

LIFECYCLE OF A HATE CRIME

COUNTRY REPORT FOR IRELAND

Amanda Haynes & Jennifer Schweppe

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FOREWORD

The following work presents, in detail, the findings of in-depth primary and secondary research conducted over two years tracing the *Lifecycle of a Hate Crime* within selected EU Member States. The research was undertaken in five jurisdictions within the EU - Ireland, England and Wales, Latvia, the Czech Republic, and Sweden in which contrasting approaches to the prosecution and punishment of 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 may be limited with measures to tackle only inchoate offences such as prohibitions on hate speech or incitement to violence. 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 the differences in both victims’ and offenders’ experiences of the criminal justice process. 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 as set out here will 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 work is accompanied by information for judges and prosecutors and by a detailed comparative analysis of the situation across the five selected jurisdictions.

FOREWORD (CONTINUED)

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

- Hate and Hostility Research Group, University of Limerick (Ireland)
- 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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We would also like to thank the organisations who assisted us with this research project, the Probation Service, An Garda Síochána, the Garda Information Services Centre, and the Crime and Justice Statistics Section of the Central Statistics Office. We would most particularly like to thank Dr Gurchand Singh, Head of Analysis at An Garda Síochána, Caroline Copeland of An Garda Síochána, and Gerry McNally of the Probation Service for their enthusiasm in facilitating this research.

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We would also like to thank Dr Amy Erbe Healy for providing us information on the European Social Survey. We would finally like to express our enormous gratitude to our ever-efficient and unflappable research assistant, Niamh Dillon.

GLOSSARY

- An Garda Síochána:** Ireland's National Police Service.
- CERD:** The Committee on the Elimination of All Forms of Racial Discrimination.
- CPD:** Continuing Professional Development.
- CPS:** Crown Prosecution Service.
- CSO:** Central Statistics Office.
- Dáil:** The Dáil, the lower house of the Houses of the Oireachtas, the national parliament.
- DM:** Discriminatory motivation.
- DPP:** Director of Public Prosecutions.
- ECRI:** European Commission against Racism and Intolerance.
- ELO/LGBT Officer:** Ethnic Liaison/Lesbian, Gay, Bisexual and Transgender Police Officers.
- ENAR Ireland:** European Network against Racism Ireland.
- EUFRA:** European Union Agency for Fundamental Rights.
- EU-MIDIS:** European Union Minorities and Discrimination Survey.
- GISC:** Garda Information Service Centre.
- GRIDO:** Garda Racial, Intercultural and Diversity Office.
- GLEN:** Gay and Lesbian Equality Network.
- GVLO:** Garda Victim Liaison Offices.
- HHRG:** Hate and Hostility Research Group.
- LGBT:** Lesbian, Gay, Bisexual, Transgender.
- MO:** Modus Operandi.
- NCCRI:** National Consultative Committee on Racism and Interculturalism.
- NGO:** Non-Governmental Organisation.
- Nolle Prosequi:** The dismissal or termination of legal proceedings.
- ODIHR:** Office for Democratic Institutions and Human Rights.
- Oireachtas:** The parliament of Ireland, consisting of the President, the Dáil Éireann, and Seanad Éireann.
- OSCE:** Organisation for Security and Co-operation in Europe.
- PULSE:** Police Using Leading Systems Effectively.
- STAD:** Stop Transphobia and Discrimination.
- TENI:** Transgender Equality Network Ireland.
- UNCERD:** United Nations Convention on the Elimination of All Forms of Racial Discrimination.
- UPR:** Universal Periodic Review.

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EXECUTIVE SUMMARY

This research is the Irish report of a five jurisdiction study which seeks to understand the Lifecycle of a Hate Crime as it navigates through the criminal justice process. The other partners to the research are the Czech Republic, Latvia, Sweden, and England and Wales. The project adopted the definition of a hate crime as promulgated by the Organisation for Security and Co-operation in Europe (OSCE), that is:

“... criminal acts committed with a bias motive. It is this motive that makes hate crimes different from other crimes. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence. The term “hate crime” or “bias crime”, therefore, describes a type of crime, rather than a specific offence within a penal code. A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias or prejudice. The term describes a concept, rather than a legal definition.”¹

The purpose of this research was to understand and explore the Lifecycle of a Hate Crime in the Irish criminal justice process. 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.

To this end, the research partners were tasked with conducting a doctrinal analysis of hate crime legislation in each jurisdiction; exploring policies pertaining to policing and prosecutorial functions in relation to hate crime; conducting a secondary analysis of statistics on the recording, prosecution and sentencing of hate crime; and conducting interviews with victims, previous offenders, judges, prosecutors, and defence practitioners. The research sought to illuminate the period between 2011 and 2016.

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

THE NATIONAL LEGISLATIVE AND POLICY CONTEXT

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

The Prohibition of Incitement to Hatred Act 1989 criminalises incitement to hatred, however it is aimed at criminalising hate speech and is thus purposefully narrow in its scope and by its nature not suited to addressing hate crime.

