

# LIFECYCLE OF A HATE CRIME

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## COMPARATIVE REPORT

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& Mark A Walters*

## *Lifecycle of a Hate Crime: Comparative Report*

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## Foreword

The following work presents, in detail, the final report which analyses the findings of in-depth primary and secondary research conducted over two years tracing the *Lifecycle of a Hate Crime* in selected EU Member States. The research was undertaken in five jurisdictions within the EU – the Czech Republic, England and Wales, Ireland, Latvia, and Sweden in which contrasting approaches to addressing hate crime are evident.

This year marks the tenth anniversary of the adoption by the EU Council of the *Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia (2008/913/JHA)*. Article 4 of the Framework Decision provides that for offences other than incitement to violence or hatred, “Member States shall 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”.

In some of the jurisdictions examined, the national legislative framework underpinning hate crime may be considered robust. In others, laws are more limited. Less clear is the practical application of these laws, of how and in what manner crimes with a hate or bias element come to be prosecuted, and whether and why they may be overlooked or downgraded to generic offences.

To provide greater understanding of the operational realities of the treatment of hate crime in the criminal justice process researchers gathered experiential accounts of these laws “in action” from criminal justice professionals including lawyers and judges. Research teams also sought to investigate and document both victims’ and offenders’ experiences of the criminal justice system in respect to hate crime. In doing so, the research aims to provide a more holistic understanding of the “lifecycle” of a hate crime, from reporting to prosecution to sentencing, in order to identify gaps and good practices in the application of laws. The findings set out here shed new light on measures to combat hate crime for a wide range of stakeholders, including police, policy makers, lawyers, judges, victim support services, and civil society organisations working with victims and offenders.

This report presents a comparative analysis of the findings from the research in each of the five jurisdictions as set out in the jurisdictional reports for the Czech Republic, England and Wales, Ireland, Latvia and Sweden. In jurisdictions where this was deemed appropriate, reports were accompanied by the production of practical information for judges and prosecutors to guide and inform them on matters which should be considered in the prosecution and punishment of hate crime.

The *Lifecycle of a Hate Crime* Research Consortium comprises the following organisations:

- Hate and Hostility Research Group, University of Limerick (Ireland)

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- IN IUSTITIA (Czech Republic)
- Irish Council for Civil Liberties (ICCL)
- Latvian Centre for Human Rights
- Umeå University (Sweden)
- University of Sussex (United Kingdom)

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Liam Herrick  
*Consortium Leader*

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## **PART 1: Introduction**

### **About the project**

The purpose of this research was to understand and explore the Lifecycle of a Hate Crime across five jurisdictions of the European Union and had as its central aim the examination of the manner in which a hate crime is addressed through the criminal justice process at various stages – investigation, prosecution, court proceedings, and sentencing – to determine how best to ensure that the hate element of a crime is appropriately treated by the court. The objectives of the research across all five jurisdictions 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 process 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.

The timeframe under consideration for the project was 2011-2016. In furtherance of the first three of these objectives, project partners were tasked with completing a doctrinal analysis of hate crime 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, convicted offenders, judges, prosecutors and defence lawyers. This latter element sought to determine the operational realities of the manner in which a hate crime is addressed through the legal processes across the jurisdictions party to this research. Each partner produced a detailed report on their findings as they related to their own jurisdiction.<sup>1</sup> The purpose of this Comparative Report is to fulfil the final objective of the study. It provides a high level analysis of the findings of the jurisdictional reports, with a view to informing EU policy on this issue.

### **What is a hate crime?**

Internationally, it is generally accepted that a hate crime is an offence which is known to the criminal law and is committed in a context that includes identity-based hostility. In the absence of an EU-wide definition of a hate crime, for the purposes of

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<sup>1</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017); Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) (Report from England and Wales); Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017); Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017); Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

this project, we adopted the Organisation for Security and Co-operation in Europe (OSCE) description of a hate crime 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.”<sup>2</sup>

Given the absence of an agreed EU definition, the five research partners encountered jurisdictional differences, as well as commonalities, in the manner in which “hate crime” as a construct was used and interpreted by research participants, as discussed in the findings section below. A particular area of divergence was identified in relation to the determination as to which forms of offending that are included under the umbrella of “hate crime” in each jurisdiction. In this project, we sought to distinguish between hate crime as defined by the OSCE, on the one hand, and criminal anti-discrimination provisions, offences connected with extremism, and incitement to hatred offences, on the other. Based on the Office for Democratic Institutions and Human Rights (ODIHR) definition of hate crime as criminal acts committed with a bias motive, other manifestations of hate such as criminal discrimination, offences related to extremism, or incitement to hatred offences are not specifically classified as “hate crimes”.<sup>3</sup> This research highlights differing relationships to these definitional boundaries across the partner jurisdictions, with particular implications for the comparability of their hate crime data.

Further, the manner in which hate crime was addressed across the criminal processes under review differed significantly across the jurisdictions: in England and Wales, new offences were introduced which create racially and religiously aggravated versions of existing criminal offences, while there are also general provisions requiring other forms of hate to be addressed at sentencing for all criminal offences; in Sweden, the Czech Republic and Latvia, legislation addresses the hate element through sentencing; and in Ireland, there is no specific legislation on hate crime. The different frameworks and legal provisions in place in the five jurisdictions addressed in this research are set out in Part 4 of this Report.

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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) 16.

<sup>3</sup> *ibid* 25-26.

### **The common experience of victims: impacts 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>4</sup> Indeed, this is recognised at EU level through the Framework Decision: in its Report on the implementation of the Framework Decision, the Commission states that one of the reasons for requiring racist and xenophobic motivations to be taken into account is the impact of this type of crime on “individuals, groups, and society at large.”<sup>5</sup>

Direct impacts can range from physical injury to emotional and/or psychological harm. Research has shown that there is a qualitative difference to the impact of hate crime as compared to non-hate motivated incidents. For instance, data from the Crime Survey for England and Wales (CSEW) showed that victims of hate crime were more likely than victims of crime overall to say they were emotionally affected by the incident (92 per cent and 81 per cent respectively),<sup>6</sup> with 36 per cent of hate crime victims stating they were “very much” affected by the incident compared with just 13 per cent for non-hate crime victims. The data also showed that twice as many hate crime victims suffer a loss of confidence or feelings of vulnerability after the incident compared with victims of non-hate crime (39 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>7</sup>

Victims who participated in this research project detailed impacts ranging from the physical to the emotional and psychological:

*“And then they kicked [name]. She was pregnant and they kicked her in the stomach. And I said, ‘Why would you kick her in the stomach when she’s pregnant?’ [The police replied:] ‘What do you want, you Black piece of shit?’ That’s what he said. And I say, ‘Listen, I’m being polite with you, speak politely to me, too. Just because I’m homeless, that doesn’t mean you can do whatever you want with me.’ [The police replied:] ‘You know we can.’ And somehow he got me down on the ground. He squeezed my throat right here and hit me with*

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<sup>4</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 2018).

<sup>5</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* (European Commission 2014) para 3.4 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 24 November 2017.

<sup>6</sup> Hannah Corcoran, Deborah Lader and Kevin Smith, *Hate Crime, England and Wales, 2014/2015* (Home Office 2015) 22.

<sup>7</sup> *ibid.* Other studies have shown that these impacts can also last longer than victims of equivalent offences which were not motivated by hate. See e.g. Gregory M Herek, Roy J Gillis and Jeanine C Cogan, ‘Psychological sequelae of hate-crime victimization among lesbian, gay and bisexual adults’ (1999) 67(6) *Journal of Consulting and Clinical Psychology* 945.

*his fists, and raged and swore at me, and the other cop guarded the others.”*  
(Victim, Czech Country Report)<sup>8</sup>

*“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, Irish Country Report)<sup>9</sup>

Hate crime does not only impact 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>10</sup> Indeed, a study in the UK involving over 3,000 LGBT and Muslim people found that simply knowing other people who have been the victim of hate crime increases individuals’ perceptions of threat, which in turn was linked to them experiencing heightened feelings of vulnerability, anxiety and anger.<sup>11</sup> These findings speak to the ripple effect of hate crimes, which serve to generate fear and anxiety among the broader community of which the victim is part: what the European Union Agency for Fundamental Rights (FRA) refers to as the “resonating nature of hate crime”,<sup>12</sup> or what Perry and Alvi have referred to as the “*in terrorem*” effect of hate crime.<sup>13</sup> Hate crimes, then, can be perceived as “symbolic crimes” that communicate Otherness and operate as an exclusionary practice.<sup>14</sup> They have the effect of regulating marginalised social groups. Indeed, the targeted community must be counted as secondary victims of the offender.<sup>15</sup>

### **Who are the victims of hate crime?**

While the vast majority of Western democracies have enacted 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.

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<sup>8</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>9</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>10</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>11</sup> Jennifer Paterson, Mark A Walters, Rupert Brown and Harriet Fearn, *The Sussex Hate Crime Project: Final Report* (University of Sussex 2018).

<sup>12</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims’ Rights* (FRA 2012) 18 <<http://fra.europa.eu/sites/default/files/fra-2012-hate-crime.pdf>> accessed 24 November 2017.

<sup>13</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>14</sup> Barbara Perry, ‘Where do we go from here? Researching Hate Crime’ (2003) Internet Journal of Criminology 9.  
<[https://docs.wixstatic.com/ugd/b93dd4\\_3241d91bd0d34a529e335f50021128d5.pdf](https://docs.wixstatic.com/ugd/b93dd4_3241d91bd0d34a529e335f50021128d5.pdf)> accessed 24 November 2017.

<sup>15</sup> Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage 2009); Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013); Jack McDevitt, Jennifer Balboni, Luis Garcia and Joann Gu, ‘Consequences for Victims: A Comparison of Bias and Non-bias Motivated Assaults’ (2001) 45(4) American Behavioural Scientist 697.

The most commonly named characteristics are race (often interpreted to include ethnicity, nationality and citizenship), religion (including non-believers), and increasingly, sexual orientation (often confined to heterosexuality, homosexuality and bisexuality). More recently, gender identity and gender expression (i.e., protecting individuals who identify as transgender) and disability have been included in a number of jurisdictions.<sup>16</sup>

Across the partners to this project, there were differences in the range of victims protected across jurisdictions, and sometimes within jurisdictions, at various points in the process. The Framework Decision is concerned with combating racism, and is written in that context, but in the absence of an overarching policy on hate crime across the EU, the categories of victims protected will, in certain jurisdictions, exclude groups which require protection. Thus, in considering the findings of this Report, we should be aware that even in those jurisdictions which have legislated against hate crime, not all victims of hate crime will be protected by that legislation.

### **How do we recognise a hate crime?**

In determining whether there is a hate element to a crime, police and prosecutors – and by extension, judges – often look for the presence of what the 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>17</sup> An OSCE document sets out a number of factors that 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>18</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 offence, it should *not* be treated as a hate crime, and there should be no suggestion by the court at sentencing stage that there was a hate element or hate motivation to the crime. Across the jurisdictions party to this project, the research partners identified differences in the extent to which criminal justice professionals (including police, prosecutors, and judges) were aware of the significance of such bias indicators, which spoke in turn to the significance of clear policy on the investigation and prosecution of a hate crime.

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<sup>16</sup> Jennifer Schweppe, ‘Defining Victim Groups in Hate Crime Legislation: Certain and Precise?’ (University of Limerick 2017) <<https://ulir.ul.ie/handle/10344/6363>> accessed 24 February 2017.

<sup>17</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Data Collection and Monitoring Mechanisms: A Practical Guide* (ODIHR 2014) 15.

<<http://www.osce.org/odihr/datacollectionguide?download=true>> accessed 24 November 2017.

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

### **A note on language**

In authoring this research report on hate crime, we have necessarily drawn upon sources which use slurs referencing group identities in rehearsing and explaining their experiences. In reporting this material, we have chosen to asterisk such slurs to limit the potential for re-victimisation among readers. We have only reproduced published text which includes slurs where it was required to substantiate an important point, and in such cases have quoted the content as it appeared in the original. We have published expletives in full.

### **Conclusion**

The five jurisdictions party to this research project were well placed to document a range of approaches to the Lifecycle of a Hate Crime within criminal justice processes. Across the five jurisdictions, there exist a range of legislative provisions and policy interventions which are explored in this project which allow us to inform the development of a European-wide policy on hate crime, and also how Member States should seek to address hate crime at a jurisdictional level.



## **PART 2: Methodology**

### **Introduction**

The purpose of this research was to explore the manner in which Article 4 of the Framework Decision was operationalised across Member States, and the extent to which the rights of victims of hate crime were recognised in the context of the Victims' Directive. The fact that the hate element of a crime can be "disappeared" over its lifecycle has been clearly established in prior research.<sup>19</sup> This research sought to understand the extent to which this "filtering out" was in evidence in the five partner jurisdictions party to this project, and then to identify means by which Member States generally could prevent this from occurring. Ultimately, the project sought to recommend policies and practices at both a national and European level to ensure that hate crime was commonly and comprehensively addressed, not only in policy, but in practice across Member States.

One of the "hallmarks of high-quality empirical socio-legal research" is a detailed discussion of the research design and methods, allowing the reader to make an informed judgement as to the trustworthiness of the empirical data upon which the Report is based.<sup>20</sup> For this reason, each jurisdictional Report includes a comprehensive account of the methodology implemented by each partner. This section first highlights methodological commonalities and differences across the five partner projects, and then describes the particular methodological approach adopted in authoring this comparative research.

### **Socio-legal approach**

The purpose of this research was to provide insights into the manner in which hate crime was addressed in practice across five jurisdictions of the European Union. Thus, a methodological approach which enabled the researchers to contrast empirical evidence regarding the practical operation of substantive and procedural rules, with a doctrinal analysis documenting their intended function, was required. To meet this objective, the project adopted a socio-legal methodology.

The field is defined by the Socio-Legal Studies Association:

"Socio-legal studies embraces disciplines and subjects concerned with law as a social institute, with the social effects of law, legal processes, institutions and

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<sup>19</sup> Amanda Haynes and Jennifer Schweppe, 'The Disappearing of Hate Crime in the Irish Criminal Justice Process', in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 31.

<sup>20</sup> Fiona Cownie and Anthony Bradney, 'Socio-Legal studies: A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 43.

services and with the influence of social, political and economic factors on the law and legal institutions.”<sup>21</sup>

Empirical legal research, that is, the study of “law, legal processes and legal phenomena using social research methods”, is central to socio-legal studies.<sup>22</sup> In this vein, *Lifecycle of a Hate Crime* adopted a “law in action” approach, which explores “how legal norms function in reality and what actors shape their implementation.”<sup>23</sup> This allowed the research partners to examine any gaps between “the law on the books” and “the law in practice”. As Bradney states, empirical legal research:

“... provides not just more information about law; it provides information of a different character from that which can be obtained through other methods of research. It answers questions about law that cannot be answered in any other way.”<sup>24</sup>

The original insights into the treatment of hate crime in five jurisdictions generated by the *Lifecycle of a Hate Crime* methodology demonstrates the value of a socio-legal approach to developing recommendations for effective evidence-informed interventions at the level of both national parliaments and the EU. As Teitelbaum notes:

“If laws are intended to produce certain results, questions about whether they do produce the expected results, whether they produce other results and whether the identifiable results are as consistent with the reason for law as one might have anticipated, are all important to examine.”<sup>25</sup>

### **Mixed methods design**

The socio-legal approach adopted in *Lifecycle of a Hate Crime* was realised through implementing a mixed methods design which combined desk-based research, qualitative primary research and secondary data analysis.

#### *Desk based research*

At the commencement of the research, each of the five partners surveyed the body of publicly available policy on hate crime in their jurisdiction in order to document and evaluate the stated aims and objectives of authorities in tackling hate crime. This initial stage of the research process was essential to the subsequent task of examining whether the law in practice met the stated aims of the respective governments. In

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<sup>21</sup> Socio-Legal Studies Association, *First Re-Statement of Research Ethics* (SLSA 2009) para. 1.2.1.

<sup>22</sup> Mandy Burton, ‘Doing Empirical Research: Exploring the decision-making of magistrates and juries’ in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 55.

<sup>23</sup> Darren O'Donovan, ‘Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls’ in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 110.

<sup>24</sup> Anthony Bradney, ‘The Place of Empirical Legal Research in the Law School Curriculum’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 1031.

<sup>25</sup> Lee E Teitelbaum, ‘An Overview of Law and Social Research’ (1985) 35 *Journal of Legal Education* 466.

addition, partners gathered publicly available statistics on recorded, prosecuted, and sentenced hate crimes. This allowed the researchers to evaluate the extent to which hate crimes are captured (or not) by the responsible statutory agencies in each jurisdiction. The relationship between policy documents and statistics, and the operational reality of the treatment of hate crime in the criminal justice process, was interrogated through qualitative fieldwork (discussed below). Some partners also reviewed reported case law on hate crime as set out in the jurisdictional reports. This enabled the researchers to highlight common evidential factors and legal issues presented in court in each of the jurisdictions, which were also subject to further enquiry during qualitative fieldwork.

### *Qualitative research*

The primary data in which the conclusions of each jurisdictional Report are grounded was collected via qualitative research methods. Due to their capacity to capture and probe unexpected insights into underexplored phenomena,<sup>26</sup> qualitative methods are especially appropriate to the study of the treatment of hate crime in the criminal justice process. Across the five partners, interviews and focus groups were utilised as two methods of qualitative data collection.

### *The qualitative interview*

The qualitative interview is characterised by the pursuit of a conversational, rather than a mechanistic, data gathering encounter, in turn fostering rapport between the interviewer and interviewee and the open sharing of experiences and perspectives.<sup>27</sup> In this research project, common interview guides were developed collaboratively by the project partners and utilised across the five jurisdictions. They established a shared set of interview topics and semi-structured questions.<sup>28</sup> In line with the conventions of qualitative interviewing, researchers retained autonomy in respect to the order in which the topics were addressed and the precise wording of the question, both of which were dictated by the flow and tone of the conversation. In responding flexibly to the interviewee's cues, partners provided the space for the participant to illuminate the research objectives. Using active listening techniques, partners recognised and reacted to critical moments as they arose, probing and clarifying, always cognisant that the participant might identify issues of central significance to the research question which had not previously been documented.<sup>29</sup> In this manner, partners sought to maximise the advantages offered by the qualitative interview as regards drawing out the participants' expertise on an under-researched field.

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<sup>26</sup> Uwe Flick, *An Introduction to Qualitative Research* (4th edn, Sage 2009).

<sup>27</sup> Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage 2011).

<sup>28</sup> There was necessarily some localisation of the guides to take account of jurisdictional differences in the character of the criminal justice process generally and legislative provisions in respect to hate crime specifically.

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

### Focus Groups

The Irish partner conducted a focus group with previous offenders at the request of the gatekeeper – the Probation Service of Ireland – who facilitated access to this category of stakeholder. Focus groups are a form of group interview used to yield data through communication between research participants.<sup>30</sup> There may be reluctance among some researchers to collect information on sensitive topics, such as crime, via group formats. However, focus groups can offer advantages in research on topics of a sensitive nature. For example, the method can be employed with pre-existing groups where participants are already known to one another, including groups constituted expressly to share, and offer mutual support in response to, stigmatized experiences or identities.<sup>31</sup> Participation in a group discussion may be less daunting if the participants have an existing knowledge of one another. The group can be a source of positive mutual support during data collection, facilitating people “... to speak about uncomfortable and formidable topics”.<sup>32</sup> Prior knowledge on the part of the group of members’ relationship to sensitive topics which will be addressed in the course of a focus group reduces the risk of data collection causing participants to disclose information not already known to other group members.<sup>33</sup> Furthermore, where there are differences in status between the researcher and the researched, the pre-existing unit can also “... provide collective power to marginalised people”<sup>34</sup> and reduce the power imbalance,<sup>35</sup> amplifying the voice of the participants relative to that of the researcher.<sup>36</sup>

### Sampling strategies

It is rarely possible for a researcher to collect data from every person with expertise in their topic of interest, a fact that is even more pronounced with respect to the labour intensive data collection and analysis methods associated with qualitative research. This research necessarily employed non-probability sampling strategies given the absence of an adequate sampling frame for all categories of stakeholder. Non-probability sampling, nonetheless, facilitates the achievement of a depth of understanding on the subject under investigation.<sup>37</sup> Both purposive and volunteer sampling methods were utilised.

An ambitious target was set across the project, with each partner aiming to interview:

- 20 defence lawyers

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<sup>30</sup> Jenny Kitzinger, ‘Qualitative Research: Introducing Focus Groups’ (1995) 311 *British Medical Journal* 299.

<sup>31</sup> Michael Bloor, *Focus Groups in Social Research* (Sage 2001).

<sup>32</sup> Pranee Liamputtong, *Focus Group Methodology: Principles and Practice* (Sage 2011) 114.

<sup>33</sup> *ibid.*

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

<sup>35</sup> Sharlene Hesse-Biber and Patricia Leavy, *The Practice of Qualitative Research* (Sage 2010).

<sup>36</sup> Deborah J. Warr, “‘It was fun...but we don’t usually talk about these things’: Analyzing Sociable Interaction in Focus Groups’ (2005) 11(2) *Qualitative Inquiry* 200.

<sup>37</sup> John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (2nd edn, Sage 2007).

## *Lifecycle of a Hate Crime: Comparative Report*

- 20 prosecutors
- 10 judges
- 10 victims of hate crime
- 10 convicted offenders.

Thus, across the project, we aimed to interview or speak with 350 participants in total. To a greater or lesser degree, this target was achieved, though not all participant groups were accessible in every jurisdiction. In some jurisdictions, alternative participants were interviewed with the permission of the EU, given the insights that they would have into the process.

	CZ	EW	IE <sup>38</sup>	LV	SE
Defence lawyers	20 <sup>39</sup>	18 <sup>40</sup>	14	7	15
Prosecutors	19	20	24 <sup>41</sup>	7	20
Judges	10	20	-	6	10
Victims of hate crime <sup>42</sup>	10	7	19 <sup>43</sup>	-	10
Convicted offenders	9	-	10	-	3
Police	-	6	5 <sup>44</sup>	10	-

### **Analysis of qualitative data**

Data collected both through the focus group and the one-to-one interviews were subject to thematic analysis. Thematic analysis is an established approach to qualitative data analysis<sup>45</sup> that involves the systematic synthesising of data relating to the same concept, process, event, phenomenon, et cetera, from multiple locations within a single transcript and across transcripts.<sup>46</sup> Researchers begin the process sensitised to the kinds of themes that are likely to emerge from the data as a result of their immersion in

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<sup>38</sup> The Irish partner conducted two additional interviews with other stakeholders in the criminal justice process for informational purposes only.

<sup>39</sup> Of the 20 attorneys interviewed in the Czech Republic, seven had experience of hate crime cases only as defence attorneys representing hate crime perpetrators; they had no experience of representing victims of hate crime. Three had experience of acting for the defence in respect to hate crime cases, but had also represented victims of various crimes. Ten were attorneys and lawyers representing hate crime victims.

<sup>40</sup> In England and Wales 18 independent barristers were interviewed who often engaged in both defence and prosecution work.

<sup>41</sup> In Ireland, the police prosecute summary cases, and so while 18 police officers were interviewed, these are counted in the 'Prosecutors' category. Four of the six legal practitioners sampled as prosecutors also had experience of working for the defence. They have been excluded from the N for defence to avoid double counting.

<sup>42</sup> In Sweden and England and Wales, this included interviewing professionals who work in victim support, either as legal counsel or as counsellors.

<sup>43</sup> In Ireland, 19 interviews were completed with self-identified victims. Two were excluded, one because of a lack of data relevant to the research question and the other for ethical reasons.

<sup>44</sup> In addition to interviewing police officers, the Irish partner interviewed five civilian employees of the Garda Information Services Centre, which logs crime reports, including reports of crimes with a 'discriminatory motivation'.

<sup>45</sup> Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012).

<sup>46</sup> Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage 2011); Carol Grbich, *Qualitative Data Analysis: An Introduction* (Sage 2007).

pre-existing (commonly published) knowledge on the object of research. This aids them in the identification of salient statements, which although relating to the same content, may be expressed in multifarious ways by individual participants. The inductive approach to research requires, however, that the researcher also seek out new and unexpected themes which may be present in the data.<sup>47</sup> A major advantage of the inductive approach to research is the capacity to incorporate understandings and meanings, shared by participants, which may not be recognised in the existing body of knowledge.

### **A comparative methodology**

As we have seen, across partner jurisdictions a socio-legal, empirically driven approach was adopted, where the same research question, research instruments, and methods of data collection and analysis were employed to a greater or lesser degree. The fieldwork was carried out by experienced researchers, skilled in empirical legal research, with expert knowledge of their own legal system. A key research question that we sought to answer in this project was, drawing from the experiences in five jurisdictions, how best to ensure on a European Union-wide basis that the hate element of a crime is not “disappeared” or “filtered out” across the criminal process. A comparative methodology was utilised to achieve this objective, the conclusions of which are detailed in this Report. Comparative analysis enabled the researchers to understand the application of hate crime laws within a wider, political, social and economic context. This approach enabled us to draw out good practices that may be usefully applied across jurisdictions, while acknowledging the differences that exist across EU states. Indeed, comparative analysis allows us to “draw out of the process of comparison knowledge that could not be obtained from examining separately” the findings from each jurisdiction.<sup>48</sup> Thus, this Report represents the culmination of the *Lifecycle of a Hate Crime* project and as Wilson suggests, the coming together of “groups of scholars and practitioners from different systems ... to try to work out a common solution to a common problem.”<sup>49</sup> In this context, the research partners in each of the five jurisdictions were consulted throughout the compilation of this Report, both in order to assure its accurate reflection of their own original, and our shared, research findings, and to benefit from their nuanced understanding of the treatment of hate crime in their own legal systems.

### **Research limitations**

*Lifecycle of a Hate Crime* examines the application of laws aimed to prevent hate crime, rather than hate speech, in the criminal justice process. In conducting fieldwork, the project partners emphasised this distinction to research participants. However, so embedded and connected were the terms in some jurisdictions that there was evidence of conflation of the terms. In this comparative report we have sought to decouple the

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<sup>47</sup> Carol Grbich, *Qualitative Data Analysis: An Introduction* (Sage 2007).

<sup>48</sup> Geoffrey Samuel, ‘Comparative law and its methodology’ in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013).

<sup>49</sup> Geoffrey Wilson, ‘Comparative legal scholarship’ in Mike McConville and Wing Hong Chui, *Research Methods in Law* (Edinburgh University Press 2007) 88.



constructs where possible and address jurisdictional findings of relevance to the object of the research: hate crime.

### **Ethical considerations**

Ethical considerations were a priority for the project and the partner for Ireland shared exemplars of ethical documentation appropriate to the project with the four other research partners. Those research partners attached to Universities secured ethics approval through their internal institutional frameworks. The Swedish researchers received institutional ethical approval through the Regional Ethics Review Board in Umeå, in their decision of 2016-03-15, dnr 2016/773-31Ö. The Irish researchers secured approval from the University of Limerick's Faculty of Arts, Humanities and Social Sciences Ethics Committee (Approval Number 2016-02-25-AHSS), as well as approval of the research design from An Garda Síochána and the Probation Service of Ireland with respect to the participation of those respective stakeholders in the fieldwork. Researchers in England and Wales secured ethics approval from the University of Sussex's Humanities Cross-Schools Research Ethics Committee (Approval Number ER/SW474/1) and from the Judicial Office for England and Wales. In the Czech Republic, in the absence of an institutional review process, the researchers created an ethics commission comprised of social scientists that provided comments on the wording of the interview questions and on data handling.

### **Conclusion: connecting policy and research: an evidence-informed approach**

In adopting a socio-legal approach to the research, we were conscious of the needs of policy makers, who would then be in a position to, as Cownie and Bradney state, "inform social or economic policy in an attempt to ensure that it is 'evidence-based'."<sup>50</sup> In the context of hate crime, Chakraborti observes that the value of policy innovations is clearer when "such interventions are grounded in scholarly evidence"<sup>51</sup> and notes that when policy is not empirically driven, it is less likely to be effective. In this context, our research sought, not only to inform local policy at a national level, but also to serve as a resource to policy makers at a European level.

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<sup>50</sup> Fiona Cownie and Anthony Bradney, 'Socio-Legal studies: A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013) 42.

<sup>51</sup> Neil Chakraborti, 'Mind the Gap! Making Stronger Connections Between Hate Crime Policy and Scholarship' (2016) 27(6) Criminal Justice Policy Review 577, 582.

## **PART 3: European Frameworks and Obligations**

### **Introduction**

In seeking to explore the policies and practices addressing hate crime across the five jurisdictions party to this project, it is first useful to understand and explore the European context to hate crime. There is no overarching policy across Europe on hate crime, either from the perspective of the European Union or the Council of Europe. The Organization for Security and Co-operation in Europe (OSCE) has developed a number of policies in this area, which are addressed at the end of this section. What we will see is a piecemeal approach to hate crime across Europe, where policies which typically emerge from a desire to address racism, are then expanded to other forms of “intolerance”, of which hate crime is one component. This chapter will explore the main European policies which relate to hate crime.

### **Implementation of Article 4 of the Framework Decision**

The EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (“the Framework Decision”) was introduced in 2008. The stated purpose of the Framework Decision is to ensure that “certain serious manifestations of racism and xenophobia are punishable by effective, proportionate and dissuasive criminal penalties throughout the EU”, and further aims to “improve and encourage judicial cooperation” in this context.

Article 4 of the Framework Decision addresses the issue of hate crime, and in this regard requires Member States to “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.” The Report on the implementation of the Framework Decision elaborates, stating that the Member States must ensure “that racist and xenophobic motives are *properly unmasked* and *adequately addressed*.”<sup>1</sup> The EU Fundamental Rights Agency (FRA) observes that this requirement under Article 4 reflects the rights of victims of racist crime as established and required by case law of the European Court of Human Rights.<sup>2</sup>

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<sup>1</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* (European Commission 2014) para 3.4. Emphasis added. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 24 November 2017.

<sup>2</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* (European Union Agency for Fundamental Rights 2013) <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 November 2017.



It is important to observe the limitations of Article 4 of the Framework Decision. First, it addresses only racism and “intolerance”, and thus there is no obligation under the Framework Decision to recognise or address other manifestations of hate crime.<sup>3</sup> This was highlighted by FRA in its Report, which compares the limited protections offered in the Framework Decision with the more expansive categories in the Victims’ Directive, and the Directive on Audiovisual Media Services (which includes discrimination based on “sex, religion or belief, disability, age or sexual orientation”).<sup>4</sup> Second, the Framework Decision gives Member States absolute discretion in the manner in which the hate element is addressed, identifying two options: either by way of aggravating circumstances, or through enhanced penalties.

One of the core objectives of this research was to explore the manner in which Article 4 of the Framework Decision is operationalised across the five jurisdictions. Thus, the research is designed to ask whether such crimes are in fact “unmasked and addressed”. The European Commission published its Report on the implementation of the Framework Decision in 2014, outlining the manner in which – at least on paper – Member States were compliant with the provision of the Decision.<sup>5</sup> In that Report, fifteen Member States (including the Czech Republic, Latvia, and Sweden) were stated to have asserted that there are provisions in their criminal codes which comply with the first option, that is, that they require that racist and xenophobic motivation must be considered an aggravating circumstance in relation to all crimes.

Eight Member States (including the United Kingdom) were stated to have asserted that there is legislation in place which requires that a racist or xenophobic motivation shall be considered an aggravating circumstance with regard to certain crimes. Three Member States of that group (including the United Kingdom) were also stated to utilise the second limb of Article 4, as they “have criminal-law provisions stating that racist motivation *may* be taken into account by the courts (Belgium) or have provided case law and detailed statistics which demonstrate that racist and xenophobic motivation is taken into consideration (Denmark and the United Kingdom).”<sup>6</sup> For example, England and Wales have enacted specific “racially and religiously aggravated offences” (e.g. racially aggravated assault), and in

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<sup>3</sup> See the section on the Treaty of the Functioning of the European Union, below, on other EU requirements in this regard.

<sup>4</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* (FRA 2013), 8 <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 November 2017.

<sup>5</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* (European Commission 2014) para 3.4. Emphasis added. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 24 November 2017.

<sup>6</sup> *ibid.*

addition have sentencing laws that state that a court “must” aggravate *any* offence where there is evidence of racial or religious hostility. The former creates substantive “hate crime” offences, while the latter simply allows the courts to enhance the penalties of an offender during the sentencing stage of a case. Two Member States (including Ireland) were stated to assert their compliance with the Framework Decision by reference to the fact that motivation can always be considered by the courts.<sup>7</sup>

As we will see throughout this Report, the positions of States regarding compliance with the Framework Decision have, in some cases, been overstated. For example, the Commission asserts that the hate element “shall be considered” an aggravating factor at sentencing, though in fact in Sweden and the Czech Republic, while legislation requires that the hate element be *considered* by the sentencing court, it is at the discretion of the court as to whether the hate element is in fact treated as an aggravating factor. Further, as we will see in the research findings of this Report, while the laws in the jurisdictions party to this project comply – at least on paper – with the Framework Decision, the extent to which those laws are operationalised, understood, and implemented varies significantly across Member States.

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

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

While the scope of the implementation of these practices is considered in more detail in the research findings sections, it is useful at this point to at least

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<sup>7</sup> In the analysis conducted by partners to this project, detailed responses were provided as to the legislative position in relation to Article 4 of the Framework Decision, which are set out in the research findings to the report.

superficially understand the extent to which these recommendations have been adopted in Member States:<sup>8</sup>

**Table 1: Recommendations to strengthen Framework implementation**

	<b>CZ</b>	<b>EW</b>	<b>IE</b>	<b>LV</b>	<b>SE</b>
<b>Police hate crime units</b>		✓			✓
<b>Specialist prosecutors' offices</b>	✓	✓			✓
<b>Detailed guidelines for Police</b>		✓		✓	✓
<b>Detailed guidelines for Prosecutors</b>	✓	✓			✓
<b>Detailed guidelines for Judges</b>		✓			
<b>Implementation of Victims' Directive (reporting)</b>	✓	✓	✓	✓	✓
<b>Implementation of Victims' Directive (court proceedings)</b>	✓	✓	✓	✓	✓
<b>Systematically collected data</b>		✓			✓
<b>Shared understanding of concept</b>		✓			✓

### **Implementation of the Victims' Directive**

In 2012, the European Union adopted the Victims' Directive introducing minimum standards on the rights, support, and protection of victims. Article 22 is of significance in the context of hate crimes. Article 22(1) states that, in assessing the needs of victims, 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." Article 22(2) states that the assessment should take the personal characteristics of the victim, the nature of the crime and the circumstances of the crime into account. Article 22(3) goes on to state that particular attention should be paid to victims who "have suffered a crime committed with a bias or discriminatory motive, which could notably be related to their personal characteristics." It goes on to provide that, in this regard, victims of hate crime "shall be duly considered." As Perry observes, this is the first time that "hate crime" was used in EU law, making its importance in hate crime policy across the Community all the more pronounced.<sup>9</sup>

In the context of criminal investigations, the "particular attention" to be paid to victims includes the following measures, which the Directive states in Article 23(2) should be made available to victims:

<sup>8</sup> We have excluded three recommendations here (that relating to the knowledge of the guidelines; that relating to the sharing of practices; and that relating to political hate speech) as it is not possible to assess whether they are implemented or not.

