

# LIFECYCLE OF A HATE CRIME

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**INFORMATION FOR PROSECUTORS**

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# INTRODUCTION

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In 2015, the European Union Directorate-General for Justice and Consumers funded researchers from Ireland, England and Wales, Latvia, the Czech Republic, and Sweden, to engage in a two-year research project to explore what is called the ‘Lifecycle’ of a hate crime across the five jurisdictions. The purpose of this Project was to examine the manner in which a hate crime is addressed through the criminal process at various stages – investigation, prosecution, court proceedings, and sentencing – to determine how best to ensure that the hate element is appropriately treated by the court. The objectives of the research across all five Member States were to:

- Detail the operational realities of hate crime legislation by gathering experiential accounts of the legislation ‘in action’ from legal professionals;
- Document differences in both victims’ and offenders’ experiences of the criminal justice system according to the legislative and policy context; and
- Identify shortfalls in the legislative responses to Article 4 of the Framework Decision on Racism and Xenophobia
- Inform future EU policy and legislative responses to hate crime.

In furtherance of the first three of these objectives, project partners were tasked with completing a doctrinal analysis of hate crime legislation in each jurisdiction; exploring policies pertaining to policing and prosecutorial functions in relation to hate crime; performing a secondary analysis of statistics on the recording, prosecution and sentencing of hate crime; and conducting interviews with victims, previous offenders, judges, prosecutors and defence practitioners. This latter element of the research design sought to determine the operational realities of the manner in which a hate crime was dealt with across the Member States. Each partner produced a detailed report on their findings as they related to their own jurisdiction. Drawing on these outputs, the partners for Ireland and England and Wales compiled a comparative report, providing a high level analysis of the findings of the jurisdictional reports, with a view to informing EU policy on this issue.

As part of that funded project, the European Union requested that the researchers produce information for prosecutors in each Member State, intended to assist them in understanding hate crime for the purposes of their practice. This short document thus provides a working definition of a hate crime, explores the impact of hate crime on its

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victims, and details the current legislative and policy context prior to addressing case law on the subject. This document should be read in conjunction with the larger national report which emanated from the research, *Lifecycle of a Hate Crime: Country Report for Ireland*.<sup>1</sup>

The research findings give particular attention to the views of legal practitioners and gardaí in Ireland as to the need for training and policies on hate crime. In that context, two issues were stated to be particularly relevant for prosecutors: first, participants spoke of a need to inform prosecutors of the impacts of hate crime, so they have an understanding of the phenomenon;

*“So again especially for ourselves prosecuting ... again I suppose the various effects it might have on injured parties and so on in case they don’t give a victim impact statement.” (Garda)*

Second, participants spoke to the need to ensure that practitioners were aware of the consequences for victims where the hate element of a crime was minimised.

*“I think there could be maybe an education drive that ... for maybe on the prosecution side how important it is to raise that and make sure it’s in the papers, make sure ... you know ... Given as part of the facts.” (Solicitor)*

*“I suppose not to be afraid to flag those elements to the court. Not to exclude them. I suppose more just even to highlight the seriousness of it. So that they’re aware of ... like if they do decide for example to offer a sanitised version of the facts that they know what they’re doing ... it might still be appropriate in a certain case to do that for whatever number of reasons. But that they at least appreciate that this is now a lesser offence that’s being presented.” (Barrister – Defence)*

One individual spoke of a need to provide information on the tools available to prosecutors to ensure that the hate element of a crime was appropriately prosecuted:

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<sup>1</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

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*“... what can we do in law. Because at the end of the day a crime is a crime. We have to prosecute ... we have to proceed with it and if we can prosecute, we can prosecute ... but I suppose it’s just knowing what legislation is there to deal with it. We can take a report, we can be sympathetic to the injured party, we can treat them all equally as I said. But I suppose ... when it comes to us going back to the station, putting incident on PULSE and proceeding with it ... after we take the statement we have to know what legislation we can use. Because d’you know? ... if you’re prosecuting somebody it has to go to court and everything has to be right.” (Garda)*

In light of these recommendations, this short booklet sets out first, what a hate crime is and how to recognise it; second, discusses the requirements of the Victims’ Directive in the context of hate crime; third, sets out some issues to consider in the context of prosecuting a hate crime; fourth, discusses the manner in which the hate crime should or could be pleaded out; and finally, sets out relevant case law on the issue.

### **WHAT IS A HATE CRIME?**

Internationally, it is accepted that a hate crime is an offence which is known to the criminal law and that is committed in a context which includes hostility towards difference. The OSCE describe hate crimes as:

*“... criminal acts committed with a bias motive. It is this motive that makes hate crimes different from other crimes. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence. The term “hate crime” or “bias crime”, therefore, describes a type of crime, rather than a specific offence within a penal code. A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias or prejudice. The term describes a concept, rather than a legal definition.”<sup>2</sup>*

There is currently no legislation in Ireland which requires a court to take a bias motivation, or a demonstration of bias, into account when determining the appropriate

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<sup>2</sup> Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (OSCE/ODIHR 2009) 1.

sanction to impose in a given case. While the 1989 Act criminalises incitement to hatred, it is a hate speech provision and purposefully narrow in its scope and thus not suited to addressing the daily criminal manifestations of bias faced by people in Ireland. In this regard, as Perry observes,<sup>3</sup> Ireland is unique in Western democracies in not having legislation which targets the hate element of a crime.