In the absence of legislation addressing hate crime, An Garda Síochána overcome the limitations imposed by this lacuna by recording what they refer to as “discriminatory motives” in relation to standard offences.

Garda HQ Directive No 04/2007 states that any incident which is perceived by “the victim or another person” – for example the police officer, a witness, or a person acting on behalf of the victim – as having a racist motivation should be recorded as such.

A NOTE ON THE IRISH CRIMINAL JUSTICE PROCESS

Ireland has a single national police service, An Garda Síochána. Police reports are, in the majority, logged by officers via telephone with civilian call takers employed in the Garda Information Services Centre (GISC).

The majority of crimes in Ireland are prosecuted in the District Court, a court of summary jurisdiction. The Director of Public Prosecutions is responsible for most prosecutions: however section 8 of the Garda Síochána Act 2005 provides that a garda can prosecute cases in the District Court, in the name of the Director of Public Prosecutions. Thus, the majority of crimes in Ireland are prosecuted by members of the national police service.

RESEARCH DESIGN AND CONTEXT

The conclusions of this research are based on the triangulation of qualitative interviews, policy analysis, analysis of official statistics, and case law analysis. We also conducted an extensive literature review on hate crime internationally, and the criminal process in Ireland more specifically.

All aspects of this research complied with the ethical regulations of the University of Limerick and all aspects of the design were approved by the University's Faculty of Arts, Humanities and Social Sciences Ethics Committee (Approval Number 2016-02-25-AHSS).

Case law analysis

All major legal databases including Justice, Bailii, LexisNexis, Westlaw IE, and the Courts Service website were searched for reported cases on the issue of hate crime. A very limited number of reported cases emerged from this search, all five of which are analyzed in this Report. The Irish Sentencing Information System returned no information on the manner in which such cases were addressed at the sentencing stage.

Along with this, we conducted a similarly extensive search for cases in which the Prohibition of Incitement to Hatred Act 1989 was addressed, which returned only one reported case.

Legislative and policy analysis

Asides from the Prohibition of Incitement to Hatred Act 1989, the Criminal Justice (Victims of Crime) Act 2017 is the only other piece of legislation which addresses hate crime in any way, and it only does so in the context of the needs of victims. Because of this, the absence of hate crime legislation has resulted in a "policy vacuum"² in Ireland. The only national plan which speaks of hate crime in any form is *Migrant Integration: A Blueprint for the Future*, which itself only discusses racist crimes rather than other manifestations of hate crime. In this context, racism and discrimination are seen as risks or barriers to the integration of migrant people. Racism and xenophobia is to be combatted through intercultural awareness and training, through addressing under-reporting of racist crime via the development of greater contact with marginalised communities, and through the review of legislation which addresses hate crime and hate speech.

Having conducted interviews with 38 criminal justice professionals, we are unaware of any guidance available to the prosecution or judges on the manner in which a hate element should be addressed in the Irish criminal justice process. Policy documents addressing hate crime are limited therefore to policing directives, whose impact is discussed in this Report, and the 2017 *An Garda Síochána Policing Plan*, which

² 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 2016) 126.

identifies hate crime as a policing priority, but does not provide any detail on how this priority is to be operationalised.

Analysis of statistics

In the absence of hate crime legislation, An Garda Síochána record discriminatory motives in respect of standard offences. The State has not made its statistics on recorded hate crime publically available since the end of 2014. The Central Statistics Office has nonetheless made this data available to us to support our analysis.

Ireland does not gather data with respect to the prosecution and sentencing of hate crime or crimes with a discriminatory motive. Although data was published by the Office for Democratic Institutions and Human Rights (ODIHR)³ relating to the sentencing of hate crimes in Ireland in 2013, the Central Statistics Office has confirmed that the data did not originate with their office.⁴ Equally the Department of Justice and Equality confirmed in a letter dated 19th of January 2017 that they do not hold this data. We note that 2013 was the only year for which data on sentences was provided to ODIHR. Neither the Central Statistics Office nor the Department of Justice were in a position to identify the source of the data, and were equally unable to provide similar data across other years.

Data gathered by third party civil society reporting mechanisms can be an important supplement to official statistics. In recent years three national organisations have operated recording mechanisms which have gathered data on hate crimes – the European Network Against Racism Ireland (ENAR Ireland), the Transgender Equality Network Ireland (TENI) and the Gay and Lesbian Equality Network (GLEN). All three have partnered with the Hate and Hostility Research Group (HHRG) across two projects, both of which required the HHRG to produce an original analysis of raw data gathered by the organisations. This report presents a synopsis of our original analysis of the civil society organisations' data. We provide three years of data from TENI (2014-2016) and one year (2015) from each of the remaining two organisations.

Qualitative interviews

The conclusions of this report are grounded in qualitative data collection with 74

³ Office for Democratic Institutions and Human Rights, *Hate Crime Reporting*, (OSCE 2017) <<http://hatecrime.osce.org/ireland>>accessed 14 November 2017.