<sup>9</sup> Joanna Perry, 'A Shared Global Perspective on Hate Crime' (2016) 27(6) Criminal Justice Policy Review 610.

- (a) interviews with the victim should be carried out in premises designed or adapted for that purpose;
- (b) interviews with the victim should be carried out by or through professionals trained for that purpose;
- (c) all interviews with the victim should be conducted by the same persons unless this is contrary to the good administration of justice;
- (d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, should be conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

The Directive goes on to provide in Article 23(3) that, in the context of court proceedings, the following measures should be made available to victims:

- (a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
- (b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- (c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and
- (d) measures allowing a hearing to take place without the presence of the public.

The deadline for implementation of the Report was November 2015. Across the jurisdictions party to this project, legislation and codes of practice are purportedly in compliance with the Directive. However, as we will see, there are variations in the degree to which this is operationalised in practice.

In particular, the question as to which characteristics are included as having “particular protection” is a question which is left to Member States to determine. FRA advises that, in implementing the Victims’ Directive, Member States should interpret the word “discrimination” as “relating to all characteristics protected under Article 21 of the Charter” – i.e., sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.<sup>10</sup> Again, while

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<sup>10</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* (FRA 2013), 8 <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 November 2017.

the scope of the implementation of the Directive will be assessed throughout this Report, at this point it is useful to examine the extent to which this recommendation is in practice across the jurisdictional partners:

**Table 2: Characteristics protected under Article 21**

	<b>CZ</b>	<b>EW</b>	<b>IE</b>	<b>LV</b>	<b>SE</b>
<b>Sex<sup>11</sup></b>	✓		✓		
<b>Race</b>	✓	✓	✓	✓	✓
<b>Colour</b>		✓		✓	✓
<b>Ethnic or social origin<sup>12</sup></b>	✓	✓	✓	✓	✓
<b>Genetic features</b>					
<b>Language</b>					
<b>Religion or belief</b>	✓	✓	✓	✓	✓
<b>Political or any other opinion</b>	✓				
<b>Membership of a national minority</b>	✓	✓			
<b>Property</b>					
<b>Birth</b>					
<b>Disability</b>	✓	✓	✓		
<b>Age<sup>13</sup></b>	✓	✓	✓		
<b>Sexual orientation</b>	✓	✓	✓		✓

Some jurisdictions include characteristics not mentioned in the Charter. For example, in Ireland, the gender identity or gender expression of an individual is particularly mentioned, as are any communication difficulties, and health. However, neither membership of the Roma community, nor the Traveller community (Ireland's only indigenous ethnic minority) is explicitly protected.<sup>14</sup> In Sweden, gender identity and gender expression are also explicitly mentioned.

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

In its seminal 2012 Report, *Making hate crime visible in the European Union: acknowledging victims' rights*, the European Union Agency for Fundamental Rights (FRA) defines hate crimes as "violence and crimes motivated by racism, xenophobia, religious intolerance or by a person's disability, sexual orientation or gender identity."<sup>15</sup> This definition is an example of what is commonly referred to as the

<sup>11</sup> We have interpreted "sex" in this context to indicate a binary understanding of gender: thus, where 'gender' is protected, we have marked it here.

<sup>12</sup> In Latvia, protection is afforded in relation to "ethnic and national origin" rather than ethnic and social origin.

<sup>13</sup> In England and Wales, 'age' applies where the victim is under the age of 18: Youth Justice and Criminal Evidence Act 1999 s 16.

<sup>14</sup> In England and Wales and Sweden, Gypsy, Roma and Traveller communities are legally recognised as an ethnic minority group.

<sup>15</sup> European Union Agency for Fundamental Rights, *Making hate crime visible in the European Union: acknowledging victims' rights* (FRA 2012) 7 <<http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>> accessed 24 November 2017.

“animus model” of hate crime legislation.<sup>16</sup> The model requires that a form of bias, prejudice or identity-based hostility (what we refer to in this Report as a “hate element”) be present during the commission of a criminal offence. However, FRA not only conceptualises the problem of hate crime as an issue of inter-personal prejudice but also as a human rights issue. It highlights that where a Member State’s “criminal justice system overlooks the bias motivation behind a crime, then this amounts to a violation of Article 14 of the European Convention of Human Rights (ECHR).”<sup>17</sup> Hate crime, then, according to FRA, is not simply a matter of targeted victimisation that has significant individual and community impacts, but it is a phenomenon that undermines “fundamental rights, namely to human dignity and with respect to non-discrimination.”<sup>18</sup>

FRA observes that where victims of crime are unable or unwilling to seek redress against hate crime, many of these crimes will go unreported, and are therefore invisible to state agencies – ultimately meaning that the rights of such victims are unprotected. Unfortunately, as Part 4 of this report will evidence, recording practices can be equally culpable in the statistical erasure of hate crimes. Importantly, the means by which the hate element of a crime is recognised across Member States can dictate the extent to which criminal justice processes are capable of addressing hate crime:

“Narrow legal definitions of what constitutes hate crime ... tend to lead to under-recording of incidents, which translates into low numbers of prosecutions, thereby affording victims of crime fewer opportunities for redress.”<sup>19</sup>

FRA therefore recommends:

“Legislators should look into models where enhanced penalties for hate crimes are introduced to stress the added severity of these offences. This would serve to go beyond including any given bias motivation as an aggravating circumstance in the criminal code. The latter approach is limited in its impact because it risks leading to the bias motivation not being considered in its own right in court proceedings or in police reports.”<sup>20</sup>

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<sup>16</sup> This can be compared to the discriminatory selection model under which hate crimes are defined as offences that are committed “because of” or “by reason” of the victim’s characteristic/s. Frederick Lawrence, *Punishing Hate: Bias Crime Under American Law* (Harvard University Press 1999).

<sup>17</sup> European Union Agency for Fundamental Rights, *Making hate crime visible in the European Union: acknowledging victims’ rights* (FRA 2012) 7 <<http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>> accessed 24 November 2017.

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

<sup>19</sup> *ibid* 10.

<sup>20</sup> *ibid* 11. (italics in original).

FRA further states in its short 2012 factsheet that Member States in the EU must make hate crimes “more visible and hold perpetrators accountable.”<sup>21</sup> It notes that despite the efforts of Member States’ to address hate crime, there have been “continued and renewed violations of the fundamental rights of people living within the EU” through crimes motivated by prejudice. It holds that where crimes go unreported, unprosecuted, and are largely invisible to the criminal justice process, “the rights of victims may not be fully respected or protected, meaning that EU Member States are not upholding their obligations towards victims of crime.”<sup>22</sup> FRA argues that to address these issues Member States need to adopt laws that oblige Member States to collect and publish statistical data pertaining to hate crime; law enforcement agencies and criminal justice systems should be alert to any indication of bias motivation; and courts rendering judgments should address bias motivations publicly.

FRA places great emphasis on data collection as a method of making hate crime visible, giving victims the opportunity to seek redress, and ensuring that Member States respond effectively to hate crime.<sup>23</sup> In *Making hate crime visible*, FRA states that in order to ensure that these data are collected appropriately, “national law makers need to introduce clear-cut definitions in national legislation of what constitutes a hate crime.”<sup>24</sup> It drew a number of conclusions based on the analysis in the Report, set out in four categories of prioritisation:

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

Throughout this Report, we will explore generally the manner in which these objectives are in place across the five partner jurisdictions. At this point, however, it is important to note that there is no EU definition of a hate crime, and Member States have no obligation to implement FRA’s objectives.

### **The Treaty on the Functioning of the European Union**

As we have noted, Article 4 of the Framework Decision is limited in scope, and limited in the characteristics it protects. However, FRA is of the view that the limited nature of Articles 82 and 83 of the Treaty of the Functioning of the European Union

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<sup>21</sup> European Union Agency for Fundamental Rights *Hate Crime in Europe* (FRA 2012) <<http://fra.europa.eu/en/publication/2012/hate-crime-european-union>> accessed 24 November 2017.

<sup>22</sup> *ibid* 1.

<sup>23</sup> *ibid* 2.

<sup>24</sup> European Union Agency for Fundamental Rights *Making hate crime visible in the European Union: acknowledging victims’ rights* (FRA 2012), 10 <<http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>> accessed 24 November 2017.

(TFEU) does not mean that the EU is excluded from fighting discriminatory motivation: it states “since the right to see that a discriminatory motivation is unmasked and properly addressed is the right of a victim, all policies and measures aimed at meeting this right can be based on Article 82(2)(c) of the TFEU.” Thus, it holds, EU legislators must ensure that all grounds of discrimination are addressed in legislation, that is, “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” due to the horizontal obligation for the EU legislator under Article 10 of the TFEU. FRA observes:

“Whereas the relevance of the Framework Decision on Racism and Xenophobia for victims’ rights remains limited, Article 82(2) (b) and (c) of the TFEU can form the legal base for a great number of EU actions that could help ‘to better protect and acknowledge the rights of victims of crimes motivated by hatred and prejudice, including racism and xenophobia.’”<sup>25</sup>

It is unclear as to the extent to which these obligations are finitely protected through the Victims’ Directive, or whether there are further positive obligations in relation to preventing hate crime, or ensuring that a hate element is appropriately addressed by the legal process. However, this obligation should be considered in light of ECHR obligations in relation to the investigation of a hate crime, as detailed below.

### **EU High Level Group on combating racism, xenophobia and other forms of intolerance**

The EU High Level Group on combating racism, xenophobia and other forms of intolerance (“the High Level Group”) was launched on 14th June 2016 by Věra Jourová, Commissioner for Justice, Consumers and Gender. The High Level Group was set up by the European Commission following recommendations made in 2015 at the first Annual Colloquium on Fundamental Rights, “Tolerance and respect: preventing and combating antisemitic and anti-Muslim hatred in Europe.” The aim of the High Level Group is to build on the work of the Expert Group on the Framework Decision, which had been in operation for five years prior to the establishment of the High Level Group. The purpose of the High Level Group is to exchange models of best practice between Member States to help combat hate crime and hate speech. It is also tasked with holding dedicated discussions on how to tackle “specificities of particular forms of intolerance” in light of the experiences of civil society and communities.

The membership of the EU High Level Group on combating racism, xenophobia and other forms of intolerance is made up of all EU Member States; Amnesty

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<sup>25</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (FRA 2013) <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 November 2017.



International European Institutions Office (AI EIO); the European Network Against Racism (ENAR); the Open Society European Policy Institute (OSEPI); the Platform of European Social NGOs (Social Platform); the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe); the European Commission against Racism and Intolerance; the European Union Agency for Fundamental Rights; and the Office for Democratic Institutions and Human Rights.

All 28 Member States also form part of both of the High Level Group's subgroups: the subgroup on methodologies on recording and collecting data on hate crimes; and the subgroup on countering hate speech online.<sup>26</sup> The latter is observed by the European Commission against Racism and Intolerance and the European Union Agency for Fundamental Rights while the former also includes the European Commission against Racism and Intolerance, the European Union Agency for Fundamental Rights and the Office for Democratic Institutions and Human Rights as group members.

The fourth and most recent meeting of the High Level Group was held in Brussels on 5 December 2017. At this meeting, Member States' representatives agreed on the key guiding principles on hate crime recording which was drawn up by the subgroup on methodologies for recording and collecting data on hate crime led by FRA. Members also discussed progress made in terms of legal and policy responses to hate crime at national level in their jurisdictions.<sup>27</sup>

### **European Commission on Racism and Intolerance**

As part of its country monitoring work, the European Commission on Racism and Intolerance (ECRI) examines each Member State on a cyclical basis. ECRI's fourth monitoring cycle ran from 2008 to 2013, and focused on implementation and evaluation. ECRI's fifth monitoring cycle began in the first semester of 2013, and is to last for five years. The thematic angle to the fifth round of monitoring focuses on four main themes: legislative issues (which should include the ratification of Protocol 12 of the European Convention on Human Rights; compliance with General Policy Recommendation (GPR) 7; and the existence of independent authorities as per GPRs 2 and 7); hate speech; violence; and integration strategies.<sup>28</sup> Importantly, in the context of the fifth monitoring cycle, issues which arise in the context of

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<sup>26</sup> For further details on the work regarding countering hate speech online, see <[http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54300](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300)>; for further details on the work regarding the improvement of methodologies for recording and collecting data on hate crime, see <<http://fra.europa.eu/en/project/2017/subgroup-methodologies-recording-and-collecting-data-hate-crime>> accessed 26 February 2018.

<sup>27</sup> European Commission, *A EU High Level Group on combating racism, xenophobia and other forms of intolerance* (European Commission 2017) <[http://ec.europa.eu/newsroom/just/item-detail.cfm?&item\\_id=51025](http://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=51025)> accessed 24 November 2017.

<sup>28</sup> European Commission on Racism and Intolerance, *Information document on the fifth monitoring cycle of the European Commission Against Racism and Intolerance* (ECRI 2012) <[https://www.coe.int/t/dghl/monitoring/ecri/activities/Information%20document%20fifth%20monitoring%20cycle\\_en.pdf](https://www.coe.int/t/dghl/monitoring/ecri/activities/Information%20document%20fifth%20monitoring%20cycle_en.pdf)> accessed 24 November 2017.

themes such as hate speech or violence for members of the LGBT community are addressed.<sup>29</sup> The Fifth Reports have been completed for both the Czech Republic (in 2015) and the United Kingdom (in 2016), while interim Reports following the fourth monitoring cycle have been published for Latvia (in 2014), Ireland (in 2015) and Sweden (in 2015). Prior to exploring the findings of ECRI in this regard, a short summary of the relevant General Policy Recommendations is outlined.

### **GPRs 1 and 7: Criminal law provisions**

ECRI's General Policy Recommendation (GPR) 1 defines the basic requirements for combating racism, xenophobia, antisemitism, and intolerance.<sup>30</sup> In the context of hate crime, it provides that State Parties must ensure that national criminal law specifically counters "racism, xenophobia, antisemitism and intolerance", *inter alia*, stringently punishing "racist and xenophobic acts" by:

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

Those two recommendations explicitly only to apply to racism and xenophobia. That said, the GPR goes on to provide that the general public should be made aware of the legislation combating racism, xenophobia, antisemitism, and intolerance – though then recommends that criminal prosecution of offences of a racist or xenophobic nature should be given a high priority and "actively and consistently undertaken". It also states that accurate data and statistics should be collected and published on the number of "racist and xenophobic offences" that are reported to the police, the number of cases prosecuted, the reasons for not prosecuting, and the outcome of cases prosecuted.

ECRI's General Policy Recommendation (GPR) 7 specifies the key aspects to be dealt with in national legislation to combat racism and racial discrimination.<sup>31</sup> Again, this GPR explicitly only applies to this manifestation of intolerance (which explicitly includes religion), as opposed to some of the other GPRs mentioned which apply across all forms of racism and intolerance. In the context of the criminal law, paragraph 18 of the GPR explicitly states that the criminal law should penalise eight acts when committed intentionally, including public incitement to violence, hatred, or discrimination; public insults and defamation; threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; offences relating to the trivialisation or

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

<sup>30</sup> European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 1: Combating Racism, Xenophobia, Antisemitism, and Intolerance* (ECRI 1996).

<sup>31</sup> European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 7: National legislation to combat racism and racial discrimination* (ECRI 2002).

justification of genocide or crimes against humanity; the public dissemination of materials relating to hate speech offences; membership or leadership of a racist organisation; and racial discrimination in the exercise of a public office or occupation.<sup>32</sup> It goes on to provide in paragraph 21 that, for all other offences (i.e. not hate speech offences), “the law should provide that ... racist motivation constitutes an aggravating circumstance.” The explanatory memorandum to the GPR states that the law may further penalise “common offences” committed with a racist motivation as specific offences.

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

ECRI’s General Policy Recommendation (GPR) 4 recommends that governments of Member States take steps to ensure that national surveys on the experiences and perceptions of racism and discrimination from the point of view of victims are organised. The intention is to recruit participants from minority groups, rather than to address the prevalence of intolerance in the general population. In the Appendix to GPR 4, specific guidelines are set out, from which Member States should draw inspiration in developing such surveys. Importantly, the purpose of such surveys is to “gain a picture of the problems of racism and intolerance *from the point of view of actual and potential victims*.”<sup>33</sup> Particularly, this GPR is not limited to experiences and perceptions of racism, but rather includes xenophobia, antisemitism, and other forms of intolerance. Further, the minority groups chosen to participate in such surveys should depend on “national circumstances, and may include ... immigrant groups, national minorities and/or other vulnerable groups.”

#### **GPR 11: Combating racism and racial discrimination in policing**

ECRI’s General Policy Recommendation (GPR) 11 specifically addresses the role of the police in combating racism and intolerance.<sup>34</sup> There are four themes to the recommendation: racial profiling; racial discrimination and racially-motivated misconduct by the police; the role of the police in combating racist offences and monitoring racist incidents; and relations between the police and members of minority groups.

Paragraphs 11-14 of the GPR relate to the third theme, regarding the role of the police in combating racist offences and monitoring racist incidents. Again, this only applies to these manifestations of intolerance, which do not explicitly mention religion. Paragraph 11 provides that the police should thoroughly investigate racist offences, including by fully taking the racist motivation of ordinary offences into

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<sup>32</sup> This is supplemented with European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 15: Combating Hate Speech* (ECRI 2015).

<sup>33</sup> European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 4: National surveys on the experience and perception of discrimination and racism from the point of view of potential victims* (ECRI 1998).

<sup>34</sup> European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 11: Combating racism and racial discrimination in policing* (ECRI 2007).

account. Paragraph 12 recommends that a system for recording and monitoring racist incidents be put in place, which would also record the extent to which such crimes are “brought before the prosecutors and are eventually qualified as racist offences.” Importantly, paragraph 14 of the Recommendation defines a racist incident as “any incident which is perceived to be racist by the victim or any other person.” Paragraph 13 provides that victims and witnesses of racist incidents should be encouraged to report such incidents.

#### **ECRI: Czech Republic Fifth Monitoring Cycle**

In the Fifth Monitoring Cycle, Czech law was stated by ECRI to broadly comply with the recommendations of GPR 7 in the context of hate crime. ECRI observed that it was particularly pleased to note that section 42(b) of the Criminal Code specifically refers to racist, ethnic, religious, or other similar hatred as aggravating circumstances that judges are required to take into account when sentencing offenders. Interestingly, it had recommended in its Fourth Monitoring Cycle that the Czech authorities monitor the implementation of the new Criminal Code, in order to ensure that the new provisions relevant to the fight against racism and other forms of intolerance are at least as protective of victims of crimes motivated by hate as those previously in force. It also recommended that steps be taken to ensure “the approach taken by both the police and the judiciary to the question of a suspect or an accused’s racist motivations is not so narrow as to empty the relevant provisions of their substance,” and to train judges and prosecutors in this regard.<sup>35</sup> This was not followed up in the Fifth Monitoring Cycle.

In the context of section 352 of the Criminal Code, in its Fifth Monitoring Cycle Report, ECRI recommended that the section be expanded to include the grounds of colour and language. It also observed that section 352 does not specifically mention homophobic or transphobic violence, and recommended that the relevant sections of the Code be amended to include specific references to the grounds of sexual orientation and gender identity.

It further noted that while data was collected on hate crime, these were not disaggregated by bias motivation, and that there were three systems of collecting data which differ significantly from one another and are not interconnected in any way. It recommended that a single mechanism for collected disaggregated data on hate crime be put in place which includes the movement of the offence through the criminal process. It finally recommended that this data be made publicly available.

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<sup>35</sup> European Commission on Racism and Intolerance, *ECRI Report on the Czech Republic (fourth monitoring cycle)* (Council of Europe 2009) para 22-23.

**ECRI: England and Wales Fifth Monitoring Cycle<sup>36</sup>**

In the Fifth Monitoring Cycle, ECRI observed that it was pleased to note that racist motivation constitutes an aggravating circumstance for all criminal offences as per the recommendation in paragraph 21 of GPR 7. It recommended, however, the addition of “language” to the existing provisions in the definition of the term “racist” in legislation.

In terms of the operation of the legislation, it referred to the difference between hate crime recorded by the police and that referred for prosecution, concluding that “a very large amount of hate crime goes unpunished.” It further observed that “enhanced sentencing”, where applied, evidences a recognition across the criminal process of the hate motivation and is “therefore one of the clearest indicators of a successful criminal justice response.”<sup>37</sup> ECRI observed, however, that the failure to record “enhanced penalties” when sections 145 and 146 of the Criminal Justice Act 2003 are applied in court, means that the hate element of many crimes is not noted on the criminal record of the offender. It also observed that there is “much speculation about the under-use of these provisions.”<sup>38</sup> ECRI was further concerned that the hate element of racially-motivated crimes was often being “filtered out” by the police, Crown Prosecution Service or the judiciary, which was purportedly occurring for four key reasons:

- Unwillingness to recognise racist motivation;
- Reclassifying of racist attacks as disputes or other forms of hostility;
- Over-strict interpretation of the provisions on racist motivation;
- Aggravated element being dropped through the process of accepting guilty pleas.<sup>39</sup>

It recommended that data be gathered on the application of sections 145 and 146 of the 2003 Act, and that a process be introduced whereby this is recorded, including on the criminal records of offenders. It also recommended that data be collected on the manner in which the hate element is filtered out of the process, and that steps are taken to narrow the gap between recorded hate crime and that referred for prosecution. Finally, it recommended that the operation of aggravated offences be reviewed to include the grounds of sexual orientation and gender identity as per the advice of the Law Commission in its 2014 Report.

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<sup>36</sup> European Commission on Racism and Intolerance, *ECRI Report on the United Kingdom (fifth monitoring cycle)* (Council of Europe 2016).

<sup>37</sup> *ibid* para 67.

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

<sup>39</sup> *ibid* citing Harmit Athwal and Jon Burnett, *Investigated or ignored? An analysis of race-related deaths since the Macpherson Report* (Institute of Race Relations 2014).

#### **ECRI: Ireland Fourth Monitoring Cycle<sup>40</sup>**

In the Fourth Monitoring Cycle, ECRI refers to the FRA observation that Ireland has a “good system for registering racist criminal offences.”<sup>41</sup> However, it encouraged the Irish authorities to improve these processes and the “follow-up given to them by the criminal justice system.”<sup>42</sup> It further observes that when a person reports that they have been the victim of a racist incident, they “will be informed by the Gardaí of the designated Garda Ethnic Liaison Officer in their area.”<sup>43</sup> Commending the Garda Síochána Diversity Strategy and Implementation Plan 2009-2012, it recommends that Irish authorities “continue their efforts to provide their law enforcement officials with training in human rights, focusing on the fight against all forms and manifestations of racial discrimination and xenophobia and on policing in a multicultural society, and make it a compulsory part of their initial and on-going training.”<sup>44</sup>

In that Report, ECRI observed that it had already recommended in its Third Monitoring Report that Irish authorities include a provision in criminal law that allows for the racist motivation of a criminal offence to be considered as an aggravating circumstance at sentencing, and consider providing that racist offences be defined as specific offences. While Ireland’s response that the courts already have the power to take any motivation into account was noted, ECRI observed that the fact that the power is discretionary “has been recognised by various stakeholders as a problem.”<sup>45</sup> ECRI observed that various sources show that the racist motivation was not consistently taken into account by judges when sentencing, but Ireland responded that it was “advised not to introduce aggravated offences as the convictions may be more difficult to obtain because the act and motive have to be proven.”<sup>46</sup>

ECRI recommended that Ireland assess the application of the criminal law provisions in order to identify any gaps that need closing or any improvements or clarifications that might be required, and particularly drew the attention of Ireland to GPR 7 in this regard.

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<sup>40</sup> European Commission on Racism and Intolerance, *ECRI Report on Ireland (fourth monitoring cycle)* (Council of Europe 2013).

<sup>41</sup> *ibid* para 21, referring to FRA *Annual Report* (Council of Europe 2010) 121 [http://fra.europa.eu/sites/default/files/fra\\_uploads/2211-FRA-2012\\_Annual-Report-2011\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf) accessed 26 February 2018.

<sup>42</sup> *ibid* para 23.

<sup>43</sup> *ibid* para 150.

<sup>44</sup> *ibid* para 152.

<sup>45</sup> *ibid* para 25.

<sup>46</sup> *ibid*.



#### **ECRI: Latvia Fourth Monitoring Cycle <sup>47</sup>**

In its Fourth Monitoring Cycle, ECRI observed that it had already encouraged Latvian authorities to review and fine-tune its criminal law provisions. It also observed that in that Third Report it strongly recommended that Latvian police and judicial authorities fully investigate and prosecute racially motivated offences by acknowledging and taking into account the racist motivation of the offence. In its Fourth Report, it noted that racist motivation has never been found to constitute an aggravating factor “even when the existence of such motive was self-evident”, and that cases show that racist motivation is “not always taken into account and point to persisting low awareness and sensitivity towards these types of offences.”<sup>48</sup>

In the context of training, it noted that there had been investment in the training of police on combating hate crimes, from which good cooperation between NGOs and the police had emerged. It particularly noted, however, that further training was required “in order to raise the police’s awareness and sensitivity towards racist crime.”<sup>49</sup> While some training for prosecutors and judges had been put in place, ECRI recommended that authorities “step up their efforts” to train judges, prosecutors and police officers on the issue, with a view to “raising the capacity of police officials and judges to qualify independently racist crime, without referring the matter to an expert.”<sup>50</sup> In the event that an expert was required, ECRI recommended referring the issue to the Ombudsman.

ECRI further noted that no steps had been taken to provide the public with information regarding the existence of criminal law provisions in relation to racially motivated acts, and recommended that an awareness campaign in this regard be carried out. It also recommended educational and awareness raising activities be carried out to address the issue of the presence and activities of right wing extremist and skinhead groups in Latvia.

#### **ECRI: Sweden Fourth Monitoring Cycle <sup>51</sup>**

In its Fourth Monitoring Cycle, ECRI noted that Chapter 29, Article 2(7) of the Penal Code provides that racist motivation is to be considered an aggravating circumstance. It noted that while the grounds of language and nationality are not expressly provided for in the Code, it would appear that in practice the interpretation of the term “national origin” allows these criteria to be taken into account. It nonetheless recommends that “language” be included as a specific ground.

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<sup>47</sup> European Commission on Racism and Intolerance, *ECRI Report on Latvia (fourth monitoring cycle)* (Council of Europe 2012).

<sup>48</sup> *ibid* para 13-18.

<sup>49</sup> *ibid* para 29.

<sup>50</sup> *ibid* para 16.

<sup>51</sup> European Commission on Racism and Intolerance, *ECRI Report on Sweden (fourth monitoring cycle)* (Council of Europe 2012).

In the Report, ECRI observed that as part of its Third Monitoring Cycle, it recommended that authorities ensure that the criminal law provisions were “thoroughly applied”; that the police, prosecution service and judges were aware of the need to counter this type of offence; and that all those working within the criminal justice process were properly trained to this end. Between the third and fourth cycles, a series of initiatives were developed by State authorities on training and the development of handbooks and manuals. While ECRI commended Sweden for these developments, it notes that under-reporting remains an issue, and that only a small percentage of offences reported are subsequently taken to court. It thus encourages Sweden to continue to use training measures to address hate crime, and that authorities increase confidence in the police by persons belonging to groups covered by ECRI’s mandate.

## **Conclusion**

From a cursory analysis of the monitoring work of ECRI, it is clear that not only are States Parties required to ensure that there is legislation which addresses hate crime, but also that the legislation is shown to be effective. In particular the issue of the “filtering out” of the hate element has been addressed. This approach, which requires an evidence base for assertions of the State, is to be commended. While the fifth monitoring cycle is not complete across all jurisdictions participating in this research, it is heartening to observe that ECRI has expanded its competence beyond “racism” (albeit broadly understood) to include sexual orientation and gender identity.

## **The European Court of Human Rights**

Over the past two decades the European Court of Human Rights (ECtHR) has had numerous applications relating to hate crime. The role of the Court has been particularly important in cases where States Parties fail to conduct effective investigations into hate crimes or where they fail to take adequate measures to prevent such crimes.<sup>52</sup> The ECtHR has repeatedly held that States are under a positive obligation, at the point of investigation, to ensure that the hate element of a crime is unmasked and appropriately investigated.

In *Angelova and Iliev v Bulgaria*<sup>53</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

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<sup>52</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?* (Oxford University Press 2016) 233.

<sup>53</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.



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>54</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>55</sup>

In *Milanović v Serbia* the Court made similar findings in the context of anti-religious violence.<sup>56</sup> In *Identoba v Georgia*<sup>57</sup> the Court considered State responsibilities in the context of homophobic violence. Here, the Court stated that there was a duty on authorities to “prevent hatred-motivated violence” on the part of private individuals in the context of a peaceful protest, as well as to investigate the existence of a link between a discriminatory motive and an act of violence under Article 3 in conjunction with Article 14.<sup>58</sup>

In its recent decision, *Balázs v Hungary*,<sup>59</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

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<sup>54</sup> *Angelova and Iliev v Bulgaria* App No 55523/00 (ECHR, 26 July 2007) para 105.

<sup>55</sup> *ibid* para 115.

<sup>56</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>57</sup> *Identoba v Georgia* App No 73235/12 (ECHR, 12 May 2015).

<sup>58</sup> See also, *Nachova and Others v Bulgaria* Apps Nos 43577/98 and 43579/98 (EHRC, 6 July 2005); *Identoba and Others v Georgia* App No 73235/12 (EHRC, 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?* (Oxford University Press 2016) 233.

<sup>59</sup> *Balázs v Hungary* App No 15529/12 (ECHR, 14 March 2016).

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>60</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>61</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>62</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 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>63</sup>

### **The Organisation for Security and Co-operation in Europe**

While membership of the Organisation for Security and Co-operation in Europe does not give rise to legally binding obligations, its comprehensive interpretation of "security" includes focus on tolerance and non-discrimination, minority rights, and policing. Its Ministerial Council Decision "Combating Hate Crimes"<sup>64</sup> acknowledges the harms of hate, and states that hate crimes are "criminal offences committed with a bias motive". It calls on participating States to do a number of things to ensure hate crime is addressed appropriately, including but not limited to the following:

- Collect, maintain and make public, reliable data and statistics on hate crime;

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<sup>60</sup> *ibid* para 52.

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

<sup>62</sup> Aleš Gíão Hanek, 'International Legal Framework for 'Hate Crimes: Which Law for the "New" Countries' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 467.

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

<sup>64</sup> Organization for Security and Co-operation in Europe, *Ministerial Council Decision "Combating Hate Crimes"* (OSCE 2009) <<http://www.osce.org/cio/40695?download=true>> accessed 26 February 2018.

- Enact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes;
- Take appropriate measures to encourage victims of hate crime to report their experiences, while also exploring the methods by which civil society organisations can contribute to this process;
- Introduce or further develop training for law enforcement, prosecution, and judicial officials dealing with hate crimes;
- Explore ways to support victims of hate crime and give them access to counselling, legal and consular assistance, and effective access to justice;
- Promptly investigate hate crime, and ensure those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities.

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

## **Conclusion**

The complex network of laws and policies that have attempted to address the problem of hate crime in Europe has produced both opportunities and challenges for improving the effective prevention of bias motivated offending. The 2008 Framework Directive has meant that Member States must respond to certain types of hate crime by establishing laws that either aggravate pre-existing offences or provide for penalty enhancements at sentencing. These laws, and their effective application, are being monitored by the Commission and ECRI, and through the work of organisations such as the OSCE. Member States that have failed to properly address hate crime may be in breach of their obligations under the ECHR and the EU Charter of Fundamental Human Rights – meaning that hate crime is not only a pressing concern for international penal policy, but it continues to be an important human rights issue across Europe.

Yet without any single legislative framework for hate crime across the EU, there remain vastly diverging approaches to challenging it. It is clear from the reports published by the European Commission, FRA, ECRI and the OSCE that challenging hate crime requires specific procedures and policies to effectively tackle hate crime in all parts of the EU. However this requires not just words on paper, but as ECRI monitoring reports indicate, common systems in place that will ensure effective monitoring and application of the law.

## **PART 4: Research Findings**

### **Introduction**

As already stated in the introduction to this Report, the objectives of the research across all five jurisdictions 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 process according to the legislative and policy context;
- Identify shortfalls in the legislative responses to Article 4 of the Framework Decision on Racism and Xenophobia; and
- 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 across the period of 2011-2016; 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, convicted offenders, judges, prosecutors and defence practitioners. This latter element sought to determine the operational realities of the manner in which a hate crime is addressed through the criminal justice process across the jurisdictions party to this research. Each partner produced a detailed report on their findings as they related to their own jurisdiction.

In this Part of the Report we present a comparative analysis of the research findings from the project as a whole. For the purposes of this analysis, we have not sought to include every issue which arose in the jurisdictional reports, but rather those which speak to issues already highlighted at a European level, and themes that emerged repeatedly across the research.

### **General contexts**

Prior to exploring the individual stages of the lifecycle, in this first section we address the legal frameworks which govern the lifecycle of a hate crime in the jurisdictions party to this research, as well as some of the more general themes which arose in the research that inform the broader context in which hate crime was understood across the project as a whole.

### **Legal frameworks**

There are three key legal frameworks for addressing hate crime that operate across the partner jurisdictions to this project. The first creates aggravated versions of existing offences in legislation; the second incorporates an aggravated penalty

provision into the general sentencing scheme of the criminal code; and the third relies on judicial discretion to ensure the hate element of a crime is addressed during the sentencing stage of the legal process. In some jurisdictions, more than one of these options is present.

Table 3: Jurisdictional frameworks addressing hate crime

Framework	CZ	EW	IE	LV	SE
<b>Aggravated offences</b>	✓	✓	-	-	-
<b>Enhanced sentencing</b>	✓	✓	-	✓	✓
<b>Judicial discretion</b>	✓	✓	✓	-	✓

### *Recognising the hate element in law*

The first way in which the hate element of an offence is recognised by state legislatures is by way of the creation of “aggravated offences”. This approach has been utilised in both England and Wales, and the Czech Republic. In England and Wales, sections 29-32 of the Crime and Disorder Act 1998<sup>1</sup> create racially and religiously aggravated forms of assaults, criminal damage, harassment and public order offences. Section 28 of the Act prescribes two ways in which the hate element of an offence under sections 29-32 can be proved in court. The first is by showing that the defendant has “demonstrated” racial or religious hostility during the commission of the offence; while the second is to prove that they were (partly) motivated by such hostilities. Section 28 also states that “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins; “religious group” is defined as meaning a group of persons defined by reference to religious belief or lack of religious belief. Similarly, in the Czech Republic, section 352(b) of the Criminal Code provides that it is an offence to use violence against a person or a group of people, or threaten them with death or serious injury where it is done so because of the presence or presumption of named victim characteristics. The characteristics named are the victim’s race, their membership of an ethnic group, their nationality, or their political or religious beliefs (or absence thereof).

