Public Order (NI) Order 1987 part III; stirring up hatred or arousing fear on religious belief, sexual orientation, disability, colour, race, nationality [including citizenship] or ethnic or national origins); enhancing sentencing powers (Criminal Justice (No. 2) (NI) Order 2004; aggravated by hostility on race, religious belief, sexual orientation and disability); general legislation applicable in certain circumstances (Protection from Harassment (NI) Order 1997- course of conduct; and Race Relations (NI) Order 1997 on racial discrimination); and Amendment and definitions (Anti-Terrorism, Crime and Security Act 2001)

³² CJINI, *ibid.*, p 20

³³ The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny, February 1999

created as substantive offences by the Crime and Disorder Act 1998 (CDA), such as racially or religiously aggravated assaults and criminal damage. These offences are in addition to provisions contained within the Criminal Justice Act 2003 which provide for enhanced sentencing for any of the five protected characteristics (disability, transgender identity, race, religion and sexual orientation).³⁴ **But it lacks of a definition of “hostility” within CDA in which a prosecutor must prove to “demonstrate the hostility” and/or “motivated by hostility” of the perpetrator in order to convict under enhancing sentencing.** The Public Order Act 1986 offences of ‘conduct that is intended or likely to stir up hatred’ on grounds of race, religion and sexual orientation provide a third tier of offences which can be regarded as falling within the ‘hate crime’ arena.

3.5 The legal position in Northern Ireland is similar to that in England and Wales **except that we do not have the CDA. Therefore, racially or religiously aggravated assaults and criminal damage do not exist as substantive offences in Northern Ireland.**

3.6 It appears that “... we have less convoluted than the three-tier approach in England and Wales. There was not requirement to include aggravation as part of the wording of the charge. Prosecutors were required to indicate to the court and defense that they considered the case to be aggravated by hostility. In the event that the aggravation was not proven, this did not automatically lead to dismissal of the substantive charge. In these circumstances, the court could not apply legislation to enhance sentences for offences deemed more serious by aggravated motivation.”³⁵

3.7 In Scotland, the public prosecutor has a statutory duty to open the case when offences had been aggravated by hostility when they were brought before the court. The Scottish courts were obligated to record the offence in a way that showed it was aggravated. Neither of these obligations were present in Northern Ireland legislation.

3.8 The main provision on Hate Speech is under the Public Order law regarding the incitement of racial and religious hatred. The Communication Act 2003 (CA) which is covered Northern Ireland creates a new offence under Section 127 of CA which makes it an offence to send a message that is grossly offensive or an indecent, obscene or menacing character over a public electronic communications network. The section replaced section 43 of the Telecommunications Act 1984 and is drafted as widely as its predecessor. The section has been used controversially to prosecute users of social media in cases such as the Twitter Joke Trial and Facebook comments concerning the murder of April Jones, of course we had our controversial trial over Pastor James McConnel in ‘satanic Islam’ sermon. The issue is how far the balance of freedom of expression and hate speech and/or racism. Do we need a guideline on hate speech prosecution?

3.9 Any new hate crime consolidated law in Northern Ireland should remedy the current legal position in Northern Ireland in order to have the same equal protection within the law across the UK – the fundamental human rights. It should also remedy the current gaps in terms of definition of “Hate Crime”, “hostility”, in particular the two limbs of “hostility” under CDA, as well as a common definition of “hate” which is currently under Article 8 of the Public Order (NI)

³⁴ College of Policing: Hate Crime Operational Guidance 2014, available at http://www.report-it.org.uk/files/hate_crime_operational_guidance.pdf

³⁵ CJINI, *ibid*, para. 2.6, p 20

Order 1987. Do we need the element of “prejudice” in the definition of “hostility”, “violence” and “hate” as outline in the EU Framework Decision?