### **WHO ARE THE VICTIMS OF HATE CRIME?**

While the vast majority of Western democracies have dedicated hate crime legislation, either by way of aggravated offences or aggravated sentencing provisions, there is little consistency in the range of victim characteristics protected by such legislation. The most commonly named characteristics are race (often interpreted to include ethnicity), religion, and increasingly, sexual orientation. More recently, gender identity and gender expression (ie, protecting individuals who identify as transgender) and disability have been included across jurisdictions.<sup>4</sup>

In an Irish context, we have three different sources to draw upon in determining those characteristics which have been deemed worthy of explicit protection in this regard: the Prohibition of Incitement to Hatred Act 1989;<sup>5</sup> the Criminal Justice (Victims of Crime) Act 2017;<sup>6</sup> and police recording categories<sup>7</sup>. When we look at these collectively, we can establish a list of characteristics recognised by the State as requiring particular attention and protection in the context of criminal victimisation. This list includes:

- Age
- Disability, including the health of the victim and any communications difficulties they might have
- Ethnicity, including ethnic origin
- Gender
- Gender identity and gender expression

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<sup>3</sup> Barbara Perry, 'Legislating Hate in Ireland: The View from Here' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 71.

<sup>4</sup> Jennifer Schweppe, 'Defining Victim Groups in Hate Crime Legislation: Certain and Precise?' (UL 2017) available: <[https://ulir.ul.ie/bitstream/handle/10344/6363/Schweppe\\_defining.pdf?sequence=2](https://ulir.ul.ie/bitstream/handle/10344/6363/Schweppe_defining.pdf?sequence=2)> accessed 11 November 2017.

<sup>5</sup> This Act prohibits expressions of hatred, including the dissemination of graphic or textual materials, which have the intention of provoking hatred against "... a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation" (sic).

<sup>6</sup> Section 15 of the Act provides that the following characteristics should be taken into account when carrying out a victim assessment: "the personal characteristics of the victim, including his or her age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communications difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime".

<sup>7</sup> This list includes: gender, anti-disability, ageism, transphobia, homophobia, antisemitism, sectarian, anti-Muslim, racism, anti-Roma, and anti-Traveller.

- Membership of the Traveller and Roma communities
- “Race”, including colour, nationality or national origin
- Religion
- Sectarian identity
- Sexual orientation

In considering the multiple ways in which a hate crime can manifest, these characteristics should be given consideration.

#### **WHAT IS THE IMPACT OF HATE CRIME?**

It is accepted internationally that hate crime is likely to have a more significant impact on its victims than non-hate motivated offences.<sup>8</sup> Indeed, this is recognised at EU level through the Framework Decision: in its Report on the implementation of the Decision, the Commission states that one of the reasons for requiring racist and xenophobic motivations to be taken into account is the impact of this type of crime on “individuals, groups, and society at large.”<sup>9</sup>

Direct impacts can range from physical injury to emotional and psychological harm. There is a qualitative difference to the impact of hate crime as compared to non-hate motivated incidents.

“I was working with a mother last year whose son was abused by [a] neighbour physically, verbally, they suffered property damage – spray paint on the house. The child tried to kill himself twice. He poured detergent over his skin because he thought it would make him white.”  
(Civil Society Organisation employee, Ireland)<sup>10</sup>

For instance, data from the Crime Survey for England and Wales (CSEW) showed that victims of hate crime were more likely than victims of crime overall to say they were

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<sup>8</sup> See for example Paul Iganski, *Hate Crime and the City* (Policy Press 2008); Jennifer Paterson, Mark A. Walters, Rupert Brown, and Harriet Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex forthcoming).

<sup>9</sup> European Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law’ [COM(2014) 27 final of 27.1.2014] (2014) 3.4. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 13 November 2017.

<sup>10</sup> Amanda Haynes, Jennifer Scheppe, James Carr, Niamh Carmody, and Shannen Enright, ‘*Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015) 31.

emotionally affected by the incident (92 per cent and 81 per cent respectively),<sup>11</sup> with 36 per cent of hate crime victims stating that they were “very much” affected compared with just 13 per cent of non-hate crime victims. The data also showed that twice as many hate crime victims suffer a loss of confidence or feelings of vulnerability after the incident compared with victims of non-hate crime (39 per cent and 17 per cent respectively). Hate crime victims were also more than “twice as likely to experience fear, difficulty sleeping, anxiety or panic attacks or depression compared with victims of overall CSEW crime”.<sup>12</sup>

Victims of hate crime in Ireland have reported similar responses<sup>13</sup>:

*“The very last one that happened, we couldn’t sleep. Like, my husband was ... our security guard. He would sleep during the day, and in the night when we sleep, he would stay down here.”* (Victim)

*“As old as I am, I know how depressed I am. You see me ... sometimes you feel like driving through the wall and say ‘What is this for?’”* (Victim)

*“For me that was my safe haven, that was the only place I could go and feel safe, and being targeted like that just ... broke me completely.”* (Victim)

*“[The perpetrator] chose me ... attacking me because of my race has a big and deeper meaning, because I’m never going to change my race or who I am.”*  
(Victim)

Hate crime not only impacts on its direct victims: the targeting of victims on the basis of their membership of a particular community “communicates to all members of that group that they are equally at risk and do not belong.”<sup>14</sup> As such, the terrorising effect of hate crime goes beyond the individual to generate fear and anxiety among the broader community of which the victim is part; what the European Union Fundamental Rights Agency refers to as the “resonating nature of hate crime”,<sup>15</sup> or

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<sup>11</sup> Hannah Corcoran, Deborah Lader and Kevin Smith, *Hate Crime, England and Wales, 2014/2015*, (Home Office, UK 2015) 22.