The second means by which the hate element of an offence is recognised across the jurisdictions in this project is through a specific requirement set out in legislation that a hate element be considered an aggravating factor at sentencing. Importantly, while four of the jurisdictions to this project have provisions that oblige the court to consider the hate element, it is not a requirement across all four that the court must aggravate the penalty; in some jurisdictions it is at the discretion of the court whether the penalty is aggravated or not.

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<sup>1</sup> As amended by the Anti-terrorism, Crime and Security Act 2001.

In England and Wales, as well as the aggravated offences in the 1998 Act, section 145 of the Criminal Justice Act 2003 states that if an offence is racially or religiously aggravated, the court *must* treat that as an aggravating factor when determining the sentence. Section 146 of the Act similarly provides that where an offence is aggravated on the basis of it being motivated by, or because the offender demonstrated, hostility towards the victim's sexual orientation, disability, or transgender identity, the court *must* treat that as an aggravating factor. In that context, disability is defined as "any physical or mental impairment"; and transgender is to be interpreted as including "references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment."<sup>2</sup> The courts have interpreted sexual orientation to include heterosexuality, homosexuality and bisexuality only.<sup>3</sup>

In the absence of aggravated offences, in Latvia, the court must consider the aggravating circumstances of the offence at sentencing. Chapter V of the Criminal Law details the manner in which punishment should be determined. Section 46(3) provides that in determining a sentence, account shall be taken by the court of mitigating and aggravating circumstances. Section 48 sets out 16 factors that "may be recognised as aggravating circumstances", which includes in section 48(14) where "the criminal offence is committed for racist, national, ethnic, or religious reasons"<sup>4</sup>.<sup>4</sup> Importantly, section 48(3) provides that anything not listed in the section cannot be considered as aggravating the sentence, meaning that there is no discretion on the part of judges to treat, for example, a transphobic motivation as aggravating the offence. In summary, while the Court is required to consider the hate element as an aggravating factor, it is not required to aggravate the sentence on that basis.

In the Czech Republic, along with the offences under section 352 of the Code, chapter V of the Criminal Code sets out the manner in which sentences are determined. Section 38 of that chapter provides that in determining a sentence, account shall be taken by the court of mitigating and aggravating circumstances. Section 42(b) then sets out 16 factors which "may be recognised as aggravating circumstances", which include where the criminal offence is committed on the basis of "national, racial, ethnic, religious, class and other similar biases."

Similarly, in Sweden, Chapter 29 of the Penal Code details the manner in which punishment should be determined. Section 1 of Chapter 29 generally provides that in assessing the appropriate punishment to be imposed in a case, special consideration should be given to the intentions or motives of the offender. Section 2 goes on to provide that a number of aggravating circumstances shall be given

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<sup>2</sup> Section 146(5) and (6) of the Criminal Justice Act 2003.

<sup>3</sup> *R v B* [2013] EWCA Crim 291.

<sup>4</sup> "National, ethnic, or religious" were added on 25 September 2014.

“special consideration” in addition to what is applicable to each and every type of crime. These aggravating circumstances include “whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance.” Again, the sentencing court is not obligated to enhance the sentence: as the Swedish Country Report notes, “it is important to notice that the bias or prejudice motive *may* have an impact. It is not mandatory.”<sup>5</sup> Thus, as is the case in Latvia, while the aggravating circumstances must be given special consideration, this does not equate to a requirement to increase the sentence imposed.

Finally, the third way in which a hate element is recognised is through the traditional sentencing discretion of the court. In Ireland, though there is no legislative framework for addressing hate crime, the Court of Appeal has stated that it is appropriate for a racist motivation to be considered an aggravating factor at sentencing.<sup>6</sup> While it has been speculated that this can and should be used as precedent for considering other motivations (e.g. against an individual because of their sexual orientation or disability), in the Country Report for Ireland the authors suggest that this might contravene the principle of certainty.<sup>7</sup> They also suggest that there is uncertainty around the interpretation of the terms “race” and “racist” in this context, asking whether it should be interpreted as including national or ethnic origin, or colour. It is also noted in that Report that it is unclear if the decision of the Court of Appeal means that hostility directed towards an intersection of cultural and religious identity, as in anti-Muslim or antisemitic hate crime, should be considered an aggravating factor. Indeed, in the absence of policy, guidelines, or legislation, the Irish Report observes that sentencing judges have stated that a case was racially aggravated even where there was no evidence presented during the course of the trial to that effect.

In England and Wales, the Sentencing Council provides additional sentencing guidelines for types of offence that judges should follow when determining sentence.<sup>8</sup> In each guideline the Council lists aggravating factors that the court may wish to consider when assessing the level of culpability of the offender, including whether the “offence was motivated by, or demonstrating, hostility based on the victims’ age, sex, gender identity (or presumed gender identity)”. This means that England and Wales have three methods of aggravating sentences for hate crime,

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<sup>5</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>6</sup> *Director of Public Prosecutions v Elders* [2014] IECA 6.

<sup>7</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>8</sup> See e.g. Sentencing Council, *Assault: Definitive Guideline* (Sentencing Council 2011).  
<[https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault\\_definitive\\_guideline\\_-\\_Crown\\_Court.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf)> accessed 24 November 2017.

each covering different characteristics - the aggravated offences (race and religion), the sentencing aggravation provisions (race, religion, sexual orientation, disability and transgender identity), and the Council sentencing guidelines (age, sex and gender identity).

In Sweden and the Czech Republic, due to the inclusion of “other similar circumstance” (in Sweden) and “other similar biases” (in the Czech Republic), judicial discretion can be utilised to protect a broader range of characteristics than those named in legislation.

#### *Victim characteristics*

As we have seen, the range of victims protected in law across the Member States differs significantly. Importantly, while in some jurisdictions it is possible for the court in its discretion (either through the criminal code, or because of the inherently discretionary nature of sentencing practices) to consider a hate element an aggravating factor at sentencing, in Latvia there is no such discretion, with the courts being limited to those characteristics protected in the law. Further, in England and Wales, while there is a relatively comprehensive range of victims is protected under the legislation as a whole, the form of protection differs by victim group.

Table 4: Victim characteristics protected under the law

Victim characteristics	CZ	EW	IE	LV	SE
<b>Class</b>	✓				
<b>Colour</b>		✓			✓
<b>Citizenship</b>		✓			
<b>Disability</b>		✓			
<b>Ethnic origin</b>	✓	✓		✓	✓
<b>Gender (incl sex)</b>					
<b>Gender identity and or gender expression</b>					
<b>National origin</b>		✓		✓	✓
<b>Nationality</b>	✓	✓			
<b>Political opinion</b>	✓				
<b>Race</b>	✓	✓	✓	✓	✓
<b>Religion/Religious belief</b>	✓	✓		✓	✓
<b>Sexual orientation</b>		✓			✓
<b>Transgender identity</b>		✓			✓
<b>“other similar factor”</b>	✓				✓

As we can see, “race” was the most commonly recognised characteristic across all jurisdictions party to this research. It is interesting to note, however, that, within a single jurisdiction, individual offences (i.e. hate crime and hate speech offences;



aggravated offences; and enhanced sentencing provisions) may protect different groups of victims. England and Wales is perhaps the most stark example of this.

In Sweden and the Czech Republic (and arguably in Ireland) the court has discretion to treat a hate motivation as an aggravating factor across a range of characteristics not specifically mentioned in the legislation: in Ireland through the operation of the principle of judicial discretion; and in Sweden and the Czech Republic where there is a specific legislative statement that any “similar circumstances” to those categories named can be considered. The Country Report for Ireland questions whether such a broad approach violates the principle of certainty, though this was not raised in the Swedish or Czech Country Reports. In Sweden, the “other similar factor” element has been invoked in cases of bias motivated crime against transgender persons “on the grounds that the provision [is a] list of examples, and can therefore be considered to include violations based on, for example, gender identity or gender expression.”<sup>9</sup> In Latvia, while the list under section 48 is closed (and limited), the list of protected characteristics under section 150 is broader, and open ended.

Across the four partner projects operating in a legislative context, criminal justice professionals were asked whether the range of protected characteristics should be expanded to protect other identity groups. In the Czech Republic, only a small number of participants were open to expanding the scope of the protection afforded in the legislation to include other categories, specifying “sexual orientation/identity, age, homeless status, subculture membership, physical disability, etc.”<sup>10</sup> In England and Wales, where there is a different legislative regime for racial and religiously aggravated offences on the one hand, and those committed against people because of their sexual orientation, transgender identity, or disability on the other, just over half of criminal justice professionals were of the view that all five characteristics should be protected equally. When discussing characteristics that fall outside the legislative framework, several interviewees noted that age and gender should be considered for inclusion (though it should be noted that these characteristics are already included under Sentencing Guidelines).

In Sweden, a significant number of the prosecutors and defence lawyers were of the view that the range of protected characteristics should not be expanded, as it would mean that the legislation would not be clear and distinct.<sup>11</sup> A small number of respondents suggested that disability and gender be added. In Latvia, some participants were of the view that the current range of protected features is sufficient; others were of the view that some other groups, “e.g. homeless persons”

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<sup>9</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017). See also Prop. 2001/02:59, Hets mot folkgrupp m.m. s. 57. (Government Bill).

<sup>10</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>11</sup> See Part 6 of this Report for further analysis of this issue.

could be added.<sup>12</sup> In this context, it is important to note that the features protected under section 48 are very limited. It is also worth observing that in 2012, the Prosecutor General stated that criminalising hate speech on the grounds of sexual orientation under section 150 should be considered. However, in formulating section 150, the Latvian Parliament left the list open ended, declining to explicitly name sexual orientation as a protected category. Indeed, the Latvian researchers to this project note that this open ended approach was adopted so that any homophobic offences perpetrated during Euro Pride in 2015 (the first Euro Pride to be held in the former Soviet Union) could be addressed by the criminal justice process, without Parliament having to explicitly name sexual orientation as a ground. This, we believe, could indicate levels of structurally embedded homophobia, given the societal significance of explicitly naming a characteristic as meriting the protection of the State, or indeed of declining to send this message.

### **National strategies or action plans on hate crime**

In its Opinion on the Framework Decision, FRA encourages Member States to consider setting up national strategies or action plans aimed at addressing hate crime.<sup>13</sup> Indeed, the very presence of an official statement from Government that hate crime, hate speech, and any form of discrimination are abhorrent in a modern democracy and contrary to human rights is vital to ensuring that the “message” that hate crime is unacceptable is communicated clearly and unambiguously. The law is an important tool that Member States can use to expressly denounce prejudice-based conduct. By specifically criminalising the hate element of an offence, legislatures can send a strong symbolic message to society that hate offences are particularly immoral, while simultaneously sending a message of support to commonly victimised communities that they will be protected from such crimes.<sup>14</sup>

Since the mid-1990s, combating hate crime has been a stated priority of the Swedish Government.<sup>15</sup> This position is framed in the context of hate crime as a human rights violation:

“Effective measures against racism and hate crime contribute towards the objective of ensuring full respect for Sweden’s international human rights

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<sup>12</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>13</sup> European Union Agency for Fundamental Rights *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* (European Union Agency for Fundamental Rights 2013) 14 <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 November 2017.

<sup>14</sup> See, for example, Jennifer Schweppe and Mark A Walters, ‘Hate Crime: Legislating to Enhance Punishment’ in Oxford Handbooks Online: Criminology and Criminal Justice (Oxford University Press 2016).

<sup>15</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

obligations. Combating racism and similar forms of hostility prevents the risk of individuals' rights being infringed.”<sup>16</sup>

Similarly, in England and Wales there is a national plan on hate crime: *Action Against Hate: The UK Government's plan for tackling hate crime*, which highlights how hate crimes “attack the fundamental values that underpin our diverse society, values of acceptance and respect for others.”<sup>17</sup>

In the Czech Republic, the National Security Audit addresses extremism, but not hate crime.<sup>18</sup> In Ireland, the only national plan which speaks of hate crime in any form is *Migrant Integration: A Blueprint for the Future*, which discusses only racist crimes rather than other manifestations of hate.<sup>19</sup> In this document, racism and discrimination are addressed as risks or barriers to the integration of migrant people. Racism and xenophobia are to be combated through: intercultural awareness and training, addressing the under-reporting of racist crime through the development of greater contact with marginalised communities, and the review of legislation which addresses hate crime and hate speech. In Latvia there is no strategy in place which addresses hate crime.

### Understanding and conceptualising hate crime across Member States

As was set out in Part 3 of this Report, the Commission has suggested practices designed to strengthen the implementation of the Framework Decision.<sup>20</sup> The first of these is ensuring that authorities responsible for the investigation and prosecution of hate crime have sufficient knowledge of relevant legislation and have clear guidelines. Garland and Chakraborti<sup>21</sup> highlight conceptual variations across the EU in how stakeholders understand hate crime as undermining effective and inclusive responses to the problem. In this Report, we sought to explore how criminal justice professionals understood the concept of hate crime, and how it was framed across

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<sup>16</sup> Government Offices of Sweden, *A comprehensive approach to combat racism and hate crime. National plan to combat racism, similar forms of hostility and hate crime* (Government Offices of Sweden 2017) <sup>17</sup> <<http://www.government.se/information-material/2017/02/a-comprehensive-approach-to-combat-racism-and-hate-crime/>> accessed 24 February 2018.

<sup>17</sup> Home Office, *Action Against Hate: The UK Government's plan for tackling hate crime* (Home Office 2016) <<https://www.gov.uk/government/publications/hate-crime-action-plan-2016>> accessed 24 February 2018.

<sup>18</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>19</sup> Department of Justice and Equality, *The Migrant Integration Strategy: A Blueprint for the Future* (Department of Justice and Equality). There was a National Action Plan Against Racism for 2005-2008 which has lapsed and not replaced.

<sup>20</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' (European Commission 2014) para 3.4. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 26 February 2018.

<sup>21</sup> Jon Garland and Neil Chakraborti, 'Divided by a common concept? Assessing the implications of different conceptualizations of hate crime in the European Union' (2012) 9(1) *European Journal of Criminology* 38.

the five jurisdictions party to the project. A number of key themes emerged in this regard.

The first noteworthy finding relates to participants' knowledge of the concept of hate crime. We found that the more developed and comprehensive the policies and legislation, the more nuanced were participants' understandings of the concept. For example, the framework in England and Wales, which includes comprehensive policies across all parts of the criminal justice process, from recording hate crime to sentencing, includes what was described as an "impressive body of documentation for hate crime."<sup>22</sup> Most criminal justice professionals interviewed for the Report from England and Wales demonstrated a sophisticated understanding of hate crime, and its place in the criminal justice process.

At the other end of the spectrum was Ireland, where in the Country Report it is observed that there was "inconsistency in [criminal justice professionals'] definitions and understandings of hate crime as a construct."<sup>23</sup> Similarly, in the Czech Republic, the "lack of a unified understanding of the notion of hate crime among the informants" was identified as a limitation to the research.<sup>24</sup> In that jurisdiction the partner to the Research observed that public prosecutors had a more unified view of hate crime, which the Report states is likely explained by the existence of a "specific methodology and a hate crime specialisation within the structure of the public prosecutor's office."<sup>25</sup> In Latvia, hate crime was almost exclusively understood as hate speech by the participants, and none of the judges (six were interviewed) or lawyers interviewed (14 in total) had any experience of dealing with either the aggravated sentencing provisions under section 48 of the Code, nor section 150 of the Code. Of the ten State police officers interviewed, only five had experience of cases being opened under section 150. The Latvian Country Report found that the conflation of hate speech and hate crime in that jurisdiction resulted in hate crime offences being addressed through incitement to hatred legislation. The partner for Latvia explains the conceptual slippage by reference to the dominance of criminal law experts from the Soviet period.

Interestingly, in Sweden, although the aggravated sentencing provisions are infrequently used, participants still had a good understanding of the concepts: when participants to the research discussed hate crime, it was "mostly in the context of the

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<sup>22</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

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

<sup>24</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

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

possibility and consequences of using bias motive as an aggravating factor when prosecuting, defending or adjudicating cases ...”<sup>26</sup>

The second major theme related to differences in the comprehension and framing of the concept of hate crime. For example, we see hate crime and hate speech being conflated, with hate speech provisions being used to address hate crime. For example, in Latvia, while section 48(14) of the Criminal Code specifically requires the hate element of a crime to be considered an aggravating factor at sentencing, the vast majority of those who took part in the research discussed their experience predominantly in the context of section 78 of the Criminal Law, which is an incitement to hatred provision:

“Nearly all described cases by the stakeholders concerned incitement to hatred on the internet; some cases included marginal printed right-wing publication.”<sup>27</sup>

While the introduction of section 48(14) had the potential to create a conceptual and operational distinction between hate crime and hate speech, this did not in fact happen in practice. Indeed, even though the participants to the research in Latvia responded in the main to questions about hate crime by addressing hate speech, and more particularly, hate speech on the internet, the overwhelming majority were of the view that the current legislative framework was appropriate to addressing hate crime. Thus, in Latvia, understandings and conceptualisations of hate crime are framed in the context of hate speech.

Similarly, the Czech Country Report documents prosecutors using both hate speech and hate crime offences. These approaches are explained in the Czech Country Report, which states:

“What is specific about the basis of hate crime is that even purely verbal acts may be penalized under the law, something which is an outgrowth of experience with the Nazi and fascist ideologies that gripped Europe in the 20th century.”<sup>28</sup>

Thus, although in both Latvia and the Czech Republic, the law fully complies with Article 4 of the Framework Decision, we do not see hate crime being prosecuted to the same extent as hate speech. FRA has highlighted that the use of “political categories” such as “right-wing extremism” or “left-wing extremism” can lead to hate

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<sup>26</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>27</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>28</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

crimes being masked, and victims of hate crime not being recognised as such. The approach in the Czech Republic contrasts starkly with, for example, England and Wales, where the stirring up of hatred provisions were not raised by participants interviewed for the Lifecycle Report. In Sweden, interviewees stated that such provisions are seldom invoked:

“The legislation dealing with agitation against a national or ethnic group and the law criminalizing unlawful discrimination are rarely used. All interviewed, be it judges, prosecutors or defence lawyers, stated that they almost never handle cases regarding unlawful discrimination, and that cases of agitation against a national or ethnic group rarely are brought to court.”<sup>29</sup>

In Ireland, although the only legislative recognition of “hate” is through the Prohibition of Incitement to Hatred Act 1989, the Act is similarly used sparingly. There has been an Irish case which found there to be correspondence between Czech and Irish incitement provisions in the context of a European arrest warrant: *Re the European Arrest Warrant Act 2003: Minister for Justice and Law Reform v Petrášek*.<sup>30</sup> This itself is interesting, given the reliance in the Czech Republic on hate speech provisions, and their very limited application in Ireland.

We have addressed variation in the definitions, conceptualisations and understandings of hate crime between States. The third theme speaks to an absence of a shared understanding of concepts even within Member States. While England and Wales reported a relatively uniform understanding of hate crime internally, this theme arose, in particular, in the Reports relating to Latvia, Ireland and, to a lesser extent, the Czech Republic:

“One police officer noted that joint training should be organised for both prosecutors and police so that there is a common understanding about concepts and borderlines ...”<sup>31</sup>

“Although the majority of criminal justice professionals (that is legal practitioners and gardaí [the police]) interviewed for this research were of the view that if a hate element is established in a case, it should aggravate the penalty imposed, ... inconsistency in their definitions and understandings of hate crime as a construct was evident.”<sup>32</sup>

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<sup>29</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>30</sup> [2012] IEHC 212.

<sup>31</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>32</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

“Prosecutors and judges ... were particularly critical of instances in which police rely too much on the concept of extremism, potentially resulting in hate crimes committed by individuals who are not sympathisers or members of hate movements being overlooked.”<sup>33</sup>

Again we found that in a jurisdiction in which there were clear definitions, policies and guidelines shared across the process, namely England and Wales, there was a greater uniformity of understanding and a more cohesive approach to practice across the legal process.

A final minority theme arose concerning the underreporting and under-recognition of hate crime through the process, an unsurprising finding in the context of international literature in this regard:

“A number of legal professionals expressed surprise that they had not been involved in or aware of more such cases.”<sup>34</sup>

“A significant majority of the interviewed prosecutors and defence lawyers are of the opinion that hate crimes are an increasing feature in the Swedish society and that the legal system has become better at identifying these crimes.”<sup>35</sup>

In this respect, England and Wales also evidenced room for improvement with the Report for that jurisdiction, highlighting particular shortfalls in police officers recognition of disablist hate crime. In that jurisdiction, the National Hate Crime Strategy sets out a commitment to prevent, positively respond to, and reduce underreporting of hate crimes.<sup>36</sup> One measure that has been introduced to help achieve these commitments is the online reporting website True Vision, which allows any individual to report a hate crime or hate incident committed anywhere nationally via a single online portal.<sup>37</sup>

### **Victims' participation in the criminal justice process**

Across the partner states to this research, the role of the victim varied considerably from one jurisdiction to another. In England and Wales, as well as Ireland, the victim has traditionally had no more significant a role in criminal proceedings than any other witness. In these jurisdictions, this situation has slowly changed over the past

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<sup>33</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>34</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>35</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>36</sup> College of Policing, *The National Policing Hate Crime Strategy* (College of Policing 2014).

<sup>37</sup> See, True Vision: Stop Hate Crime <<http://www.report-it.org.uk/home>> accessed 24 February 2018.

20-30 years as victims have become more involved in the criminal process. Indeed, the move to a more victim-centred approach to justice is typified (and in the case of Ireland, led) by the Victims' Directive, which is helping to change the way victims are treated at the early stages of criminal proceedings (at the point of reporting), during trial processes (when giving oral testimony), and at the end of criminal proceedings (through the making of a victim impact statement).

While the Victims' Directive is helping to ensure that victims are better supported during the criminal process, where individuals are victims of a hate crime, they can only benefit from the measures available where the hate element is properly recognised. In Ireland, where the system is "essentially blind" to the hate element of a crime, it was observed that "it is difficult to see how in practice this element of the Directive and the Act can be operationalised in a manner which effectively protects victims of hate crime."<sup>38</sup> At the opposite end of the spectrum, an eagerness to provide special support mechanisms for victims of hate crime can have an opposite effect if measures are not implemented with due care and attention. One note of caution sounded by the research partners in England and Wales was that in the rush to adhere to the special measures provisions, they found that some practitioners failed to properly consider the exact needs of the victim. Failure to consider the specific needs of individual witnesses may exacerbate rather than improve the difficulties faced by hate crime victims - for example by providing video links for disabled victims, without first checking that they have the capacity to understand that a judge will be speaking to them through an electronic device.

In other jurisdictions, victims play a much more central role in the legal process. For example, in Sweden a crime victim who qualifies as an injured party under the Chapter 20, Section 8(4) of the Procedural Code has legal standing in the case.<sup>39</sup> They are a party to the trial, can address the court, examine and cross-examine witnesses, and make statements to the court.<sup>40</sup> Generally speaking, victims of crime are entitled to free legal aid in the form of legal representation, as well as counselling services. The victim can also sue for compensation.<sup>41</sup> Swedish law was generally compliant with the Victims' Directive prior to the deadline for transposition, and those legislative changes required to remedy any shortfalls (that is, the right of victims to information regarding proceedings, the right to an interpreter, and the right to an individual security assessment) came into force on November 1 2015.<sup>42</sup> Perhaps unsurprisingly, the experience of victims of hate crime in the Swedish criminal process was overwhelmingly positive:

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<sup>38</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>39</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*



“[A]ll were satisfied with the treatment they received from the court and from the prosecutor; a significant majority were satisfied with the work of the police and a few also felt that the defendant’s lawyer treated them with respect. The most important contributor to this satisfaction was, however, another legal actor, the legal counsel (the injured party counsel) who helped them throughout the process.”<sup>43</sup>

It is not only victims who are impacted by the protective measures offered by the Directive. One of the convicted offenders interviewed in Sweden reflected on the impact that the delivery of evidence by video link had on him:

*“One witness would not even enter the courtroom. It was a girl and she wanted to use a video link instead. Because she was afraid of entering the courtroom. And it felt ... it felt very special when you heard it. It did not feel okay that this person in question should be afraid of me. It was really the first time, I felt something that could be compared to a punch in the face. That this girl felt scared. And, that first she went into the courtroom, but then she wanted to have a video link instead.”* (Convicted offender, Swedish Country Report)

The Swedish Country Report speculates that without the support of counsel for the injured party, the experiences of victims of hate crime with the criminal justice system would have been very different. The extent of the support given to these victims cannot be overestimated:

“We heard stories of counsel preparing the victims for court, not only as regards what would actually take place, but also about strategies to cope with being in the same room as the offender, where to look, how to think about things that the offender might possibly say or do. They also told stories about how the counsel helped them to handle the press, got them counselling from professionals, and explained the court decision when reading the judgment was not enough for them to understand what had really happened in court. Many of the injured party counsel also played an active part in the investigation leading up to the court case, in that they accompanied the victim to the police interrogation and helped them to understand why it was necessary to answer the, sometimes intrusive questions put to them.”<sup>44</sup>

Contrast this experience with that of victims of hate crime in the Czech Republic:

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<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

“All three categories of informants viewed the approach taken to victims as problematic, burdened by formalism, with the result that victims often do not understand their current position or rights. In a similar manner, criticism was levelled at a lack of knowledge on the part of criminal justice agencies, particularly the police and the courts, which leads to the rights of victims being directly violated.”<sup>45</sup>

While it was accepted by the research partner in the Czech Republic that the work of victims’ representatives went some way to addressing these shortcomings, victims were nonetheless traumatised and revictimised by engaging in the criminal process. In Ireland, police interviewees were of the view that there was no evidence that those working in Victim Liaison Offices, put in place to secure the effective and meaningful operation of the Victims’ Directive, had any training on the treatment of victims of hate crime, or of any of the particular measures that should be put in place for them.

## **Conclusion**

It is clear that the Framework Decision has been implemented with significant variations across the jurisdictions party to this project. With respect to victims of hate crime, some of the variation appears to be related to the type of legal system in place (victim-centred or offender-centred). Others relate to which concept of hate crime is embedded within law and policy, which in turn impacts on the operationalisation of the Directive with respect to victims of hate crime. Moreover, in those jurisdictions where the role of the victim is peripheral to the legal process, and where hate crime is not yet legislated for, support for victims of hate crime will continue to be lacking.

The remainder of this part of the Report will go on to explore four key stages in the Lifecycle of a Hate Crime: police reporting and recording of hate crime; the investigation of a hate crime; the prosecution of a hate crime; and the sentencing of a hate crime. In the concluding section, we will finally explore how the hate element of a crime is communicated between practitioners across the process, from the point of recording to sentencing.

## **Police recording of hate crime**

The adequacy of police recorded hate crime data may be undermined by underreporting where victims do not communicate their experiences to the police. This section of Part 4 focuses in particular on the equally salient problem of police under-recording, i.e. failures on the part of the state and its agencies to adequately record hate crimes at the point at which they are reported.<sup>46</sup> Notably, the two

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<sup>45</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>46</sup> Paul Iganski, *‘Hate’ Crime and the City* (Policy Press 2008); Paul Giannasi and Nathan Hall ‘Policing hate crime: transferable strategies for improving service provision to victims and communities

problems are inextricably interrelated – when the State or its agencies deny, misrecognise or overlook a hate motivation or participate in the disappearing of the hate element, targeted groups are less likely to report.<sup>47</sup> As FRA notes, “[m]uch still needs doing to build trust among victims that reporting their experiences will lead to recognition of their suffering and the prosecution of perpetrators.”<sup>48</sup> In its Report on the implementation of the Framework Decision, the Commission did not explicitly address the issue of recording hate crime, though it did recommend that police be given the tools to “identify” hate crime.<sup>49</sup>

## Policies

The five jurisdictions party to this research differ significantly with respect to the availability of clear policy to support police in recording hate crime. In England and Wales, the 2014 College of Policing *National Policing Hate Crime Strategy*<sup>50</sup> and *Hate Crime Operational Guidance*<sup>51</sup> for police staff provide detailed and practical guidance on the manner in which hate crimes are to be recorded, supplemented by training which is provided at a local level. In Sweden, guidelines and policies are formulated at a regional level, such that each policing region has its own protocols with respect to the recording of hate crime. In Latvia, the current policy, *Guidelines for State Police Officers on the Identification and Investigation of Hate Crimes*, dates from August 4 2017, but fails to incorporate an operational definition of hate crime.<sup>52</sup> In Ireland, limited (and dated) guidance is contained in policing directives.<sup>53</sup> In the Czech Republic, there is no police policy on recording hate crime.

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internationally,’ in Jennifer Schweppe and Mark A Walters (eds), *The Globalisation of Hate: Internationalising Hate Crime?* (Oxford University Press 2016).

<sup>47</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Data Collection and Monitoring Mechanisms: A Practical Guide* (OSCE 2014) 11.

<<http://www.osce.org/odihr/datacollectionguide?download=true>> accessed 24 February 2018.

<sup>48</sup> European Union Agency for Fundamental Rights, ‘Combating hate crime: Encouraging reporting and improving recording’ (EUFRA 214) <<http://fra.europa.eu/en/press-release/2014/combating-hate-crime-encouraging-reporting-and-improving-recording>> accessed 24 February 2018. OSCE/ODIHR identifies a number of common obstacles to the accurate and comprehensive recording of hate crime, including policy gaps, reporting gaps, priority gaps, lack of training, concern about the repercussions of reporting, and prejudices.

<sup>49</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) para 3.4.

<<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 24 February 2018. Emphasis added.

<sup>50</sup> College of Policing, *National Policing Hate Crime Strategy* (College of Policing 2014) <[http://report-it.org.uk/files/national\\_policing\\_hate\\_crime\\_strategy.pdf](http://report-it.org.uk/files/national_policing_hate_crime_strategy.pdf)> accessed 24 February 2018.

<sup>51</sup> College of Policing *Hate Crime Operational Guidance* (College of Policing 2014) <<http://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf>> accessed 24 February 2018.

<sup>52</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

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

Given the variations in the legal definitions of hate crime across the five partner states to this project, it is perhaps unsurprising that their approaches to recording hate crime are equally diverse. Our findings regarding the range of methodologies employed across the five jurisdictions reflect FRA's 2017 conclusion:

“... divergent legal definitions have determined the scope of data collection, the purpose for which data are intended, and diverse methodologies for data collection have all impeded direct comparisons.”<sup>54</sup>

Thus, for example, police in Ireland – a jurisdiction which lacks hate crime offences – record crimes with a hate element under the auspices of crimes “with a discriminatory motive”. In the Czech Republic, much of that which is published as data on hate crime, in fact relates to extremism.

While the presence, absence, divergence, or ambiguity, of legislative definitions of hate crime is fundamental, we also see - across the five jurisdictions - that three other factors also impact on the quality of police recording: first, the operational definition of a hate crime that is used at the point of recording; second, whether it is mandatory to address the question as to whether a crime included a hate element or not; and finally, the extent of the training which supports stakeholders' understanding of that definition. Additionally, divergences between recording practices and legislative definitions have implications for the recording of hate crime.

#### *Defining hate at the point of recording*

In England and Wales, Ireland, and Sweden, the hate element is recorded by identifying a hate motivation on an incident report form, which may be electronic or hard copy (and later transferred to an electronic database). In Latvia and the Czech Republic, the hate element attaches to the offence type, rather than the motivation at the point of recording: where there is no relevant offence (i.e., where the hate element would be addressed through enhanced sentencing), it is not recorded at this point.

In ECRI's GPR 11 on combating racism and racial discrimination in policing, paragraph 14 of the Recommendation defines a racist incident as “any incident which is perceived to be racist by the victim or any other person.” Across the five partner jurisdictions to this project, divergences in the adoption of this definition were apparent. England and Wales, Sweden and Ireland, employ this “perception test”, which first emerged from the Macpherson report relating to the inquiry into

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<sup>54</sup> EU Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey: Technical Report* (EUFRA 2017).  
<[http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-midis-ii-technical-report\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-technical-report_en.pdf)>  
accessed 24 February 2018.

the “botched” police investigation of the racist murder of Stephen Lawrence.<sup>55</sup> This broad victim-centred definition is an attempt to reduce the potential for under recording as a consequence of the “unwitting prejudice, ignorance [or] thoughtlessness” amongst some police officers (what Macpherson referred to as “institutional racism”) by limiting police discretion.<sup>56</sup> Thus, in Ireland, Sweden, and England and Wales, there are a wide range of stakeholders who can trigger the recording of a hate element. However, while in England and Wales, for example, the perception test is generally well understood and integrated into operational policing, the Irish Report observes that, in that jurisdiction despite the test being part of official police policy, it is not understood in any meaningful way across the service. Again, this speaks to the need to underpin policy with training. The “perception test” is not utilised in either Latvia or the Czech Republic.

#### *Mandatory recording*

In Ireland and Sweden, it is mandatory at the point of recording for police officers to address the question as to whether there was a hate element to the crime: thus, before a crime can be recorded, the police officer must address the question as to whether the crime included a hate element. In Ireland, the mandatory character of the question is a recent innovation, dating to November 2015. The Irish Report finds that since this date, police recorded crimes with a discriminatory motive have significantly increased in number. Swedish researchers to this project noted that while the mandatory nature of the question is positive, in the sense that the hate element must be addressed, it has also resulted in both over-reporting and under-reporting of hate crime.

In the Czech Republic and Latvia, it is not mandatory for police officers to state whether the crime had a hate element or not at the point of recording. In England and Wales the police are not required to ask victims whether they believed the incident to be motivated by hate; however where a victim or anyone else reports that they believed the incident to be so motivated the responding officer *must* record it as a “hate crime”.

#### *A shared understanding at recording*

The absence of a shared understanding of recording categories and protocols is a significant obstacle to the quality of police recorded hate crime data. The Report for Ireland finds that despite the reformulation of recording practices in that jurisdiction in November 2015, and a concomitant increase in the number of police recorded “crimes with a discriminatory motive”:

“... no training or documentation had been provided to establish a shared understanding of the meaning of the categories of discriminatory motivation,

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<sup>55</sup> William Macpherson, *The Stephen Lawrence Inquiry. Report of an Inquiry* (The Stationery Office, UK 1999) para 45.17.

<sup>56</sup> *ibid*, para 46.25.

or the circumstances under which a discriminatory motive should be recorded. This has resulted in inconsistencies and ambiguity in the understandings both of police and call takers.”<sup>57</sup>

Consequently, the significance of the increase in police recorded crimes with a discriminatory motive is unclear.

