



Northern Ireland  
**Council for  
Racial Equality**

**NICRE  
BRIEFING PAPER  
THE REFORM OF  
HATE CRIME LAW IN NI:  
HATE SPEECH  
&  
NEGATIONISM**

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# THE REFORM OF HATE CRIME LAW IN NORTHERN IRELAND:

## PART II – HATE SPEECH & NEGATIONISM

### 1. Introduction

1.1 In Part I we outline the proposed basic hate crime offences (paragraph 4.1) which mirrors section 28-32 of the racial and religious aggravated offences of the Crime and Disorder Act 1998 to form our new Hate Crime law in Northern Ireland by amending section 28(1)(b) with extended grounds (characteristics) under the Group Selection Model of “by reason” test which aims to have more conviction on hate crime in Northern Ireland on one hand, to end the legal confusion in sentencing under section 145 & 146 of the Criminal Justice Act 2003 in England and Wales, our equivalent Criminal Justice (No. 2) (NI) Order 2004, as well as accommodates some new grounds (characteristics) such as disability, age and sexual orientation on their vulnerability without hostility scenario on the others.

1.2 Dr Robbie McVeigh has been working in hate crime research<sup>1</sup> over the last two decades in Northern Ireland. His latest research report “Incitement to Hatred in Northern Ireland”<sup>2</sup> in 2018 looking at international best practice from Article 20 of the ICCPR and Article 4 of the ICERD as well as the European Commission against Racism and Intolerance of the Council of Europe provides a comprehensive analysis which identifies issues and concerns to reform the current law that based on the legal case study. We endorse his conclusion and form the basis to reform the hate crime law in the context of incitement to violence and hatred whether it is a speech or a behaviour.

1.3 In Part II we are looking at Hate Speech and hate crime offences under Public Order law in the context of the EU Framework Decision on Racism, in particular the Incitement of Racial and Religious Hatred under the original 1987 Order, the international human rights standards under UN International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and European Commission against Racism and Intolerance (ECRI) of the Council of Europe, in particular the UN Rabat Plan of Action<sup>3</sup> and ECRI General Policy Recommendation No. 15 on Combating Hate Speech<sup>4</sup>.

### 2. Hate Speech under the EU law

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<sup>1</sup> Dr McVeigh, Robbie, “The Next Stephen Lawrence?: Racist Violence and Criminal Justice in Northern Ireland, NICE, 2006; Dr McVeigh, Robbie, “Race and Criminal Justice in Northern Ireland: Towards a Blueprint for the Eradication of Racism from the CJSNI, NICE, 2013

<sup>2</sup> Dr McVeigh, Robbie, “Incitement of Hatred in Northern Ireland”, Equality Commission, CAJ 2018

<sup>3</sup> Report of the United Nations High Commissioner for Human Rights on the expert workshop on the prohibition of incitement to national, racial or religious hatred”, General Assembly, A/HRC/22/17/Add.4, 11 January 2013

<sup>4</sup> ECRI General Policy Recommendation No. 15 on Combating Hate Speech, Council of Europe, Strasbourg, 21 March 2016

2.1 Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law<sup>5</sup> (the Framework Decision) was adopted unanimously on 28 November 2018, after seven years negotiations. The Framework Decision adopted a common criminal law approach to certain forms of racism and xenophobia, namely racist and xenophobic hate speech and hate crime within the Union.

2.2 The uniformity of the Union law requires Member States to ensure that hate speech with intentional conduct is punishable when directed against a group of persons or a member of such group defined by reference to race, colour, religion, descent or national or ethnic origin:

- publicly inciting to violence or hatred<sup>6</sup>, including by public dissemination or distribution of tracts, pictures or other material<sup>7</sup>;
- publicly condoning, denying or grossly trivialising
  - crimes of genocide, crimes against humanity and war crimes as defined in Article 6, 7 and 8 of the Statute of the International Criminal Court (ICC)<sup>8</sup>; or
  - the crimes defined in Article 6 of the Charter of the International Military Tribunal<sup>9</sup> appended to the London Agreement of 8 August 1945,

when the conduct is carried out in a manner likely to incite violence or hatred against such a group or one or more of its members.

2.3 Under Article 1(2) of the Framework Decision, Member States may choose to punish only conduct which is either (i) carried out in a manner likely to disturb public order or (ii) which is threatening, abusive or insulting. Under Article 1(4), any Member State may make punishable the act of denying or grossly trivialising the above mentioned crimes only if these crimes have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only. This possibility is not provided for the act of condoning the above mentioned crimes. Regarding “hate crime”, Member States must ensure that racist and xenophobic motivation is considered as an aggravating circumstance, or alternatively that such motivation may be considered by the courts in determining the applicable penalties.

## **2.4 Racist and xenophobic hate speech (Article 1)**

### **2.4.1 Public incitement to violence or hatred**

Part III of the Public Order Act 1986, our equivalent 1987 Order<sup>10</sup>, are slightly different. The 1986 Act is under the Title: Racial Hatred – Meaning of Racial Hatred; whereas the 1987 Order is under the Title: Stirring up Hatred or Arousing Fear – Act intended or likely to stir up hatred or arousing fear. Article 8 defines fear and hatred with a reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.