⁴ Email communication with the Central Statistics Office, (29 April 2016).

stakeholders from across the Irish criminal justice process. All interview data was subject to thematic analysis.

Prosecutors and defence practitioners

The Director of Public Prosecutions and the Chief State Solicitor's Office both declined our invitations to participate in this research.

Nonetheless, interviews were conducted with 14 barristers and solicitors who exclusively represented the defence in criminal proceedings; four barristers who acted for both the prosecution and the defence; and a further 20 individuals who were involved in the prosecution or investigation of crimes, including two prosecuting solicitors, and 18 police officers. These interviewees were sourced via a purposive sampling strategy and selected primarily for their identification in case law and media reports relating to cases involving a hate element.

Victims of hate crime

Seventeen⁵ self-identified victims of hate crime were sourced via a volunteer sampling strategy; the research was advertised by civil society organisations that advocate for, and/or support, groups who commonly experience hate crime, and was also advertised by key influencers in commonly targeted communities. Each victim discussed between one and three reported hate crimes. In total the 17 victims provided data on 26 hate crimes, 25 of which were reported to the police.

Offenders

Ten previous offenders were interviewed via a focus group. In the absence of hate crime offences, it is not possible to identify offenders who have been convicted of crimes involving a hate element in Ireland. As such, the Probation Service of Ireland offered us the opportunity to interview a group of previous offenders – without identifying their records – who had experience of the criminal justice process and spoke persuasively to their perspective on the operation of processes relevant to the prosecution and sentencing of crimes with a hate element in Ireland.

Judges

We applied formally to the Chief Justice for permission to approach members of the

⁵ Nineteen interviews were completed with self-identified victims. Two were excluded from analysis, one because of a lack of data relevant to the research question and the other for ethical reasons.

judiciary to be interviewed for this research and were denied access.

FINDINGS: POLICY ANALYSIS

Prohibition of Incitement to Hatred Act 1989

In Ireland, the only legislative recognition of 'hate' is through the Prohibition of Incitement to Hatred Act 1989. This legislation, designed to address hate speech, even in that context has resulted in few prosecutions, largely because of the requirement to prove that the defendant either intended to, or in the circumstances was likely to, stir up hatred. A number of barristers interviewed for this research discussed the efficacy and scope of the 1989 Act, and those that did spoke to the high standard of proof required. Gardaí interviewed raised the impact of the relatively complex nature of the Act on prosecutorial expediency.

The Act is limited in terms of its protection of groups. By only naming race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community and sexual orientation, the Act ignores incitements to hatred against other communities, most obviously disabled people, intersex and transgender people, asylum seekers and refugees, and, arguably, the Roma community.

Three barristers interviewed for this research had experience of cases in which a charge under the 1989 Act was at least contemplated as a means of addressing the hate element of a crime. The first case involved an anti-religious element, but ultimately a prosecution was brought under section 6 of the Public Order Act 1994, which was dismissed at prosecution stage. In the second case – where a racist element was perceived – there was a charge under the 1989 Act, but a *nolle prosequi* was entered in relation to that charge and a guilty plea was entered for an associated offence. In the third case – where a racist element was perceived – direction was sought from the Director of Public Prosecutions on taking a charge under the 1989 Act. Here, the DPP's office directed that a charge not be brought under the Act, and a guilty plea was accepted in the District Court for an associated offence. Of these two last cases, in only one was the interviewee definitive that the hate element was nonetheless taken into account.

Victims' Directive

The Criminal Justice (Victims of Crime) Act 2017 and associated prosecutorial guidelines appear compliant with the Directive. However, this research has identified obstacles to the identification of victims of hate crime throughout the criminal justice process, which are likely to impact the operationalisation of the Directive with respect to this particular category of victims.

The majority of gardaí interviewed stated that they had not seen the impact of the Directive in the context of hate crime. They highlighted the lack of an explicit and formal link between the work of specialist ELO/LGBT Officers and those working within the Garda Victim Service Offices.

We found no evidence that those working within Garda Victim Service Offices had received training on the treatment of victims of hate crime specifically, or on any of the particular special measures that should be in place for them.

FINDINGS: CASE LAW ANALYSIS

There does not seem to be any case reported in Ireland regarding religious (e.g. antisemitic or Islamophobic) hate crime; or in relation to anti-LGB or anti-transgender hate crime.

The Court of Appeal has indicated that it is appropriate for a racist hate motivation to be considered an aggravating factor at sentencing, but there is no *requirement* on the sentencing courts to treat it as such. The same circumstances seem to apply to disability as an aggravating factor.

FINDINGS: CASE ANALYSIS

The Report presents an analysis of 42 cases described by criminal justice practitioners in which a hate element was present.