<sup>12</sup> *ibid.* Other studies have shown that these impacts can also last longer than for victims of equivalent offences which were not motivated by hate. See e.g. Gregory M. Herek, J. Roy Gillis, and Jeanine C. Cogan, ‘Psychological sequelae of hate-crime victimization among Lesbian, Gay and Bisexual adults’ (1999) 67 *Journal of Consulting and Clinical Psychology* 945.

<sup>13</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>14</sup> Amanda Haynes and Jennifer Schweppe, ‘LGB and T? The Specificity of Anti-Transgender Hate Crime’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 130.

<sup>15</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims’ Rights* (2012) 18 available <[http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf)> accessed: 1st July 2014.



what Perry and Alvi refer to as the “in terrorem” effect of hate crime.<sup>16</sup> In a 2015 research report<sup>17</sup> we recount the perspectives of civil society organisations who recognised the presentation of this effect in the communities for which they advocate:

“So we speak about people living a life of fear. That’s certainly been our experience. Fear is the common word used with an intellectual disability or to explain their experience of abuse or assault or indeed to explain their fear of participating in mainstream events. We would organise quite a lot of events for people with an intellectual disability to attend. On a broad range of areas. And people with an intellectual disability would attend in pairs, in groups, they will plan their attendance and the question is why. We ask people. And its safety. So people with an intellectual disability are afraid of things. What are they afraid of? They are afraid of being targeted. They’re afraid of being robbed. They’re afraid of being assaulted.”

(Jim Winters, Policy Officer, Inclusion Ireland)<sup>18</sup>

“I think people are afraid, people are frightened you know that they could be the next victim, that they could be assaulted, that they could be beaten up... worried about their family and friends ... I think it sends a tremor through the community.” (Martin Collins, CEO, Pavee Point)<sup>19</sup>

Hate crimes then can be perceived as “symbolic crimes” that communicate Otherness and operate as an exclusionary practice.<sup>20</sup> They have the effect of regulating marginalised social groups. Indeed, the targeted community must be counted as the secondary victims of the offender.<sup>21</sup>

## HOW DO WE RECOGNISE A HATE CRIME?

In determining whether there is a hate element to a crime, police and prosecutors –

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<sup>16</sup> Barbara Perry and Shahid Alvi, ‘We are all vulnerable’: the in terrorem effects of hate crimes’ (2012) 18 *International Review of Victimology* 57.

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

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

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

<sup>21</sup> Neil Chakraborti & Jon Garland, *Hate Crime, Impact, Causes & Responses* (Sage 2015); Nathan Hall, *Hate Crime*, (2nd edn, Routledge 2013); Jack McDevitt, Jennifer Balboni, Luis Garcia and Joann Gu, ‘Consequences for Victims: A comparison of bias and non-bias motivated assaults’ (2001) 45(4) *American Behavioural Scientist* 697.

and by extension, judges – often look for the presence of what the Organization for Security and Co-operation in Europe (OSCE) refers to as ‘bias indicators’ in the facts of the case which “suggest that the offender’s actions were motivated in whole or in part by bias, prejudice or hostility.”<sup>22</sup> An OSCE document sets out a number of factors which could be considered bias indicators:

“... if a perpetrator uses racial slurs while attacking a member of a racial minority, this could indicate a bias motive and be sufficient for the responding officer to classify a crime as a likely hate crime. By the same token, the desecration of a cemetery or an attack on a gay pride parade may be bias indicators of anti-religious or anti-LGBT motivation.”<sup>23</sup>

It goes without saying, of course, that in the absence of bias indicators, or without any evidence to establish that there was a hate element to the case, the case should *not* be treated as a hate crime at the point of prosecution, and there should be no suggestion by the court that there was a hate element or hate motivation to the case.

### **INTERNATIONAL OBLIGATIONS**

The 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law requires Member States, under Article 4, to “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties”. This requirement has not been legislated for in an Irish context, and research shows that while courts often treat the hate element as aggravating the sentence, this is not always the case.<sup>24</sup> Indeed, research shows that one of the major impediments to the appropriate treatment by the criminal justice process of hate crime, is the fact that it is not consistently recognised throughout the process from the point of reporting to prosecution and sentence<sup>25</sup>.

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<sup>22</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Data Collection and Monitoring Mechanisms: A Practical Guide*, (2014)

<sup>15</sup>. Available online: <http://www.osce.org/odhr/datacollectionguide?download=true> accessed 13 November 2017.