The partner for England and Wales finds that, despite the comprehensive policy and guidance available in that jurisdiction, approximately 43 per cent of hate crimes reported to the police are not recorded as such.<sup>58</sup> The Report notes in particular that there are still vast improvements to be made in the recording of disability hate crime, highlighting that out of an estimated 34,840 reported disability hate crimes, just 3,629 incidents (ten per cent) were officially recorded by the police. Prosecution interviewees asserted that police do not always record a disablist motivation even where a disablist slur has been used in the course of an offence.<sup>59</sup> In contrast, participants held that the police were adept at identifying racist crimes.<sup>60</sup> Prosecutors interviewed by the partner for England and Wales expressed concern that where police record a hate motivation they may omit to consider the presence of intersectional or multiple hate motivations, despite the fact that officers can flag multiple motivations on their recording systems.<sup>61</sup>

We have noted that in the Czech Republic hate crime has historically been conflated with extremism, although Perry notes that as far back as 2011 the Czech Republic demonstrated a critical reflexivity regarding the need to disaggregate the two constructs.<sup>62</sup> The Czech National Security Audit highlights the need to address victims’ rights and to abandon the anti-extremist approach in hate crime investigations.<sup>63</sup> More fundamentally, In IUSTITIA, the research partner for the Czech Republic, who collaborate with the police in the collation of third party hate crime statistics, note that they have identified discrepancies in police classification, which suggested shortfalls in either the ability or willingness of the police to recognise hate motivations.

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<sup>57</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>58</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

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

<sup>60</sup> *ibid* 81.

<sup>61</sup> *ibid* 82.

<sup>62</sup> Joanna Perry, "Evidencing the case for 'hate crime' in Neil Chakraborti and Jon Garland (eds) *Responding to Hate Crime: The case for connecting policy and research* (Policy Press 2014) 71.

<sup>63</sup> Security Policy and Crime Prevention Department, *National Security Audit* (Ministry of the Interior of the Czech Republic 2016) 27-28.

<<http://webcache.googleusercontent.com/search?q=cache:UZz7q6O1rTEJ:www.mvcr.cz/cthh/soubor/national-security-audit.aspx+&cd=1&hl=cs&ct=clnk&gl=cz;>> accessed 24 February 2018.

*Divergences between legislative and practice definitions*

Across the partner jurisdictions to this project, there were two particular examples that showed how police recording practices can exceed the limits of legislation, operating in spite of, rather than because of, the legislative position. The impacts of each are remarkably different. For example, in England and Wales, some police forces record bias motivations that are not covered in hate crime legislation. For instance, Ellison and Smith noted that following a series of murders of sex workers between 2000 and 2005, police in Liverpool introduced a policy that all crimes against sex workers/prostitutes were to be treated as hate crimes in that territory.<sup>64</sup> They observed that as a result of the priority accorded to such crimes, in which police recording played a role, “in 2010, the Merseyside Police had an 84 per cent conviction rate for those who committed violent acts towards sex workers and a 67 per cent conviction for rape.”<sup>65</sup> The “Merseyside model” as it is known, thus illustrates that, even in the absence of legislation, the collection of hate crime data can have operational impact.

In Ireland, in the absence of legislation as we have seen, the police service has introduced an extensive list of eleven discriminatory markers by which a hate motivation can be recorded. However, the domino effect of innovative recording practices in evidence in the “Merseyside Model” in England and Wales is not identified in the Report from Ireland. Rather, the partner for that jurisdiction finds that rather than the hate element being communicated forward and impacting the investigation, prosecution and sentencing of a hate crime, it is often “disappeared” or “filtered out” from the process:

“While [police] admitted that the hate element will sometimes be considered or recorded during the course of an investigation, the vast majority of police officers interviewed were of the view that it simply is not something that will be prioritised at the investigation stage.”<sup>66</sup>

**Conclusions**

The quality of police recording practices with respect to hate crime are fundamentally shaped by the legislative framework and the availability of policy and training to support police officers in the recording of a hate element. Internal variations in officers’ understanding of recording categories and protocols undermine the quality of police recorded hate crime data. Even in those jurisdictions with a longer history of recording hate crime and more developed support

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<sup>64</sup> Graham Ellison and Lucy Smith, ‘Hate Crime Legislation and Violence Against Sex Workers: Lessons in Policy and Practice’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave MacMillan 2016) 197-198.

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

<sup>66</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).



structures, police officers evidence shortfalls in their recording practices which may relate, in particular, to variations in their understanding of particular hate motivations. Thus, variations in police recorded data across grounds may reflect variations in the quality of recording rather than prevalence. These findings indicate the importance of continuous training for police officers in respect to recording protocols.

As we have highlighted, while it is possible for police services to record hate crime data in the absence of legislation, the police recording of hate motivations (particularly in such contexts) does not necessarily involve the transfer or use of such data beyond the point of recording. It is a key conclusion of this section that the objectives of recording for statistical purposes and recording for operational purposes are distinct: it does not follow that where one is achieved the other will follow. Although historically they have often been pursued through the same mechanisms, the objectives of recording for statistical purposes and recording for operational purposes should be recognised as distinct and progress in each of these two dimensions of hate crime data collection should be monitored independently.

At a European level, the comparability of hate crime statistics and their utility to international bodies is impacted by systemic variations in the conceptualisation of hate crime as a construct. The findings presented in this section support the position that the development of cross-national comparable hate crime statistics will require first, the development a uniform definition of hate crime and second, mechanisms for recording crimes on this shared basis. Part 5 develops these points further.

### **Investigating hate crime**

As was set out in Part 1 of this Report, the Commission has suggested practices designed to strengthen the implementation of the Framework Decision.<sup>67</sup> Such practices should, the Commission state, include the existence of “special hate crime units ... detailed guidelines, as well as specific training for police ...”<sup>68</sup> The extent to which this recommendation has been implemented is outlined in the table below:

**Table 5: Specialised police units, guidelines, and training**

<b>Specialised units, guidelines &amp; training</b>	<b>CZ</b>	<b>EW</b>	<b>IE</b>	<b>LV<sup>69</sup></b>	<b>SE</b>
<b>Specialised police hate crime units</b>		✓			✓

<sup>67</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’ (European Commission 2014) para 3.4. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>> accessed 24 February 2018. Emphasis added.

<sup>68</sup> *ibid.*

<sup>69</sup> Police guidelines apply only to the State Police in Latvia; there is no public information about any specific guidelines used by the Security Police.



<b>Guidelines for police on investigating hate crime</b>	✓	✓	✓
<b>Specific training for police</b>	✓		✓

The table highlights the degree of variation across the five jurisdictions party to this research in respect to their implementation of the Recommendation. Furthermore, the jurisdictional parallels between the experiences of victims of hate crime in the criminal justice process, discussed earlier in Part 4, and the jurisdictional availability of hate crime-specific policing resources, are of interest.

### **Investigation policies**

There are dedicated policies in place which provide guidance to the police in investigating hate crimes in Latvia, Sweden and England and Wales. In terms of content, policies differ across jurisdictions. In Latvia, for example, the guidelines cover both hate crime and hate speech offences, and draw attention to:

“... the investigative activities that need to be undertaken and required proof, initial criminal procedural activities to be conducted concerning hate crimes in public places, and on the internet as well as provide examples of hate crime cases that have reached courts.”<sup>70</sup>

The Latvian police guidelines also refer to hate crime indicators developed by the OSCE/ODIHR as a means of illustrating the types of bias indicators commonly present in hate crimes.<sup>71</sup>

In England and Wales, the national police guidance document provides information on recording both “hate crimes” and “hate incidents”.<sup>72</sup> The latter is defined as “any non-crime incident which is perceived, by the victim or any other person” to be motivated by hate. This brings non-criminal hate-based conduct into the purview of policing in England and Wales. Its inclusion was a response to a number of high profile cases where ongoing anti-social behaviour, not typically monitored by the police, escalated into more serious forms of hate motivated violence and cases in which the persistence of “low-level” hostility impacted victims to tragic effect. The guidance sets out a number of key indicators that should be considered when gathering intelligence on hate crime, including: community intelligence; community voices; covert human intelligence sources; open-source intelligence (such as newspapers and academic research); crime pattern analysis (identifying hate crime hot spots); hate material (such as online expressions of hate); political headlines (statements made by politicians); and other internet activity. More specifically,

<sup>70</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>71</sup> That is, the characteristics of the victim; circumstances related to the property targeted; characteristics of the offender; conduct of the offender; timing and location of the incident; and the content of the victim or witness statements.

<sup>72</sup> College of Policing, *Hate Crime Operational Guidance* (College of Policing 2014).

when investigating individual incidents of hate, officers should seek to obtain CCTV footage, and victim, suspect and witness statements.

In Sweden, between 2001-2015, a series of policies and procedures were introduced to address hate crime from a policing perspective.<sup>73</sup> In the context of investigating hate crime, the guidelines focus on:

“... how to actually deal with both victims and crime scenes; what questions to ask victims; how to behave towards victims; key indicators for the police to look for in cases of suspected hate crimes; what the police should think about regarding contact with the victims’ community; and why the victim of a hate crime might be reluctant to report the crime.”<sup>74</sup>

Thus, as well as addressing the investigative process, the Swedish policy includes information regarding the harms of hate, as well as potential reasons for underreporting. Further, as part of a slew of recommendations made in 2015, it was proposed to implement “capacity-building measures so that all police investigators have sufficient knowledge about the legal aspects of hate crimes.”<sup>75</sup>

The extent to which civil society organisations or external parties were involved in the development of such policies varied from jurisdiction to jurisdiction. For example, in Latvia, the guidelines were drawn up via a collaborative process in which the State Police College, the State Police Central Criminal Police Board, the Security Police, the Office of the Prosecutor General, the Ombudsman’s Office, and the Latvian Centre for Human Rights participated. In the Czech Republic, in 2015-2016, the civil society organisation In IUSTITIA was selected to develop police guidelines, following a governmental tender as part of that jurisdiction’s *Campaign against Racism and Hate Violence*. The police were consulted during the drafting of the guidelines, which deal both with the investigation of a hate crime, and victims’ needs and rights. Unfortunately, as far as the researchers in the Czech Republic are aware, these policies, although delivered, have not been implemented by the police. In England and Wales, the Hate Crime Independent Advisory Group, which includes civil society organisations, justice professionals and academics, advises on the College of Policing’s *National Policing Hate Crime Strategy* as well as their *Hate Crime Operational Guidance*. In Sweden, civil society organisations were not involved in the development of the policies discussed herein.

In the absence of any policies in Ireland, the vast majority of police officers interviewed for the research were of the view that the hate element of a crime

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<sup>73</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>74</sup> *ibid.*

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

“simply is not something that will be prioritised at the investigation stage”, with the absence of legislative provisions to require this being the most common reason proposed. A minority of police interviewees asserted that, in Ireland, police officers generally do not understand hate crime, and its impacts. Lawyers participating in the research also perceived a lack of police training and policies on hate crime as one of the key reasons why, in their opinion, the hate element of a crime was not appropriately investigated. Other reasons presented by participants included a lack of resources, a lack of knowledge, and the absence of legislation.

Lawyers and victim advocates in the Czech Republic were critical of police investigations, and spoke of “inadequate utilization of the hate classification, which may result from unwillingness or bias on the part of police officers, a tendency to side with offenders, or a preference for less complicated ordinary classifications that are easier to prosecute than hate crime.”<sup>76</sup> Prosecutors differed in their opinions as to the adequacy of police investigations of hate crime: some were of the opinion that the police “always paid due attention” to the hate element in investigations. Other prosecutors, however, were less positive, while observing that the role of police at the point of investigation is vital to ensuring that the hate element will be properly addressed through the process. In the absence of policies, this prosecutor for example was of the view that the question as to whether a case is appropriately investigated depends on the dedication and knowledge of the individual officer:

“Cooperation is always about people. It depends on which officer we’re talking about, how intelligent he is, how aware, how diligent, how willing he is to discuss something with his co-workers. To consult, too, with the public prosecutor who will make the decision.” (Public Prosecutor)<sup>77</sup>

### **Specialisms in investigation and prosecution**

Alongside general policies regarding policing hate crime, in Sweden and England and Wales, there are also dedicated specialised units for investigation hate crime. In 2015, the Swedish Police Authority presented a report advancing a number of proposals for improving the policing of hate crime, which included the establishment of groups consisting of “specially trained police officers to handle investigations of hate crimes ... responsible for skills support, coordination, and victim support and monitoring.”<sup>78</sup> These units have been established, but are only present in the three largest cities in Sweden (Stockholm, Malmo, and Gothenburg). The warrant for specialism with respect to hate crime, noted in the Swedish Country Report, states:

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<sup>76</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>77</sup> *ibid.*

<sup>78</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

“It takes a lot of investigating and resources to be able to validate a claim that there is a bias motive.”<sup>79</sup>

The Swedish Country Report observes that prosecutors in Sweden who worked with police from specialised hate crime units were “much more satisfied with police investigations” than those prosecutors who had worked with the ordinary police, underscoring the efficacy of this innovation.<sup>80</sup>

In England and Wales, only some police forces have specialist units for hate crime (e.g. Community Safety Units in London and SIGMA (Hate Crime Investigation) Units in Merseyside). Specialist hate crime officers within these units are tasked with investigating hate crimes and collating evidence that is then presented to the Crown Prosecution Service (CPS) for charging decision. However, many forces do not have specialist units, and while many do have “hate crime officers”, the investigation of most hate crimes will fall to regular police officers.

In Ireland, there are no dedicated hate crime units. Ethnic Liaison Officers/LGBT Officers (ELO/LGBT Officers) are tasked with assisting in the investigation (where required) of racist and homophobic incidents, and also ensuring that appropriate support mechanisms are available in this context. In the context of investigation, the Report for Ireland observes, “anyone who discussed the role of ELO/LGBT Officers in the context of [hate] crimes was clear that their role was limited to victim support, and that they had no investigative function.”<sup>81</sup> It was also observed that the training provided to these specialist officers was inadequate. Thus, while the role is envisaged as being one which supports the investigative function, in practice, such specialist officers do not in fact do so.

### Expert opinions

In two jurisdictions, expert opinion is sometimes sought at the investigation stage as to whether the offence was hate motivated. Section 194 of the Latvian Criminal Procedure Code states that experts may be requested where research is required in the field of science, technology, art and craft. In the context of hate speech and hate crime, it is not necessary for expert opinion to be sought, and the decision as to whether to request it is made by the investigator. The Latvian Country Report notes that such expertise is sought in the context of hate speech cases from experts in linguistics, human rights, philosophy, and journalism, observing that the “choices made in favour of one or the other areas of expertise [are] not always clear.”<sup>82</sup> The quality of such expert opinion is “sometimes questioned not only by the defence, but

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

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

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

<sup>82</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

also other stakeholders”, and the Latvian Report observes that in several cases, the defence has called on its own experts, including “known right-wing activists.”<sup>83</sup>

In 2014, the Ministry for Justice deemed the capacity of the Security Police in investigating crimes under section 78 (hate speech provisions) to be sufficient, though observed that expert evidence is sought by the Security Police in determining whether cases should be forwarded to the prosecutor’s office for indictment. The Latvian Ombudsman’s Office published its report *On Practical Problems Concerning the Identification of Hate Speech and Hate Crimes in Latvia* in 2016, and specifically addressed the issue of using external experts in the investigation stage to determine whether or not a case should be considered within the definition of either hate speech or hate crime.<sup>84</sup> While perhaps more directly addressed at hate speech rather than hate crime, the Report states clearly that police officers should be able to recognise elements of hate speech and hate crime without the input of an expert, and where such expertise is necessary, criteria for recruiting such experts and expertise should be clearly established. The views of participants set out in the Latvian Country Report add further weight to these recommendations, with participants questioning the role of such experts in cases involving a hate element: for example, almost all judges interviewed noted problems with expert opinions.

In the Czech Republic, at the stage of court proceedings, the Country Report observes that judges interviewed were of the view that forensic expertise is useful in evaluating the “symbolism and ideology of movements associated with extremism”, but that expert evidence is not typically included in evidence in hate crime cases. That said, defence attorneys interviewed repeatedly criticised what they viewed as “the misuse of forensic judgments by criminal justice agencies”, referring in particular to perceived bias on the part of such experts in evaluating hate crime cases.

The question as to whether a case should be considered a hate crime or not, we assert, is one which should be decided by the investigators and prosecutors to a crime, rather than seeking the views of experts, who may bring their own biases and theoretical perspectives to the case. ECRI recognises this, stating, in its fourth monitoring report on Latvia, “some sources have highlighted that the criteria for the selection of external experts are insufficiently developed.”<sup>85</sup>

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<sup>83</sup> *ibid.*

<sup>84</sup> Latvian Ombudsman (*Tiesībsargs*), Problematic Aspects of the Identification and investigation of hate speech and hate crimes in the Republic of Latvia (*Naida runas un naida noziegumu atpazīšanas un izmeklēšanas prakses problēmaspekti Latvijas Republikā*) (in Latvian) (2016) 116. <[http://www.tiesibsargs.lv/uploads/content/publikacijas/naida\\_noziegumu\\_un\\_naida\\_runas\\_izmekl\\_esana\\_lv\\_2016\\_1496214733.pdf](http://www.tiesibsargs.lv/uploads/content/publikacijas/naida_noziegumu_un_naida_runas_izmekl_esana_lv_2016_1496214733.pdf)> accessed 24 February 2018.

<sup>85</sup> European Commission against Racism and Intolerance, *ECRI Report on Latvia* (fourth monitoring cycle) (Council of Europe 2012) 14.

### **The “filtering out” of the hate element**

If the first point at which a hate element can be “disappeared” or “filtered out” by the criminal justice process is the point of recording, the second point at which this can occur is the point of investigation. It is clear across partner jurisdictions that without a clear understanding of the legislation, policies on the investigation of hate crime, or an understanding of the process of including a hate element in the prosecution, the hate element will be lost at the point of investigation. For example, in Sweden, the Country Report states:

“It was suggested that the police need more knowledge of how the legislation is constructed in order to be able to improve the gathering of evidence and to be able to establish a bias motive.”<sup>86</sup>

In the Swedish Report it was also observed that in gathering evidence, police officers are typically focused on the basic crime, with the motive forgotten, or addressed at a later point in the investigation when the evidence no longer exists or is difficult to find. Similarly, in Ireland, while it is, at least on paper, mandatory to record a hate element, the absence of any policies or training means that it will not be recognised through the system, as “... in the absence of legislation, and thus the absence of any stated proofs, the hate element is simply not prioritised.”<sup>87</sup> In addition, some of the victims of hate crime interviewed highlighted delays in gathering evidence, including statements, which they considered relevant to supporting the existence of a hate motivation.

In the Czech Republic, judges and prosecutors were particularly critical of instances in which the police “rely too much on the concept of extremism”, which the researchers in that jurisdiction observed “potentially result[s] in hate crimes committed by individuals who are not sympathizers or members of hate movements being overlooked.”<sup>88</sup>

Even where a comprehensive framework of laws and policies on hate crime exists, large numbers of incidents can still “drop out” of the system. In England and Wales, the research partners highlight that out of an estimated 34,840 disability hate crimes reported to the police in 2015-16, just 84 cases (0.2%) cases resulted in a conviction and a recorded enhanced penalty that same year. This demonstrated that despite having a clear and concise definition of hate crime, multiple policy guidelines, and training programmes across criminal justice institutions, there can remain a pervasive reluctance to accept certain types of hate crime as motivated by

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<sup>86</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>87</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>88</sup> *ibid.*

“hate”: as already observed, the research from England and Wales found that police officers and judges often interpreted evidence of targeted violence against disabled people as confirmation that the offender had taken advantage of the victim’s vulnerability, rather than as proof of identity-based hostility.

The Country Report for England and Wales emphasises that communication between the police and the prosecution services is crucial to building a cogent case for prosecution. Breakdowns in communication sometimes limit the prosecutors’ ability to pursue the hate element later in the legal process, an issue also highlighted in the Czech Report. As in Sweden and Ireland, prosecutors in England and Wales asserted that police officers often fail to investigate the hate element of a crime early enough in the investigation process, meaning that the opportunity to pursue the offence as a “hate crime” later in court is often lost.

Finally, the decision as to whether a case is even considered appropriate for prosecution following the investigation is another clear point at which the hate element of a crime – or indeed the crime itself – can be filtered out of the case. Where a clear and coherent definition of a hate crime is shared across the criminal justice process, there should be no requirement for external expert intervention at the stage of investigation. At a minimum, where external experts are sought and utilised, they should be properly qualified and selected from a pre-determined panel of experts.

## **Conclusions**

Our analysis of the research carried out across the jurisdictions party to this project identifies a variety of good practices which can support and positively encourage good investigative practices. The introduction of dedicated policy in relation to the investigation of a hate crime is one mechanism for developing an informed and coherent approach to the investigation of hate crime. However, in the absence of appropriate training, these policies can remain “on paper” and not integrated into operational investigative practice. Such policies and training should include definitions of hate crime, and explanations of the legislative context in which a hate crime is addressed at a national level, details of bias indicators which could inform police investigations, and a clear discussion of the role of evidence versus perception in the initial identification of a potential hate element, with particular reference to the weight placed on the perception of the victim.

We further assert that such policies and training should also include information that sensitises investigators to hate crime, including the harms of hate, the impacts of hate crime, reasons for underreporting or not reporting, possible sources of victim reticence to engage with the investigation, and supports and accommodations available to victims. Where policies in relation to the investigation of hate crime are developed, the approach in Latvia, whereby civil society organisations were



involved in informing policy, is, we believe, an example of good practice. Indeed, this approach has now been adopted in England and Wales through the involvement of the Hate Crime Advisory Group, which informs policy in this regard. This should be an inclusionary process: it is important that representatives from all affected communities are involved.

We have seen that where there are specialisms in investigation of hate crime, this results in more informed practices amongst investigators, and allows them to dedicate the additional time that is often required to conducting an investigation of this type. We also note that where there are good relationships between prosecutors and investigators, and where the investigation is informed by the legal requirements for the prosecution, this also contributes to ensuring that the hate element is appropriately addressed at the point of investigation.

It is key that where investigative policies are introduced, they are supported by comprehensive training programmes, which are delivered to all stakeholders in that process nationally. These should be supplemented with specific training packages designed specifically for those individuals who work directly with victims in the context of the requirements of the Victims' Directive, as well as specific training and policies for specialist investigators. It is further vital that these policies and training packages are inclusive of all commonly targeted characteristics, including (but not limited to) age, disability, gender identity, and sexual orientation.

### **Prosecuting hate crime**

As was set out in Part 1 of this Report, the European Commission has suggested practices designed to support the implementation of the Framework Decision.<sup>89</sup> Such practices should, the Commission states, include the existence of "special prosecutors' offices for hate speech and hate crime, detailed guidelines as well as specific training for ... prosecutors ..."<sup>90</sup> The extent to which this recommendation has been implemented is outlined in the table below:

**Table 6: Prosecutorial specialisms, guidelines and training**

<b>Prosecutorial specialisms, guidelines, &amp; training</b>	<b>CZ</b>	<b>EW</b>	<b>IE</b>	<b>LV</b>	<b>SE</b>
<b>Specialised prosecutors' offices for hate crime and hate speech</b>	✓	✓			✓
<b>Guidelines for prosecutors</b>	✓	✓			✓

<sup>89</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 24 February 2018. Emphasis added.

<sup>90</sup> *ibid.*



<b>Specialist training for prosecutors</b>	✓
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### **Policies**

While there are dedicated policing policies across a number of jurisdictions, fewer jurisdictions offer prosecutorial guidelines and policies. There does not appear to be any special office of, or guidelines or training for, prosecutors in respect to hate crime in Ireland.<sup>91</sup> Similarly, there is no prosecution policy, specialism in prosecution, or specialist training for prosecutors in Latvia. However, relevant stakeholders interviewed for the research in both jurisdictions differed in their views as to the need for such policies: in Ireland, participants were broadly in favour of training and policies for prosecutors; in Latvia, none of the interviewees saw the need for such supports.

In Sweden, by contrast, guidelines were issued relating to the prosecution of unlawful discrimination as far back as 1990, and in 1999 and 2002 guidelines were issued on the prosecution of a hate crime and disseminated in the form of a memorandum by the national Prosecution Development Center.<sup>92</sup> The memorandum states that it is the responsibility of the prosecutor to ensure that the hate motive is clearly stated in the summons application, and that the prosecutor in the trial should formally request the application of the aggravating factor where applicable. However, while the guidelines are clear in terms of the legal issues, the Swedish Country Report notes:

“There are hardly any references to how to treat victims of hate crimes, and the documents regulating the work of prosecutors do not distinguish between different groups of victims of hate crime. The needs of victims of hate crime [are] seen as being met through the general legislation regarding the rights of victims when coming into contact with the judicial system.”<sup>93</sup>

The general prosecution policy in the Czech Republic provides that where a prosecutor is supervising a hate crime, they should insist on all efforts being made to identify the motivation of the offender: a directive of the Supreme Public Prosecutor (General Directive of the Supreme Public Prosecutor No. 8/2009, dated 21 September 2009)<sup>94</sup> obliges prosecutors dealing with hate crime to take all necessary steps to determine the motive.<sup>95</sup> That said, prosecutors interviewed in the Czech

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<sup>91</sup> Researchers in Ireland were not allowed access to the Office of the Director of Public Prosecutions and thus cannot state definitively if any such policies exist.

<sup>92</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>93</sup> *ibid.*

<sup>94</sup> Available at <[http://www.nsz.cz/images/stories/PDF/POP/trest/1\\_SL\\_902-205\\_2.pdf](http://www.nsz.cz/images/stories/PDF/POP/trest/1_SL_902-205_2.pdf)> accessed 24 February 2018.

<sup>95</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

Republic were sceptical about the effectiveness of the Directive. As stated in the Country Report:

“One informant maintained that even though public prosecutors have a methodology for use in hate crime cases, nothing binds them to follow it—in the final analysis, how they proceed is up to them.”<sup>96</sup>

A 2006 Directive explicitly understands extremist crimes as hate crimes, evidencing their conceptual and operational conflation in this jurisdiction, an issue which this Report has highlighted:

“... the crimes with extremist subtext we need to understand crimes motivated by racial, national or other social bias”.<sup>97</sup>

The Crown Prosecution Service (CPS) in England and Wales has a total of three guidance documents to cover the five protected strands in England and Wales. The guidance provides information on recording hate crimes at the point of prosecution and being proactive in seeking information and evidence from the police, steps that prosecutors should go through when reviewing cases, and information on the relevant legislation that should be applied. Prosecutors interviewed as part of the England and Wales Report were generally well versed in the guidance. All CPS Hate Crime Leads interviewed (see below) had also recently completed specialist training on prosecuting disability hate crime, which in the assessment of the partner for England and Wales had clearly improved their understanding of the ways in which hate can be demonstrated against disabled people.

### **Specialisms in prosecution**

As with hate crime investigation, the Commission has recommended that specialists be tasked with prosecuting hate crime. Again, this recommendation has been implemented to differing degrees across the jurisdictions party to this project.

In Latvia and Ireland, the unavailability of targeted policies is compounded by the absence of specialist prosecutors. Consequently, we see highly idiosyncratic approaches to the prosecution of hate crime in those jurisdictions. In the absence of specific specialisms for prosecuting hate crime, it is down to individuals to determine the extent to which they are willing to ensure that the hate element of a crime is properly addressed. In Ireland, for example, the Country Report notes that

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<sup>96</sup> *ibid.*

<sup>97</sup> *Metodický materiál Extremismus.* (Nejvyšší státní zastupitelství 2009) 10. <[http://webcache.googleusercontent.com/search?q=cache:xmR\\_kg400rQJ:portal.justice.cz/nsz/soubor.aspx%3Fid%3D82741+%&cd=1&hl=cs&ct=clnk&gl=cz](http://webcache.googleusercontent.com/search?q=cache:xmR_kg400rQJ:portal.justice.cz/nsz/soubor.aspx%3Fid%3D82741+%&cd=1&hl=cs&ct=clnk&gl=cz)> accessed 24 February 2018.

the priority given to a hate element at prosecution stage will depend “on the individual approach taken by the prosecutor.”<sup>98</sup>

Reasons put forward in the both Latvian and Irish Country Reports for the disappearance of a hate element is the issue of resources for prosecutors, and the pressure on prosecutors and the police (in Latvia) and police prosecutors (in Ireland) to clear cases and secure convictions.

*“Everyone wants to feel comfortable in court and therefore it is simpler to terminate and find ... some shortcomings in the case, rather than forward it to the court and go. One must be a real fighter to go.” (Prosecutor, Latvia)*

*“So for example from a prosecutorial point of view they want the guilty plea and they will quite happily, at the expense of the true reflection of what is occurred, they will happily take the guilty plea in exchange for not leading evidence if it is disputed.” (Defence lawyer, Ireland)*

While in some jurisdictions, the practice of sacrificing evidence relating to the hate element in order to expedite a conviction is prohibited by targeted policy, the existence of a prosecutorial specialism can serve to ensure that resources are dedicated precisely to addressing the hate element.

Sweden and the Czech Republic both boast specialist hate crime prosecutors in addition to targeted policies. The Country Report from the Czech Republic identifies the existence of a hate crime specialization within the structure of the public prosecutor’s office as key to the relatively unified understanding of hate crime amongst prosecutors in that jurisdiction. That said, judges interviewed nonetheless expressed the view that an individualised approach to prosecution was in evidence. The Report for the Czech Republic found:

*“A factor that fundamentally influences the prosecution of hate crime is therefore the approach taken by particular persons within in the criminal justice system, in the sense of (1) their will and willingness to prosecute hate crimes and (2) carefully gathering sound evidence of hate motivation to be presented in court, or identifying it as such in the first place so that it can be made part of the charges.”<sup>99</sup>*

The Report then detailed some of the strategies utilised by prosecutors to address the hate element, including adopting “a more rigorous qualification from the outset,

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<sup>98</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>99</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

including hate motivation, which the court may subsequently reclassify if necessary or, if the evidence is weak, to emphasize punishing the offender even at the cost of using a less appropriate legal classification that does not take hate motivation into account.”<sup>100</sup>

Equally, while a review of cases which were handled by the Prosecutors Office in Sweden found that the hate element of a crime was treated appropriately, the majority of defence lawyers participating in the Swedish research were of the view that, because of the difficulties in proving a hate motivation, the aggravated sentencing provision is rarely used, with one defence lawyer stating that it is “a forgotten part of the criminal code.”<sup>101</sup>

In England and Wales, where the most comprehensive supports are available to prosecutors in respect to hate crime, the Crown Prosecution Service employs a Hate Crime Lead for each of its districts across the country. Each Lead oversees all hate crime prosecutions in their area and they work closely with the police in gathering evidence for presentation in court. Hate crime cases go through a process whereby the CPS review the cogency of available evidence and discuss whether any additional evidence can be gathered by the police before the case goes to trial. Interviewees noted that open communication between the police and the prosecutors was key at this point in the legal process, and that breakdowns in communication sometimes limited the successful application of hate crime laws.

Clearly, not just the availability, but also the operational impact of recommended prosecutorial supports requires consistent monitoring.

### **Establishing the hate element: the intention of the offender and proof requirements**

Jurisdictions differed with respect to the legal requirements that had to be met for a case to be prosecuted as a hate crime. While in some jurisdictions party to this research, evidence that the crime was motivated by hate was required prior to the case being treated as a hate crime, in others, lesser standards were present.

In Latvia, those who acted for the defence were of the view (albeit in the context of hate speech offences) that legislation should be capable of differentiating between offenders who “write a comment in a moment of anger and those who do that in an organised and systematic manner.”<sup>102</sup> A similar concern arose amongst some interviewees in England and Wales (and on the part of judges in several reported cases) as to the level of culpability that should be assigned to offenders who

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<sup>100</sup> *ibid.*

<sup>101</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>102</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

demonstrate hate in the “heat of the moment”, typically due to frustration and anger, compared with those whose basic offence was motivated by hate according to the legal understanding of the term. Both prosecutors and defence lawyers in that jurisdiction noted that in cases involving people who lash out suddenly, trials frequently descended into a contest to prove whether the defendant is a “racist” or “hater”, and *not*, as the legislation prescribes, whether the defendant had objectively expressed hate during the commission of the offence. In many of these cases interviewees believed that jurors were unlikely to convict, leading one defence lawyer to exclaim that such situations were “God’s gift to defence.”<sup>103</sup>

In Sweden, the Country Report notes:

“Culpability is defined through intent but what complicates the use of this kind of provision in Sweden ... is that the court also has to take into account the motivation for the crime.”<sup>104</sup>

We noted earlier that defence lawyers in Sweden perceived that it was difficult for prosecutors in that jurisdiction to establish a hate motivation and indeed, the proof requirements required were seen by a significant majority of prosecutors interviewed as problematic:

“First, the prosecutor needs to provide evidence both regarding the requirements for the actual crime, the intent to commit a crime, and also of the motive behind it ... Secondly, it is difficult to provide evidence of the motivation as a motive is seldom visible.”<sup>105</sup>

The Country Report for Sweden describes the burden of proof required in that jurisdiction, which is that the prosecution “needs to show beyond reasonable doubt that the crime of assault, for example, can be linked to the defendant yelling racist slurs.”<sup>106</sup> In this context, it is important to recall the recent decision of the European Court of Human Rights in which the Court observed:

“not only acts based solely on a victim’s characteristic can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to.”<sup>107</sup>

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<sup>103</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 125.

<sup>104</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> *Balázs v Hungary* App No 15529/12 (ECHR, 14 March 2016).

At the other end of the spectrum, the Irish Country Report notes that there is no guidance whatsoever in case law regarding the proof requirements in respect to a hate element, again giving rise to concerns regarding the principle of certainty in this context.

Some of the research partners to this project raise the question as to whether membership of an extremist organisation could be used in evidence going to establish the motive of the offender. In Sweden, lawyers were generally critical of this approach:

“Some hold that it should not be considered as relevant which organisation or political party the suspect is a member of, and that the prosecutor should be neutral, objective, and only provide sufficient material for a conviction.”<sup>108</sup>

Indeed, while all of the offenders interviewed as part of the Swedish Country Report were involved with hate groups, the Report records that the police “never saw or noted the connection between the criminal activity and membership of these organisations.”<sup>109</sup> In the Czech Republic, prosecutors will, where relevant, introduce evidence regarding the links between the offender and right-wing extremism in establishing a hate motivation, as discussed by this prosecutor:

*“If we would judge a racist crime, then of course it [daggers with swastikas on them, white power music, calendars etc.] is an absolutely ideal evidence, right. It is an absolutely ideal evidence by which we prove that the person has a certain relationship to it, because such things are not collected by a person who doesn’t have a relationship to it. Because if he was interested in acquiring history or information about these movements, then he would have both right-wing and left-wing extremist movement.”*<sup>110</sup>

Finally, in terms of trial procedure and the right to a fair trial, the Country Report for Sweden finds that the majority of judges in that jurisdiction were of the view that if the prosecutor does not raise the hate element of the crime during the course of the prosecution, and only mentions it at closing arguments, this would amount to a violation of the right to a fair trial. In the Irish Country Report, where addressing the hate element is part of normal sentencing practices, the same concern was framed through the lens of the constitutional principle of certainty. This issue had not been addressed in case law in either jurisdiction.

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<sup>108</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>109</sup> *ibid.*

<sup>110</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

### **The “filtering out” of the hate element at prosecution**

Across the jurisdictions party to this project, we see the hate element being further “filtered out” at the prosecution stage, for a number of reasons, two of which are addressed here: first, the presence or absence of prosecutorial policies; and second through the process of plea bargaining.