Twenty three specific cases were detailed by prosecutors, in which they had acted and where a hate element was present. In the majority of cases, the hate element was explicitly introduced either by way of plea agreement or in the course of a hearing or trial. Two interviewees stated that they could not introduce the racist element, as it

was not relevant to the charge, or because there was another motivation. In a minority of cases, the hate element was minimised, but the prosecutor hoped that the judge would ‘look around the corners of the case’ to see the hate element. The hate element was contested in two cases, and in one of those the garda admitted on cross examination that the offence was not racially motivated. In eleven of the cases, the prosecutor was of the opinion that the sentence was aggravated due to the hate element. In six cases, the participant was of the view that the hate element was not taken into account. In those cases in which the hate element was either not presented, or where the prosecutor sought to have the judge ‘read between the lines’, participants stated that the hate element was not taken into account. In one case, where the prosecutor was of the view that it was a racist attack though there was no evidence to support that view, it was asserted that the court in sentencing nonetheless referred to the crime as a racist one.

Defence practitioners detailed 19 cases in which they had acted where a hate element was present. Noting that we asked participants to think of cases in which a hate element was present, in the vast majority of cases the participants held that evidence of the hate motivation was presented in court. In one case, the participant stated that the evidence of the hate motivation was minimised. In two cases, evidence of a racist motivation was not presented in court as a result of a plea agreement. In approximately half the cases, participants were clear that the hate element aggravated the sentence. However, in almost an equal number of cases where the hate element was presented to the court, participants stated that the hate element did not aggravate the sentence. Again, in two cases, in which the practitioners were clear that there was no evidence of a hate element presented to the court in the context of a guilty plea, the participants stated that the personal characteristics of the individual in question led the judge to treat what they considered to be a hate element in the case as an aggravating factor.

FINDINGS: STATISTICAL ANALYSIS

Police recorded statistics

An Garda Síochána have been proactive in facilitating the recording of what they refer to in the absence of hate crime legislation as crimes with a discriminatory motive, since 2002. The recording of discriminatory motives occurs at the point at which a

garda on operational duties logs a crime onto PULSE, the computer-based national incident recording system. In the majority, civilians working as call takers (Incident Creation Representatives) in the Garda Information Services Centre (GISC) log reports to PULSE on behalf of the police.

Police recorded data is provided to the Central Statistics Office (CSO) who are responsible for assessing the quality of the data, collating statistics, and disseminating information. The CSO have found ongoing quality issues with respect to Irish 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 PULSE.

In the period 2006-2014, the police recorded an average of 158 crimes with a discriminatory motive per year, ranging from a low of 114 in 2014 to a high of 233 in 2007. In each year the largest number of crimes with a discriminatory motive were identified as racist.

Significant improvements have been made to the mechanisms for the police recording of hate crime data specifically since 2015 via an update termed PULSE 6.8, including the expansion of the range of categories of discriminatory motive from five to eleven and the establishment of the question as mandatory, indicating a commitment to fulfilling the State's obligations under the Victims' Directive to identify victims of hate crimes in order to provide them with access to appropriate supports. However, in this context, we note that the question has been relocated from the Incident Details screen to the Victim Needs Assessment screen which supports the view that the information is sought for the purposes of victim support rather than investigation.

The eleven categories of discriminatory motives are: ageism, anti-disability, anti-Muslim, anti-Roma, antisemitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia. The number of crimes recorded as having a discriminatory motive increased dramatically following the introduction of PULSE 6.8: from 114 in 2014 to 308 in 2016. While the increase in the number of recorded crimes with a discriminatory motive in 2016 certainly indicates a higher rate of recorded hate crime, the findings of this report support the view that this figure un-

derrepresents the real figure of hate crime in Ireland and that both underreporting and underrecording remain a challenge.

While it is possible to record an anti-Muslim discriminatory motive as well as antisemitism, there is no means by which to record other forms of anti-religious motivations, or indeed motivations informed by bias against a lack of religion or religious belief.

Civil society statistics

TENI's Stop Transphobia and Discrimination (STAD) mechanism recorded 46 incidents which detailed a total of 57 anti-transgender criminal offences occurring in Ireland 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 percentage reported has fallen year by year.

GLEN's 'stophatecrime.ie' site, which collected data on homophobic and transphobic crimes, recorded eleven incidents, each relating to a single criminal offence, in or throughout 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 described was reported to the police.

ENAR Ireland logs details of racist and religiously aggravated incidents on its iReport.ie online racist incident reporting system. ENAR Ireland received 143 reports relating to incidents occurring in 2015 which bore the characteristics of criminal offences via its iReport third party monitoring system. Of these reports, 133 involved a single criminal offence, seven described two criminal offences, two related to three criminal offences and one described four criminal offences. In summary, iReport received reports of 157 crimes occurring in 2015. Of 143 reports, a total of 99 identified 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 An Garda Síochána.

FINDINGS: UNDERSTANDING HATE CRIME IN THE ABSENCE OF LEGISLATION

There was a lack of consistency in criminal justice professionals' definitions and understandings of hate crime as a construct, although the majority of criminal justice professionals interviewed were of the view that if a hate element is established in a case, it should aggravate the penalty imposed.