<sup>23</sup> *ibid.*

<sup>24</sup> Fundamental Rights Agency, *Data in Focus Report: Minorities as Victims of Crime* (Publications Office of the European Union 2012) 37.; ENAR, ‘ENAR Ireland Triggers European Parliament Investigation of Ireland on Hate Crime’, (ENAR 2016) <<http://enarireland.org/enar-ireland-triggers-european-parliaments-investigation-of-ireland-on-hate-crime/>> accessed 8 November 2017; Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, ‘*Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

<sup>25</sup> *ibid.*; Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

Further, the European Court of Human Rights has found in a series of cases that States are under a positive obligation to, at the point of investigation, ensure that the hate element of a crime is unmasked and appropriately investigated.<sup>26</sup> For example, in *Angelova and Iliev v Bulgaria*<sup>27</sup> the applicants complained that the authorities failed to carry out a prompt, effective, and impartial investigation in the context of a racially motivated murder committed against two members of the Roma community. The Court found there to be a violation of Article 2 in the case, as there had been a failure to effectively investigate the death of the victim promptly, expeditiously and with the required vigour, “considering the racial motives of the attack and the need to maintain the confidence of minorities in the ability of authorities to protect them from the threat of racist violence.”<sup>28</sup> In the context of the application under Article 2 in conjunction with Article 14, the Court set out the obligations of States in this regard:

“... when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”<sup>29</sup>

In *Milanović v Serbia* the Court made similar findings in the context of anti-religious violence.<sup>30</sup> In *Identoba v Georgia*<sup>31</sup> the Court considered State responsibilities in the context of homophobic violence. Here, the Court stated that there was a duty on the part of authorities to “prevent hatred-motivated violence” on the part of private individuals in the context of a peaceful protest, as well as to investigate the existence of a link between a discriminatory motive and an act of violence under Article 3 in conjunction with Article 14.<sup>32</sup>

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<sup>26</sup> Jasmina Mačkić, ‘The European Court of Human Rights and Discriminatory Violence’ in Jennifer Schweppe and Mark A. Walters (eds) *The Globalization of Hate: Internationalizing Hate Crime?* (OUP 2016).

<sup>27</sup> *Angelova and Iliev v Bulgaria* App No 55523/00 (ECHR, 26 July 2007); see also, *Šečić v Croatia* App No 40116/02 (ECHR, 31 May 2007). See also *Nachova v Bulgaria* App Nos 43577/98 and 43579/98 (ECHR, 6 July 2005) in which the racist violence was perpetrated by the police.

<sup>28</sup> *Angelova and Iliev v Bulgaria* App No 55523/00 (ECHR, 26 July 2007), para 105.

<sup>29</sup> *ibid* para 115.

<sup>30</sup> *Milanović v Serbia* App No 44614/07 (ECHR, 14 December 2010). In *Škorjanec v Croatia* App No 25536/14 (ECHR, 28 March 2017), the Court held that racially motivated offences extended to crimes committed against a victim who is associated or affiliated with a particular racial group.

<sup>31</sup> *Identoba v Georgia* App No 73235/12 (ECHR, 12 May 2015).

<sup>32</sup> See also, *Nachova and Others v Bulgaria* Apps Nos 43577/98 and 43579/98 (ECHR, 6 July 2005); *Identoba and Others v Georgia* App No 73235/12 (ECHR, 12 May 2005). See further, Jasmina Mačkić, ‘The European Court of Human Rights and Discriminatory Violence’ in Jennifer Schweppe and Mark A. Walters (eds), *The Globalization of Hate: Internationalizing Hate Crime?* (OUP 2016) 233.

In its recent decision, *Balázs v Hungary*<sup>33</sup> the Court explicitly referenced the OSCE/ODIHR resource guide, *Preventing and Responding to Hate Crimes* in its examination of the case, which involved an applicant who alleged that the anti-Roma assault perpetrated against him was not appropriately investigated by the State authorities. In this context, the Court stated:

“Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts which are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ... The Court also reiterates the particular requirement for an investigation into an attack with racial overtones to be pursued with vigour and impartiality, having regard to the need to continuously reassert society’s condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence”<sup>34</sup>

The Court particularly noted that where there is an allegation of a racist utterance on the part of law enforcement agents of the State, “it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives.”<sup>35</sup>

Importantly, as Hanek observes, while having specific legislation which addresses the hate element of a crime is beneficial, the obligation to unmask the hate element applies even in the absence of such legislation.<sup>36</sup> It can be assumed that, while the judgments to date have concerned only racist, homophobic, and anti-religious hate crime, given the fact that the obligations stem from an application under either Article 2 or 3 in conjunction with Article 14, such obligations should also then apply in the context of crimes committed against an individual because of their “sex, race, colour, language, religion, political or any other opinion, national or social origin, association

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<sup>33</sup> *Balázs v Hungary* App No 15529/12 (ECHR, 14 March 2016).

<sup>34</sup> *ibid* para 52.

<sup>35</sup> *ibid* para 61.

<sup>36</sup> Aleš Gíao Hanek, ‘International Legal Framework for Hate Crimes: Which Law for the “New” Countries’ in Amanda Haynes, Jennifer Scheppe and Seamus Taylor, *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 467.