#### *Legislation, policies and filtering*

We can see that the presence of legislation and policies on prosecuting hate crime assists in preventing the “filtering out” of the hate element. For example, in Sweden, while there are guidelines on the investigation and procedural aspects to the prosecution of a case, until 2002 “[t]here [were] no procedural rules stating that the prosecutor in the case of a hate crime must indicate that there has been a hate crime motive for the crime.”<sup>111</sup> This, as the Swedish Country Report states, led to a “disappearing” or “filtering out” of the hate element from cases, resulting in new guidelines being published in 2002. These guidelines state that the bias motive should be clearly stated in the summons, and that the prosecutor in the trial should formally request the application of the aggravating factor where applicable. In the national Prosecution Development Centre, which has a special responsibility for hate crimes, guidelines state that the bias motive must always be included in the summons application as an aggravating circumstance. However, the Swedish Country Report notes that the majority of defence practitioners and judges interviewed were of the opinion that prosecutors “very seldom” include such a statement in the summons application. This position was refuted by prosecutors who claimed that they were “very meticulous” in their use of the aggravating factor provisions, though some did admit that it is “easy to forget to invoke the provision on aggravating factors.”<sup>112</sup> One explanation for this is presented by judges, who noted that “there is no real tradition among prosecutors of naming aggravating circumstances at that stage of the criminal process.”<sup>113</sup> Thus, while prosecutors claimed that the policies were fully adhered to, other criminal justice practitioners disagreed. Thus policy guidelines could be seen as inadequate to addressing the opacity produced by a reliance on the aggravated sentencing model.

In England and Wales, legislative policies impacted on the way in which different forms of hate crime were addressed at prosecution stage. The England and Wales Report observes that there was a clear difference in approach to prosecuting racially and religiously aggravated offences (which fell within criminal legislation) compared with crimes that were aggravated by sexual orientation, disability or transgender hostility (which could only be dealt with under sentencing provisions). Racially and religiously aggravated offences required evidence of the hate element to be adduced in court as part of the substantive offence. Interviewees believed that

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<sup>111</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

this resulted in both the police and CPS being more proactive in gathering the relevant evidence for court. Crimes where the hate element could only be considered at sentencing resulted in more cases where the hate element was filtered out. One interviewee explained:

“[O]ur primary role is to gather evidence and present evidence and obtain a conviction. And what we’re talking about is evidence to support the charge. So if you’ve got a racially aggravated charge, you have to ask yourself as a police officer and as a prosecutor, ‘Do I have enough evidence to prove the assault or the abusive behaviour or whatever it is, and the racial hostility?’ Now if you’re dealing with a sexual orientation hate crime or a disability hate crime, you don’t need to ask the same question, you know, in strictly legal terms; all you need to do is prove that an assault has happened, and then – almost as an afterthought – when it comes to the point of sentence, you start thinking about can you ask the court for an uplift on the basis of the aggravating factor.”<sup>114</sup>

In Ireland, the absence of legislation addressing the hate element of the crime was one of the primary reasons given by participants as to why the hate element of a crime was so poorly addressed at prosecution: indeed, the majority of criminal justice professionals in that jurisdiction were of the view that there were deficiencies in the prosecutorial process in ensuring that the hate element of an offence was presented to the sentencing judge.

#### *Plea bargaining and filtering*

The ease with which the hate element can be “pleaded” or “bargained” out of the criminal justice process was identified as a source of concern in some jurisdictions. In the Irish County Report, it was stated that one of the reasons for the hate element of a crime not being presented in court was the use of plea agreements: “it was perceived that it is preferable to prosecutors to secure a guilty plea in the absence rather than go to trial to ensure that the hate element is included.”<sup>115</sup> The dilution or elimination of the hate element was found to result from the operation of plea agreements:

“during pre-trial discussions, suggestions made by the defence to ‘sanitise’ or dilute the facts of the case by removing the ‘hate’ element of an offence from what was presented to the court by the prosecuting authority by way of a guilty plea would be successful.”<sup>116</sup>

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<sup>114</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 182.

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

<sup>116</sup> *ibid.*



Interestingly, while lawyers were of the view that such an element would often be minimised or eliminated, police officers (who also prosecute crime) were more cautious, and the majority were of the view that such an element would generally be included in proceedings. Similarly, in Latvia, the Country Report observes that plea bargaining is accepted practice.

In England and Wales, CPS policy is not to accept any plea bargains to hate crime charges. This means that where there is evidence of a hate element in an offence the CPS should not accept guilty pleas for the basic offence in order to avoid a full trial. The Country Report notes that, in accordance with that policy, charge bargaining was very rare and prosecutors rigorously pursue hate crimes in court – a marked change from the findings of a previous report into prosecution practices some 15 years earlier.<sup>117</sup> This showed that strict adherence to new policy guidance had had a significant effect on the number of offences proceeded against in court as “hate crimes.”

In Sweden, by contrast, there is no plea-bargaining in the system, and there must be a main hearing in every case when a decision is made to proceed with charges.

## **Conclusions**

Our comparative analysis of the research carried out across the jurisdictions party to this project distinguishes a variety of good practices which can support and positively encourage the appropriate prosecution of a hate crime. As with the conclusions in relation to the investigation of a hate crime, we find that the presence of policies, specialisms, and comprehensive training assist in ensuring that the hate element of a crime is appropriately addressed at this stage. Our conclusions to the section on investigating hate crime, above, can equally be applied here. Further, however, clear guidance should be given in relation to proof requirements, and the appropriate evidential bases upon which a prosecution for hate crime can rest. Policies regarding the circumstances in which a plea agreement can be reached in relation to the hate element of a crime in common law countries have been shown to be particularly effective at preventing the filtering out of the hate element. Finally, this chapter again highlights the fundamentally different ways in which aggravated offence and aggravated sentencing models interact with administrative structures and practices within the criminal justice process. In this section, the determining effects of aggravated offence models on the system within which they exist stood in contrast to the arguably more ephemeral system effects and opacity of aggravated sentencing models. These observations raise questions as to the degree to which policy guidelines can moderate gaps in the effectiveness of different legislative approaches in ensuring that the hate element of a crime is consistently addressed throughout the criminal justice process.

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<sup>117</sup> Elizabeth Burney and Gerry Rose, *Racist Offences: How is the Law Working?* (Home Office Research Study 244, 2002).

## Sentencing

All jurisdictions party to this research assert their compliance with Article 4 of the Framework Decision. However, the extent to which there are policies in place that require judges to consider the hate element of a crime differs across the jurisdictions, as does the extent to which judges are trained in relation to hate crime. Once again, the Commission has suggested practices designed to strengthen the implementation of the Framework Decision in this context.<sup>118</sup> Such practices should, the Commission state, include the existence of “detailed guidelines, as well as specific training for ... judges ...”<sup>119</sup> There should also be data available in relation to sentences imposed. Of all the stages of the criminal justice process this Report has examined, we find the least comprehensive compliance with the Recommendations at the point of sentencing, as evidenced by the table below:

Table 7: Sentencing policies and judicial training

Sentencing policies & judicial training	CZ	EW	IE	LV	SE
Sentencing guidelines	✓	✓			
Data on sentencing available	✓	✗			
Judicial training					

## Policies

Of the five jurisdictions, only Sweden and England and Wales have established policies and guidelines in relation to sentencing hate crime. As part of the 2001 Swedish National Action Plan to combat racism, xenophobia, homophobia and discrimination, the judiciary was asked to increase its understanding of the contexts in which hate crimes occur and the need for interaction between judicial actors was stressed.<sup>120</sup> England and Wales has a Sentencing Council which has provided guidelines specific to sentencing hate crime. Guidelines in respect to individual offence types also contain information on aggravating factors, including where there is a demonstration of hate or hate motivation. There are no policies in place in any other jurisdictions.

## The aggravation of the penalty

The extent to which a hate element is judicially recognised at sentencing, and the extent to which it aggravates the sentence, varies across jurisdictions, but with some points of similarity.

<sup>118</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 24 February 2018. Emphasis added.

<sup>119</sup> *ibid.*

<sup>120</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

For example, while Swedish legislation explicitly requires judges to give special consideration to a hate element of a crime, and there is no Irish legislation in place on this issue, judicial discretion is seen as core to the operation of the system in both jurisdictions. Thus, in Sweden, while there is legislation in place, as emphasised in the Country Report:

“It is important to note that the bias or prejudice motive only *may* have an impact; it is not mandatory.”<sup>121</sup>

Indeed, the Swedish Country Report finds that prosecutors “tend to see judges as unwilling to take the bias motive seriously.”<sup>122</sup> Similarly, in Ireland, the Court of Criminal Appeal has stated that it is appropriate for a racist motivation to be considered an aggravating factor at sentencing. However, only a slight majority of criminal justice practitioners were of the view that where a hate element is presented to court, it will always be considered an aggravating factor. Once again, interviewees spoke to the lack of any standardised approach, with some judges taking the issue more seriously than others:

*“... some of the judiciary in the District Court are very good and they will set out their sentencing criteria and where they start and the rationale, others won’t ...”*  
(Police Prosecutor, Ireland)<sup>123</sup>

A significant number of the prosecutors and the defence lawyers interviewed for the research in Sweden were of the opinion that “there is a need for legislation that states that those who commit bias-motivated crimes should be penalised more severely.”<sup>124</sup> The Irish Country Report makes the more moderate recommendation that a specific statutory provision be introduced that requires courts to consider the hate element of an offence in all cases.

In the Czech Republic, some prosecutors “raised the question of how existing sentencing ranges are used both as regards hate crimes and other types of crime” with criticism being raised in relation to the length of prison sentences in particular.<sup>125</sup> In Latvia, research participants had not been involved in any case in which the aggravated sentencing provisions had been utilised. Defence practitioners questioned the severity of sanctions imposed in the context of incitement to hatred

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<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>124</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>125</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

offences, and a judge highlighted the “lack of uniform practice concerning punishment in hate crime cases.”<sup>126</sup>

In a much more formalised context, in England and Wales, the substantive offences under the Crime and Disorder Act 1998 establish new sentencing maxima for offences that are aggravated by racial or religious hostility (e.g. assault equates to six months’ imprisonment; racially aggravated assault equates to two years imprisonment). All other offences that fall under the Criminal Justice Act 2003 provisions “must” be aggravated where there is evidence of hate; however the sentence cannot exceed the maximum of that prescribed for the basic offence (e.g. assault equates to six months’ imprisonment; sexual orientation aggravated assault equates to six months’ imprisonment). There is no set method of calculating a penalty uplift. The guidelines simply state:

- “sentencers should first determine the appropriate sentence, leaving aside the element of aggravation related to race, religion, disability, sexual orientation or transgender identity but taking into account all other aggravating or mitigating factors;
- the sentence should then be increased to take account of the aggravation related to race, religion, disability, sexual orientation or transgender identity.”<sup>127</sup>

In interviewing judges, the partner for England and Wales asked how they calculated the uplift that they add to the sentences of hate crime offenders. Three main methods of calculating the uplift were identified, including:

- The intuitive approach – no exact percentage or calculation is applied. Judges gauge the level of sentence intuitively, based on the facts as presented, as well as their sentencing experience;
- The sentencing category climber – sentencers do not apply a percentage uplift but instead simply climb to the next sentencing range using the category levels as set out in Sentencing Guidelines;
- The percentage uplift – the judge follows the guidelines for the general seriousness of the offence and then applies a percentage uplift to the final penalty.<sup>128</sup>

The disparate methods used to determine an uplift resulted in divergent sentencing outcomes, with some judges reporting that they tended to add 20 per cent to the sentence, with others stating that they would usually enhance by 100 per cent. The

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<sup>126</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>127</sup> Sentencing Council, *Hate Crime* (n.d.) <<https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/>> accessed 26 February 2018.

<sup>128</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 146.

case of England and Wales demonstrates that even with specific legislation and sentencing guidelines, diverging approaches to sentencing hate crimes can still occur.

While the enhancement of penalties for hate crime offenders typically equated to increased punishment, some professionals across three jurisdictions also spoke of restorative justice and rehabilitation programmes as being particularly important in the context of addressing the causes of hate crime. For example, while an emphasis was placed by participants in the research conducted in the Czech Republic on “more rigorous punishment”, participants also highlighted a need for reform measures aimed at “resocialisation, and the use of restorative justice designed to help [offenders] reassess their relationship to the targeted group.” Similarly, in Ireland, a significant minority of lawyers emphasised the importance of rehabilitative measures in the context of offending, with some highlighting restorative justice in particular.

The European Forum for Restorative Justice defines restorative justice as:

“... an inclusive approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved.”<sup>129</sup>

There has been a proliferation of restorative justice practices across Europe over the past 10-20 years, such that the Victims Directive sets out information on safeguards about its use. The Directive does not require Member States to establish restorative justice practices, but it does state that where practices already exist they must provide safe spaces and competent facilitators to deliver measures that are in line with victims’ rights and needs.

In England and Wales a number of restorative justice programmes have been set up to specifically address the harms caused by hate crime.<sup>130</sup> Other rehabilitation programmes that utilise victim-empathy processes may also offer opportunities for offender reformation. Learning about impacts (whether direct from the victim or via other community members or professionals), may also increase the chances of offender edification, which in turn reduces reoffending rates.<sup>131</sup> In England and Wales one judge reflected:

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<sup>129</sup> European Forum for Restorative Justice, *PRACTICE GUIDE for restorative justice services* (EFRJ 2016).

<sup>130</sup> Mark A Walters, *Hate Crime and Restorative Justice: Repairing Harms, Exploring Causes* (Oxford University Press 2014).

<sup>131</sup> Paul Iganski, with Karen Ainsworth, Laura Geraghty, Spiridoula Lagou and Nafysa Patel, ‘Understanding how “hate” hurts: a case study of working with perpetrators and potential

“... it’s an interesting debate whether, for example, in some cases of hate crime, whether the public interest may be best served by people going on a course so they can understand other people’s views ... It would be a pretty good idea actually.” (Judge, England and Wales)<sup>132</sup>

Although restorative justice offers genuine opportunities to repair the harms of hate, it was clear from the research project that restorative programmes (and rehabilitation measures) are rarely used as part of any official sentence for hate crimes across the jurisdictions.

### **Declaratory value of the hate element in the criminal law and at sentencing**

In the context of hate crime, the sentencing decision has the potential to communicate to the offender a condemnation of the hate element of their offence at sentence which, as well as sending a message to society at large condemning the prejudiced nature of the offending, might be expected to deter them from future hate crime offending. There are numerous other reasons why judges should give reasons for their sentence regardless of whether the crime has a hate element, underpinned as O’Malley observes, by a mixture of normative and instrumental concerns.<sup>133</sup>

In Sweden, there is no requirement on the court to explain its reasoning for imposing a particular sentence, with the fundamental principle of *jura novit curia* applying: the court knows the law, and the court has no duty to show how that knowledge was obtained.<sup>134</sup> Indeed, a majority of prosecutors and a few defence lawyers participating in the project were of the view that it was “difficult to determine how much impact the aggravating circumstance has had on the verdict.”<sup>135</sup> Prosecutors were of the view that it was important that this element be named “as an educational question with regard to the victim of the crime and the offender.”<sup>136</sup> Similarly in Latvia, one respondent stated (albeit in the context of hate speech offences):

“The main thing was not punishment, but the fact that the defendants had come to the conclusion that they should not conduct themselves in that

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perpetrators’, in Neil Chakraborti and Jon Garland (eds), *Responding to hate crime: The case for connecting policy and research* (Policy Press 2015).

<sup>132</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 142.

<sup>133</sup> Thomas O’Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 782.

<sup>134</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>135</sup> *ibid.*

<sup>136</sup> However, none of the convicted offenders interviewed as part of the research knew whether they had been given a longer sentence because of the hate element. Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

manner and that before expressing their opinion, they should give it a thought what consequences it will have on the specific group ...”<sup>137</sup>

In Ireland, there is similarly no requirement on judges to explain the reasoning behind their decision when delivering the sentence of the court. In speaking about their experiences, convicted offenders clearly distinguished between the attention they would pay to the sentencing decision in a guilty plea, and where they had pleaded not guilty: in the latter instance, they were clear that they would pay close attention to what the court said, primarily for the purpose of determining if there were grounds for appeal. In the context of a guilty plea, the majority of convicted offenders stated that they typically paid little attention to the reasons for the sentence.

Importantly, in Ireland, lawyers referred to three cases they were involved in, in which a court considered a hate element to be an aggravating factor – in one case, a “grossly aggravating factor”, despite the fact that, in the opinion of the practitioner, there was no evidence presented in the case to establish the hate element. While there is an important declaratory value in identifying a hate element when it is presented to the Court, it is equally important that the judge does not peer behind the facts of the case presented and draw their own conclusions as to the motivations in the case.

While the censure of hate motivations during sentencing may serve an important symbolic role in condemning hate crime, there was much discussion in England and Wales as to whether this declaratory function is best performed by the criminal law or via judges’ comments made during their sentencing decisions. Reflecting the conclusions of the previous section, the majority of interviewees in England and Wales stated that all strands of hate crimes should be equally proscribed under the Crime and Disorder Act 1998 (i.e. as aggravated offences). One interviewee commented:

*“They need to be charged as separate offences because it sends a message out to society that these type of crimes won’t be tolerated. And also puts them on the radar, because crimes, hate crimes against people, you know, transgender people and people based on their sexual orientation ... I think, if they were lifted so that they had their own separate offence, then they’d probably be taken much more seriously; and it would shift offenders’ attitude.”*<sup>138</sup>

Additionally, the Report for England and Wales found that there was far more widespread awareness of the aggravated offences than the sentencing provisions

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<sup>137</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>138</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 182.

amongst key professionals, especially amongst judges, illustrating that aggravated offences are more likely to focus on the minds of legal practitioners tasked with addressing hate crime, including sentencers. Reiterating the conclusion of the previous section, the England and Wales Country Report is supportive of FRA's recommendation that:

"Legislators should look into models where enhanced penalties for hate crimes are introduced to stress the added severity of these offences. This would serve to go beyond including any given bias motivation as an aggravating circumstance in the criminal code. The latter approach is limited in its impact because it risks leading to the bias motivation not being considered in its own right in court proceedings or in police reports."<sup>139</sup>

### **Victims' perspectives on enhanced penalties**

While it is important to understand the declaratory impacts of a sentence on the offender, victims' perspectives on this issue are also relevant. The Swedish Country Report notes that, while almost all victims stated that the naming of hate crime was important to them, "most important was that the perpetrator was convicted of a crime, with or without the bias motive."<sup>140</sup> Interestingly, unlike the legal professionals interviewed, they were unconcerned with the length of the sentence imposed on the offender, and whether the hate element aggravated the sentence, with one victim stating:

*"I did not care about damages, I did not care about the penalty. I just wanted to get recognition that, yes, he is guilty. My lawyer was more focused on it being defined as a hate crime but for me it made no differences really. He had done wrong towards me and I wanted a confirmation of that."* (Victim, Swedish Country Report)<sup>141</sup>

In contrast, victims interviewed for the Irish Country Report were generally of the opinion that the hate element of a crime should be identified. One victim stated:

*"I wanted the racist element to be addressed because it was. It was you know. I wouldn't have been happy if it was not addressed."* (Victim, Irish Country Report)<sup>142</sup>

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<sup>139</sup> European Union Agency for Fundamental Rights, *Making hate crime visible in the European Union: acknowledging victims' rights* 11 <<http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>> accessed 24 February 2018. Italics in original.

<sup>140</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>141</sup> *ibid.*

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



Some victims interviewed for the Irish Report discussed hate crime as a societal problem and a minority discussed pursuing a criminal justice response specifically so that others who share the identity for which they were targeted might be spared the experience of hate crime in the future. Particularly in these contexts, the naming of the hate element of a crime is arguably more salient.

In the England and Wales Report a number of interviewees noted the importance of victims having a role in sentencing via the use of victim impact statements. Articulating the impacts of hate crime to the court was considered by many to be a therapeutic undertaking for victims. In the same vein, a number of interviewees also spoke of using restorative justice which proactively includes the victim's perspective in the justice process. One police officer explained:

*"So if it doesn't make it to court or if they don't want it to go to court ... we can talk about community resolutions and restorative practices ... And that, increasingly, is becoming almost a choice thing for people to decide that they don't want to go through the court system, but they do want to educate the perpetrator ... I think it's preferable for a lot of people, bearing in mind as well, a lot of LGBT people in particular that I speak to, but I should imagine that this is true for all the strands, is that most victims say that they just want the perpetrator to be educated about what it's like to be part of a minority, rather than them to be punished. And I'm hearing that really increasingly. I mean there are some people who want their day in court, and they want to see justice done in a punitive way. But more and more people, just they want that education ..."*  
(Police officer, England and Wales)<sup>143</sup>

In the Czech Republic, only two of the victims interviewed were satisfied with the outcome of the criminal proceedings in relation to their case, with the Country Report observing that one issue that arose in this context was "dissatisfaction with the sentence given to the offender."<sup>144</sup>

### **Offenders' perspectives and labelling**

While the label of "criminal" is problematic, Burney and Rose highlight that the label of "racist" is much more problematic for offenders, who will routinely admit that they committed the basic criminal offence, but "were genuinely upset and indignant at the prospect of a 'racist' tag in the context of aggravated offences."<sup>145</sup> This perspective was affirmed in the England and Wales Report for this research where

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<sup>143</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

<sup>144</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>145</sup> Elizabeth Burney and Gerry Rose, *Racist offences: how is the law working? The implementation of the legislation on racially aggravated offences in the Crime and Disorder Act 1998* (Home Office 2002) 91.

both judges and lawyers remarked that the label “racist” was often vehemently resisted by offenders. This resistance was a product of the fact that in England and Wales the label of racist was considered highly stigmatising. Such is the gravity with which the label is perceived in that jurisdiction, that most practitioner interviewees also felt that juries were reluctant to convict defendants of the associated aggravated offence unless they were certain that the offender was a genuine racist. One judge remarked:

*“[There’s] a huge reluctance. I mean pretty much every case I’ve thought very clearly the offence was racially aggravated, but they come back and say, ‘not guilty’”. (Judge, England and Wales).<sup>146</sup>*

On the contrary the Swedish Country Report observes that it did not “make much difference to the offenders” that the crime was or was not acknowledged as a hate crime in the proceedings.<sup>147</sup> Indeed, some of the interviewees stated that that being convicted of a hate crime raised their status among their peers:

*“It was almost like, however sick it might sound, that when you were sentenced, it was almost like you got confirmation ... it gets established that you are who you’ve claimed to be. Then you get it in print ... so then you moved up in the hierarchy.” (Convicted offender, Swedish Country Report)*

In the Czech Country Report, the vast majority of the convicted offenders who participated in the research “did not consider themselves to be suffering from a serious social stigma” having been convicted of a hate crime. Three participants, however, explicitly stated that being labelled a hate criminal had a negative impact on their lives, “particularly because of the reactions of those around them and unpleasant experiences tied to the stigma of being labelled a ‘racist’.”<sup>148</sup> However, one participant (who considered himself an anti-fascist) said that his conviction on hate crime charges had “evoked a positive reaction within his circle of acquaintances [who were not anti-fascists].”<sup>149</sup> The remainder of the participants were “either unimpacted by the label, or were already so thought of and were therefore used to it.”<sup>150</sup>

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<sup>146</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 123.

<sup>147</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>148</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>149</sup> *ibid.*

<sup>150</sup> They were either unimpacted by the label, or were already so thought of and were therefore used to it.

A lawyer quoted in the Country Report for Ireland foresaw resistance to the label of hate crime offender arising in an Irish context:

*“I think they would have a problem being accused of the aggravated version. It would provoke a reaction and a response in people whereby they wouldn't be prepared to accept responsibility for behaviour where they felt they were labelling themselves racist or homophobic or misogynist.”* (Defence lawyer, Ireland)<sup>151</sup>

However, previous offenders interviewed distinguished between differentially stigmatising manifestations of hate crime. At two extremes, crimes targeting people on the basis of their disability were universally regarded as reprehensible, whereas racist and transphobic crimes were viewed as far less disreputable. The researchers assert that the previous offenders appeared to regard crimes against groups whom they perceived as least socially distant as most stigmatising.

These findings indicate that the stigma attached to hate crime offences may differ markedly depending on the Member State in which such crimes are committed, the characteristic targeted, and also the “community of care” that surrounds the offender. We see that in places where the label is most stigmatising, resistance to accepting responsibility for the hate element of an offence may become more intense. This may be such that both judges and juries become reluctant to attach the label unless they are certain that the offender is genuinely motivated by hate.

### **Recognising recidivism**

One issue which arose in the context of sentencing was the question as to whether a recidivistic racist would – or could – be treated by the criminal justice system as such. In Ireland, practitioners were in agreement that, if an individual had committed a crime with a hate element, it would not be recognised on their record as such. The reason for this is that, in the absence of either aggravated offences or any requirement or mechanism to record a sentence uplift, the system is simply incapable of recording such previous offending, and thus, unable to recognise it.

In England and Wales recognition of recidivism depended on how the hate element had been included in the early conviction. Where the offender had been previously convicted of a racially or religiously aggravated offence, that was flagged on the Police National Database, but where the offence was aggravated at sentencing based on sexual orientation, disability or transgender hostility (or by race or religious hostility for those offences that fall outside of the Crime and Disorder Act 1998), the hate element was not always identifiable:

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<sup>151</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

*“At the moment you wouldn’t ... necessarily see an uplift on sentence recorded on somebody’s PNC record, so when they come before the court for further offences you wouldn’t necessarily know that the burglary, the theft, the assault that’s on their record was an offence that was dealt with by the court that received an aggravated or an increased and uplifted sentence. If they had committed an offence under the Crime and Disorder Act, then very clearly it’s on the record that that’s what it is. So from a practical point of view, things like that make a difference to how they’re dealt with in the future. If they commit further offences then it’s clear that they’ve got a previous history of it”.*(Public Prosecutor, England and Wales)<sup>152</sup>

An inability to recognise hate crime recidivism has implications for the system’s capacity to respond appropriately to the offence.

## **Conclusions**

The largely discretionary nature of judicial sentencing practices across the jurisdictions party to this project impacted upon the manner in which the hate element of an offence was addressed at sentencing. Across the research project, participants were generally more concerned with ensuring that the hate element was named at sentencing stage, rather than insisting that it should necessarily enhance the sentence, with rehabilitative efforts and restorative justice measures being mentioned as avenues for preventing repeat offending.

As is most clear from the England and Wales Report, the legislative framework that regulates how the hate element is addressed through the legal process impacts significantly on the manner in which it is addressed at sentencing. Where legislation does not specify the hate motivation as an element of the offence, the hate element is less likely to be addressed at the sentencing stage. Where there is no legislative framework in place, as in Ireland, the hate element is often disappeared or filtered out before the case is presented in court.

As with the other stages of the legal process, we believe that policies are key in this context to ensuring that the hate element of a crime is addressed. However, while sentencing guidelines are certainly useful in terms of policy, legislation is required, at a minimum requiring the sentencing judge to consider a hate element as an aggravating factor, but optimally including the hate element in the offence itself. This latter approach is, as we have demonstrated, most likely to embed a recognition of hate within the system, and produce knock on effects with respect to ensuring that evidence of hate is captured by investigators and prosecutors and presented in court, which in turn helps to identify recidivistic hate offenders.

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<sup>152</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 188.

In tandem with training provided to police officers and lawyers, judges should be trained on hate crime. Again, this training should include sensitising judges to the harms of hate, and the impacts of hate crime, as well as rights that victims of hate crime have under the Victims' Directive as implemented. Further, training should include guidelines to the effect that judges should clearly state whether they were of the view that the hate element of the crime was proven in the case; whether they consider it an aggravating factor; and the extent of this aggravation.

### **Forward communication of the hate element**

Important as it is for the hate element to be recognised at individual stages in the process, it is equally important that this comprehension be communicated forward in the process: from the recording of the crime to its investigation; from the investigation to the prosecution; presenting the evidence in court to ensure it is addressed at sentencing; and openly acknowledging the hate element at sentencing.

The Country Report for Sweden notes that prosecutors are actively involved in investigation, providing direction to police investigators seeking to establish whether a case involved a hate crime motivation. In Sweden, the prosecutor (who is always a lawyer) takes over the case once a person is reasonably suspected of having committed a crime. At this point, the prosecutor heads the police investigation, decides on when to prosecute a case, and represents the State's interest in the prosecution of a case.

The partner for England and Wales states that prosecution interviewees noted that the police in that jurisdiction cannot themselves apply a hate crime charge. They must direct hate crime cases to the prosecution service for this purpose.<sup>153</sup> Collectively the police and the CPS collate and present evidence to the court on the hate element of a crime. This appears to be most successfully executed in cases involving racially aggravated offences. However, the researchers found that the hate crime flag can often be lost towards the end of the criminal justice process for various other types of hate crime. Interviewees noted that crimes addressed through aggravated sentencing were likely to lose their flag upon conviction. This is because the hate element of sexual orientation, disability and transgender identity crimes does not make up a part of the substantive offence and is not, therefore, recorded on the Police National Database. This has implications for post-conviction outcomes, as neither the prison service nor offending management services will be aware that the offender has been convicted of a hate motivated offence.

At the other end of the scale, the Country Report for Ireland found that although the hate element is subject to mandatory recording by police, it is not routinely communicated to investigators or prosecutors and, were it to be communicated

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<sup>153</sup> *ibid*, 81.

forward would not, according to interviewees, influence the work of either party. The research partner states:

“Interviewees were clear that the selection of a discriminatory marker does not impact the investigation process, while the PULSE report does not form part of the prosecution file. There is currently no protocol for communicating or utilising the discriminatory motive marker within the remaining stages of the criminal justice process.”<sup>154</sup>

Where there is a clear understanding of the definition of hate crime, we see this impacting positively on the effectiveness and directedness of the investigation. However, even where there are policies and procedures in place for the investigation of a hate crime, as in Latvia, we see the police categorising what the Latvian Country Report describes as “violent crimes” under incitement to hatred provisions.<sup>155</sup> The impact of the newly introduced guidelines remains to be seen, but it is hoped that these will result in improved practices regarding the identification, investigation, and prosecution of hate crime.

## **Conclusion**

From our analysis of the current legal frameworks, practices and policies, it is clear that - across all jurisdictions to this project - there is no uniformity in the manner in which a hate element is addressed through the criminal process.

Part 4 of this Report has shown that the extent to which a hate element is recognised by individual actors in the criminal justice process largely depends on first, on the legislative approach to addressing hate crime; secondly, the existence of policies on the issue; thirdly, the extent to which these policies are shared across the process; and finally, the extent to which those policies are embedded in practice. Training is hugely important in this context. The jurisdictional Reports identify practices which can help to embed recognition of, and response to, the hate element of a crime in the structures of the criminal justice process, from recording, through investigating, prosecuting and sentencing hate crime.

In order for good practice to be transferred in a meaningful way, jurisdictional innovations identified in this Report need to be localised to account for not only the legal, but also the socio-political context, individual to each State. We believe that this localisation process would be achieved most effectively in consultation with – among others - civil society organisations across a range of minoritised identities, who are best equipped to inform justice agencies about the experiences and needs of

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<sup>154</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>155</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

commonly victimised groups.<sup>156</sup> Ultimately, a comprehensive policy addressing all aspects of the criminal process should be produced, with police, prosecutors, and judges all involved in its development. This approach, we believe, will ensure a coherent approach to addressing hate crime across the criminal justice process, informed by shared objectives and understandings across all relevant practitioners. Further, these policies should be accompanied by training that is conducted cross-sectorally, particularly to foster productive communications between police and prosecutors on the hate element.

Finally, while mainstreamed up-skilling in the area of hate crime should be a stated objective, we assert that the consistent and appropriate addressing of a phenomenon as complex as hate crime requires investment in specialist knowledge and dedicated resources: specialisations in policing and prosecuting hate crime are vital to ensure the hate element is uncovered and addressed adequately throughout the criminal justice process. In the absence of these developments, we believe the hate element of a crime will inevitably continue to be disappeared and filtered out through the various stages of the criminal justice process.

Part 4 has demonstrated the importance of socio-legal research to uncovering the gaps, not just in policy, but between policy and practice, in addressing the hate element of a crime. The collection and publication of hate crime statistics is another an important tool for assessing progress in each jurisdiction, as well as allowing for comparability across jurisdictions. The next part of this report will address current jurisdictional data collection practices.

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<sup>156</sup> A minoritised community is defined in the Country Report for Ireland as “a social group with a shared characteristic whose position in society is characterised by relative disadvantage which may be economic, cultural, or political. This position is produced by power imbalances, and maintained by, existing structural inequalities in society.” Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017), 104.



## **PART 5: Statistical analysis**

Valid and reliable data are essential to informing constructive interventions to prevent and combat hate crime.<sup>1</sup> Although not without risk,<sup>2</sup> the positive potential of evidence informed policy making<sup>3</sup> and, at an operational level, of data driven policing<sup>4</sup> has been established. Hate crime data can provide insights into the character of the challenge presenting, particularly with respect to shifts and changes in the grounds on which individuals are targeted, and intelligence regarding temporal and geographic patterns of hate activity. Hate crime data are equally important to monitoring the implementation and impact of policy, including with respect to the investigation and prosecution of hate crimes. If we do not record hate crime we are arguably complicit in its statistical erasure.

However, statistics should always be interpreted in the context of the methodologies by which they are produced, as of the underlying realities they seek to capture. The UK National Audit Office<sup>5</sup> notes that crime statistics specifically are “often viewed as socially constructed, due to the process between an offence being committed and it being recorded by the police.”<sup>6</sup> The processes in question include recording and reporting practices, as well as the protocols and policies governing the latter. In the context of hate crime, all of these factors shape the resulting data, as well as, as FRA also observes, the legislative definition (or absence thereof) of hate crime:

“[n]arrow legal definitions of what constitutes hate crime . . . tend to lead to under-recording of incidents, which translates into low victim numbers of prosecutions, thereby affording victims of crime fewer opportunities to seek redress.”<sup>7</sup>

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<sup>1</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (FRA 2012).

<sup>2</sup> See for example, Chris Fox, ‘The ethical challenges of evidence-based policy research’ in Malcolm Cowburn, Loraine Gelsthorpe and Azrini Wahidin, *Research Ethics in Criminology: Dilemmas, Issues and Solutions* (Routledge 2017); Sarah Brayne, ‘Big data surveillance: The case of policing’ (2017) 82(5) *American Sociological Review* 977.

<sup>3</sup> See for example, Thomas G. Blomberg, Julie Mestre Brancale, Kevin M. Beaver and William D. Bales (eds), *Advancing Criminology and Criminal Justice Policy* (Routledge 2016).

<sup>4</sup> See for example, Earl Hardy, ‘Data-driven policing: How geographic analysis can reduce social harm’ (2010) 2(3) *Geography Public Safety* 1.