4 The effectiveness of the enhancing sentencing under Criminal Justice (No. 2) (NI) Order 2004 (Criminal Justice No. 2 Order)

4.1 The Criminal Justice No.2 Order enables aggravated sentencing if found convicted to have racial or religious motivated which impose mandatory enhancing sentencing in the open court. The PSNI listed 6 categories of incidents and crimes motivated by hate in their recording and monitoring form. These are racist, sectarian, faith/religious (non-sectarian), homophobic, disability and gender identity (transphobic hate crime). This means that where offences were recorded by the PSNI as having either of these aggravating factors the legislation which allowed for enhanced sentencing did not apply. In appropriate cases the police procedure was that sectarian motivated cases shown to have a faith/religious or other recognized category of motivation were recorded as such and the enhanced sentencing legislation may then be applicable.

4.2 As a matter of fact, that sectarian and transphobic motivated crimes are not recognized under the Criminal Justice No. 2 Order nor do we have the Crime and Disorder Act 1998 to cover the rest of the two grounds. Moreover, the PSNI forward report on their recorded six categories of hate crime will make difficulty for the PPS which operated within statutory legislation.

4.3 Penalties will be increase for offence ‘aggravated by hostility’. Hostility was not defined in the law, but the legislation pointed to a definition of ‘hatred’ contained in Article 8 of the Public Order (NI) Order 1987. Use of the public order to deal with hate crime was uncommon.

4.4 The Review Team and its Reference Group should remedy these problems by extending to the other two grounds and have a proper definition of hostility under the new consolidated law, taking into account of the Article 8 provision under the Public Order 1987 and the EU legal framework.

4.5 The other aspect of the effectiveness is the sufficient evidence to prove the racial and religious motive in commissioning the crime. This goes straight to the question whether we have sufficient evidence to prove ‘hatred’ or ‘hostility’. The CJINI has the following comments:

“The standard of case files tracked by Inspectors through the system was on a par with those examined during other by inspections. Weakness were evident in the strength of evidence included on files for onward transmission to the PPS. However, there were specific weaknesses pertaining to the hate crime files in that evidence to prove ‘hatred’ or ‘hostility’ was sometimes lacking. The focus of the files appeared to be on presenting the ‘perception’ of the victim. Whilst it can be argued that detailed presentation of the victim’s perception would go some way to providing evidence of hatred or hostility, the standard for recommending prosecution for a hate offence ‘aggravated by hostility’ was not reached.....”³⁶

4.6 The Review Team and its Reference Group might consider whether to put a statutory duty to police officer to obtain evidence that based on ‘hatred’ or ‘hostility’ in order to satisfy the test of aggravated offence as outlined in Crime

³⁶ CJINI. *ibid*, paragraph 3.20, p 34

and Disorder Act 1998. This will divert their use of the perception test in evidence collection.

5 Incitement offences under Part III of the Public Order (NI) Order 1987

5.1 We need to draw a clear distinction on the aim and nature of Hate Crime law and Public Order offences, including Anti-Terrorist law on incitement of racial and religious hatred. There are confusion as different piece of legislation also deals with incitement offences. The origin is under the Public Order Act 1936³⁷ (1936 Act) which aims at, at that time, to control extremist political movements in the 1930s, such as the British Union of Fascists (BUF)³⁸. The BUF had a paramilitary wing of the Fascists Defence Force and embraced of Nazi-style anti-semitism in 1936 led to increasingly violent clashes with opponents, notably the 1936 Battle of Cable Street in London's East End. At that time the British press persistently associated the BUF and the growing British hostility towards Nazi Germany further contributed to the decline and it was banned by the British government in 1940 after the start of the Second World War.

