



Northern Ireland
**Council for
Racial Equality**

**NICRE
BRIEFING PAPER
THE REFORM OF
HATE CRIME LAW IN NI:
PART I – THE BASIC
HATE CRIME OFFENCES**

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THE REFORM OF HATE CRIME LAW IN NORTHERN IRELAND:

PART I – THE BASIC HATE CRIME OFFENCES

1. Introduction

1.1 There are three types of hate crime law in England and Wales, Scotland and Northern Ireland. They are (1) under the current hate crime aggravated offences (not apply to NI) and related enhancing sentencing; 2. under the public order offences; and 3. under anti-terrorists law. These offences are confusing as they are coming from different part of the statutory law. It is not only confusion to victims, witnesses and their family members and friends and/or community, it also makes the legal profession, including judges, confuse, too, if they are not familiarise of the current law and practice, in particular sentencing. Need not to say certain ground is more difficult to establish a hate motive or hostility towards the victim such as disability under the current enhancing sentencing regime.

1.2 It is both confusing and difficult to grasp as a victim why and to what extent to use the current enhancing sentencing scheme? Did victim know whether we have a hate crime law at all? Why there are hate crime law within public order and anti-terrorists offences? Any distinction between these three different types of hate crime in terms of sentencing and the threshold of evidences? What are the most effective way or means to convict a perpetrator of hate crime and hate speech? What are the impacts of these law to our Northern Irish society? How far these laws applies to the incitement of racial and religious hatred in sectarian crime, such as bonfire during parading season? Why we still need to invoke the Attorney General in order to prosecute under the incitement of racial and religious hatred in the Public Order law?

1.3 Moreover, most of the law were enacted in the 80s, how effective of the current law in terms of prosecution, conviction and sentencing in the 21st century? Do we need a whole set of new hate crime law in Northern Ireland that based on human rights and equality for all?

1.4 This Briefing Paper based on the Scottish Review, in particular their academic report “A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review” in 2017, The Law Commission Report “Hate Crime: Should the Current Offences be Extended?” in 2014, “Hate crime and the “justice gap”: the case for law reform”¹ and “Taking the “Hate” out of Hate Crimes: Applying Unfair Disadvantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes”². There are three parts of this paper. Part I is the basic hate crime law; Part II is the hate crime offences within the Public Order law and Part III is hate crime offences within the Anti-terrorist law.

1.5 The Reform of Hate Crime Law in NI focus on to what extent the current law in England, Wales and Scotland could extend to Northern Ireland with the view for improvements in terms of gaps and relevance. It also focus on how the current EU law which did not transposed into UK law in full, could have impacts to Northern Ireland in

¹ Walters, Mark Austin, Owusu-Bempah, Abenaa and Wiedlitzka, Susann (2018), *Criminal Law Review*, 12. pp. 961-986.

² Woods, Jordan Blair, *UCLA Law Review*, Volume 56. pp. 489-541.

particular dealing with those offences arising from the incitement of racial and religious hatred during the parade season as well as in other occasion, hate crime committed by paramilitary organisation and/or their member and supporter. And finally, the use of hate crime law under anti-terrorist offences.

2. Current Review and Reform

2.1 The Law Commission in England and Wales in May 2014 published its report “Hate Crime: Should the current offences be extended?”. Due to the limited scope of the terms of reference, it recommends a full review of the existing law and sentencing, in particular Crime and Disorder Act 1998 (CDA). Nevertheless, it extended the aggravated offences under CDA to disability and transgender in light of section 145 and 146 of the Criminal Justice Act 2003 by issuing a Guidance on sentencing for hostility as well as recording use of enhancing sentencing on the Police National Computer.

2.2 The Scottish Minister Ewing appointed Lord Bracadale, a former senior judge, to lead the Independent Review of Hate Crime Legislation in Scotland in January 2017, with terms of references whether to extend aggravated offences to age and gender; whether religious aggravated offences are fit for purpose; any issues and gaps in the current hate crime framework, etc. The Independent Review Report was published in May 2018. It recommends to extend the current aggravated offences to cover gender and age by applying to the current test; and with a new provision that would allow the courts to recognise offences that involve the exploitation of vulnerable people, rather than the current law that based on hostility and/or hatred. It also confirmed that the current religious aggravation to capture religious or other beliefs held by individuals rather than a group. It also recommends a new offence on the stirring up hatred covers all other protected characteristics than racial characteristic, including new measures that protect the freedom of expression.