<sup>5</sup> National Audit Office, *Comparing International Criminal Justice System, Briefing for the House of Commons Justice Committee, Ministry of Justice* (National Audit Office 2012) <[www.nao.org.uk/report/nao-briefing-comparing-international-criminal-justice-systems/](http://www.nao.org.uk/report/nao-briefing-comparing-international-criminal-justice-systems/)> accessed 26 February 2018.

<sup>6</sup> *ibid.*

<sup>7</sup> European Agency for Fundamental Rights, *Working Group I: Recording and monitoring hate crime: strategies to improve official data collection mechanisms*, (FRA 2013) <[http://fra.europa.eu/en/event/2013/fundamental-rights-conference-2013/workinggroups#workinggroup1\\_Tue](http://fra.europa.eu/en/event/2013/fundamental-rights-conference-2013/workinggroups#workinggroup1_Tue)> accessed 26 February 2018.



The European Union has long recognised the importance of accurate hate crime data to combating that particular social ill.<sup>8</sup> In 2016, the EU High Level Group on combating racism, xenophobia and other forms of intolerance requested that FRA co-ordinate a subgroup on methodologies for recording and collecting hate crime data. In 2017, the Subgroup published a set of key guiding principles on *Improving the Recording of Hate Crime by Law Enforcement Authorities*, which were endorsed by the High Level Group. These Principles recognise that “[t]he proper identification and recording of hate crime is the first step in ensuring that offences are investigated and, where necessary, prosecuted and sanctioned.”<sup>9</sup>

With these caveats in mind this analysis of hate crime statistics available in each of the five participating jurisdictions focuses on the instructiveness, and limitations, of that data. We seek to highlight particular gaps in the insights which the available data permit, concerns raised by partners regarding their quality, and – in this larger report – any discordance between the picture established by official statistics and findings generated through qualitative inquiry. The purpose of this Report is to produce a comparative analysis of the treatment of hate crime across five jurisdictions. With respect to the secondary analysis of official hate crime data, this objective is not as yet obtainable. Our findings support the conclusions of Ludwig and Marshall with respect to crime generally:

“Crime statistics are highly problematic at EU level for a number of reasons, with international exchange and comparison of crime data limited by features of the different legal and criminal justice systems of member states, including differences in offence categorisations, sentence types and reoffending measures.”<sup>10</sup>

The recommendations to this Report propose a number of mechanisms by which this impediment to the efforts of the EU and its Member States to combat hate crime might be addressed.

### **Official statistics**

This section of the Report draws out factors contributing to the lack of comparability between the official statistics generated across the five participating jurisdictions. Manifesting particularly as differences in legislative provisions and recording practices, and grounded in historical variations in national conceptualisations of

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<sup>8</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (FRA 2012).

<sup>9</sup> Subgroup on methodologies for recording and collecting hate crime data, *Improving the Recording of Hate Crime by Law Enforcement Authorities: Key Guiding Principles* (EU High Level Group on combating racism, xenophobia and other forms of intolerance 2017) 4.

<sup>10</sup> Anika Ludwig and Mary Marshall, ‘Using crime data in academic research: issues of comparability and integrity’ (2015) 25 (3) *Records Management Journal* 230.

hate crime, the methodologies by which official hate crime statistics are produced vary significantly from jurisdiction to jurisdiction.

### **Legal constructs**

In its implementation report on the Framework Decision, the Commission specifically addressed the issue of data collection, asserting that States should produce “reliable, comparable and systematically collected data ... in order to assess the level of prosecutions and sentences.”<sup>11</sup> However, in this research project, the lack of a uniform definition of hate crime across Member States emerged as a particular obstacle to the comparability of official hate crime data cross-nationally. As we know, different Member States employ different legal constructs in addressing hate crime through the criminal justice process, and these varying understandings of hate crime permeate the manner in which the phenomenon is recorded. Thus, while some countries record hate crimes as existing offences which have an added hate element (e.g. racially aggravated assault), other countries base their hate crime data on standalone offences to which the hate element is integral, for example, offences relating to membership of extremist organisations, or hate speech. In those countries, these offences are understood as examples of hate crime, and thus may be reported as such.

The findings of the five jurisdictional reports emanating from *Lifecycle of a Hate Crime* speak to this issue, and to the resulting difficulties in disaggregating data on hate crime, as defined by the OSCE, from that relating to other offences such as hate speech, extremism and unlawful discrimination. In Ireland, the research partner found that police record hate crime in the absence of a legislative framework and with minimal policy guidance. The Czech partner notes that hate crime statistics published in that jurisdiction are not construed with regard to hate crime per se. They deal with the category of “crimes with an extremist subtext” which includes a very heterogeneous range of crimes: in addition to crimes with an added hate element, this category of offence includes hate speech punishable by the criminal law, crimes related to establishment of a hate organisation or expressing sympathy or support for a hate movement, and also other crimes committed by people recognized as political extremists. In Sweden, hate crime statistics aggregate crimes which fall under the OSCE definition of hate crime, as well as unlawful discrimination and hate speech offences. In 2016/2017, 95% of crimes identified as having a hate element in England and Wales consisted of criminal damage, arson, violence against the person, and public order offences. Many of the public order offences classified as hate crimes involve the use of threatening and abusive language that is likely to cause harassment, alarm or distress.<sup>12</sup> Hate-based language

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<sup>11</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/2014/027 final* (European Commission 2014).

<sup>12</sup> See e.g. Public Order Act 1986 (UK) s 5.

directed at someone in public is frequently deemed, in and of itself, to be abusive, and thus what might be considered as hate speech will in fact be classified as a “hate crime”. The Home Office has also noted the potential for terrorist offences to be flagged as a hate crime.<sup>13</sup>

The differences in legal constructs and the absence of a shared understanding of hate crime raises fundamental obstacles to comparing like with like in interpreting differences in hate crime statistics across jurisdictions. Such conceptual and legislative differences also impact the relevance of jurisdictional statistics to monitoring compliance with international obligations in respect to hate crime, where the methodologies used to collect hate crime data reference an alternative interpretation of the construct to that employed by the international body. For example, in Germany, where hate crime is understood through the lens of extremist activity rather than as an existing offence with an added hate element, Glet cautions:

“The data provided in the ‘hate crime statistics’ cannot be expected to present a realistic picture of the current situation and should, arguably, be viewed rather critically, especially by those making political criminal policy decisions.”<sup>14</sup>

### **Parties to the process**

Partner jurisdictions differ with respect to the number of stakeholders who participate in the production of official hate crime data, including with respect to the police recording of hate crime, with some jurisdictions operating more centralised systems of collection and analysis than others. Ludwig and Marshall raise such variations in the range of parties to the production of hate crime statistics internationally as an additional factor impacting the comparability of jurisdictional data:

“This issue is further exacerbated by the involvement of a number of different actors and agencies in the criminal justice process, who have different methods and responsibilities when it comes to recording crime. Variations occur in: recording practices; the way crimes are counted (e.g. whether countries register a crime as soon as it is reported to the police or whether they do so only when it is taken up by prosecutors or associated with a named suspect);

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<sup>13</sup> Aoife O’Neill, *Hate Crime England and Wales, 2016/7* (Home Office 2017) 2-3. The Home Office make a distinction between those terrorist attacks which they describe as “targeted against general British or Western values rather than one of the five specific strands” and those which “appear to be against a specific religion”, asserting that only the latter would be included in official hate crime statistics. While the focus is on avoiding some of the conceptual slippage that this Report has highlighted in other jurisdiction’s hate crime statistics, the alignment of England and Wales’ perception test with the imposition of this additional criterion is unclear.

<sup>14</sup> Alke Glet, ‘The German hate crime concept: An account of the classification and registration of bias-motivated offences and the implementation of the hate crime model into Germany’s law enforcement system’ (2009) *Internet Journal of Criminology* 1.

the point at which a crime is measured (e.g. report to the police, identification of suspect, etc.); the rules by which multiple offences are counted; the list of offences that are included in the overall crime figures and so on.”<sup>15</sup>

The methodological variation which presents an obstacle to the comparability of data cross-nationally, may also impact the production of data nationally. Partners to this research raise the importance, within a jurisdiction, of co-ordination between parties with respect to their recording protocols and practices.

In terms of who is responsible for data collection and publication, the Country Report for Ireland notes that, in that jurisdiction, official data are recorded by the national police force and provided to the Central Statistics Office (CSO) who are responsible for assessing the quality of the data, collating statistics and disseminating information. Sweden exhibits an equally centralised system in which a national police service records data on hate motivations and the publication of statistics is the responsibility of the Swedish National Council for Crime Prevention (BRÅ).

The Report for Latvia, however, notes that responsibility for hate crime in that jurisdiction is divided between the State Police who are responsible for processing offences under section 150 - incitement to social hatred/hate crimes motivated on grounds of gender, disability, age and other features, and the Security Police who are responsible for processing crimes under section 78 – hate crimes/speech with religious, ethnic, national, racial motive. Both agencies provide their data electronically to the Ministry of Interior Information Centre, which is the body responsible for the collation and publication of hate crime statistics. The research partner notes that the Security Police also provide data upon request. Furthermore, data (relating to specific sections of Criminal Law) are also collected by the Court Administration which operates a court system database. The partner for Latvia noted that due to changes in recording parameters, data are not always comparable. With respect to the degree of co-ordination among these stakeholders in the production of Latvian hate crime statistics, ODIHR cite a 2016 report by the Ombudsman's Office entitled *Issues of Investigating Hate Crimes and Hate Speech in the Republic of Latvia* which noted:

“... law enforcement agencies do not have a uniform understanding of the concept of hate crime ...”<sup>16</sup>

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<sup>15</sup> Anika Ludwig and Mary Marshall, 'Using crime data in academic research: issues of comparability and integrity' (2015) 25 (3) Records Management Journal 230.

<sup>16</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Latvia* (ODIHR 2017) <<http://hatecrime.osce.org/latvia>> accessed 26 February 2018.

There are four State bodies involved in the production of official hate crime statistics in the Czech Republic: the Police Presidium of the Czech Republic, the Supreme Prosecutor's Office, the Ministry of Justice of the Czech Republic and the Probation and Mediation Service. According to the jurisdictional Report for the Czech Republic, the four bodies work independently of one another. Each focuses on a different stage in the criminal justice process and each employs different temporal parameters in presenting the data, reflecting ECRI's finding that in that jurisdiction: "there were three systems of collecting data which differ significantly from one another and are not interconnected in any way".<sup>17</sup> The Czech partner notes that the Police Presidium registers crimes, whereas the Supreme Prosecutor's Office, the Ministry of Justice and the Probation and Mediation Service focus on offenders. Consequently, the Czech research partner highlights that it is not possible to follow a single offender through the criminal justice process.

England and Wales has the largest number of parties to the collection of hate crime data. The jurisdiction does not have a national police force – though it does have a national policing body (the College of Policing) that oversees all police forces' training. In England and Wales, data on police recorded hate crime are provided by each of the 43 territorial police forces, and the national transport police force, to the Home Office. The data are provided either electronically (via the Home Office Data Hub (HODH)) or manually depending on the force. Data on prosecutions, conviction rates, and the application of hate crime laws during sentencing, are collected by the centralised Crown Prosecution Service and published by the Home Office.<sup>18</sup> Interestingly, despite the involvement of so many stakeholders in the process of producing official hate crime statistics, among the five jurisdictional Reports, it is the Report for England and Wales which presents the most robust evidence of uniformity with respect to the shared use of a common "operational" definition of hate crime. The Report clarifies for example that the Crown Prosecution Service employs the same definition as the police<sup>19</sup> and finds a generally high level of shared understanding not only across responsible state bodies, but also within them: the research partner for England and Wales points to the comprehensiveness of the policy guidance available to stakeholders as a key factor. However, it should be noted that the agreed operational definition used across agencies differs somewhat to the legislation that is ultimately applied in court. This means that statistics regarding the attrition rate (known also as the "justice gap") for hate crime – calculated by totalling the number of crimes that fall out of the system from police

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<sup>17</sup> European Commission against Racism and Intolerance, *Report on the Czech Republic: Fifth monitoring cycle* (ECRI 2015) 15.

<sup>18</sup> Hate Crime data are also collated each year during the Crime Survey for England and Wales by the Office for National Statistics. The Survey provides estimates on the number of hate crimes that are committed in England and Wales and the percentage of these crimes which are reported to the police.

<sup>19</sup> Crown Prosecution Service. *Underlying Data* (CPS 2017) <<https://www.cps.gov.uk/underlying-data>> accessed 26 February 2018.

recorded hate crime through to court conviction and declared penalty uplift – must be treated with some caution.

Given the range of stakeholders who may be involved in the process of data collection, and the findings of jurisdictional reports which support the need for additional co-ordination among them, it is worth highlighting not only the importance of clear and common policy. Further, as was observed in Part 4 of this Report, this policy should be shared across the criminal process, and joint training should be provided to police and prosecutors on the policies.

### **Publication of data and statistics**

The publication of hate crime data benefits the wide range of non-state stakeholders who can use the data to inform their own interventions in respect to combating hate crime. More generally, the publication of hate crime statistics serves to raise public awareness of the reality of hate crime and of reporting and recording mechanisms. The Police Foundation in the United States argues in favour, not only of the publication of summary statistics, but of the open release of hate crime data collected by law enforcement agencies. They assert that:

“... open hate crime data signals that the police take this type of offense seriously, which can cultivate trust for the law enforcement system among victims and help quell ambient community tensions. It can also warn potential perpetrators that their actions will not be tolerated. As a result, open hate crime data may increase reporting rates among victims. By providing an avenue for accountability, it may also ensure the accuracy of reporting rates among law enforcement officials. More accurate reporting will lead to a better understanding of hate crime in the United States, which in turn will enable informed decision-making around preventing and addressing this type of offense.”<sup>20</sup>

Four of the five jurisdictions addressed in this research publish some official statistics on hate crime on an annual basis but with differing degrees of detail. Only one (England and Wales) engages in any open release of hate crime data.

In Ireland, the publication of all crime data has been suspended since Q1 2017<sup>21</sup> pending the conclusion of quality reviews.<sup>22</sup> The State has not made official statistics on police recorded hate crime publically available since the end of 2014. The Central

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<sup>20</sup> Police Foundation, *Releasing Open Data on Hate Crimes: A Best Practices Guide for Law Enforcement Agencies* (Police Foundation 2018) 5-6.

<sup>21</sup> Central Statistics Office, *Press Statement: Expert Group on Crime Statistics* (CSO 2017) <<http://www.cso.ie/en/csolatestnews/pressreleases/2017pressreleases/pressrelease-crime-expertgrouponcrimestatistics/>> accessed 26 February 2018.

<sup>22</sup> Central Statistics Office, *CSO Press Statement: Recorded Crime Statistics* (CSO 2017) <<http://www.cso.ie/en/csolatestnews/pressreleases/2017pressreleases/pressstatementcsorecordedcrimestatistics7thseptember2017/>> accessed 26 February 2018.

Statistics Office made this data available to the partner for Ireland on request to support our analysis. The available statistics consist of a breakdown by discriminatory motivation type of the aggregate number of crimes for which such a motivation was recorded.<sup>23</sup>

In Sweden, official hate crime statistics are published on an annual basis. The Reports, published by the Swedish National Council for Crime Prevention (Brå), present a portrait of the prevalence and manifestations of hate crime in Sweden. The Report's findings are based on police reports of crimes with an identified hate motivation (further detail of the manner in which these are processed follows later in this section), data from the Swedish Crime Survey (SCS) and, where available, from the Politicians' Safety Survey (PTU) and the Swedish School Survey on Crime (SUB), both of which enable respondents to report experiences of crimes with a hate motivation, but which are not administered annually.<sup>24</sup> The Reports include information on the manner in which police recorded hate crimes were processed, that is, they provide a breakdown of the number of sampled principal offences with an identified hate motivation under investigation; closed immediately/closed immediately (limited investigation), closed after investigation/closed after investigation (limited investigation), and which culminated in a person-based clearance. The Report defines hate crime as inclusive of unlawful discrimination and defamation. A limited proportion of the findings permit disaggregation of these offences from those which relate to the OSCE definition of hate crime.<sup>25</sup>

In the Czech Republic the Ministry of Interior Affairs publishes annual *Reports on Extremism in the Czech Republic*. The Report contains statistics drawn from all four state bodies: Police Presidium, the Supreme Prosecutor's Office, the Ministry of Justice, and the Probation and Mediation Service, and thus includes data on recorded crime, prosecutions and accusations, sentences, and offenders. However the Czech partner notes that the Report concentrates primarily on documenting the situation with respect to political extremism rather than hate crime. Indeed, the research partner for the Czech Republic notes:

"The *Reports on Extremism* completely ignore crimes where the motive of hate was found to be an aggravating general circumstance. That can be applied wherever the motive of hate is absent in basic as well as qualified merits.

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<sup>23</sup> The eleven categories of discriminatory motives are: ageism, anti-disability, anti-Muslim, anti-Roma, antisemitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia.

<sup>24</sup> Brottsförebyggande rådet, *English Summary of Brå report 2017:11* (Brå 2018)

<sup>25</sup> The Report defines person-based clearances as where "a person had been linked to the offence by means of a decision to prosecute, by having accepted a summary sanction order or by having been granted a waiver of prosecution." *ibid*.



Statistics of such crimes are not reported anywhere. The only way to obtain them would be to search court rulings and criminal orders.”<sup>26</sup>

The Report for Latvia notes that the Ministry of Interior Affairs Information Centre publishes hate crime statistics annually. The partner for Latvia highlights that the Court Administration database - which includes data on section 150 and 78 offences, including the number of sentenced offenders disaggregated by age, gender, and type of sentence - has not been publicly accessible since 2017.

At the other end of the scale, England and Wales not only publishes annual reports on police recorded hate crime, prosecutions and sentencing, but the Crown Prosecution Service also makes their data available publically in CSV (comma-separated values) format, which readily lends itself to secondary analysis.<sup>27</sup> As in Sweden, the annual reports produced by the Home Office disaggregate a limited range of findings by offence type.

### **Assessments of quality**

In interpreting jurisdictional hate crime data, it is important that we attend to issues of quality. The quality of crime statistics is impacted both by methodological shortfalls and human error. Indeed, the EU Sub-group on Methodologies for Recording and Collecting Hate Crime has dedicated the first two years of its labours to improving police recording practices.<sup>28</sup>

BRÅ acknowledge quality issues in recording practices in respect to hate crime in Sweden. They cite, in particular, research which has identified “substantial deficiencies” in police officers’ use of the function which permits them to identify an offence as a hate crime.<sup>29</sup> A majority of prosecutors interviewed by the partner for Sweden held that at least 25 per cent of hate crimes identified by police were incorrectly classified as such. BRÅ has responded to these quality issues by avoiding reliance on data produced by the mandatory question identifying potential hate crimes in producing hate crime statistics. Specifically, 50 per cent of reports relating to a predetermined group of offences are randomly sampled.<sup>30</sup> Relevant reports are identified from within this sample via a key word search and manual assessment.<sup>31</sup>

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<sup>26</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>27</sup> Crown Prosecution Service. *Underlying Data* (CPS 2017) <<https://www.cps.gov.uk/underlying-data>> accessed 26 February 2018.

<sup>28</sup> European Union Agency for Fundamental Rights, *Subgroup on Methodologies for Recording and Collecting Hate Crime Data* (FRA 2017) <<http://fra.europa.eu/en/project/2017/subgroups-methodologies-recording-and-collecting-data-hate-crime>> accessed 26 February 2018.

<sup>29</sup> Brottsförebyggande rådet, *English Summary of Brå report 2017:11* (Brå 2018).

<sup>30</sup> “Police reports relating to the crime categories: violent crime, unlawful threat, non-sexual molestation, defamation, criminal damage, graffiti, agitation against a population group, unlawful discrimination and a selection of other offences.” *ibid* 6.

<sup>31</sup> *ibid*.



ODIHR cites a 2016 report by the Ombudsman's Office entitled *Issues of Investigating Hate Crimes and Hate Speech in the Republic of Latvia* which, having identified slippage between law enforcement agencies' understandings of hate crime:

“... recommended the development of a methodology for recognizing, identifying and investigating hate crimes.”<sup>32</sup>

According to the partner for Latvia, the 2016 report was able to offer only limited information about operational practice as most police precincts had never dealt with hate crime cases, and thus their responses to the Ombudsman were often hypothetical and largely referred to hate speech rather than hate crime.

The partner for the Czech Republic notes that, in that jurisdiction, registered incidents are sometimes wrongly assessed. For example, the Police may interpret hate crime or hate speech as extremist crime. In its Monitoring Report on the Czech Republic, published in 2015, ECRI recommended that the Czech authorities ensure that:

“... a single mechanism for collecting disaggregated data on hate crime, including hate speech, is put in place, recording the specific bias motivation, as well as the follow-up given by the justice system, and that this data is made available to the public.”<sup>33</sup>

Neither in Ireland nor England and Wales do police recorded crime data attain the standards of quality required by those jurisdictions to be accorded the status of national statistics. In 2014 the UK Statistics Authority determined that police recorded data did not meet the criteria to be designated as National Statistics. The position of the Authority on this issue remained the same in 2017.<sup>34</sup> In the course of *Lifecycle of a Hate Crime* the partner for England and Wales identified shortfalls via interviews with members of the Crown Prosecution Service in the ability of police officers to recognise anti-disability hate crime, even where disablist slurs were used in the course of an offence.

In Ireland, the Central Statistics Office have found ongoing quality issues with respect to police recorded crime data generally. For example in 2015 between 16 per cent and 17 per cent of crime reported to An Garda Síochána was not logged on the national crime incident recording system. These deficiencies have led to an official reluctance to publish crime data, including hate crime data, even on an

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<sup>32</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Latvia* (ODIHR 2017) <<http://hatecrime.osce.org/latvia>> accessed 26 February 2018.

<sup>33</sup> European Commission against Racism and Intolerance, *Report on the Czech Republic: Fifth monitoring cycle* (ECRI 2015) 27.

<sup>34</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales: year ending June 2017* (ONS 2017).

aggregated and annual basis. As noted, publication of crime data in Ireland has been suspended since Q1 2017<sup>35</sup> pending the conclusion of quality reviews.<sup>36</sup> With specific reference to data on “discriminatory motivations” the Central Statistics Office in Ireland warns users:

“It is important to note that the levels of crime with a discriminatory motive recorded in Ireland are very low in comparison with figures in other jurisdictions.”<sup>37</sup>

In the course of this research, the partner for Ireland identified significant shortfalls in police officers’ awareness and comprehension of hate crime recording categories. The findings of their qualitative fieldwork with 74 interviewees across the criminal justice process places important context on the operational impact of the jurisdiction’s “lists of bias indicators that police officers can use to identify the bias motivation underlying the reported offence” and “specific instructions, guidance or training on recording hate crime” recorded in the Subgroup on methodologies for recording and collecting hate crime data’s *Improving the Recording of Hate Crime by Law Enforcement Authorities*. While the partner for Ireland recognised the advancement which the list of eleven discriminatory motivations available to Irish police represented, they found:

“Gardaí interviewed in 2017 displayed little awareness of the recording categories when we asked them to recall the categories of discriminatory motive available.”<sup>38</sup>

Interviewees clarified that while technical training on the use of the recording system had begun to be rolled out, training on the substantive issues involved had not been mainstreamed and the training that was available did not specifically address the recording of discriminatory motivations.

### **Disaggregation of police recorded data**

Both FRA and ODIHR have emphasised the importance of producing hate crime statistics which are not merely aggregate totals, but which achieve sufficient

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<sup>35</sup> Central Statistics Office, *Press Statement: Expert Group on Crime Statistics* (CSO 2017) <<http://www.cso.ie/en/csolatestnews/pressreleases/2017pressreleases/pressrelease-crime-expertgrouponcrimestatistics/>> accessed 26 February 2018.

<sup>36</sup> Central Statistics Office, *CSO Press Statement: Recorded Crime Statistics* (CSO 2017) <<http://www.cso.ie/en/csolatestnews/pressreleases/2017pressreleases/presstatementcsorecordedcrimestatistics7thseptember2017/>> accessed 26 February 2018.

<sup>37</sup> Central Statistics Office, *Crimes with a discriminatory motive: information note* (CSO 2017).

<sup>38</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

granularity to inform effective interventions.<sup>39</sup> Specifically, FRA has recommended that hate crime statistics identify the bias motivation involved; the number of convictions; the grounds on which offences were identified as discriminatory; and the sanctions applied.<sup>40</sup> This research finds the degree to which published police recorded hate crime statistics are disaggregated differs in each jurisdiction.

With respect to contemporary police recorded hate crime data in Ireland, the Central Statistics Office does not currently publish crime data, but at the request of the partner for Ireland it disaggregated the total number of offences recorded as associated with a hate crime motivation by one of eleven motivation types - ageism, anti-disability, anti-Muslim, anti-Roma, antisemitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia. The Central Statistics Office was not in a position to facilitate further disaggregation by, for example, offence type.

In Latvia, data published by the Ministry of the Interior are disaggregated by the section of the criminal law and by administrative district. The partner for Latvia notes that the Court Administration database, which has not been publically accessible since 2017, provided for disaggregation of the number of sentenced offenders by age group, gender and sentence imposed.

In England and Wales, hate crime data are disaggregated by year, motivation, offence type, and charge decision. The Country Report for Sweden notes that BRÅ, the body which publishes police recorded hate crime statistics in that country, provides data on the percentage of crimes with an identified hate motive. As in England and Wales, the data are disaggregated by year, motivation and offence type.

The partner for the Czech republic informed us that in *Reports on Extremism*, hate crime data (or, more precisely, the data on crimes with an extremist subtext) are disaggregated by offence type, motivation (but only for the Roma, Jews and Muslims/Arabs), location (region), and a number of offenders from security forces and the Army of the Czech Republic.

### **Recorded hate crime**

The Subgroup on methodologies for recording and collecting hate crime data asserts that, given the importance of data on hate crime:

“Appropriate mechanisms thus need to be in place to enable law enforcement officials to identify the potential bias motivation of an offence, and to record that information on file. Having such mechanisms in place would also help

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<sup>39</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (FRA 2012); Office for Democratic Institutions and Human Rights, *Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide* (ODIHR 2014.)

<sup>40</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (FRA 2012).

ensure that victims and witnesses can report hate crimes to law enforcement authorities with confidence.”<sup>41</sup>

The methodology for recording a hate crime differs in each of the five jurisdictions addressed in this research. Police recorded hate crime data cannot therefore be considered comparable and should be read with a view to the differences in legislative definitions of hate crime, in the types of legal provisions used to address this phenomenon, and in the protocols used to govern recording, in each jurisdiction.

In Latvia, section 48 of the criminal code provides for aggravated sentences where a hate motivation is identified, but the 2016 UPR Country Report for Latvia found that no data were provided with respect to that section.<sup>42</sup> The research partner for Latvia notes that where a crime falls under sections 78, 149, 150 or 151 of the criminal code, the victim’s skin colour, ethnicity, and religious denomination are recorded. These are not however hate crime offences in the manner of the OSCE definition of hate crime. Thus hate crime data reported by Latvia to ODIHR are restricted to hate speech offences, which the organisation notes, “may have included violence or threats”.<sup>43</sup> ODIHR states “ODIHR observes that Latvia has not reported on hate crimes separately from cases of hate speech.”<sup>44</sup>

In 2012, 2013 and 2014, ODIHR similarly cited difficulties in separating hate crime data from that relating to hate speech offences and from offences pertaining to political extremism more generally in respect to the Czech Republic. The Czech research partner states that between 2011 and 2014, a total of 91 crimes were recorded under § 352 which is an offence of violence against a group of people and against an individual. A further 90 hate crimes with qualified merit were recorded - § 140 murder (1 crime recorded), § 145 grievous bodily harm (4 crimes recorded), § 146 bodily harm (52 crimes recorded), § 175 extortion (52 crimes recorded) and § 228 damage to another person’s property (31 crimes recorded). For 2015, and citing improvements in the mechanisms used by the State to record hate crimes, ODIHR were able to report that the Czech police recorded 64 offences with an extremist sub-text which also complied with the OSCE definition of a hate crime. In 2016, they recorded 49 such hate crimes. Of the 64 hate crimes recorded in 2015, ODIHR reports that 25 were motivated by bias against Roma and Sinti, 28 were motivated by antisemitism and seven were motivated by bias against Muslims. In 2015, of 64

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<sup>41</sup> Subgroup on methodologies for recording and collecting hate crime data, *Improving the Recording of Hate Crime by Law Enforcement Authorities: Key Guiding Principles* (EU High Level Group on combating racism, xenophobia and other forms of intolerance 2017) 4.

<sup>42</sup> Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Latvia (Annex I)* (UPR 2016).

<sup>43</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Latvia* (ODIHR 2017) <<http://hatecrime.osce.org/latvia>> accessed 26 February 2018.

<sup>44</sup> *ibid.*

hate crimes recorded 26 were motivated by bias racism/xenophobia, 22 by bias against Roma and Sinti, six by bias against Muslims, two by bias against Christians and one by antisemitism.<sup>45</sup>

In Sweden, Brå reports an estimated 6,980 crimes with an identified hate motivation with respect to 2014. Xenophobic/racist prejudice were by far the most frequent motivation identified, associated with 68 per cent of hate crimes in 2015. Official data reported to ODIHR for the period 2012 to 2016 cited between 3943 and 5518 recorded hate crimes annually, excluding data relating to “defamation, hate speech and unlawful discrimination.”<sup>46</sup> In 2016, the vast majority of reported hate crimes recorded by ODIHR related to racism and xenophobia (3,439).

The jurisdictional Report for Ireland states that between 2006-2014, the national police service recorded an average of 158 crimes with a discriminatory motive annually, ranging from a low of 114 in 2014 to a high of 233 in 2007. Every year of recording, racist discriminatory motives were the most numerous category of motivating factor identified. While the figures have not been made available to ODIHR through its reporting process, the Country Report for Ireland notes that the number of crimes recorded as having a discriminatory motive increased dramatically after November 2015, when changes to the recording methodology were made, making the consideration of the presence of a “discriminatory motive” mandatory. In 2016, a total of 308 crimes with a discriminatory motive were identified. By far the largest number of offences were associated with racist motivations.

The jurisdictional Report for England and Wales notes that in 2015/6 the police in that jurisdiction recorded a total of 62,518 hate crimes, an increase of 19 per cent on the previous year. Seventy nine per cent were perceived to be motivated by hostility towards the victim’s race, twelve per cent to the victims’ sexual orientation, seven per cent towards their religion, six per cent towards their nationality and one per cent towards their identity as a transgender person. The Report highlights the differences between the overall number of hate crimes recorded by the police and the average annual numbers of hate crimes identified by the national victimisation survey, the Crime Survey for England and Wales. The partner for England and Wales provides a breakdown of police recorded hate crime data for 2015/6 by offence type: 55 per cent of recorded hate crimes are public order offences, 25 per cent constitute violence against the person without injury, nine per cent constitute violence against the person with injury, seven per cent constitute criminal damage

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<sup>45</sup> The bias motivations of the remaining seven crimes were not identified. Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Czech Republic* (ODIHR 2017) <<http://hatecrime.osce.org/czech-republic>> accessed 26 February 2018.

<sup>46</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Sweden* (OSCE 2017) <<http://hatecrime.osce.org/sweden?year=2011>> accessed 26 February 2018.

and arson, and four per cent fall into the category of other notifiable offences. The Report finds that there are differences in, not just the levels, but the types of hate crime experienced across different strands or grounds. It notes in particular:

“... lower rates of public order offences and higher rates of theft, burglary and sexual offences for disability hate crime cases compared with the other strands of hate crime. Similarly, criminal damage and arson is much higher for religion-based hate crime (14%) compared with transgender hate crime (4%)”.

These findings highlight the kinds of intelligence that can be gained through disaggregated data.

The data relayed here are presented with caution regarding their relationship to the true prevalence and manifestations of hate crime in the participating jurisdictions. Generally, however, this exercise serves to highlight differences in the availability of disaggregated police recorded hate crime statistics, the challenges of recording hate crime data in respect to legal provisions employing aggravated circumstances, and the difficulties of disaggregating data on hate crime and hate speech where these provisions are conflated within the criminal code.

### **Prosecution and sentencing statistics**

FRA has emphasised the importance of gathering and publishing data on hate crime prosecutions. In its opinion, adequate systems of data collection include not just data on reporting and police recording, but

“... the number of convictions of offenders; the grounds on which these offences were found to be discriminatory; and the punishments served to offenders.”<sup>47</sup>

There was far greater variation among the five jurisdictions addressed in this Report with respect to the availability of data on prosecution and sentencing than in respect to police recorded hate crime data. The scenarios documented range from no collection of data on prosecution or sentencing to the collection and publication of such data.

At one end of the scale, neither the research partner in Sweden nor Ireland were able to access data on prosecution or sentencing in their jurisdictions. In Sweden data on prosecution and sentencing are not collected. The Country Report for Sweden notes that BRÅ, the body which publishes police recorded hate crime statistics in that country, provides data on the percentage of crimes with an

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<sup>47</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (FRA 2012) 62.



identified hate motive which were investigated by the police but not the proportion which were prosecuted. The Country Report for Ireland notes:

“The State does not routinely gather data on the prosecution or sentencing of crimes with a discriminatory motive.”<sup>48</sup>

ODIHR<sup>49</sup> has published data on sentencing in respect to Ireland for 2013 only, which stated that, of the 109 hate crimes recorded by the police service in Ireland that year, 12 individuals were sentenced. However, the research partner for Ireland was unable to ascertain how this figure was determined or what it signifies. Both the Central Statistics Office and the Department of Justice and Equality disavowed responsibility for this data and neither body was able to provide the partner with similar data for other years.

Both in respect to Ireland and Sweden, the jurisdictional reports find that aggravated sentencing is a significant obstacle to the collection of data. In both jurisdictions, the court is not required to name aggravating circumstances in their decision. In Ireland, there is additionally no written record of decisions in the lower courts where most crime is processed. In Sweden, while there is a written record of decisions, the lower courts do not have a searchable database of decisions. One would need to read each decision to identify a hate crime case.

ODIHR publishes official hate crime data for Latvia with respect to prosecution and sentencing. However, the data relate to section 78, which is an incitement to hatred provision, not section 48 which is that jurisdiction’s aggravated sentencing provision.<sup>50</sup> As in Ireland and Sweden, there are no mechanisms in place to record the use of section 48. The partner for Latvia confirmed to us that judges generally make reference to mitigating or aggravating circumstances in their decisions. There are written records of decisions, but data are not collected according to mitigating or aggravating circumstances, but rather according to criminal offences. Moreover, the original fieldwork conducted by the research partner for Latvia found no evidence that section 48 had in fact been used in that jurisdiction, highlighting the importance of data collection to monitoring the implementation of the criminal code.

The research partner in the Czech Republic reports that investigating officers in the Czech Police Presidium log details of hate crime prosecutions on the Electronic Criminal Proceedings (ECP) information system, to which ODIHR notes that the

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<sup>48</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>49</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Ireland* (OSCE 2017) <<http://hatecrime.osce.org/ireland>> accessed 26 February 2018.