5.2 Although the 1936 Act was not extended to Northern Ireland, the Act was used extensively against IRA and Sinn Fein demonstrations in the 1970s. In November 1974, 12 people were each fined the maximum £50 under the Act for wearing black berets at Speakers' Corner during a Sinn Fein anti-internment rally.³⁹ The police in Northern Ireland in 2015 and 2016 used it to charge Paul Golding and Jayda Fransen of the far-right political movement Britain First under the old section 5 (conduct conducive to breach of the peace)1936 which is now Article 9 of the Public Order (NI) Order 1987 "...uses threatening, abusive or insulting words or behavior, or displays any written material which is threatening, abusive or insulting,..." Dr Robbie McVeigh provided a detail of history, issues and recommendations for change on the incitement to hatred in Northern Ireland.⁴⁰ It is a high quality research paper which could assist the Review Team and its Reference Group in this Review processes.

5.3 In spring 2004, the UVF distributed a leaflet which is highly inflammable at the Community meeting regarding the Chinese Welfare Association was planned to buy a building in Donegal Pass as the permanent office. It also instructed pupils to whom it parents affiliated to UVF or supporters of UVF, distributed the same leaflet to the school bags of the Chinese pupils the Botanic Primary School. The ESOL teacher got the leaflet and informed NICEM to take action. This was the first case when NICEM asked all the political parties to support the use of the incitement of racial hatred provision on the "Yellow Invasion" leaflet (see appendix 1).

5.4 The only issue is whether there is a witness to provide evidence for the purpose of the prosecution case. The case collapse despite the PSNI officers working hard to identify and locate the computer and the printer but could not identify who owned this equipment.

5.5 In the context of a post-conflict society and the ongoing of paramilitarism in organized racist hate crimes against minority ethnic people and the Muslim community⁴¹, there should have a clear distinction, in terms of enhancing

³⁷ <http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/6/contents>

³⁸ https://en.wikipedia.org/wiki/British_Union_of_Fascists

³⁹ "12 who wore....", The Times, 21 November 1974, p 3

⁴⁰ Robbie McVeigh, "Incitement to Hatred in Northern Ireland", Equality Coalition 2018

⁴¹ NICEM, "NICEM submission to the UN Committee on the Elimination of all Forms of Racial Discrimination on the 18th-19th Periodic Reports of the UK", paras 6.19, p 34-35; and "NICEM submission to the UN Committee

sentencing if it proved the paramilitary involved in the attacks whether it is sanction or not. There should be a separated aggravated offence which involved with paramilitary racist attacks and hate speech.

5.6 On 7 July 2019, The Avoniel Leisure Centre which is located at the UVF stronghold East Belfast area, it has been forced to closed after a group of men threatened staff and blocked the entrance on Sunday morning. A Loyalist bonfire is being built in the leisure centre's car park. The barricade at the leisure centre after tyres were removed from another Belfast bonfire by masked contractors called in by the council⁴². It is one of the many controversial bonfires, which was supported by the public purse, as the latest incident as highlighted by Dr Robbie McVeigh's report. The core of the issue is the removal of paramilitary flags in public place which is falling into different department/local council/agencies, despite the law is clear. Who will take the risks to remove the illegal paramilitary flags or banners, etc.? Recently, the leader of Progressive Unionist Party, the political wing of the UVF, asked the UVF take down flags in the mixed Cantrell Close housing estate in Belfast.⁴³

5.7 In consulting with the NICRE board and the Ethnic Minority Police Association of the PSNI, there is an urgent need to protect the public servant, including public sector services that provide by voluntary and community sector, when they are on duty to provide services, this includes police, health care profession, fire brigade, council staffs, highway staffs, staffs of Department of Infrastructure, etc. with threatening, abusive or insulting words and behaviour. The Review Team and its Reference Group should consider having such a provision to tackle paramilitarism on one hand, to protect life, act of violence and harassment of public servants on the others.

6 Underreporting of Hate Crime and Hate Speech

6.1 The CJINI report highlights the current gap of underreporting, in particular the hate crime and hate speech related with Islamophobia. The imminent of fear and immediate reprisal are the key factors to put it real that follows after 9-11, London bombing in 2005, the Refugees crisis in Europe, the Brexit and the recent presence of Britain First in Northern Ireland.