While barristers and solicitors sometimes defined hate crime quite narrowly, gardaí tended to take a broader understanding of the concept from a general policing perspective. Criminal justice professionals held that public order, criminal damage, assault, and theft were the most common forms of hate crime. A minority mentioned harassment.

Criminal justice professionals most commonly referred to racist and homophobic motivations, with a small minority referencing disablist, transphobic, and ageist motivations. A small number of individuals explicitly understood sexual crimes as being hate crime. Nearly half of all participants involved in investigation, prosecution, or defence mentioned taxi drivers particularly as being impacted by hate crime.

Practitioners expressed surprise that they had not encountered more cases involving a hate element in court. Previous offenders unanimously agreed that hate crime is manifest in Irish society.

Across all participants: previous offenders, criminal justice professionals and victims, there was agreement that the salience of hate crime as a social problem would increase in the future.

FINDINGS: THE NEED FOR LEGISLATION

The vast majority of both defence practitioners and gardaí responded positively to the question as to whether hate crime legislation should be introduced. The primary reason for supporting the introduction of such legislation across all participants was the fact that it would provide the criminal justice process the tools with which it could address hate crime.

The majority of criminal justice professionals were of the view that if a hate element is established in a case, it should aggravate the penalty imposed. A significant minority of practitioners (but only one garda interviewee) emphasised the importance of rehabilitative measures in the context of hate crime offending, with some particularly placing emphasis on restorative justice measures. Of those practitioners that discussed the merits of rehabilitation in this context, most recognised that an enhanced sentence would be justified in some cases.

While one offender held that any legislation against hate crime would be subject to abuse by the police, the previous offenders interviewed were, in the majority, in agreement that those targeting people on the basis of their personal characteristics should be sanctioned, including through the criminal justice process. In doing so, however, they distinguished between motivation and demonstration of hostility, arguing in the majority that only the former merited sanction. The majority held, that while hate crimes should be sanctioned, they should not attract a penalty enhancement, making an exception for crimes with a disablist motivation.

FINDINGS: POLICE REPORTING

Interviewees across all stakeholder groups stated that they believe hate crime to be underreported in Ireland. Third party reporting mechanisms in Ireland have documented a range of reasons for underreporting, the most common of which include the belief that the police could or would not do anything, that the police would not take the report seriously, and that the incident was too common or not serious enough an occurrence to report.

In this research, the perception of unequal access to justice for minority communities was a particular theme among Black African men who were victims of racist crime and a victim of anti-Roma crime. The majority of interviewees across other stakeholder groups were also of the view that minority communities face prejudice and discrimination within the criminal justice process.

All 17 victims involved in this research had made at least one report to the police regarding a hate crime. Those targeted at home discussed reporting in order to

prevent further victimisation. A minority describe reporting as a means of protecting others from similar harm. Many victims spoke to the societal impact of hate crime.

FINDINGS: POLICE RECORDING

With the exception of those working primarily with victims and in the Garda Racial and Intercultural Diversity Office (as it was then known), gardaí interviewed in 2017 had difficulty recalling all eleven recording categories.

Training had been provided to introduce police to the updated PULSE 6.8, although not all those interviewed had had access to this training more than a year after the rollout of the update. Police and GISC interviewees unanimously agreed that neither civilian call takers nor police officers had had access to either training or documentation on protocols for recording a discriminatory motive. Consequently, both groups evidenced variation and uncertainty in interpreting recording categories.

Although the Garda HQ Directive No 04/2007 retained the Macpherson definition, or the ‘perception test’ as the criterion for recording a racist discriminatory motive, only those police officers who worked exclusively with victims and who had additional training on hate crime had any knowledge of the perception test. Police interviewees differed in their belief as to whether it is the victim, or the police officers’ perception, which determines recording, and more specifically, whether evidence of a hate element is required to legitimate the recording of a discriminatory motive.

Although none of the victims to whom we spoke were able to say definitively whether a crime they reported had been logged on PULSE as having a discriminatory motive, three individuals, one making a report in 2016, one making a report in 2011 and one making a report in 2009, felt certain that An Garda Síochána had acknowledged the crime against them as having a hate element. Two individuals, both reporting prior to the commencement of the Victims’ Directive in November 2015, held that individual police officers had expressly rejected their perception that the crime they reported was associated with a hate element.

Many of the victims interviewed experienced what we refer to as a continuum of

hostility, consisting of criminal offences, discrimination and non-crime incidents. Other jurisdictions record non-crime hate incidents as a source of intelligence on concentrations of activity and repeat victimisation. However, it is not currently possible to record a discriminatory motive on the non-crime databases on PULSE.

FINDINGS: INVESTIGATING HATE CRIME

While gardaí interviewed for this research held that the hate element will sometimes be considered or recorded during the course of an investigation, the vast majority were of the view that it is not a priority at the investigation stage. In explaining this perception only a small minority of garda interviewees pointed to resources. The most common explanation given was the absence of legislation. Gardai described their investigative approach as led by legislation and the proofs required to secure a conviction. Thus, they stated, in the absence of legislation, and therefore the absence of any stated proofs, the hate element is not prioritised.