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with a national minority, property, birth or other status” meaning that States should be aware of their obligations across a broad range of personal characteristics. However, it must be noted that the obligations under the ECHR do not extend to requiring States to introduce specific hate crime legislation.<sup>37</sup>

### **The Criminal Justice (Victims of Crime) Act 2017**

In Ireland, the Victims’ Directive addresses the needs of victims of hate crime in the context of court proceedings, provisions which have been transposed in the Criminal Justice (Victims of Crime) Act 2017. Article 22(1) of the Directive states that an assessment must be carried out to determine if the victim has any particular “protection needs” and the extent to which they would benefit from “special measures” in the course of criminal proceedings “due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.” Section 15(2) of the 2017 Act sets out the context for this assessment and provides that:

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

...

- (d) the personal characteristics of the victim, including his or her age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communications difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime;
- (e) whether the alleged offence appears to have been committed with a bias or discriminatory motive, which may be related to the personal characteristics of the victim, including such characteristics as are referred to in paragraph (d);
- (f) the particular vulnerability of victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence or exploitation and victims with disabilities.”

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<sup>37</sup> *ibid.*

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

- (a) “The exclusion of the public, any portion of the public or any particular person or persons from the court during criminal proceedings;
- (b) Directions regarding the questioning of the victim in respect of his or her private life;
- (c) Measures under part III of the Criminal Evidence Act 1992 enabling the victim to give evidence through a live television link or an intermediary or enabling a screen or other similar device to be used in the giving of evidence.”

### **PROSECUTING HATE CRIME**

Although the DPP provides guidelines on how the decision to prosecute should be taken for anyone so tasked, there is little explicit reference to hate motivations other than a requirement in paragraph 3.6 that prosecutors shall “comply fully with the relevant requirements of the European Union Victims’ Directive 2012/29/EU as discussed in Chapter 12” and:

“be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, gender, religion, national origin, disability, age, marital status, sexual orientation, and social and economic status and refrain from manifesting, by words or conduct, bias or prejudice based on such differences, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy”.<sup>38</sup>

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<sup>38</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 12  
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 7 November 2017.

That said, some of the guidance provided is relevant to hate crime. In particular, the guidelines have been revised to take into account the Victims' Directive which requires that victims be treated in a particularly protective manner by the criminal justice process as a whole in the context of the investigation and prosecution of a hate crime.

In making the decision to prosecute, a fundamental consideration is an assessment as to whether the prosecution is in the public interest.<sup>39</sup> In coming to this decision, it will first be ascertained whether there is enough evidence to support a *prima facie* case, and then the strength of the evidence to support that *prima facie* case is considered.<sup>40</sup> Where this is the case, the Prosecutor will then ask whether the public interest favours a prosecution, or whether there is any public interest reason not to prosecute.<sup>41</sup> In assessing the strength of the evidence, factors to consider which are relevant in the context of prosecuting hate crimes include:<sup>42</sup>

- the reliability of witness evidence, including an assessment as to whether the evidence could be affected by “the condition of the victim”;
- the consistency of that witness evidence;
- how likely the witness is to stand up to cross-examination; any previous convictions of the witness which might weaken the prosecution case;
- the “competency” of witnesses;
- in the context of “persons with an intellectual disability,” whether they “are they capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the Criminal Evidence Act 1992?”<sup>43</sup>;
- reliability of identification evidence.

Once the prosecutor has established that there is sufficient evidence, they must then go on to assess if the public interest requires that a prosecution be pursued. The more

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<sup>39</sup> *ibid* 12; Separate considerations apply in the context of the prosecution of children. See chapter 5 of the Guidelines.

<sup>40</sup> Details as to how this assessment is made are available at pp. 12-13 of the Guidelines.

<sup>41</sup> In this context, where the suspect is a victim of crime (for example, where the suspect is a victim of human trafficking) the Guidelines state that the prosecutor should consider whether the public interest is served in prosecuting the suspect.

<sup>42</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 15

<sup>43</sup> This section allows evidence to be given by a child or “a person with mental handicap” (sic) without them taking either an oath or affirmation. However, if they do give evidence which he or she knows to be false or does not believe to be true, section 27(2) provides that they shall be guilty of an offence and liable to be dealt with as if he or she had been guilty of perjury.

serious the offence, the more likely it is that the public interest will dictate its prosecution, though there are further aggravating and mitigating factors to be considered. Those aggravating factors relevant in the context of the prosecution of hate crime include:<sup>44</sup>

- if the accused was in a position of authority or trust and the offence is an abuse of that position;
- where the accused was a ringleader or an organiser of the offence;
- where the offence was carried out by a group;
- where a weapon was used or violence threatened or the victim of the offence has been otherwise put in fear, or suffered personal attack, damage or disturbance - *the more vulnerable the victim the greater the aggravation*;<sup>45</sup>
- where there is a marked difference between the age or mental capacity of the accused and the victim, and the accused took advantage of this;
- where the accused has previous convictions or cautions which are relevant to the present offence;
- where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct.