<sup>50</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Latvia* (ODIHR 2017) <<http://hatecrime.osce.org/latvia>> accessed 26 February 2018.

prosecutors' office also has access.<sup>51</sup> The Czech partner found that there were no data available within that jurisdiction in respect to the provision § 42 (b). §42(b) is a provision which sets out that Courts may consider as an aggravating circumstance when the criminal offence was committed:

“... out of greed, for revenge, due to hatred relating to nationality, ethnic, racial, religious, class or another similar hatred or out of another particularly condemnable motive”.<sup>52</sup>

The Crown Prosecution Service for England and Wales notes that it does not collect data which meet the stringent standards required of National Statistics, as in the case of police recorded data in that jurisdiction. However the Service does publish data on the prosecution of crime, including hate crime, applying the same perception test as the police, although prosecutorial decisions are determined by the legal definition.<sup>53</sup> The data are disaggregated by offence type and hate motivation. The CPS also reports the percentage of cases that are proceeded against in court, the percentage that result in a conviction for an offence, and finally the percentage of these cases which resulted in a “declared uplift” (i.e. cases where the offender received an enhanced penalty as per the hate crime provisions).<sup>54</sup> However, the Report of the partner for England and Wales notes that there are temporal differences in the recording protocols applied by the police and prosecutors that cause difficulties in comparing data on an annual basis.

It is important to note that England and Wales employs a combination of aggravated sentencing and aggravated offences, but it has established mechanisms that enable the collection and publication of data on the use of aggravated sentencing provisions where a sentence uplift has been raised by counsel. The prosecutor notes on the Hearing Record Sheet any announcement regarding a sentence uplift which is made in court (and can remind the court where no announcement is made). This information is transferred to the Casework Management System (CMS). These data are checked by an Area Hate Crime Co-ordinator, which also facilitates queries where an uplift might have been expected and was not apparent in the data. Although, the CPS holds that this system is improving the recording of uplifts, recording is not yet fully comprehensive.<sup>55</sup> The partner for England and Wales notes:

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<sup>51</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Czech Republic* (ODIHR 2017) <<http://hatecrime.osce.org/czech-republic>> accessed 26 February 2018.

<sup>52</sup> The European Judicial Training Network, Criminal Code of the Czech Republic (EJTN 2009) <<http://www.ejtn.eu/PageFiles/6533/Criminal%20Code%20of%20the%20Czech%20Republic.pdf>> accessed 26 February 2018.

<sup>53</sup> Crown Prosecution Service. *Underlying Data* (CPS 2017) <<https://www.cps.gov.uk/underlying-data>> accessed 26 February 2018.

<sup>54</sup> Note that the police data cannot be *directly* mapped onto CPS data due to the fact that incidents recorded by the police may not proceed to court until the next reporting cycle.

<sup>55</sup> Email from Crown Prosecution Service to Mark A Walters (December 2017).



“... the hate crime element of an offence might be applied to the sentence, but not announced in court in the way that is required by ss. 145 and 146.”<sup>56</sup>

In such circumstances the data are lost.

### **National surveys**

Given the shortfalls in the availability and quality of police recorded hate crime statistics, it is perhaps unsurprising that the Fundamental Rights Agency advises that official reporting should be supplemented by crime victim surveys or recording systems operated by other sources like civil society organisations.<sup>57</sup> Among the five jurisdictions addressed in this Report, only two have established state-funded crime and victimisation surveys which address hate crime.

The Country Report for Latvia reported that that jurisdiction has not established a national crime and victimisation survey. A victimisation survey was commissioned by a civil society organisation in 2012 as part of an EU funded project on victim's rights, but it did not include questions related to hate crime. The partner for Latvia notes that stand alone surveys may include questions on crime victimisation but are not published regularly. The Czech research partner notes that the last national victimisation survey in that jurisdiction was carried out in 2007, but did not incorporate any questions on hate crime. In 2017, a national victimisation survey carried was out by the Institute of Crime and Social Prevention, which, the Czech partner informed us, incorporated some questions on hate crime. However, the results have not yet been published. Ireland, likewise, does not have a dedicated national crime and victimisation survey. The state-funded Quarterly National Household Survey irregularly includes a module on crime victimisation. The last such module ran in October–December 2015. Previously the module was carried out in a single quarter of 2010, 2006 and 2003. None of the questions relate to hate crime or crimes with a discriminatory motivation.<sup>58</sup>

By contrast, in Sweden, the Swedish Crime Survey operates, which gathers data directly from victims regarding their experiences of crime, including hate crime. The annual survey is statistically representative, but does not include a diversity booster.<sup>59</sup> The research partner for Sweden notes that in respect to 2015, the Swedish Crime Survey found that 145,000 persons (aged 16-79) were subject to

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<sup>56</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

<sup>57</sup> European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (FRA 2012).

<sup>58</sup> Central Statistics Office, *Statistical Release: Crime and Victimisation, Quarterly National Household Survey* (CSO 2016).

<sup>59</sup> Brottsförebyggande rådet, *Nationella trygghetsundersökningen 2016: Om utsatthet, trygghet och förtroende. Rapport* (Brå 2017) 1.

255,000 xenophobic hate crimes, 47,000 persons were victims of anti-religious hate crimes, and 23,000 people were subject to homophobic hate crimes.

The Crime Survey for England and Wales (CSEW) is regarded in that jurisdiction as an important tool for measuring the prevalence of hate crime and ascertaining the degree of underreporting of such crime. The CSEW is run by the Office for National Statistics in England and Wales and is nationally representative.<sup>60</sup> The survey is conducted via face-to-face interviews with over 50,000 households nationwide and addresses experiences of crime in the previous 12 months.<sup>61</sup> The Survey addresses the nature of the victim's experience, whether the offence became known to the police, the victim's level of satisfaction with the response of the police, and the impacts of the experience on the victim's emotional wellbeing and levels of fear regarding future victimisation.<sup>62</sup> From being regarded as a useful complement to official police recorded data at the time of its origins in the 1990s, CSEW data have, since 2002, been published alongside police recorded data fostering a perception of "two competing 'official' pictures of crime levels and trends ... [in which] the survey results are winning the battle for credibility."<sup>63</sup> Although it does not address non-crime hate incidents, it provides an insight into unreported as well as recorded crimes.

The research partner for England and Wales reports that (based on 12-month averages of combined CSEW data) the Crime Survey for England and Wales recorded an average estimated 204,000 hate crimes each year between for March 2014 to March 2016. The research partner notes that an estimated 54 per cent (110,160) were brought to the attention of the police. 104,000 hate crimes per year were motivated by hostility towards the victim's race, 31,000 targeted the victim on the basis of their religion, 27,000 targeted the victim's sexual orientation, and 67,000 hate crimes per year were based on hostility towards the victim's disability. The research partner highlights that it was not possible to provide data in relation to estimated rate of police reporting in relation to either transgender identity or sexual orientation.

It is worth highlighting that the small number of hate crime cases in the overall sample means that the CSEW usually calculate an average estimated number of hate crimes based on survey data collated over a two year period. However, aggregating data across two sample periods still does not provide sufficient sample sizes of

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<sup>60</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales: Year Ending June 2017* (ONS 2017).

<sup>61</sup> Hannah Corcoran, Deborah Lader and Kevin Smith, *Hate Crime, England and Wales, 2014/5* (Home Office 2015).

<sup>62</sup> *ibid* 26.

<sup>63</sup> Mike Maguire and Susan McVie, 'Crime Data and Criminal Statistics: A Critical Reflection' in Alison Lieblich, Shadd Maruna, and Lesley McAra (eds), *The Oxford Handbook of Criminology* (OUP 2017) 166.

transphobic hate crimes, and as such estimates for these types of crime remain absent from published reports. While the CSEW is an important source of insight into hate crime in England and Wales, this highlights the disadvantages of employing a survey of the general population to collect data on experiences which are concentrated among minorities.

### **FRA surveys**

The European Union Agency for Fundamental Rights (FRA) has employed survey methodologies to collect data regarding the experiences of a number of minority groups across the European Union. The purpose of the exercise is to explore the potential of targeted surveys to address shortfalls in hate crime data at an EU-level. The discussion is organised by report, starting with the 2012 EU LGBT Survey. The second report investigated the experience of being transgender in the European Union (EU). The third report documented manifestations of antisemitism throughout the EU while the final report focused on minorities experiences of discrimination (EU-MIDIS)<sup>64</sup>.

### **Report 1 – EU LGBT survey<sup>65</sup>: European Union Lesbian, Gay, Bisexual and Transgender Survey**

In the largest LGBT survey to be conducted in the European Union, FRA collected information on experiences of discrimination, hate-motivated violence and harassment from persons who self-identified as lesbian, gay bisexual or transgender. The survey was conducted through an anonymous online questionnaire, primarily promoted via LGBT-related online media and social media. The data revealed the extent to which respondents' experiences and perceptions varied according to their national context. The online survey succeeded in collecting information from 93,079 persons across Europe aged 18 and over who identified as lesbian, gay, bisexual or transgender. Data weighting was employed to ensure that no single identity or nationality was over or under represented in the sample.

### **Report 2 - Being Trans in the European Union**

Drawing on the dataset generated by the EU LGBT<sup>66</sup> survey, the FRA study *Being Trans in the European Union*<sup>67</sup> addressed transgender persons' experiences in the

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<sup>64</sup> FRA has also published a report investigating Gender-based Violence against women (GBV) in the EU. See: European Union Agency for Fundamental Rights, *Violence against Women: An EU- Wide Survey* <<http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>> accessed 26 February 2018.

<sup>65</sup> European Union Agency for Fundamental Rights, *EU LGBT Survey: European Union lesbian, gay, bisexual and transgender survey: Main results* (FRA 2014). <<http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results>> accessed 26 February 2018.

<sup>66</sup> The same data weighting applies as in the EU LGBT Survey.

<sup>67</sup> European Union Agency for Fundamental Rights, *Being Trans in the EU: Comparative analysis of EU LGBT survey data* (FRA 2014) <<http://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>> accessed 26 February 2018.

European Union.<sup>68</sup> In total, 6,771 self-identified trans persons participated in the EU LGBT survey. After data cleaning, analysts were able to use the responses of 6,579 participants. This represents the largest collection of empirical evidence of its kind to cast light on transgender persons' experiences in the European Union.<sup>69</sup>

### **Report 3 – Antisemitism<sup>70</sup>**

The 2017 FRA report documents manifestations of antisemitism as recorded by official and unofficial sources in the 28 European Union Member States.<sup>71</sup> In describing its methodology, FRA states that data were collected by three different methods: the first method involved the collection of official data, which were drawn from the Office for Democratic Institutions and Human Rights (ODIHR) and the European Commission against Racism and Intolerance (ECRI); the second method employed was to gather data by way of a request to government offices; and the third was to access data from civil society organisations, referred to as “unofficial data” in the Report. In discussing the limitations of the Report, FRA acknowledged that the inconsistent approach to data collection across Member States was an obstacle to any meaningful comparison of officially collected data.<sup>72</sup>

### **Theme 4 – EU-MIDIS II<sup>73</sup>**

The second European Union minorities and discrimination survey (EU-MIDIS II) was carried out across all Member States, and included 25,000 participants. The survey collected data on the experiences and opinions of immigrants and ethnic minorities' with respect to discrimination, victimisation, social inclusion and integration.<sup>74</sup> Member States were asked by FRA to:

“... identify the most common grounds of discrimination and the persons/groups most vulnerable to or at risk of discriminatory treatment and criminal victimisation, also including potentially ‘racially’, ‘ethnically’ or ‘religiously’ motivated discrimination and victimisation”.<sup>75</sup>

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<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> European Union Agency for Fundamental Rights, *Antisemitism: Overview of data available in the European Union 2006–2016* (FRA 2017) <<http://fra.europa.eu/en/publication/2016/antisemitism-overview-data-available-european-union-2005-2015>> accessed 26 February 2018.

<sup>71</sup> European Union Agency for Fundamental Rights, *Discrimination and Hate Crime against Jews in EU Member States: Experiences and Perceptions of Antisemitism* (FRA 2013) <<http://fra.europa.eu/en/publication/2013/discrimination-and-hate-crime-against-jews-eu-member-states-experiences-and>> accessed 26 February 2018.

<sup>72</sup> European Union Agency for Fundamental Rights, *Antisemitism: Overview of data available in the European Union 2006–2016* (FRA 2017) <<http://fra.europa.eu/en/publication/2016/antisemitism-overview-data-available-european-union-2005-2015>> accessed 26 February 2018.

<sup>73</sup> European Union Agency for Fundamental Rights, *EU MIDIS II: Main Results* (FRA 2017) <<http://fra.europa.eu/en/publication/2017/eumidis-ii-main-results>> accessed 26 February 2018.

<sup>74</sup> *ibid* 114.

<sup>75</sup> European Union Agency for Fundamental Rights, *EU MIDIS II Technical Report* (FRA 2017) 14-15 <<http://fra.europa.eu/en/publication/2017/eumidis-ii-technical-report>> accessed 26 February 2018.

According to FRA, most of the selected target groups are considered “hard-to-reach” for the purposes of conducting a survey. This, FRA suggests, was either due to the group being relatively small in size or dispersed, or due to the absence of appropriate sampling frames in respect to the target groups.<sup>76</sup> The availability of sampling frames and the distribution of the target group varied significantly across Member States. FRA developed new and advanced sampling methodologies which were employed across most of the 28 Member States. In some cases, multiple methods were adopted to facilitate adequate coverage of the target population.<sup>77</sup> On the basis of these strategies the Survey was successful in collecting data from over 25,500 respondents across a variety of minority groups.

### **Civil society mechanisms**

In the absence of national surveys, civil society mechanisms can be a useful tool for understanding the experiences of minoritised communities in a particular jurisdiction. In that context, civil society hate crime data are explored for those jurisdictions in which a national crime victimisation survey addressing hate crime is not available. International research tells us that victims will not report to the police if they do not have confidence in the justice system.<sup>78</sup> In such circumstances, civil society organisations may be in a position to record hate crimes which would not otherwise be reported to the police.<sup>79</sup> As United for Intercultural Action observed:

“[CSOs] cooperating with minority and vulnerable groups are often well placed to know of hate motivated incidents and crimes, hence they have access to information that law enforcement agents are not likely to find.”<sup>80</sup>

The Country Report for Ireland cites data from three third party reporting mechanisms operated by civil society organisations: European Network Against Racism Ireland’s iReport.ie system for monitoring racist and religiously aggravated incidents; Transgender Equality Network Ireland’s Stop Transphobia and Discrimination (STAD) mechanism; and the Gay and Lesbian Equality Network’s “stophatecrime.ie” site, which collected data on homophobic and transphobic crimes. The last mechanism is currently suspended as GLEN is in the process of being wound up. The Report provides data for GLEN and ENAR Ireland for 2015 and

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<sup>76</sup> The survey results presented in the EU MIDIS report are “based on weighted data to reflect the selection probabilities of each household and individual based on the sampling design. The weights also account for the differences in the (estimated) size of the target population in each of the countries.” (FRA 2017, 115)

<sup>77</sup> *ibid.*

<sup>78</sup> Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013) 126.

<sup>79</sup> Office for Democratic Institutions and Human Rights, *Preventing and Responding to Hate Crimes: A resource guide for civil society organisations in the OSCE Region* (ODIHR 2009) <<http://www.osce.org/odihr/39821?download=true>> accessed 26 February 2018.

<sup>80</sup> United for Intercultural Action, *Hate Crimes: Why hate crimes require special attention? The Impact of hate crimes on social cohesion* (United against Racism 2013). <<http://www.unitedagainstracism.org/wp-content/uploads/2014/04/InfoLeafletHateCrimeA3.pdf>> accessed 26 February 2018.

for TENI for the period 2014-2016 all of which are primarily administered online and which provide for anonymous self-reporting.

ENAR Ireland received 143 reports relating to racist and religiously aggravated hate incidents occurring in 2015. Some incidents involved multiple offences, thus ENAR Ireland received reports of 157 racist and religiously aggravated offences in total. Of 143 reports, 99 identified the use of racist or religiously aggravated language. In only 35 of the 143 reports did the respondent state that the crime or crimes had been reported to the police.

TENI recorded 46 incidents occurring in Ireland which detailed a total of 57 offences motivated by transphobia between 2014 and 2016. In 38 of 46 reports, transphobic language was identified. Of the 46 incidents, only six were reported to An Garda Síochána, and the Country Report for Ireland notes that the percentage reported has reduced annually. GLEN recorded eleven incidents, each relating to a single offence motivated by homophobia in 2015. Six of the eleven reports stated that homophobic/transphobic language was used in the commission of the offence. Only three of the eleven reports stated that the offence was reported to the police.

In the absence of a regular state or civil society survey addressing hate crime, the jurisdictional Report for Latvia cites two stand-alone civil society reports relating to 2013 and 2014 in which victims identified experiences of hate incidents: the first recorded 18 homophobic and/or transphobic events which included hate incidents, violence and discrimination.<sup>81</sup> The second reported that 38 of 1003 students surveyed reported experiencing racist incidents, none of which had been reported to the police.<sup>82</sup> Finally, the Latvian partner conducted their own online survey in 2016, which found that of 135 foreign students studying in Latvia who participated, 62% had been subject to verbal insults/harassment on the basis of their personal characteristics. The majority of those who had experienced hate incidents had not reported them to police. Most believed their experiences were not serious enough to report. Others reported that they did not trust the police, did not believe that reporting their experience would change anything, or had normalised hate incidents. Victims of physical attacks also mentioned previous attempts to report hate incidents, wherein police rejected their complaint or responded inappropriately, and a belief that the police would be less likely to assist a non-national than a local.<sup>83</sup>

In publishing hate crime data for Latvia for 2016, ODIHR provides details of 5 hate crimes reported by civil society/international organisations, all of which were

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<sup>81</sup> As cited in Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017) 21.

<sup>82</sup> *ibid* 22.

<sup>83</sup> Latvian Centre for Human Rights, *Results of foreign student and migrant survey on manifestations of intolerance in Latvia* (Cilvektiesibas 2016).

<[http://cilvektiesibas.org.lv/media/attachments/10/05/2017/Student\\_survey\\_ENG2016\\_rVmHvwR.pdf](http://cilvektiesibas.org.lv/media/attachments/10/05/2017/Student_survey_ENG2016_rVmHvwR.pdf)> accessed 26 February 2018.

motivated by racism/xenophobia and which are classified by ODIHR as including attacks against property (one), threats (two), and violent attacks against people (two). ODIHR cites one attack against property for 2014 and 2015. In 2014 the attack was racist/xenophobic in character and in 2015 it was motivated by prejudice against Muslims. In 2013, ODIHR states that in respect to Latvia, civil society/international organisations reported one desecration of a Holocaust memorial plaque, four physical assaults motivated by homophobia/transphobia and repeated assaults on a gay man with disabilities. In 2012, civil society/international organisations reported one case of attempted arson with an antisemitic motivation, and two homophobic/transphobic threats. No information was available for 2011.<sup>84</sup>

Although there is no national victimisation survey addressing hate crime in the Czech Republic, hate crime data are routinely recorded by two civil society organisations. In IUSTITIA (the Czech partner to this research) and the Jewish Community in Prague. In IUSTITIA informed us that it gathers data on hate crime generally, while the Jewish Community in Prague gathers data on antisemitic hate crime specifically. The researchers further noted that Jewish Community in Prague recorded a total of 89 cases of violence, threats, harassment or damage to property which were motivated by antisemitism (including anti-Israeli sentiment) occurring between 2011 and 2014.<sup>85</sup>

## **Conclusions**

At the level of individual jurisdictions, there is clearly room for substantial improvements in the methodologies by which official hate crime data is produced. This section has highlighted, in particular, conceptual differences leading to variation in what is recorded as hate crime, shortfalls in the co-ordination of recording protocols across authorities party to the process; quality issues with relevance to shortfalls in training and policy; a dearth of data collection after the point of recording; the particular challenges of recording hate crime where it is addressed by means of aggravated sentencing and where it is conflated with hate speech within aggravated offences. More generally, the section has highlighted the value of a socio-legal approach to illuminating the existence of impactful gaps between policy and practice in respect to the production of official hate crime statistics.

In respect to addressing jurisdictional shortfalls in the quality of hate crime statistics, this Report has highlighted the potential of state crime and victimisation surveys, at least in filling the gaps in our understanding of the prevalence and reporting of hate crime. However, surveys of the general population often

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<sup>84</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Reporting: Latvia* (ODIHR 2017) <<http://hatecrime.osce.org/latvia>> accessed 26 February 2018.

<sup>85</sup> The Jewish Community in Prague, *An Annual Report on Anti-Semitism In the Czech Republic in 2014* (JCP 2015) 4 <[http://old.kehilaprag.cz/index.php?option=com\\_docman&Itemid=276&lang=cs](http://old.kehilaprag.cz/index.php?option=com_docman&Itemid=276&lang=cs)> accessed 26 February 2018.



underrepresent the communities most commonly targeted by hate crime offenders. Surveys focusing specifically on the experiences of minorities have the potential to address this gap, but to date have given little specific attention to the topic of hate crime. Civil society organisations make a valued contribution to our knowledge of hate crime nationally but, in the absence of significant and multi-annual funding, it is difficult for such organisations to consistently produce robust data of the type required to track change over time.

With regard to the potential for evidence informed policy development at EU-level, our findings in this regard support Bondt's 2014 declaration:

“Using statistical data to actually support evidence-based EU criminal policy is far from reality. The availability of high quality comparable crime statistical data is nowhere near the level needed to support and evaluate EU criminal policymaking and guarantee the credibility of evidence-based policymaking at the EU level.”<sup>86</sup>

We have highlighted in particular the methodological variation in the manner in which, across the five jurisdictions of relevance to this research, parties to the criminal justice process record hate crime. These variations are reflected in the broader process of producing official statistics in relation to recorded crime, prosecution and sentencing. ODIHR has emphasised that hate crime recording mechanisms must take account of and be appropriate to individual jurisdictional contexts.<sup>87</sup> Indeed, where differences in hate crime data emanate most fundamentally from different legislative approaches to addressing hate crime, this will necessarily be the case. This does not, however, eliminate the requirement for comparable cross-national data, in particular to inform evaluations of progress in meeting EU-level objectives and directives. In this context, data for this purpose may be more effectively generated in parallel to criminal justice administrative systems, including through the use of EU-wide surveys of minorities in the manner of EU-MIDIS.

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<sup>86</sup> Wendy De Bondt, 'Evidence based EU criminal policy making: in search of matching data', (2014) 20 *European Journal of Criminal Policy Research* 23.

<sup>87</sup> Office for Democratic Institutions and Human Rights, *Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide* (ODIHR 2014) 7.



## **PART 6: Conclusions and Recommendations**

Hate crime is a problem affecting the lives of minoritised communities across Europe on a daily basis. Addressing hate crime through the criminal justice system, while not the only mechanism available to states, is arguably the most direct means of responding to hate crime at our disposal. The effectiveness of punishment in addressing offending behaviour is a matter of debate, but there is ongoing evidence of the potential of alternative approaches such as restorative justice. The Victims' Directive is founded in an appreciation of the needs of victims of crime to have their experiences addressed appropriately by the legal process. It is accepted that the criminal justice process is an imperfect tool, but the flawed nature of the system does not mitigate the requirement of victims of hate crime for access to the established means of addressing issues of social control and infringements of personal safety and security within the state. Failures on the part of the legal process to appropriately address hate crime have deleterious implications for direct victims' trust in the system, but may also reduce their trust in the state and in majority society. These effects also manifest among the minoritised communities which share the characteristics targeted. The detrimental impacts of a failure to appropriately address hate crime through the criminal justice process are therefore experienced at the level of the individual, community and society.

Hate crime legislation has a "symbolic" purpose, emphasising the wrongfulness of hate motivated crimes:<sup>1</sup> in criminalising hate, society is sending a message that it will not tolerate this type of behaviour. Across the five jurisdictions party to this project, this message is sent in different ways due to the construction of legislation, and also its operation. The criminal justice system is, of course, not the only mechanism by which hate crime can be addressed and combated, but it has an important place among the resources at Members States' disposal.

This Report has shown that the extent to which a hate element is recognised by individual actors in the criminal justice process largely depends on first, the legislative approach to addressing hate crime, secondly, the existence of policies on the issue, thirdly, the extent to which these policies are shared across the process, and finally, the extent to which those policies are embedded in practice.

Our analysis of the Lifecycle of a Hate Crime across the five jurisdictions party to this project has identified a number of practices that can embed the capacity to recognise and respond appropriately to hate crime into the criminal justice system, and a number that diminish its capacity in this respect. In this final part of the Report, we summarise and discuss our conclusions, and recommendations to support the

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<sup>1</sup> Phyllis B. Gerstenfeld, 'Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behaviour' (1992) 10 *Behavioural Sciences and the Law* 259, 267.

operationalisation of Article 4 of the Framework Decision across Member States, and progress the EU position on hate crime.

#### **Article 4 in practice: the disappearing of the hate element**

While all partner jurisdictions to this research assert their compliance with the requirements of Article 4 of the Framework Decision, the socio-legal approach adopted in this research has revealed that the implementation of Article 4 across jurisdictions (and the adoption of the recommendations of the Commission to strengthen the Framework Decision) is much more fragmented, and at some stages and for some jurisdictions, deficient.

At the point of recording, this Report has identified divergent practices across jurisdictions, with a minority utilising the “perception test” as recommended by ECRI; a minority making it mandatory for police officers to address whether the case was hate motivated or not; and some still lacking any policy regarding the recording of a hate element. This Report has found that the absence of clear and common recording protocols has deleterious implications for the quality of hate crime statistics and the capacity of both the State and the EU to monitor progress in addressing hate crime through the criminal justice system.

In the following stages of the criminal justice process, disparities widen. At the point of investigation, England and Wales and Sweden have addressed all of the Commission’s recommendations to support the implementation of Article 4. However, neither the Czech Republic nor Ireland have addressed any of the Commission’s Recommendations with respect to the establishment of specialised units, guidelines and training for investigators, and Latvia has established only guidelines. We have found that shortfalls in these regards detrimentally impact the knowledge, comprehension and resources that investigators can bring to bear on evidencing the presence of a hate element.

At the stage of prosecution, this report finds that Ireland and Latvia have addressed none of the Commission’s Recommendations with respect to prosecutorial specialisms, guidelines and training, while only England and Wales have instituted specialist training for prosecutors. We find that the lack of supports available to prosecutions contributes to the idiosyncratic approaches to the prosecution of a hate element in evidence in some jurisdictions.

Enactment of the Recommendations is most limited at the point of sentencing. Specifically, three States have enacted none of the recommendations with respect to sentencing guidelines, data and training, and no state has addressed the recommendation that judges be trained in relation to hate crime. In practice, we have found that the hate element may already have been lost to the court at the stage of prosecution, through the manner in which it is presented in the courtroom,

but it may also simply not be addressed by the judge. This presents two problems: first, the “message element” of the crime is lost; and second, in the context of recidivistic behaviour, it is not possible to track reoffending.

At all stages of the process, what we refer to as the “forward communication of the hate element” is vital to ensuring that slippage and filtering out does not occur. We believe that in order to prevent the “filtering out” or “disappearing” of a hate element, the EU and its Member States should implement the following policies and practices across criminal justice processes.

Haynes and Schweppe have observed that, in the absence of hate crime legislation, the hate element of an offence can be “disappeared” from the criminal justice process.<sup>2</sup> However, even the presence of what might be considered the most robust legislation in operation in the European Union does not necessarily result in the hate element being captured across the process. As Part 4 of this Report has observed, the hate element of a crime is often “filtered out” by the police, the prosecution or judiciary in England and Wales.

### **Requirements at EU level**

The combating of hate crime through the criminal justice system is key to realising a safe society for Europe’s marginalised and minoritised communities, in turn addressing the societal fissures and fractures to which targeted hostility contributes. Chakraborti observes:

“... the value of hate crime laws and their enforcement can be significant, whether in terms of their capacity to express our collective condemnation of prejudice, to send a declaratory message to offenders, to convey a message of support to victims and stigmatized communities, to build confidence in the criminal justice system within some of the more disaffected and vulnerable members of society, and to acknowledge the additional harm caused by hate offences.”<sup>3</sup>

However, the mere presence of such laws on statute books is not sufficient to achieve such impact: such laws must be effective, and appropriately enforced, both, as Chakraborti states, “for individual freedoms and for cohesive communities.”<sup>4</sup>

We assert that four steps are required at an EU level, to ensure that hate crime is addressed at both a community and a national level: first, a common and inclusive

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<sup>2</sup> Amanda Haynes and Jennifer Schweppe, ‘Internationalising Hate Crime and the Problem of the Intractable State: The Case of Ireland’ in Jennifer Schweppe and Mark Walters, *The Globalization of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016).

<sup>3</sup> Neil Chakraborti, ‘Mind the Gap! Making Stronger Connections Between Hate Crime Policy and Scholarship’ (2016) 27(6) Criminal Justice Policy Review 577, 583.

<sup>4</sup> *ibid.*

definition of hate crime should be established across Member States; second, an EU Action Plan on Hate Crime should be introduced; third, FRA should be tasked with executing an EU-wide survey of minoritised communities regarding the prevalence, impacts, reporting and police experiences in reporting the reporting of hate crime; and finally, the mechanisms for monitoring the implementation of EU policies on hate crime should be reviewed with a view to incorporating methodologies which provide insight into gaps between policy and practice. The importance of international pressure cannot be underestimated in regard to advancing jurisdictional progress in addressing hate crime: as stated by the Latvian researchers to the Country Report, “any changes are propelled by some dedicated individuals ... and largely through pressure by international organisations.”<sup>5</sup>

### **A common understanding of hate crime in Europe**

As we have seen, there is no common definition of hate crime across Europe, either formal or informal. Across Member States generally, and across the jurisdictions party to this project specifically, a range of interpretations of the concept of hate crime are in evidence. At this conceptual level, we see key differences in the way that hate crime is understood, which speak, we assert, fundamentally to the different ways in which hate and hostility have manifested historically across the Member States. Perry observes that, across Europe:

“Recent bitter ethnic conflict, and the legacy of Nazism, colonialism, slavery and communism each influence affected countries’ understanding and conceptualisation of and approach to hate crime policy.”<sup>6</sup>

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

“In Germany, hate crimes are considered *politically motivated offences* because they present a threat to the human and constitutional rights of the victim and undermine the democratic, pluralistic directive of the country. In this regard, the German approach towards recording hate incidences is based on an offender-oriented system of classification, which focuses primarily on the political motive of the alleged perpetrator.”<sup>7</sup>

In framing the following discussion, we distinguish between the *conceptualisation* of a hate crime on the one hand, and the *construction* of a hate crime, on the other.

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<sup>5</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>6</sup> Joanna Perry, ‘Evidencing the case for “hate crime”’ in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015) 78.

<sup>7</sup> Alke Glet, ‘The German hate crime concept: An account of the classification and registration of bias-motivated offences and the implementation of the hate crime model into Germany’s law enforcement system’ (2009) *Internet Journal of Criminology* 1. Emphasis in original.

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

"The limits of the federal government's commitment to hate crime data collection are immediately apparent in [the Act] itself. Efforts are constrained by the narrow definition of both the protected groups and the enumerated offences ... Moreover, this brings to mind the problem of inconsistency between reporting agencies. Not all states recognise the same categories of bias in their legislation. Some states do not include gender in their hate crime legislation; some do not include sexual orientation; yet others include such anomalous categories as 'whistle blowers'."<sup>8</sup>

Ten years following the passing of the Framework Decision, in Europe we are faced with the self-same issues regarding hate crime. Throughout this Report, we have highlighted our finding that there remains no single understanding or definition of hate crime either across or within Member States. While there may be an approximation of laws on paper, in practice, the concepts addressed in what are stated to be hate crime laws across the five Member States to this project differ significantly. The findings presented in parts 4 and 5 of this Report support the conclusion that at a European level, there is first a requirement for a single conceptualisation of hate crime, if progress in addressing this common challenge is to be pursued, which is supported and monitored by the EU.

It is beyond the scope of this Report to detail the philosophical and legal differences between harmonisation and approximation of hate crime laws, and what approach the EU should take to this issue. However, we assert that the European Union could usefully adapt the ODIHR definition of a hate crime: that is, that a hate crime is a criminal offence already recognised by the criminal law, which is combined with a hate element. Perry notes that the approach of the OSCE in coming to its definition was to use one which excluded those offences "on which there is no international consensus on their criminalization:"<sup>9</sup>

"For example, while several countries criminalize discrimination, or membership of 'extremist' groups, and include these acts within their national concepts of hate crime, most do not. Similarly, although all European countries criminalize hate speech, to some extent, there is a diverse approach

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<sup>8</sup> Barbara Perry, 'Counting – and Countering – Hate Crime in Europe' (2010) 18(4) *European Journal of Crime, Criminal Law and Criminal Justice* 349.

<sup>9</sup> Joanna Perry, 'A Shared Global Perspective on Hate Crime' (2016) 27(6) *Criminal Justice Policy Review* 610, 619.

to the threshold of 'hate' above which freedom of expression is no longer protected."<sup>10</sup>

Given this, it is most appropriate to define hate crime, at least for the purposes of the legal process, according to what we might refer to as the "lowest common denominator" definition. On this basis, extremism should be conceptualised differently to hate crime; incitement to hatred offences should not be included in the definition; and anti-discrimination measures should equally be excluded.

Once the *concept* has been approved, broad agreement should be reached on the *construction* of such offences, most particularly, the protected groups to which the legislation applies. In this context, scholars have identified that there are three core questions whose relevance transcends the differences and commonalities in the construction of hate crime laws across Member States:

- The range of victim groups which hate crime legislation should protect;
- The formal recognition of the hate element as either part of an aggravated offence or through the sentencing process;
- The extent to which the hate element should be present in the offence – either as a motivation to the crime, bias selection of the victim, or as bias demonstrated through the course of the offence; which includes the question as to whether the crime needs to be wholly or partly motivated by hate.<sup>11</sup>

The consequences of the absence of a common conceptualisation and construction of hate crime are numerous. First, as Perry notes, disparate legislation produces methodological differences with respect to data collection.<sup>12</sup> Second, case law from the European Court of Human Rights evidences – at best – a lack of awareness amongst police officers as to European-level obligations to evidence the hate element of a crime, and appropriately investigate hate crime.<sup>13</sup> At worst, it indicates that the type of "unconscious racism" that was found to permeate policing culture in

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

<sup>11</sup> See, for example, Jon Garland and Corinne Funnell, 'Defining hate crime internationally: issues and conundrums' in Jennifer Schweppe and Mark Walters, *The Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016); Piotr Godzisz, 'Eastern crimes, western theories: Conceptualising the hate crime model in Central and Eastern Europe' (*International Network for Hate Studies*, 22 January 2015) <<http://www.internationalhatestudies.com/eastern-crimes-western-theories-conceptualising-hate-crime-model-central-eastern-europe/>> accessed 24 February 2018; Joanna Perry, 'Evidencing the case for "hate crime"' in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015); Kay Goodall, 'Conceptualising 'racism' in criminal law' (2013) 33(2) *Legal Studies* 215; Jon Garland and Neil Chakraborti, 'Divided by a common concept? Assessing the implications of different conceptualizations of hate crime in the European Union' (2012) 9(1) *European Journal of Criminology* 38.