Solicitors and barristers gave mixed responses to the question of how they believed the hate element of a crime was investigated. Those who held that there are shortfalls in the investigation of the hate element in the majority pointed to deficits in resources, training and the lack of specific policies.

More fundamental obstacles to investigating a hate element were identified in interviews with victims. In relation to seven of the ten hate crimes reported by victims post-November 2015, the victim stated that they did not make a signed statement. Across all victims interviewed, with one exception, victims did not clearly differentiate between making a complaint and making a statement. They used the latter term to describe either process. The victim was often under the impression that they had made a statement, having made only a complaint. Of the three victims who recalled with clarity making a statement in relation to crimes which were reported from November 2015, when the Victims' Directive came into effect, only one was clear that language used in the commission of the offence which spoke to the hate element was included in their statement. Some victims also perceived that police did not respond in a timely fashion to their identification of CCTV or audio visual footage as important evidence.

The ELO/LGBT Officer is a specialist role with wide ranging responsibilities in respect to diversity generally and particular responsibilities in respect to hate crime specifically. Focusing on two types of hate crime to the exclusion of others, the Garda Síochána Diversity Strategy and Implementation Plan 2009-2012, stated that ELO/LGBT Officers should:

- “Assist, where required, in the investigation of racist and homophobic incidents and ensure appropriate support mechanisms are available to ethnic minority communities and the lesbian, gay, bi-sexual and transgendered communities;
- Monitor the recording of racist and homophobic incidents within the district on a weekly basis.” (sic)

All those gardaí interviewed for this research, who addressed the role of ELO/LGBT Officers in the context of such crimes were clear that, in practice, their remit was limited to victim support, and that they had no investigative function.

The recommendation of the 2014 Garda Inspectorate Report that the merging of the ELO and LGBT roles be reversed has not been acted upon. These are not full-time positions and only two days training is allocated to introduce the initiate to their responsibilities. More generally, we found varying levels of awareness of the role among gardaí whom we interviewed.

FINDINGS: PROSECUTING HATE CRIME

As far as we are aware, there is no specific policy on the prosecution of hate crime. There is a reference in the Prosecutorial Guidelines of the Office of the Director of Public Prosecution on how the decision to prosecute should be taken in order to ensure compliance with the Victims’ Directive, as well as a reference to respecting diversity. Some of the general guidance, with respect to assessing the strength of the evidence and public interest requirement in pursuing a prosecution, are also relevant to hate crime.

Prosecutors identify varying approaches to whether and how to introduce evidence of

a hate element to the court, some of which result in the minimising or disappearance of the hate element, and include examples of the hate element being pleaded out.

The majority of criminal justice practitioners interviewed were of the opinion that there were deficiencies in ensuring that the hate element of an offence was presented to the sentencing judge, pointing to the absence of legislative and policy guidance as leading to training gaps. A second reason for the hate element of an offence not being presented in court by prosecutors was expediency. A majority of garda interviewees stated that, in the absence of legislation, the presentation of the hate element at prosecution stage depends on the individual approach taken by the prosecutor.

This research identified two key points at which the hate element may be lost to the court: prosecutors interviewed for this research were clear that the PULSE report which identifies a discriminatory motive would not be part of the prosecution file, and that the presence or absence of such marker would have no impact on the manner in which the case is prosecuted. Second, the majority of legal practitioners held that the hate element may be disappeared through pre-trial discussions in which either a plea or ‘facts’ are agreed, although only a small minority of gardaí stated that they would accept a plea in return for the hate element being eliminated from the facts presented to the court. The DPP does not, to our knowledge, have any policies in relation to pre-trial discussions specific to hate crime.

Almost all legal practitioners were of the view that, while legal arguments *could* be made to exclude evidence of a hate element, it was highly unlikely that such arguments would be successful.

FINDINGS: SENTENCING

The Court of Appeal has stated that where a racist element is present in a case, it is appropriate that it be considered an aggravating factor in sentencing, but there is no obligation on members of the judiciary to enhance a sentence due to the presence of a hate motivation.

While, the majority of criminal justice professionals interviewed held that a hate

element will aggravate a sentence if presented in evidence, there was not complete agreement on this point with some defence practitioners citing examples of cases in which evidence of a hate element had been presented but they believed it had not been taken into account. In addition, there were a small number of reports of judges enhancing sentences on the basis of a hate element which was not presented in evidence. We believe that in the absence of legislation, it could be argued that aggravating a sentence on the basis of an undefined construct such as a racist motivation may be in violation of the requirement for certainty in the context of criminal cases.

Practitioners were in agreement that, unless a repeat hate offender had been charged under the 1989 Act, their recidivism would not be apparent on their criminal record. Gardaí interviewed felt that it would be laborious to use PULSE to investigate whether any of an accused's prior convictions were hate motivated, and that this is therefore not common practice.