In addition to those factors affecting the seriousness of the offence, the Director then goes on to set out other matters that may arise in assessing whether the public interest requires a prosecution. Again, in the context of the prosecution of hate crimes, the relevant factors include:<sup>46</sup>

- the availability and efficacy of any alternatives to prosecution;
- the prevalence of offences of the nature of that alleged and the need for deterrence, both generally and in relation to the particular circumstances of the offender;
- the need to maintain the rule of law and public confidence in the criminal justice system;

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<sup>44</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 16  
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 7 November 2017.

<sup>45</sup> Emphasis added.

<sup>46</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 17  
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 7 November 2017.



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- the attitude of the victim or the family of a victim of the alleged offence to a prosecution;
  - the likely effect on the victim or the family of a victim of a decision to prosecute or not to prosecute;
  - whether an offender who has admitted the offence has shown genuine remorse and a willingness to make amends.

#### **PRE-TRIAL DISCUSSIONS AND AGREEMENTS**

Again, as far as we are aware, the DPP does not have any specific policies in relation to plea bargaining and hate crime. The Director of Public Prosecutions acknowledges that “pre-trial discussions concerning pleas” occur, where an accused person will offer to plead guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges than those proffered. However, while stating that such agreements “must be consistent with the requirements of justice”, the Director goes on to state that such an offer should not be entertained unless:

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

Further, a plea should not be accepted if to do so would “distort the facts disclosed by the available evidence and result in an artificial basis for sentence.”<sup>47</sup>

In determining whether or not to accept a plea, the DPP sets out a number of considerations which should be taken into account where relevant: none of these are particularly relevant to hate crime. Prior to making a decision to minimise or eliminate the hate element from a case, prosecutors should consider the impact that will have on the victim, as well as the requirement to ensure that the facts of the case are not distorted, as per the DPP Guidelines.

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<sup>47</sup> Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 38  
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 7 November 2017.

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## CASE LAW ON HATE CRIME

Given the absence of any legislation on the issue, it is unsurprising that there is extremely limited case law on hate crime in Ireland. Indeed, used in this context the terms ‘hate’, ‘hatred’ or ‘hate crime’ do not appear in any written judgment delivered in the history of the State.

### Prohibition of Incitement to Hatred Act 1989

In Ireland, the only legislative recognition of ‘hate’ is through the Prohibition of Incitement to Hatred Act 1989. This Act prohibits expressions of hatred, including the dissemination of graphic or textual materials, which have the intention of provoking hatred “against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation” (sic).

Given its context and purpose, one would not expect there to be a large number of prosecutions under the Act. That said, even with these relatively low expectations, the Act has been criticised for being unworkable and unenforceable. For example, “hatred” is defined in the Act as “against a group of persons”. Schweppe and Walsh observe that this limitation is a weakness in the Act, limiting its capacity to address a “very common form of racist behaviour”, that is where the hatred is directed at another person on account of their actual or perceived characteristics.<sup>48</sup> O’Malley agrees that given the requirement that the ‘hatred’ expressed is against a group, as opposed to an individual, it is likely that the number of prosecutions under the Act will remain low.<sup>49</sup>

Described by Keogh as the “Achilles heel” of the Act,<sup>50</sup> it is this requirement – that the defendant either intended to, or in the circumstances was likely to, stir up hatred, that has arguably resulted in so few prosecutions under the Act. Byrne and Binchy ask whether it is sufficient that a few “cranks” are likely to be stirred up, or whether there is an object element to the requirement, concluding that the standard likely to be applied is essentially somewhere between the few “cranks” and the objective standard of the hypothetical juror. Daly, however, argues that the “is likely to” element

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<sup>48</sup> Dermot Walsh and Jennifer Schweppe, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI, 2008) 60-61.

<sup>49</sup> Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 223.

<sup>50</sup> Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178.

of “stirring up” facilitates convictions for cases in which the expression “is either not intended to be heard by others, or simply not intended or expected to incite others to hatred”, ultimately incorporating a threshold of negligence to a criminal act.<sup>51</sup>

One of the few cases in which the scope of this element of the Act was addressed is the ‘O’Grady case’, where the defendant was a bus driver who refused to allow a Gambian man board the bus as he was eating a sandwich. In so refusing him access, the bus driver, as Schweppe and Walsh observe, “subjected the individual to extremely derogatory remarks to the effect that he as a black man lacked the civilised standards of behaviour of the white Irish man.”<sup>52</sup> The conviction of the defendant was overturned on appeal by the Circuit Court on the basis that the only two witnesses to the incident were entirely supportive of the Gambian man. The Circuit Court found that an essential component of the Act – that is, that someone was incited to hate – had not been established.<sup>53</sup>

The Law Reform Commission further observes that the Act has proven particularly ineffectual in combating online hate speech, perhaps for this reason.<sup>54</sup> It refers to the so-called ‘Traveller Facebook case’, in which the accused had created a Facebook page entitled “Promote the use of knacker babies for shark bait.”<sup>55</sup> The Commission notes that the case was dismissed in the District Court on the basis that there was reasonable doubt as to whether there had been intent to incite hatred against the Traveller community.<sup>56</sup> Indeed, Keogh observes that such is the application of the “stirring up” requirement; a conviction will only be secured in cases where “racist material is sent between racists but not when the victim group is directly targeted.”<sup>57</sup> Rather than stir up hatred in society, most right-minded people will be disgusted by the type of material the Act seeks to limit.<sup>58</sup>

There is no written decision on the interpretation of, or application of, section 2 of the 1989 Act. However, in *Re the European Arrest Warrant Act 2003: Minister for Justice*

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<sup>51</sup> Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16.