<sup>12</sup> Barbara Perry, 'Counting – and Countering – Hate Crime in Europe' (2010) 18(4) *European Journal of Crime, Criminal Law and Criminal Justice* 349.

<sup>13</sup> See Part 3 of this Report for a brief analysis of these obligations.

the United Kingdom in the early 1990s following the racist murder of Stephen Lawrence may still represent a challenge for Europe. Third, and perhaps most fundamentally, victims of hate crime across Europe are treated differently across (and sometimes within) jurisdictions when they are a victim of a hate crime.

As we observed in Part 1 of this Report, FRA has elaborated on the need for, and potential form of a uniform definition of, hate crime. It also notes that there should be a shared understanding of what constitutes hate crime across the criminal justice process within jurisdictions, i.e. among police, prosecutors and judges in order to ensure that the hate element of a crime is taken into consideration in a timely fashion and throughout criminal proceedings.<sup>14</sup> We assert that this shared conceptualisation and understanding should not only be present in criminal justice agencies and processes within Member States, but also across the European Union: we further recommend that this conceptualisation be placed at a legislative level across the EU.

#### *Inclusive protection*

We recommend that any shared conceptualisation of hate crime be inclusive across a range of protected categories, and that a presumptive, European-wide definition of categories should apply. We are mindful of the FRA recommendation that hate crime legislation should reflect the range of protected groups identified in the Charter for Fundamental Rights, namely “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.” The characteristics identified in the Treaty for the Functioning of the European Union are, “sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.” Those identified in the European Convention on Human Rights are “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” In terms of those characteristics that are commonly identified across all documents, we see:

**Table 8: Protected characteristics across the EU**

	<b>TFEU</b>	<b>Charter</b>	<b>ECHR</b>
<b>Age</b>	✓	✓	
<b>Any other opinion (other than political)</b>		✓	✓
<b>Association with a national minority</b>			✓
<b>Belief</b>	✓	✓	
<b>Birth</b>		✓	✓

<sup>14</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013)

<<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 February 2018.



<b>Colour</b>		✓	✓
<b>Disability</b>	✓	✓	
<b>Ethnic origin</b>	✓	✓	
<b>Genetic features</b>		✓	
<b>Language</b>		✓	
<b>Membership of a national minority</b>		✓	
<b>National origin</b>			✓
<b>Other status</b>			✓
<b>Political opinion</b>		✓	✓
<b>Property</b>		✓	✓
<b>Race</b>		✓	✓
<b>Racial origin</b>	✓		
<b>Religion</b>	✓	✓	✓
<b>Sex</b>	✓	✓	✓
<b>Sexual orientation</b>	✓	✓	
<b>Social origin</b>		✓	✓

Importantly, in the context of all three documents, the purpose is not to identify those characteristics that are to be addressed in hate crime specifically, rather their identification typically relates to the guarantee of non-discrimination.

We propose that the EU develops a common presumptive list of protected categories based on FRA's recommendation. Member States should be in a position to add to, but not derogate from, this presumptive list, thus allowing, as Perry would advise, for the historically and culturally contingent character of hate crimes.<sup>15</sup>

Allowing for the derogation from the list, or for Member States to develop their own list of characteristics, would have two drawbacks: first, as this Report has outlined, there are current challenges with respect to the quality and comparability of jurisdictional hate crime data. The exclusion of a group's experiences from recorded hate crime locally may undermine their case for protection at the level of the Member State; second, even where there is evidence of targeted victimisation against a group, support for legislative protection may be impacted by the degree of institutional prejudice to which they are subject, paradoxically placing the greatest obstacles to protection in the path of those likely to be in most need.<sup>16</sup> In the Swedish and Czech Reports, some participants qualified that they would be open to broadening the characteristics protected in the legislation if there was an evidence base for such a proposition, "if it could be shown that unprotected groups are being

<sup>15</sup> Barbara Perry, *In the Name of Hate* (Routledge 2001).

<sup>16</sup> Seem for example, Bengi Bezirgan, 'The Problematisation of Hate Crime Legislation in Turkey: The Re-emergence of Legitimate Victims' in Jennifer Schweppe and Mark Walters, *The Globalisation of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016); Piotr Godzisz and Dorota Pudzianowska, 'Do Some Identities Deserve More Protection than Others? The Case of Anti-LGB Hate Crime Laws in Poland' in Jennifer Schweppe and Mark Walters, *The Globalisation of Hate: Internationalizing Hate Crime?* (Oxford University Press 2016).



attacked.”<sup>17</sup> In the Appendix to the England and Wales Report produced for this research, it is stated that, in determining protected characteristics, we should first, ask: what social groups are experiencing targeted violence?; second, are such groups exposed to an increased risk of enhanced harm?; third, do these harms undermine societal commitments to the principles of equality, dignity and respect of others?; and finally, is re-criminalisation a necessary means of aiding the prevention of the conduct?<sup>18</sup> We are also mindful of Hall’s words of caution, where he states that overly open-ended definitions can dilute the relevance of the construct:

“at some point you have to stop including categories in your definition of hate crime, otherwise the term will cease to have meaning and will simply become coterminous with crime in general.”<sup>19</sup>

If FRA’s recommendation is adopted, a number of issues are worth considering. First, the principle of certainty requires that those categories of groups that are too vague for the purposes of the criminal law be excluded. For example, references to groups of people experiencing targeted victimisation relating to their “genetic features”, “political or any other opinion” and “social origin” are probably too amorphous or vague for the purposes of the criminal law.<sup>20</sup> Second, while all three documents used the dated term “sex” we prefer the more accurate terminology utilised in the recent Victims’ Directive, that is “gender, gender identity, and gender expression.” Those who are intersex may not be protected under these terms, so including “sex characteristics” as a term should also be considered. The terms “race” and “racial origin” are equally problematic, but are in common usage as a general descriptor in legislation. We note that age is problematized from a scholarly perspective as potentially worthy of inclusion in hate crime legislation, although a body of empirical research documenting age as a ground for bias motivated crime specifically has yet to be amassed. This is something which could usefully be addressed by FRA on a European-wide level.

Drawing together those groups most commonly identified across the TFEU, the Charter on Fundamental Rights, and the Convention, with those which have been evidenced by FRA as experiencing targeted victimisation, a list of characteristics could be developed that, we believe, could be presumptively identified by the EU for inclusion under hate crime legislation. Member States should be advised to pay particular attention to forms of anti-religious hatred which are prevalent across Europe today, particularly, anti-Muslim and antisemitic hate crime, as well as hatred

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<sup>17</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>18</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).

<sup>19</sup> Nathan *Hate Crime* ( 2nd edn, Routledge 2013).

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

towards those ethnic minority groups which have a long history of oppression, particularly members of the Gypsy, Roma and Traveller communities. Research by FRA has also uncovered extensive and pervasive forms of anti-LGBTI abuse across Europe which must be addressed.<sup>21</sup> Finally, we recommend that all ECRI GPRs should explicitly relate to all forms of intolerance, defined in accordance with the proposed inclusive definition, rather than be limited to racism and xenophobia.

### **EU Action Plan on Hate Crime**

In its Opinion on the Framework Decision, FRA encourages Member States to consider setting up national strategies or action plans aimed at addressing hate crime.<sup>22</sup> We believe that a similar plan should be developed at an EU level, which addresses not only the role that the criminal law plays in addressing hate crime, but also develops evidence-based policies and recommendations that can be adopted and adapted across the EU. This EU Action Plan on Hate Crime could usefully draw on the framework recommended by ECRI, and thus provide an exemplar for National Plans. In particular, the Action Plan should include:

- EU wide monitoring and recording of hate crime;
- Actions for improved reporting;
- Development of guidance policies for police, prosecutors, and judges on addressing hate crime;
- Development of effective criminal justice interventions that address the underlying of causes of hate crime;
- Victim support initiatives;
- Education as prevention.

Such a plan could usefully fall under the work of the EU High Level Working Group on Hate Crime, and indeed some of the recommendations made here are already being addressed by that group.

### **EU analysis of the prevalence and impacts of hate crime**

Crime and victimisation surveys offer particular advantages with respect to generating comparable cross-national data within the European Union. Their design is not restricted by national legislative provisions, which not only differ with respect to their construction of hate crime, but which also in some cases conflate hate crime,

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<sup>21</sup> European Union Agency for Fundamental Rights, 'EU LGBT Survey: European Union lesbian, gay, bisexual and transgender survey: Main results' (FRA 2014) <<http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results>> accessed 12 January 2018.

<sup>22</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013) 14. <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 February 2018.

criminal acts of discrimination, and incitement to hatred. Such a survey might usefully draw on the international crime classifications as a basis for differentiating between different types of hate motivated criminal behaviour.

Given that the targets of hate crime are often, although not always, numerical minorities, who are moreover subject to discrimination, and in some cases social stigma, sampling will always be a challenge in such endeavours. FRA notes:

“... we need to develop and adopt survey methods that capture the experiences of persons belonging to vulnerable groups, including those categorised as ‘hard to reach’. ‘Hard to reach’, ‘elusive’ or ‘hidden’ populations are socially disadvantaged and disenfranchised groups that are difficult to access, engage and retain in research cost efficiently and in large numbers.”<sup>23</sup>

The approach adopted by the Crime Survey in England and Wales (which samples the general population) to producing an adequate sample size to analyse data relating to hate crimes, that is by combining data from two or three years, is effective but does not permit that data be disaggregated by year. An alternative approach is to focus resources on sampling protected and/commonly targeted groups. The FRA Technical Report for the recently published EU MIDIS II Survey presents details of a variety of methods which were used in that case to produce an adequate sample of hidden and hard to reach populations. It makes it clear that it is feasible to sample minority groups, but that national agencies are likely to require both financial and technical support to obtain statistically robust samples. Nonetheless, we perceive this to be a necessary investment if not only the prevalence and impact, but also the use and effectiveness of criminal justice interventions to addressing hate crimes is to be monitored.

Given the investment of resources that would be required to generate an adequate sample of commonly targeted communities, we note that it may be more cost effective on a European scale to gather data on hate crime via a crime and victimisation module within a larger pan European survey addressing minority experiences of discrimination in the manner of MIDIS II. Online surveys offer a more cost effective alternative to interviewer-administered or telephone-assisted surveys, although they will not produce statistically representative results. However, even where this is an objective of the overall research, an online alternative to the main data collection instrument may be required to be inclusive of all communities affected by hate crime. For example, FRA justifies the use of an online survey to gather data on the experiences of Europe’s LGBT population with reference to the

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<sup>23</sup> *ibid.* (2017). EU MIDIS II Technical Report (2017) 7.

sensitivities involved in recruiting potential participants with this characteristic by any means other than volunteer sampling:

“Online surveys also guarantee anonymity. This allowed a broader spectrum of the LGBT population to be reached compared with more traditional approaches, for example ‘hard-to-reach’ or ‘closeted’ LGBT populations. Full anonymity, privacy and confidentiality, which is guaranteed to the respondents, helped obtain reports of sensitive or negative experiences, such as criminal victimisation. The online survey methodology also helps eliminate bias, which could have been introduced by telephone or face-to-face interview approaches when dealing with very sensitive and personal questions, such as sexual orientation, gender identity or experiences of criminal victimisation.”<sup>24</sup>

With respect to the use of non-probability sampling methods, ECRI GPR Number 4, on *National surveys on the experience and perception of discrimination and racism from the point of view of potential victims*, recognises that in the absence of an appropriate sampling frame “alternative means of identifying and reaching the pertinent respondents will have to be found.”<sup>25</sup> Whatever its form, the need for, and aims of, such a survey should be incorporated into the EU Action Plan on Hate Crime.

### **Evidence informed assessment**

As we have already stated, the European Commission published its Report on the implementation of the Framework Decision in 2014, which outlined the manner in which – at least on paper – Member States were compliant with the provisions of the Decision.<sup>26</sup> In that Report the Commission clearly states its intention to engage in “bilateral dialogues” with Member States to ensure full and correct transposition of the Framework Decision. In Part 4 of this Report we have seen, across the jurisdictional research that informs this Report, that while States may comply with the terms of the Framework Decision on paper, empirical research into the operationalisation of the provisions, as presented herein, demonstrates that the policy has not been integrated into practice comprehensively and in every jurisdiction. It is important that, where States assert their compliance with the Directive, that this assertion is supported by empirical evidence, which is independently generated where possible.

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<sup>24</sup> FRA, *EU LGBT Survey – Survey Methodology Q and A*, available <<http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results/survey-methodology-q-and-a>> accessed 12 February 2018.

<sup>25</sup> European Commission on Racism and Intolerance, *ECRI General Policy Recommendation Number 4: National surveys on the experience and perception of discrimination and racism from the point of view of potential victims* (ECRI 1998).

<sup>26</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>> Emphasis added.

### **Member State Requirements**

In addition to policies and practices that we believe should be adopted at a European level, there are additional requirements that we believe need to be implemented at a jurisdictional level. The remainder of this section will address these issues.

FRA recommends that legislation be adopted at an EU and national level that obliges Member States to collect and publish data pertaining to hate crime, which would include data on:

- The number of hate crimes reported to and recorded by the authorities;
- The number of convictions of offenders;
- The grounds (i.e. personal characteristics of the victim) upon which these offences were found to be discriminatory;
- The punishments imposed on offenders.

This, FRA suggested, should be accompanied by policies which would seek to ensure that hate crime is effectively investigated and prosecuted. These data should, we believe, also include the number of prosecutions taken.

FRA also addressed the issue of hate crime legislation:

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

Courts rendering judgments should address bias motivations publicly, making it clear that these lead to harsher sentences.”<sup>27</sup>

We fully endorse the opinions of FRA in this regard, and, as we have stated above, suggest that these recommendations be supported by an inclusive EU conceptualisation of hate crime, in particular, drawing clear delineations between incitement to hatred and related offences, criminal discrimination, and hate crime.

### **National Action Plans on hate crime**

In its Opinion on the Framework Decision, FRA encourages Member States to consider setting up national strategies or action plans aimed at addressing hate

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<sup>27</sup> European Union Agency for Fundamental Rights *Making hate crime visible in the European Union: acknowledging victims' rights* 11 <<http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>> accessed 24 February 2018.

crime.<sup>28</sup> As we have seen in this Report, only two of the partners to the research reported that such a national action plan or strategy was in place.

We recognise the important work of national plans which address the needs of individual minoritised groups, such as migrants, members of the Roma Community, and the LGBTI community. However, we believe that Member States should have national plans which further address hate crime as an experience common to minoritised communities, and one which requires a joined up response. Such plans should be developed in partnership with civil society organisations, and recognise and provide for both intersectionality and variations in the experiences of diverse communities.

We believe that national plans on hate crime would further the objective of ensuring a coherent and comprehensive understanding of the harms of hate, as well as providing opportunities for contrasting and publicising official and unofficial data on hate crime. Such strategies offer a platform for situating criminal justice responses within the context of a broader approach to addressing hate crime that should include educative and preventative measures. These national plans should be informed by the proposed EU Action Plan on Hate Crime.

### **Jurisdictionally appropriate legislation**

In its Opinion on the Framework Decision, FRA has suggested that EU Member States “could assess the extent to which the enhancement of penalties can be applied as a means of ensuring that bias motives are taken into consideration in a timely fashion and throughout criminal proceeding.”<sup>29</sup> We believe that this suggestion should be made mandatory, placing on all Member States an obligation to frame their criminal codes and legislative statements to include a requirement that the hate element of a crime be considered an aggravating factor, preferably by way of aggravated offences, or alternatively through a general penalty enhancement provision which can attach to ordinary offences at the point of prosecution.

Across all Member States party to this research, participants highlighted deficiencies in existing legislation to a greater or lesser degree. In Latvia, for example, the requirement that “substantial damage” was inflicted under section 150 was a source of concern for some participants, with stakeholders stating that the requirement “hinders and causes problems with the applications of the provision.”<sup>30</sup> However,

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<sup>28</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013) 14 <<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 February 2018.

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

<sup>30</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

despite (or perhaps because of) the fact that section 48 of the Criminal Code had never been utilised, and conceptual slippage/ambiguity among interviewees, the vast majority of participants declared the current legislative regime to be broadly satisfactory. Not one interviewee addressed shortcomings with section 48: the provision was simply not something they considered relevant.

In the Czech Republic, the vast majority of judges, prosecutors and attorneys were of the view that hate crime laws were adequate, and that “all the hate crimes with which they had come into contact were susceptible to prosecution and sentencing.”<sup>31</sup> Those who suggested amendments to the Criminal Code referred to amending the range of protected groups, amendments to specific sections of the Code, and some procedural issues.

In Sweden, a number of participants expressed frustration with the proof requirements attached to the aggravating sentence provisions, but prosecutors, judges, and defence lawyers were divided as to whether a new aggravated offence should be introduced: those in favour were of the view that it would be easier for the police and the general public to know what a hate crime was, and it would be easier to use in court; those opposing the introduction of such a provision stated that it would be difficult to create one specific provision since hate or bias motivation could be a factor in so many different situations. The possibility of aggravated versions of multiple existing offences was not addressed as an option.

Having spoken of the disappearing of the hate element at various stages of the process, the vast majority of interviewees in Ireland were of the view that the introduction of legislation was the only means of ensuring that the hate element of a crime was addressed from the point of recording to the point of sentencing. Adding support to the perspectives of interviewees in Ireland, in England and Wales, both aggravated offences and sentencing penalty enhancement provisions are in operation and thus the partners were able to compare and contrast the enforcement of these different provisions. It was clear that the aggravated offences resulted in more prosecutions and higher conviction rates. Significantly, the partners reported that hate crimes that fell outside of the aggravated offences tended to be treated less seriously by the authorities, resulting in the hate element being filtered out of the criminal process more frequently.

The England and Wales Report was also able to compare the enforcement of different models of hate crime law, the first involving a “demonstration of hostility” and the second including “motivation of hostility”. Few cases were prosecuted and convicted under the motivation provisions, with the vast majority of cases being

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<sup>31</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

proven in court via the use of the “demonstration of hostility” test. The partners recommend that the demonstration of hostility test be maintained but that a different model of hate crime replace the motivation test, based on a group selection model of law. This would involve the inclusion of a “by reason” test, meaning that any offence committed by reason of the victim’s protected characteristic would be classified as an aggravated offence. This, they argue, would particularly reduce the problems faced by prosecutors when prosecuting disability hate crimes.

Comparisons between jurisdictions showed that where aggravated offences are introduced, these tend to be better understood, operationalised, and recorded across criminal justice processes. Member States should be aware of these differences, and understand that additional data collection processes and policies may be required where an enhanced sentencing approach is taken.

It must also be stated that simply amending a country’s criminal code to comply with Article 4 of the Framework Decision will not automatically result in the hate element of a crime being unmasked, or prevent it from being “disappeared” or “filtered out” as it traverses the criminal process. Latvia is fully compliant with its legislative obligations under Article 4 of the Framework Decision, yet not one participant to the research could recall a case being addressed under the relevant provisions. Similarly, the Swedish Country Report observes that the issues with the current legal framework in that jurisdiction are not due to the legislation “but rather its implementation.”<sup>32</sup> In the absence of a common understanding of hate crime, which is embedded across the system through training, compliance will remain “on paper” and be absent from practice.

### **Specialisms in investigation and prosecution**

In its Opinion on the Framework Decision, FRA has suggested that EU Member States “could consider the benefits of setting up specialised units”, or use other approaches such as community policing to address and deal with hate crime across a range of different groups of victims.<sup>33</sup>

Where dedicated units are established for the prosecution and investigation of hate crime, the additional time that is required to adequately evidence that element, as well as to address the needs of victims and their rights under the Directive, can be

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<sup>32</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>33</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013) 14

<<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 February 2018.



ringfenced. We have seen in this Report that where such specialist units exist in policing and in prosecution, the hate element of a crime is more rigorously assessed and addressed through the criminal justice process. In Sweden, we saw that prosecutors who worked with police from specialised hate crime units were “much more satisfied with police investigations” than those prosecutors who had worked with regular police. Contrast this with the position in Ireland, where the Country Report notes that the priority given to a hate element at prosecution stage will depend “on the individual approach taken by the prosecutor.” We observed this individualistic treatment of hate crime at a number of key stages in the process and across a number of jurisdictions. In such scenarios the recognition of the hate element and its treatment are dependent on individuals within the process: where they lack the skill or training to do so, the hate element disappears.

We recommend the introduction of regionalised specialist units for the investigation and prosecution of hate crime which are adequately resourced and for which dedicated training is provided. Although they are found to enhance the quality of the system’s response once identified, the recognition of hate crime cannot solely rely on specialised units. It is vital first responders, and those who record crime at the initial stages, are appropriately trained to recognise hate crime and ensure that hate element is adequately recorded and communicated forward. The Country Report for Ireland finds that where the “perception test” is combined with a mandatory question as to whether the crime was hate motivated, recorded hate crime figures rise. That said, as the Irish case proves, in the absence of any policies or training supporting these policies, the recording of a hate element may have little effect beyond that point.

### **A common understanding of hate crime across the criminal process**

In its opinion on the Framework Decision, the European Union Agency for Fundamental Rights (FRA) notes that there should be a shared understanding of what constitutes hate crime across the criminal justice process, i.e. on the part of police, prosecutors and judges within a jurisdiction in order to ensure that the hate element of a crime is taken into consideration in a timely fashion and throughout criminal proceedings. Thus, as with our proposal that a common conceptualisation of hate crime be established across the EU, it is necessary for each Member State to have a definition of hate crime which is shared and operationalised across the criminal process. This was recognised by the Commission in its Implementation Report on the Framework Decision where it stated:

“The exchange of information and good practices by bringing together law enforcement officials, prosecutors and judges, civil society organisations and other stakeholders can also contribute to better implementation.”<sup>34</sup>

In the Swedish Country Report, the need for this common understanding across the process was highlighted by the obstacles identified by interviewees to applying the legislation:

“All defence lawyers and prosecutors agree that the main problem lies in the implementation of the legislation on all levels in the judicial system, from the police to the courts.”<sup>35</sup>

Similarly, in the Czech Report it is stated:

“Any shortcomings noted [by judges] tended to concern how [laws][are used by actors in the criminal justice system.”<sup>36</sup>

Researchers for the Irish Report noted:

“Although the majority of criminal justice professionals (that is legal practitioners and [police]) interviewed for this research were of the view that if a hate element is established in a case, it should aggravate the penalty imposed, [the] inconsistency in their definitions and understandings of hate crime as a construct was evident.”<sup>37</sup>

We argue that to establish a clear legislative position across Member States, the legislative statement must be supplemented by training and policies across the criminal process which support its consistent and accurate operationalisation. While we have recommended the establishment of specialist units, it is vitally important that such training is interdisciplinary in nature, and shared across police, prosecutors and judges. Article 25(1) of the Victims’ Directive places an obligation

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<sup>34</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>> Emphasis added.

<sup>35</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

<sup>36</sup> Václav Walach, Vendula Divišová, Klára Kalibová and Petr Kupka, *Lifecycle of a Hate Crime: Country Report for the Czech Republic* (ICCL 2017).

<sup>37</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

on States to give specialist training to all officials likely to come into contact with victims of hate crime, including police officers and court staff.<sup>38</sup>

Across all country reports, the value of, and need for, training for all criminal justice professionals across the criminal process was highlighted. The vast majority of all participants addressed training as something which would be both valuable to them in their own understanding of the issues, but also to other actors across the process:

“Six of seven prosecutors consider training necessary and helpful ... Five of the seven interviewed judges believe that special training would improve proceedings in hate crime cases ...”<sup>39</sup>

“Collectively, the participants highlighted the need for awareness raising, education, and policies right through the criminal process to ensure that the hate element of the offence is not disappeared”.<sup>40</sup>

“Recent training of all CPS lawyers on disability hate crime has helped to improve the prosecution of disability hate crime. The vast majority of CPS interviewees spoke of the usefulness of recent training programmes in this regard, which, it was asserted, had made many prosecutors reconsider when targeted abuse will amount to a demonstration or motivation of disability hostility.”<sup>41</sup>

Underscoring the necessity of training to embedding policy, in Latvia, “all the interviewed police officers indicated that guidelines would be necessary and very helpful in hate crime investigation ...”<sup>42</sup> This despite the fact that there are policies in existence in that jurisdiction. This finding speaks to the need for any policy to be accompanied by across the board training: where criminal justice professionals are unaware of existing policies, they are meaningless.

Judges were more divided on the question of the value of training. In Sweden, a majority of judges did not see the need for any special training for judges concerning hate crime, though they did suggest that prosecutors and police officers might need

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<sup>38</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013) 16

<<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 February 2018.

<sup>39</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>40</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>41</sup> Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017) 172.

<sup>42</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

education in these matters. Conversely, in Latvia, judicial participants were of the view that guidance manuals or training materials should be developed to include case law from the European Court of Human Rights, as well as case law from other jurisdictions. Judges from the Czech Republic were clearly opposed to the production of a manual, but half of the participants were open to having training in the area of hate crime and extremism. In Ireland, the Chief Justice declined to permit judges to be approached as potential participants.

Any training or policies developed, as we noted, should not only detail the manner in which a hate crime should be investigated, prosecuted, and sentenced, but also seek to sensitise all relevant individuals to the direct and indirect impacts of hate crime. This latter element, which would involve the sensitisation of criminal justice practitioners across the process to the impacts of hate crime, was highlighted as a requirement in the Irish Country Report:

“... the most common issue that [police] stated should be included in training was the human impact of hate crime. This, [police] felt was required not only to ensure members of the force were aware of the potential impacts of the crime on its victims, but also to raise awareness more generally of the phenomenon, as well as ensuring that it is appropriately recognised during court proceedings.”<sup>43</sup>

This training should be provided across the criminal process, utilising shared definitions and materials. Further, where specialist units for the investigation and prosecution of hate crime are present, training should be delivered collectively allowing for the sharing of perspectives, requirements, and understandings:

“A significant number of interviewed judges, prosecutors, police officers and defence counsel support the need for training, including multi-disciplinary training that would bring together the police, prosecutors and judges.”<sup>44</sup>

The utility of guidelines and guidance manuals in this context was supported, particularly in jurisdictions in which there are a small number of hate crime cases:

“Guidance manuals are also seen as a helpful aid.”<sup>45</sup>

In some jurisdictions, participants pointed to similar training processes in other prioritised areas which could be replicated in the context of hate crime:

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<sup>43</sup> Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

<sup>44</sup> Anhelita Kamenska, *Lifecycle of a Hate Crime: Country Report for Latvia* (ICCL 2017).

<sup>45</sup> *ibid.*

“One judge highlighted that systematic training about these issues would be needed, similar to the regular training on other types of crimes, such as human trafficking.”<sup>46</sup>

In the absence of shared understandings of hate crime across a jurisdictional system, we believe that the hate element of a crime will be inevitably “disappeared” and “filtered out” through the process. We further believe that such a shared understanding will not be possible in the absence of clear policies and guidelines.

### **Victim support through the criminal process**

As we have noted, the Victims’ Directive places specific obligations on Member States to address the particular needs of victims of hate crime through the criminal process, from the point of recording through to the trial and sentencing. In Sweden, which has the most comprehensively developed victim support processes and services, and exceeds the requirements of the Directive, the authors of the Country Report stated that there was agreement across all interviewees that the value of the injured party counsel to victim support could not be emphasised enough. Contrast this, for example, with the experience of victims in Ireland, where the partner clarified that only one of the 17 victims interviewed had accessed any victim support services and this individual had learned of the service independently of their engagement with the criminal justice system.

The research partner for Sweden concludes:

“We would recommend that all victims of bias-motivated crimes should be seen as entitled to legal representation in the form of an injured party counsel. It is in the best interest of the victim and also, we would like to think, in the best interest of the legitimacy of the judicial system. A victim who feels safe in the legal process is a victim who will continue to believe that their rights are taken seriously.”<sup>47</sup>

The implementation of the Victims’ Directive goes some way to promoting and protecting the rights of victims, but we see where the criminal justice process properly supports and operationalises the rights of victims, their experience is more likely to be a positive one. In the absence of appropriate implementation and resources, victims may be revictimised by the criminal process. While the provision of legal representation for all victims of crime is not appropriate across all jurisdictions, victim support services should be fully operationalised to ensure victims of crime are protected in the process.

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<sup>46</sup> *ibid.*

<sup>47</sup> Görel Granström and Karin Åström, *Lifecycle of a Hate Crime: Country Report for Sweden* (ICCL 2017).

### **Data collection by state and civil society organisations**

International organisations such as ECRI, CERD, the UN HRC and the OSCE look to data collection mechanisms, as a means of promoting approximation of laws on hate crime:<sup>48</sup>

“The argument for evidencing the nature and volume of hate crime has been repeatedly made by the OSCE and FRA. The European Commission against Racism and Intolerance (ECRI) has similarly focused on the need to collect data on ‘racist violence’ and the UN Human Rights Council and Committee on the Elimination of Racial Discrimination (CERD) have made similar calls.”<sup>49</sup>

As has been recognised by all international organisations who have spoken to this issue, including CERD, the OSCE, ECRI, and FRA, the collection and publication of comprehensive data on hate crime across all Member States is vitally important. FRA suggests that EU Member States should, on an annual basis, collect and publish data on hate crime.

In its Opinion on the Framework Decision with special attention to the rights of victims of crime, FRA states that Member States are encouraged to take measures to facilitate the reporting of hate crime, and to encourage victims and witnesses to report such crimes.<sup>50</sup> FRA highlights that trust in police is a major issue in the context of hate crime, which impacts on victims’ rights under Article 47 of the Charter to have access to criminal justice. It particularly suggests that Member States should work with civil society organisations, national human rights institutions, equality bodies, and ombudsperson institutions to “ensure efficient outreach” and encourage reporting.<sup>51</sup>

More specifically, FRA recommends that Member States should encourage and fund victimisation surveys which include questions on experiences of hate crime which can “look into the different forms and impact of hate crime victimisation, as well as the effectiveness of measures taken to address hate crime and to provide victims

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<sup>48</sup> See, for example, Joanna Perry, ‘Evidencing the case for “hate crime”’ in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015); Michael Whine, ‘National Monitoring of Hate Crime in Europe: The Case for a European Level Policy’ in Jennifer Schweppe and Mark Walters (eds) *The Globalisation of Hate: Internationalising Hate Crime?* (Oxford University Press 2016).

<sup>49</sup> Joanna Perry, ‘Evidencing the case for “hate crime”’ in Neil Chakraborti and Jon Garland, *Responding to Hate Crime: The case for Connecting Policy and Research* (Policy Press 2015) 72.

<sup>50</sup> European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime* FRA Opinion 02/2013 (European Union Agency for Fundamental Rights 2013)

<<http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>> accessed 24 February 2018.

<sup>51</sup> *ibid.*

with assistance and support.”<sup>52</sup> It suggests that where such surveys are conducted, efforts should be made to include a booster sample of specific groups in the population to ensure that the experiences of those most commonly targeted as victims of hate crime are captured in the data.

Our comparative analysis underscores the importance, not just of recorded crime data, but of data relating to other stages in the process to assessing how the lifecycle of a hate crime progresses through the system. As outlined in the Report for England and Wales, for example, it is possible to compare the number of prosecutions and the percentage of convictions, to the number of police recorded hate crimes, thus tracking the number of hate crimes that fall out of the system (sometimes referred to as the “justice gap”). More generally disaggregated data on investigation and prosecution outcomes can identify how crimes with a hate element are being disposed of. Equally, sentencing data are vital to our understanding of the manner, and the consistency with which the hate element is being treated at the point of sentencing. The Report for England and Wales emphasises the value of such data to post-conviction responses to offenders. On this basis, we would include a requirement on states to collect and publish data on the investigation outcomes for crimes with a hate element, the number of crimes prosecuted by authorities and the percentage of these that result in conviction *and* a penalty enhancement, as well as sentencing data. FRA also recommends that hate crime data be broken down by, *inter alia*, gender, age, and the grounds on which the offence was found to be discriminatory: we further recommend that it be broken down by offence type.

Finally, we believe that in parallel to official reporting processes, Member States should consider financially resourcing third party monitoring processes, which allow civil society organisations to assist in shining a light on the “dark figure” of hate crime, particularly in jurisdictions in which victims of hate crime report to the police in low numbers, or where police recording practices are poor. Schweppe and Haynes have explored the potential form of such third party monitoring processes, and designed a system which can be adopted across a range of identity groups and jurisdictions.<sup>53</sup> They emphasise that, in order to allow the survey to speak to national data collection processes, as well as evidencing the experience of victims of hate crime, such surveys should comply with EU data protection regulations.

## **Conclusion**

This project examined the lifecycle of a hate crime across five EU jurisdictions. The research has documented the different approaches taken by these jurisdictions to identifying, investigating, prosecuting and sentencing hate crimes. This comparative

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

<sup>53</sup> Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016).

analysis has revealed a number of commonalities in practice, as well as key differences in the approach taken to addressing this type of offending. The research identified good practices, primarily but not exclusively, in those jurisdictions with the most established detailed policies and guidelines, supported by a body of legislation, aimed at addressing hate crime. The law has an important declaratory function to play in addressing hate crime as it symbolises a country's commitment to challenging prejudice and discrimination, while simultaneously upholding the rights of all groups of people to be free from targeted violence and abuse. The value of hate crime legislation, framed by a national action plan, should not be underestimated.

Yet even jurisdictions with developed frameworks were not without limitations in their responses to hate crime. The research identified opportunities for the “filtering out” of hate crimes throughout the criminal justice processes in all jurisdictions. The hate element dropped out of the system where the police failed to gather sufficient evidence of the hate element, where prosecutors failed to present evidence in court, and where judges failed to consider the hate element at sentencing. Even where the courts had specific sentencing guidelines for hate crime, it was possible for the hate element to be neglected by the court. Deficiencies in the treatment of hate crime were particularly associated with inadequate resourcing, a lack of specialist prosecutors, and shortcomings in presenting the hate element at prosecution; poor communication between authorities; a lack of training; and the fundamental issue of the construction of legislative provisions, or the lack thereof. Ultimately, variations in jurisdictional approaches were also found to reflect differences at the level of how hate crime itself is conceptualised.

This comparative analysis of the Lifecycle of a Hate Crime has demonstrated that although the Framework Decision was implemented by most Member States on paper, the operational realities uncovered through socio-legal research speak to the need for significant improvements to the prosecution and sentencing of hate crime across the EU. If this is to be achieved, this Report concludes that the EU must move to legislate to provide a common definition of hate crime that can be used throughout Europe, and be supported by an EU-wide Action Plan on hate crime that fosters improved monitoring, more expert justice practitioners and specialist training across institutions, as well as the collection of comparable hate crime data across the EU. Only then can we ensure that all Member States of the EU are effectively tackling hate crime and supporting the needs of victims.





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