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<sup>5</sup> OJ L 328/55 of 6.12.2008.

<sup>6</sup> Article 1(a)

<sup>7</sup> Article 1(b)

<sup>8</sup> Article 1(c)

<sup>9</sup> Article 1(d)

<sup>10</sup> N.6, For the definition of “incitement “ and “hate”, see pp. 21-23; For history of the incitement to hatred law and case law, see p. 27-41

It falls short of “descent” which is included in the original Directive. Moreover, **incitement** has a broader meaning than just stirring hatred and arousing fear. Dr McVeigh observed that “Historically ‘Incitement’ was an offence in common law in England and Wales. It was an *inchoate offence* – alongside conspiracy and attempt - covering an offence which is yet to be committed. (All three inchoate offences require a *mens rea* or intent, and upon conviction, the defendant is sentenced as if they had succeeded in committing the inchoate crime in question.) In this context incitement consisted of persuading, encouraging, instigating, pressuring, or threatening to cause someone else to commit a crime. Incitement was abolished in England and Wales in 2008 when Part 2 of the Serious Crime Act 2007 came into force, replacing it with the offences of *encouraging* or assisting crime. To add further ambiguity, the term incitement was also removed from the Public Order Act 1986 and the Public Order (NI) Order 1987 - leaving the more colloquial notion of *stirring up* hatred as the key term.”

The current public order offences do not have the provision on incitement to violence. In its report to the Commission both Ireland and UK government argued that “....the concept of violence to be effectively covered by the term hatred”<sup>11</sup>.

#### **2.4.2 Public dissemination or distribution of tracts, pictures or other material inciting to violence or hatred**

The Framework Decision requires Member States that acts of public incitement to violence or hatred by public dissemination or distribution of tracts, pictures or other material shall be criminalised which indicates that not only oral communication should be covered. We are satisfied that the current law covers the above list.

#### **2.4.3 Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes**

The Framework Decision obliges Member States to criminalise the public condoning, denial and gross trivialisation of the crime as defined in Article 6, 7 and 8 of the ICC Statute on crimes of genocide, crimes against humanity and war crimes directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group. Thirteen Member States, including UK and Ireland, have no provision under criminal law to sanction these conduct<sup>12</sup>.

#### **2.4.4 Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal**

The Framework Decision requires Member States to criminalise the public condoning, denial and gross trivialisation of crimes against peace, war crimes and crimes against humanity committed by major war criminals of the European Axis countries. Such conduct can be considered as a specific manifestation of antisemitism when it takes place in a way that is likely to incite to violence or hatred. It is, therefore, essential that this conduct be criminalised. UK and Ireland, among

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<sup>11</sup> para. 3.1.1 at pp.3, “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, Brussels, 27.1.2014 .

<sup>12</sup> para. 3.1.3 at pp.4, N.14

other 15 Member States, have no specific provisions criminalising this form of conduct<sup>13</sup>.

2.5 The new Hate Crime law in Northern Ireland should rectify the followings gaps within the current Framework Decision on hate speech and hate crime:

- Public incitement to violence or hatred (Article 1(a));
- Public condoning, denial or gross trivialisation of genocide, crimes against humanity and war crimes (Article 1(c));
- Public condoning, denial or gross trivialisation of the crimes defined in the Charter of the International Military Tribunal (Article 1(d))+

Accordingly, Hate Speech and Negationism under the new Hate Crime law should read as follows:

### **Public Incitement to violence or hatred**

In this Part-

Meaning of “fear” of a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins or descent, religious belief, sectarian, language, gender, gender identity, sexual orientation, disability, and age.

Meaning of “hatred” against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins or descent, religious belief, sectarian, language, gender, gender identity, sexual orientation, disability, and age.

Meaning of “violence” against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins or descent, religious belief, sectarian, language, gender, gender identity, sexual orientation, disability, and age.

“Negationism” refers to publicly condoning, denying or grossly trivialising genocide, crimes against humanity and war crimes as defined in Article 6, 7 and 8 of the Statute of the International Criminal Court and Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, direct against a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such as group or a member of such a group

Use of words or behaviour or display of written material or display of an object or display of flag

**Article XX (1) (a) he intends thereby to incite hatred, violence or arouse fear, or  
(b) having regard to all circumstances hatred or violence is likely to be stirred up or fear is likely to be aroused thereby**

Based on the formula under Article XX (1) above and a defence is available for defendant or defendants to rewrite the rest of the Part III, including Article 1(c) and 1(d)

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<sup>13</sup> para. 3.1.4 at pp. 6, N. 14

of the Framework Decision. We also propose a protection clause for those public servants and contractors of work for the specific purpose to remove flags, objects, displayed materials, etc. and/or at bonfire for the purpose of public safety, public health and public security. For those who attacks the public servants and/or contractors of work should have higher sentencing than the current public order offences under Part III.

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