The Law Commission in England and Wales on 18th October 2018 announced to complete a wide ranging review into hate crime to explore how to make current legislation more effective and consider if there should be additional protected characteristics such as misogyny and age. The Review will commence in 2019, “building on the previous work, the project will review the adequacy and parity of protection offered by the law relating to hate crime and to make recommendations for its reform. It will also consider which characteristics (for example gender, age, disability) should be considered as deserving enhanced protection in criminal law and on what basis.”

The Review of Hate Crime Law in NI was announced on 7th June with the similar terms of reference as in Scotland and UK to improve the current hate crime protection and to extend to other possible grounds that not covers under the current law, with particular concerns to identify issues and gaps of the current law. Senior Judge Murrin was appointed to head up the independent review with a draft for consultation in October this year, with the full recommendations in May 2020.

3. Under current hate crime aggravated offences in England and Wales

3.1 The Crime and Disorder Act 1998 (CDA) and its subsequent amendment which put all hate crime offences into a single legislation which could be a model for Northern Ireland. These includes section 28 (Meaning of “racially or religiously aggravated”, section 29 (aggravated assaults), 30 (criminal damages); 31 (public order offence); and 32 (racially or religiously aggravated harassment, etc.).

3.2 By the Criminal Justice Act 2003 (CJA) which provides enhancing sentencing for five protected characteristics (grounds) such as race, religion (ss. 145) disability, transgender identity, and sexual orientation (ss. 146). These almost cover all the hate crime law in England and Wales as well as in Scotland, whereas in Northern Ireland, we do not have these basic hate crime offences except enhancing sentencing under Criminal Justice (NI) (No.2) Order 2004 to cover race, religion and belief, disability and sexual orientation, the equivalent ss.145 and 146 CJA in England and Wales.

3.3 CDA are set out in law as more serious versions of the basic offences. They carry a higher maximum sentences than the basic offences and are recorded on an offender’s criminal record as racially or religiously aggravated. CDA has a clear distinction from other offences where hostility based on different grounds as an aggravated factor or factors at sentencing, such as ss.145 and 146 CJA.

3.4 Study in England and Wales shows that there is gaps in the current hate crime aggravated offences and sentencing. Burney and Rose (2002 at p.25) remarked that “[a]ttention’ is a common feature within the criminal justice process, as potential offences, charges and convictions make their way through the system’s many ‘gateways’” This means that only a small proportion of cases result in a conviction. For hate crime cases, it is more complex as it is compounded by the prosecution to demonstrate that it proves the basic offence has been committed and it is also a hate crime which distinct from other crimes. These two sets of evidences are crucial for any conviction in the court.

3.5 We do not have those offences under ss. 28-32 of CDA. We do have the equivalent ss. 145-146 of CJA sentencing based on hatred and/or hostility towards any one of the four grounds. Despite we have less than 1,000 racial hate crime recorded by the PSNI per year, Northern Ireland has the highest rate of hate crime in UK per population. The CJINI in the recent “Hate Crime” report highlighted the issues of evidence based prosecution:

“.....However, using the published figures for 2015-16 the following main points emerge:

- *decisions were issued for 764 persons in cases involving hate crime;*
- *the evidential test was met for 57% of the persons for whom decisions were issued compared with 59% in 2014-15; and*
- *of the remaining 326 decisions, 99% did not pass the evidential test, and 1% did not pass the public interest test.*

These figures bear out the issues raised regarding lack of evidence to support those hate crime cases forwarded to the PPS by the PSNI in that in 43% of decisions issued the file had failed the evidence test.

3.30 The figures for all cases in which decisions were issued during the same period indicated that the evidential test was met for 70% of the persons for whom a decision was issued. The evidential test failure rate of 30% in all cases compares unfavourably with a rate of 43% for hate crime cases forwarded to the PPS by the PSNI.”

3.6 In viewing the low conviction rate on race due to lack of or insufficient evidences to go to the court in which the gaps are far wider than in England and Wales. For other grounds, the number of cases brought forward for prosecution and the conviction rate are much lower than race as you will expect. The fundamental question is how to prove the hostility of hatred towards ground like disability and sexual orientation if basic offence had proved? What types of crimes are committed towards disability and sexual orientation? Are we create hierarchy of rights on these grounds under the current law? The hierarchy of rights is even higher if CDA extended to Northern Ireland and expanded to more existing and new grounds. Do we have any new approach to tackle these evidential proof problem?