<sup>52</sup> Dermot Walsh and Jennifer Schweppe, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI, 2008) 61.

<sup>53</sup> *ibid.*

<sup>54</sup> That said, Kane and O’Moore describe the Act as a “technologically neutral” one, as appropriate to online expressions of hatred as it is to those occurring offline. Sinead Kane and Mona O’Moore, ‘The EU Directive for Victims of Crime: how it applies to victims of bullying’ (2013) 23(3) Irish Criminal Law Journal 83.

<sup>55</sup> Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.245, 2.246.

<sup>56</sup> Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.245, 2.246.

<sup>57</sup> Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178, 181.

<sup>58</sup> *ibid.* 178.

*and Law Reform v Petrášek*, a case involving an extradition request, a question arose as to the correspondence of the Czech law of “defamation of the ethnical group, race and persuasion”<sup>59</sup> with the 1989 Act. The warrant stated that Petrášek verbally attacked a Roma family, and “scolded them, and called black swines (sic), Negro swines three women (sic) ... He shouted at them that he would speak only with whites”.<sup>60</sup> In addressing whether correspondence existed in the case, counsel for the respondent stated that the facts did not satisfy the ingredient relating to the place of commission; the ingredient relating to intention; or the ingredient of stirring up hatred. The Court was not impressed with these arguments, and, finding correspondence with the 1989 Act, Edwards J stated:

“The conduct described speaks for itself in this Court’s view, and an intention to stir up hatred in the case of the s.2 offence ... ; alternatively the creation of a likelihood that hatred would be stirred up in the case of the s.2 offence ... can all be inferred from the description of the underlying facts provided. In addition the conduct complained of is stated in the additional information to have been committed in public.”<sup>61</sup>

Thus, while there does not seem to be any evidence that anyone was in fact “stirred up”, as has apparently been suggested as a prerequisite to a prosecution under section 2 in previous cases, Edwards J nonetheless found that the facts, as presented, corresponded to section 2 of the 1989 Act.

### **HATE MOTIVATIONS AS AGGRAVATING FACTORS**

There have been a small number of reported cases in Ireland which discuss the manner in which a hate element should be addressed by the court.

#### **Racist motivation as an aggravating factor**

The first written judgment in which the question as to whether a racist motivation is an aggravating factor was *Director of Public Prosecutions v Elders*.<sup>62</sup> In this case, the racist element was present at the beginning of a series of events which took place where the appellant said to the injured party: “eff off’... ‘eff off Packi bastards”.<sup>63</sup>

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<sup>59</sup> *ibid* para 37.

<sup>60</sup> *ibid* para 38.

<sup>61</sup> [2012] IEHC 212, para 42.

<sup>62</sup> [2014] IECA 6.

<sup>63</sup> *ibid* para 2.

The sentencing judge assessed the offence as being at the top end of seriousness, and that “the racist element was an aggravating factor”<sup>64</sup> and sentenced the appellant to a term of five years imprisonment, the maximum sentence available for that offence.<sup>65</sup>

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

“Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact.”<sup>66</sup>

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

The second case in which this issue was addressed is *People (DPP) v Collins*.<sup>67</sup> As there was disagreement between the parties as to whether the offence in question was in fact racially motivated,<sup>68</sup> the comments of Birmingham J are, strictly speaking, obiter, but none the less worth observing:

“It is not clear what role, if any, this concern about a possible racist motivation had when it came to the selection of sentence. Undoubtedly it is the case that if an offence is racially motivated that would be regarded as an aggravating factor.”<sup>69</sup>

### **Disability as an aggravating factor**

In *People (DPP) v Moran*,<sup>70</sup> in an application for review of a sentence on grounds of

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<sup>64</sup> *ibid* para 7.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid* para 11.

<sup>67</sup> [2016] IECA 35.

<sup>68</sup> “In relation to the judge taking account of the fact that the offence may have been racially motivated. He was prompted to do this by a sentence in the probation report which quotes their client as saying ‘he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend’. By reference to this sentence the judge said that he felt that it was highly probably that the attack had some element of racism to an unspecified degree.” para 15.

<sup>69</sup> [2016] IECA 35 para 16.

<sup>70</sup> [2015] IECA 141.

undue leniency, it was argued by the Director that the sentencing judge failed to take sufficient account of a number of aggravating factors in sentencing the respondent. One of these factors was that the injured party who suffered from a “mental disability”<sup>71</sup> and thus was, as the Director argued, “vulnerable”, was subjected to a series of aggravated burglaries in his own home. Further, it was argued by the Director that the sentence “similarly did not reflect the fact that the respondent carried out the second and third aggravated burglaries being aware of his victim’s vulnerability and with a view to extorting money from him”.<sup>72</sup> In giving judgment for the Court of Appeal, while Sheehan J found that the sentence imposed was indeed unduly lenient, as the sentencing judge “failed to give sufficient weight to the many aggravating factors”,<sup>73</sup> neither the particular vulnerability of the victim nor the fact that the victim seems to have been targeted because of this vulnerability was explicitly mentioned as an aggravating factor.