RECOMMENDATIONS

We were tasked to understand the manner in which a hate crime progressed through the criminal justice process, and in this context, have evidenced a number of stages at which deficiencies are present. In this context, we believe that a number of processes and policies should be introduced to rectify these deficiencies.

General recommendations

- The development of mechanisms to gather and publish data regarding the prosecution and sentencing of crimes which have been flagged as having a discriminatory motive.
 - The introduction of legislation incorporating aggravated offences and sentencing provisions specific to hate crime as recommended in *'Out of the Shadows' Legislating for Hate Crime in Ireland*.
 - The reform of the Prohibition of Incitement to Hatred Act 1989, in particular to address cyber hate and to protect a more inclusive range of groups.
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- Publication of an updated Garda Diversity and Inclusion Strategy.

Reporting and recording

- All members of An Garda Síochána and GISC to be given access to documentation and training on protocols for recording a discriminatory motive, including elaborated definitions of the recording categories and the perception test, and protocols governing the circumstances in which a discriminatory motive should be recorded.
- The addition of discriminatory motivation recording categories for religion and for lack of religion or belief on PULSE.
- A public awareness campaign to encourage members of the public to report crimes with a discriminatory motivation, and to ask for the discriminatory motivation marker to be selected when they do so.
- The discriminatory motivation question to be added to all non-crime databases and those working within Garda Victim Service Offices to adopt a sign-posting role with respect to authorities responsible for addressing common non-crime hate incidents.

Investigation

- The development of protocols for the explicit communication of the discriminatory motive marker to the responsible investigator and the prosecution.
 - Published guidelines on the investigation of a crime with a discriminatory motive.
 - The development of a specialist hate crime investigation unit in each of the six garda regions.
 - Training on the investigation of crime with a discriminatory motive to be provided to all stakeholders involved in crime investigation.
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- Full scale review of the role of the ELO/LGBT Officer.
 - Automatic inclusion of specialist officers into hate crime investigations.
 - An expansion of the number and range of specialist liaison officers available nationwide and a programme of continuous professional development for officers occupying these roles.
 - The incorporation of specialist liaison officer roles into rostering arrangements, such that at least one specialist officer will be available 24/7 in each of the 109 garda districts.
 - The development of a formal link between the work of specialist officers and the work of the Garda Victim Liaison Offices.

Prosecution

- The development of specific guidelines on prosecuting hate crime by the Office of the Director of Public Prosecutions, with particular reference to:
 - Considerations in determining whether to prosecute a hate crime.
 - Introducing a hate element in court.
 - Pre-trial discussions (plea agreements) in respect to hate crime.
- Published guidelines for prosecutors working with victims, witnesses or offenders in a case involving a hate element.
- Bespoke training for all prosecutors on identifying, recognising and prosecuting hate crime.
- Full scale review of the role of gardaí as prosecutors.

Sentencing

- The introduction of a specific statutory provision which requires courts to consider the hate element of an offence in all cases.
- Bespoke training for all judges on recognising and sentencing hate crime.

Post-Sentencing

- Including the development of provisions with respect to crimes with a discriminatory motive in the Probation Service of Ireland's next Strategy Plan.
- Continued co-operation with the Northern Ireland Probation Service towards this end.

CHAPTER 1: INTRODUCTION

The absence of hate crime legislation in Ireland makes it a particularly interesting case study for exploring the manner in which a hate element is addressed through criminal justice processes. Mason observes that hate crime legislation allows “liberal democratic states to make a public statement that such crime will not be tolerated and that serious penalties will apply.”⁶ In the absence of such a statement, Ireland allows us to examine what message is being sent to, and from, society as to the attitude of the State to hate crime, but also allows us to understand how it is conceptualised by criminal justice practitioners. This introduction will set out the core principles underpinning hate crime legislation, as well as seek to understand its impacts on its victims and society.

WHAT IS A HATE CRIME?

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

“... criminal acts committed with a bias motive. It is this motive that makes hate crimes different from other crimes. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence. The term “hate crime” or “bias crime”, therefore, describes a type of crime, rather than a specific offence within a penal code. A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias or prejudice. The term describes a concept, rather than a legal definition.”⁷

There is currently no legislation in Ireland which requires a court to take a bias motivation, or a demonstration of bias, into account when determining the appropriate sanction to impose in a given case. While the Prohibition of Incitement to Hatred Act 1989 criminalises incitement to hatred, it is a hate speech provision and purposefully narrow in its scope and thus not suited to addressing the daily criminal manifestations of bias faced by people in Ireland. In this regard, as Perry observes, Ireland is unique in Western democracies in not having legislation which targets the hate element of a crime.⁸

⁶ Gail Mason, ‘The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion’ (2014) 18(1) *Theoretical Criminology* 75.

⁷ Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (OSCE/ODIHR 2009) 1.

⁸ Barbara Perry, ‘Legislating Hate in Ireland: The View from Here’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017) 71.