3.7 Currently our legal approach is the “hatred motivation” model which will have significant disadvantage for disability. This is more the case of perceived “vulnerability” and the interpretation of “hostility”. How we create a new parity of protection under the new Hate Crime law? The US model could be part of the solutions by using “group selection” model (also known as discriminatory model) through “by reason” test.

3.8 Under “group selection” hate crime law, an offender must have “selected” his or her victim because of the victim’s protected grounds. Evidence of the offender’s prejudice or biased motivation is not required. Instead, it is considered that, by virtue of specifically targeting a victim because of the victim’s identity characteristics, the offender has evinced prejudice or bias towards that individual.

3.9 The Criminal Code in Illinois is an example to demonstrate this regard. Sec. 12-7.1 Hate Crime.

(a) A person commits hate crime when, **by reason** of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action, disorderly conduct, harassment by telephone, or harassment through electronic communications.....”³

And a penalty enhancement is applied where the offender has committed a basic offence by reason of one of the specified group identity characteristics.

3.10 Under the current aggravated offences in England, Wales and Scotland, the threshold is to test either by a hostile motivation or by the demonstration of hostility. In Scotland it is “evinces...malice and ill-will based on the victim’s membership (or presumed membership) [of a protected group, or] the offence is motivated (wholly or partly)

³ France, Bulgaria and Denmark use a version of the discriminatory selection model: see OSCE, Hate Crime Laws – A Practical Guide (Warsaw: OSCE, 2009).

by malice and ill-will towards [members of the protected group]”. In England and Wales and to certain extent Northern Ireland, it is “demonstrates...hostility...[or] the offence is motivated (wholly or partly) by hostility”.

3.11 Woods⁴, advocating the group selection model, argued why opportunistic bias crimes are deserved for a heavy sentencing that based on Unfair Advantage Theory to justify the enhanced punishment which is consistence with all three theories of punishment, namely retribution, utilitarianism and denunciation. Walter and others in their large scale of hate crime research in England and Wales which funded by the EU, argued the same and suggested to introduced a new Hate Crime law that based on a **“by reason” test**. But their recommendation not accepted by Lord Bracadale, stating that “[t]he advocates of his approach argued that what is important is not whether a group has historically suffered discrimination or oppression, by whether the group is vulnerable to violence because of their perceived difference.”⁵

3.12 They further argued that Lord Bracadale misinterpreted or their recommendation and highlighted the followings: “...in determining what groups should be “protected” under hate crime law, reference to historical marginalisation and oppression is key to understanding why groups have been selected for protection.....The “by reason” test does not include any reference to vulnerability but instead relies on the decision by the offender to select a victim based on their protected characteristic. The importance of perceived vulnerability and difference is that it helps us to understand why selecting people with certain characteristics should be included in hate crime legislation – however, it does not make up the test for inclusion.”⁶

3.13 They provided further two examples to illustrate victim’s “vulnerability and difference”. “The transgender woman who is sexually assaulted and beaten because the offender knows she can do nothing to protect herself, or the young Muslim girl whose head scarf is torn from her head because she is seen as an easy target, are but two examples of “hate crime” committed by a reason of the victim’s identity. In many of these types of cases, there is no clear cut toward (i.e. verbal) manifestation of hostility, neither will there always be sufficient proof to show that the defendant was “motivated” by hostility. Yet, these kinds of cases illustrate how often certain group of people are brutalised, sometimes tortured, and often abused, simply because of who they are. Their vulnerability cannot be disentangled from the judgements that offenders make about the worthiness of their victim’s value as human beings. Victims are “selected” because their “difference” means that they are deemed to be somehow less, and their worth as equal members of society is therefore diminished.”⁷

3.14 The mechanics of the law, as they argued “...we need to understand the circumstances in which an offender would fall foul of the law. To adequately reflected the culpability of the targeted selection, we might ask first whether the victim’s identity characteristic was a sine qua non of the offence. The relevant

⁴ See Woods (n2) at 532-540

⁵ Bracadale, Review of Hate Crime Legislation in Scotland, para.3.16.

⁶ Walters and others, at p.27-28.