In *People (DPP) v DO’D* the Court considered the imposition of a five year sentence on the accused following his conviction under section 5 of the Criminal Law (Sexual Offences) Act 1993.<sup>74</sup> The Court of Appeal was asked to consider *inter alia* whether the level of mental impairment of the injured party should have been treated as an aggravating factor in determining the sentence of the accused. On this issue, the sentencing court stated that the following was treated as an aggravating factor:

“The fact that the injured party, obviously, was mentally impaired, and the level of mental impairment, and the level of support that she needed, and her particular circumstances and particular way that the mental impairment impinged on her ability to form any relationship.”<sup>75</sup>

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

“In general, the more mentally impaired a victim is, and consequently the more

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<sup>71</sup> *ibid* para 11.

<sup>72</sup> *ibid* para 25.

<sup>73</sup> *ibid* para 36.

<sup>74</sup> Section 5 provides for a specific offence of having or attempting to have sexual intercourse or committing or attempting to commit buggery on a person who is ‘mentally impaired’.

<sup>75</sup> *ibid* para 5.

vulnerable he or she is, the greater will be the culpability of the offender. Conversely, the milder the victim's mental impairment, the lesser the offender's culpability will generally be."<sup>76</sup>

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

Kilcommins et al. observe that although there is little jurisprudence on the question, there is "no reason why a sentencing judge in Ireland could not regard the fact that the crime was committed against a person with a disability as an aggravating factor."<sup>77</sup> That said, there is of course, nothing requiring a court to take it into account as an aggravating factor either.

### **Observations**

We can say with some degree of certainty that where a racist motivation is present, the court should treat that as an aggravating factor. It is unclear, however, the extent to which the racist element should aggravate the sentence. While the courts have addressed the question of whether disability should be treated as an aggravating factor, this is based on a presumption of vulnerability, rather than an assessment as to whether the offence was motivated by anti-disability bias. This distinction is vitally important to recognise.

It is not clear what level of proof is required in order to establish a racist element. In *People (DPP) v Collins*<sup>78</sup> the trial judge seems to have taken into account the fact that the offence "may have been racially motivated".<sup>79</sup> Birmingham J stated:

"He was prompted to do this by a sentence in the probation report which quotes their client as saying 'he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend.' By reference to this

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<sup>76</sup> *ibid* para 10.

<sup>77</sup> Shane Kilcommins, Claire Edwards and Tina O' Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (ICCL 2013) 51.

<sup>78</sup> *People (DPP) v Collins* [2016] IECA 35, para 15.

<sup>79</sup> *ibid*.

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sentence the judge said that he felt that it was highly probable that the attack had some element of racism to an unspecified degree.”<sup>80</sup>

The Court of Appeal did not take the opportunity to consider whether this amounted to proof of racist motivation on the part of the accused, nor whether such evidence was appropriate to consider as proof of a racist motivation. While the Court did not explicitly criticise the sentencing judge for treating statements in the probation report as proof of a racist motivation to the offence, it did state that it was “not clear” what role, if any, this concern regarding a racist motivation had when it came to determining the sentence. Further, in the cases involving victims with disabilities, there was no assessment as to whether the offence was motivated by an anti-disability bias or any other factor.

Given the very low number of reported cases on hate crime (and the fact that the term “hate crime” has never been used in a reported case) it is difficult to draw any conclusions on the approach that is taken by the judiciary in relation to hate crime. This is particularly the case in assessing the evidential burden required in determining if a hate crime occurred. It can be said with some degree of certainty that the Court of Appeal treats a racist motivation as an aggravating factor. The assessment of the court as to the degree of disability of the injured party will seem to determine the level of aggravation of the sentence, rather than the motivation of the offender. There does not seem to be any case reported in Ireland regarding religious (e.g. antisemitic or Islamophobic) hate crime; or in relation to anti-LGB or anti-transgender hate crime.

In *Lifecycle of a Hate Crime: Country Report for Ireland*<sup>81</sup> we note that while O’Malley clearly states that the principle of proportionality requires that a racist motivation be considered an aggravating factor, he does not address the question as to whether the principle of certainty applies in this context. In that Report, we note that once the contexts and circumstances of hate motivated crime are considered, the applicability of the principle of certainty becomes compelling in cases involving a hate element. Two specific core elements to a hate crime are addressed in this context: first the range of victim categories to which this discretion applies; and second, the manner in which the hate element is evidenced. This issue has not been addressed in reported case law.

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<sup>80</sup> *ibid.*

<sup>81</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).



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## **CONCLUSION**

Ireland is subject to international obligations to consider racist and xenophobic motivations as an aggravating circumstance. Moreover, this jurisdiction is required to identify, assess the needs of, and accommodate victims of all hate crimes across the criminal justice process. Although Ireland lacks legislation to address the hate element of a crime, it is possible for this to be considered as an aggravating factor and to avoid what the European Union Fundamental Rights Agency refers to as the filtering out of the hate element of the crime, or what we call the “disappearing” of hate crime from the criminal justice process.

For further information on the issues raised in this Report, please see:  
[www.iccl.ie/hatecrime](http://www.iccl.ie/hatecrime)



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