6.2 The criminal justice agencies should divert more resources to support the Muslim community in viewing their rights under the Victims' Rights Directive. In our view, the current overburden of the Migrant Centre NI bi-lingual advocate scheme with 2 part-time to deal with all race cases which is overtaken the number of sectarian attacks and in some case, 10 times more than disability and/or sexual orientation. The model of bi-lingual advocate scheme should extend to the Muslim community to empower their support and as a resilient community to victims of Islamophobia.

7 The current conviction rate (clearance rate) is lower than the rest of UK due to lack of evidence, insufficient evidence or not pass the public interest tests in the initial report submitted by the PSNI

on the Elimination of all Forms of Racial Discrimination on the 21st-23rd Periodic Reports of the UK", Paras 10.2, p 17

⁴² Belfast Telegraph, 7 July 2019 and BBC Northern Ireland, 7 July 2019

⁴³ Belfast Telegraph, 2 July 2019

7.1 This follows the CJINI report on the low conviction rate which is also highlighted at the UN Committee Conclusion Observations in August 2016. **The Review Team and its Reference Group should consider whether a guidance on evidence on hate crime and hate speech shall be developed as part of the new Consolidated hate crime law, in addition to the current training provided by the PPS to the PSNI on this subject area.**

8 The current Advocacy Support Scheme is not sufficient as outlined under the Victims' Rights Directive

8.1 The Victims Rights Directive comprehensively covers the rights of victims of crime to: recognition; effective access to justice; participation in proceedings; and to protection against repeat victimization. They include provisions ensuring the effectiveness of investigation and prosecution, the rights of victims to the provision of assistance and victim support, the right of victims to legal advice, representation and legal aid or the protection of victims against secondary victimization.

8.2 **The Review Team and its Reference Group should look at the gap on the transposed Directive to Northern Ireland and considers a once and for all approach to support victims of all hate crimes which are under a standard provision on the number of victims against the number of required professional staff in post-reporting case to the police station up to the end of the criminal processes.**

9 Restorative Justice and/or other alternative to perpetrator of hate crime

9.1 In the recent CJINI Report it highlighted what the victims want:

“Victims’ reviews on how offenders were dealt with were generally based on their wish for the offending behavior to be stopped. Victims were focused on the prevention of further instances of hate crime and favored restorative approaches, such as education on the benefits of cultural and other differences.”⁴⁴

In our view, we have no objection through education and training (formal and informal) to tackle perpetrator or potential perpetrator of hate crime, especially the children and young people in school as well as those teens in the neighbourhood. The only issue is that restorative justice rely heavily both the victim and perpetrator are in equal footing and are ready for the process, otherwise it does not work. In our experiences working with the Youth Justice Agency, they did not talk to the victim before bringing the perpetrator in. This might be due to lack of staff resources in the highly pressurized timing in the Magistrate. **Therefore, if the process with sufficient resources to prepare both side, NICRE will support the use of restorative approach to tackle low level of intimidation and hate crime, including anti-social behavior.**

9.2 **The Review Team and its Reference Group should also recommend the recommendations from CJINI in its second report that hate crime is not the sole responsibility of the criminal justice system, it is the responsibility of everyone in our society.**

10 Government lack of joint-up approach to tackle hate crime

⁴⁴ CJINI, *ibid.*, p 8

10.1 In its first Inspection Report on Hate Crime in Northern Ireland, the Executive Summary highlights the following:

“The whole society has a responsibility for confronting and finding solutions to hate crime, it is not the sole responsibility of the criminal justice system. Responsibilities to challenge culture, attitudes, values and actions rest with individuals, groups, organisations and the various sectors of local society. While all criminal activity is a matter of concern, crime that also denies humanity to its subjects and can devastate relationships and corrupt the ability to function together as a community, is a cause for even greater concern.