⁷ Ibid., p.28.

question to ask is: “but for” the victim’s protected characteristics would the offence have occurred? The characteristic need not be the sole reason for selection, but, following current rules on legal causation, we might ask whether the victim’s protected characteristics was a “substantial” reason (cause) for committing the offence. Where the answer is in the affirmative, then the aggravated version of the offence is made out. Crimes that are committed against individuals where their characteristic is incidental to the offence, should not fall within the meaning of the “by reason” test. It is important that identity remain the focus of hate crime legislation and that preventing and addressing targeted victimisation is the goal of such laws.”⁸

3.15 The use of “by reason” test aims at to provide greater flexibility for prosecutors to pursue certain forms of prejudice-based crimes, which the current motivation of hostility test fails to achieve. Whereas a defendant is convicted of a basic offence against a disabled victim because of her/his perceived “vulnerability”, under “by reason” test, the offence could more accurately be labelled and disposed of as a hate crime, as against a judge enhancing sentence and labelling the offence as one aggravated by “vulnerability”, as proposed by Lord Bracadale.

4. A proposed Hate Crime Law in NI

4.1 Due to our specific circumstances in Northern Ireland and the Good Friday Agreement affirms human rights and equality for all, we should use this opportunity in the new Hate Crime Law to cover the following grounds: sectarian, race, religion, gender, gender identity, sexual orientation, disability and age based on actual or perceived identity as listed. The use of Group Selection Model would improve the current prosecution of all types of hate crime on one hand, to stop the confusion of sentencing on the others. We recommend by amending s.28(1)(b) (or equivalent in a new Hate Crime Order) by introducing the following provision:

“The offence is committed by reason of the victim’s membership (or presumed membership) of a racial or religious or sectarian group, or by reason of the victim’s gender (or presumed membership) or by reason of the victim’s sexual orientation (or presumed membership) or by reason of transgender (or presumed membership) or disability (or presumed membership) or age (or presumed membership) or by reason of language⁹ (or presumed membership).

It is a closed list as suggested which aims to build more case law in these area in order to extend to more new ground or grounds. We also bear in mind that the intersectionality between different identity are interplayed. Therefore, there should be a provision that could trigger the review and to extend to new ground or grounds for the future hate crime law. The proposal will put Northern Ireland deviate from the current practice in England and Wales as well as in Scotland. It is justifiable in

⁸ Walters and others, at p. 25-26

⁹ European Commission against Racism and Intolerance (ECRI) Report on the United Kingdom, 5th Monitoring Cycle, paragraph 8, pp. 12, 4th October 2016, Council of Europe.

viewing our special circumstances in Northern Ireland under the Good Friday Agreement.

- 4.2 Section 28(1)(a) should be maintained as it is currently prescribed. The majority of hate crime cases would continue to fall within s.28(1)(a), which is, and would remain, an important tool when tackling most hate crimes where an outward manifestation of hostility has been expressed. As result of the fundamental change of the aggravated offences of the hate crime, ss.145 and 146 of CJA will be repeal accordingly, and no longer have the confusing sentencing under the aggravated factor of hostility.
- 4.3 Based on the research findings of Walters and others that jury is capable to deal with multiple charges, we recommend that for Crown Court Trial on alternative charges and verdicts the basic offence should be left to the jury which be included on the indictment from start of the trial, so that the jury, as well as the judge and parties to the case, have a clear statement of the issues which the jury must determine. We also recommend that jurors be provided with written directions or “route to verdict” documents, setting out the issues that must be proven or disproven in respect of each count on the indictment.
- 4.4 In order to have a fairer outcomes and to stop to expedite court process through plea bargaining by the defence lawyer, we recommend that magistrates should be allowed to reach alternative verdicts to racially, religiously and sectarian aggravated charges. Regarding the mode of trial and over-charging issues, we recommend that charging decisions always be made in accordance with the PPS Code for Prosecutors, to ensure that the required threshold for prosecution is met on the aggravated element as well as the basic offence despite the burden of proof is shift to the defendant to disapprove it.
- 4.5 Based on the new Northern Ireland Hate Crime law, a corresponding guidance, procedures, policy and practice should be in place from DoJ, PSNI, PPS, Court NI, Probation NI, Prison NI, Youth Justice Agency.
- 4.6 Based on the new Northern Ireland Hate Crime law, a corresponding guidance, procedures, policy and practice which is “Victim Centred” on their rights that based on the EU Victims’ Rights Directive¹⁰ and the latest Strategy “Strengthening Victims’ Rights: From Compensation to Reparation”¹¹.

For further enquiry of this Briefing Paper, please contact Patrick YU, Secretary of NICRE, at 7 Rugby Road, Belfast BT7 1PS or email him at patrick@nicre.org.

¹⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

¹¹ “Strengthening Victims’ Rights: From Compensation to Reparation”, EU Victims’ rights Strategy 2020-2025, Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Juncker, March 2019.