Inspectors found that effective partnerships are one of the most productive means of delivering services to victims of hate crime. This has encouraged voluntary and community groups to come more to the fore to support and engage with the CJS. The necessary remedial work is about changing attitudes this may start within family units, the workplace, religious or political organisations, the education system through curriculum development in schools exploring diversity and culture through citizenship modules. It is important that the work of the CJS in preventing and detecting hate crime promptly to minimize victimization and revictimization fits with other initiatives.”⁴⁵

10.2 In its follow up inspection report in 2010, in its Executive Summary highlights the following:

“Despite good progress being made in terms of political consensus in tackling racism, in practice the drive from the centre to implement the Racial Equality strategy had been stayed, pending agreement on a replacement for the Shared Future Policy.....”⁴⁶

In the recent Hate Crime Report, the Chief Inspector made the following remarks whom was the writer of the previous follow-up report, in his Forward:

“We must never underestimate the moral responsibility that our political leadership has in articulating the vision of a Northern Ireland that celebrates and protects diversity and embraces the richness that different can bring to our lives. Leaders must always speak in unambiguous and unequivocal terms, in supporting through actions those who are marginalized or threatened both in their homes and in public space. But words alone are not enough if they are not accompanied by clear actions that demonstrate and reinforce our society vision....This report concludes that the level of hate crimes occurring in Northern Ireland remains stubbornly high, despite the progress that has been made by the criminal justice agencies. And when under reporting is considered alongside those incidents which fall below the threshold for prosecution, the situation becomes more glaring....WE have made a small number of strategic and operational recommendations to support the work of the criminal justice agencies and to provide effective cross-departmental governance in tackling the underlying enabling factors of hate crime. This issue demands a Whole of Government approach and should be a priority for any future Executive if this scourge is to be eliminated from our society.”⁴⁷

10.3 It recommends that to review the current hate crime law and “To provide effective cross-departmental governance in tackle the underlying, enabling factors of hate crime

⁴⁵ CJINI “Hate Crime in Northern Ireland – A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland”, January 2007 p 9

⁴⁶ CJINI “Hate Crime – A follow-up inspection of the management of hate crime by the criminal justice system in Northern Ireland”, July 2010 p 9

⁴⁷ CJINI “Hate Crime – An inspection of the criminal justice system response to hate crime in Northern Ireland”, December 2017 p 5-6

the DoJ should, as soon as possible, directly link its Hate Crime Strategy contained in the Community Safety Strategy to Together: Building United Communities (T:BUC) or any future Northern Ireland Executive Cohesion, Sharing and Integration Policy or its equivalent. Outcome based accountability measures with which to monitor the effectiveness of these strategies should be developed, consulted on and agreed⁴⁸.”

10.4 Currently, the representatives of NICRE Board met on 21st February the International Reporting Commission regarding to extend their power to monitor paramilitary racist attacks in addition to their monitoring the criminality of the paramilitary. Our concern is that the PSNI has a specific task force to serve the Commission but there is no sharing of information on the racist attacks within the PSNI. The previous International Monitoring Commission had published their annual report on the paramilitary UVF and UFF/UDA targeting ethnic minority groups since 2004 until their closing, except two reports which dealt with the Loyalist Paramilitary decommissioning of their arms.

10.5 We urge the Review Team and its Reference Group to take the same approach as the Chief Inspector to make the government working in a cohesive and joint-up approach to tackle racism in Northern Ireland through law, policy and practice.

END

For further inquiry about this Briefing Paper, please contact our Secretary with the following details:

patrick@nicre.org or mobile at: 07710 767235

We are happy to meet individual and/or groups, including politicians who are willing to discuss the Review of the Hate Crime law. We are happy to organize meeting and/or seminar for further promotion of your participation in this important Review processes.

APPENDIX 1

“THE YELLOW INVASION” leaflet

⁴⁸ Ibid, p 9