WHO ARE THE VICTIMS OF HATE CRIME?

While the vast majority of Western democracies have dedicated hate crime legislation, either by way of aggravated offences or aggravated sentencing provisions, there is little consistency in the range of victim characteristics protected by such legislation. The most commonly named characteristics are race (often interpreted to include ethnicity), religion, and increasingly, sexual orientation. More recently, gender identity and gender expression (ie, protecting individuals who identify as transgender) and disability have been included in a number of jurisdictions.⁹

In an Irish context, we have three difference sources to draw upon in determining those characteristics which have been deemed worthy of explicit protection in this regard: the Prohibition of Incitement to Hatred Act 1989;¹⁰ the Criminal Justice (Victims of Crime) Act 2017;¹¹ and police recording categories.¹² When we look at these collectively, we can establish a list of characteristics recognised by the State as requiring particular attention and protection in the context of criminal victimisation. This list includes:

- Age
- Disability, including the health of the victim and any communications difficulties they might have
- Ethnicity, including ethnic origin
- Gender
- Gender identity and gender expression
- Membership of the Traveller and Roma communities
- “Race”, including colour, nationality or national origin
- Religion
- Sectarianism¹³
- Sexual orientation

⁹ Jennifer Schweppe, ‘Defining Victim Groups in Hate Crime Legislation: Certain and Precise?’, (UL 2017) available: <https://ulir.ul.ie/bitstream/handle/10344/6363/Schweppe_defining.pdf?sequence=2> accessed 11 November 2017.

¹⁰ This Act prohibits expressions of hatred, including the dissemination of graphic or textual materials, which have the intention of provoking hatred against “... a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation” (sic).

¹¹ Section 15 of the Act provides that the following characteristics should be taken into account when carrying out a victim assessment: ‘the personal characteristics of the victim, including his or her age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communications difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime’.

¹² This list includes: gender, anti-disability, ageism, transphobia, homophobia, antisemitism, sectarian, anti-Muslim, racism, anti-Roma, and anti-Traveller.

¹³ Primarily relating to the ethno-national conflict in Northern Ireland.

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

IMPACTS OF HATE CRIME

It is internationally accepted that hate crime has a more significant impact on its victims than ordinary crime.¹⁴ Direct impacts can range from physical injury to emotional and psychological harm.

“I was working with a mother last year whose son was abused by [a] neighbour physically, verbally, they suffered property damage – spray paint on the house. The child tried to kill himself twice. He poured detergent over his skin because he thought it would make him white.”¹⁵
(Civil Society Organisation Employee)

There is a qualitative difference in 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).¹⁶ Thirty six per cent of hate crime victims stated that they were “very much” affected compared with just 13 per cent of non-hate crime victims. The data also showed that twice as many hate crime victims suffer a loss of confidence or feelings of vulnerability after the incident compared with victims of non-hate crime (39 per cent and 17 per cent respectively). Hate crime victims were also more than “twice as likely to experience fear, difficulty sleeping, anxiety or panic attacks or depression compared with victims of overall CSEW crime”.¹⁷ Victims participating in this research cite similar effects:

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

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

¹⁴ Paul Iganski, *Hate Crime and the City* (Policy Press 2008).

¹⁵ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *“Out of the Shadows” Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

¹⁶ Hannah Corcoran, Deborah Lader and Kevin Smith, *Hate Crime, England and Wales 2014/2015* (Home Office, UK 2015) 22.

¹⁷ *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, J. Roy Gillis, and Jeanine C. Gogan, ‘Psychological sequelae of hate-crime victimization among Lesbian, Gay and Bisexual adults’ (1999) 67 *Journal of Consulting and Clinical Psychology* 945.

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

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

Hate crime not only impacts on its direct victims: the targeting of victims on the basis of their membership of a particular community “communicates to all members of that group that they are equally at risk and do not belong.”¹⁸ As such, the terrorising effect of hate crime goes beyond the individual to generate fear and anxiety among the broader community of which the victim is part; what the EUFRA refers to as the “resonating nature of hate crime”,¹⁹ or what Perry and Alvi refer to as the “in terrorem” effect of hate crime.²⁰ In a 2015 Report²¹ we spoke to members of civil society organisations who recognised this effect in the communities for which they advocate:

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

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

¹⁸ 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.

¹⁹ European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims’ Rights* (2012) 18. <http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf> accessed 1 July 2014.

²⁰ Barbara Perry and Shahid Alvi, ‘We are all Vulnerable: The In Terrorem Effects of Hate Crimes’ (2012) 18 *International Review of Victimology* 57.

²¹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, *‘Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

Hate crimes then can be perceived as “symbolic crimes” that communicate Otherness and operate as an exclusionary practice.²² They have the effect of regulating marginalised social groups. Indeed, the targeted community must be counted as secondary victims of the offender.²³

Previous offenders to whom we spoke in the course of this research demonstrated a clear understanding of what the literature refers to as the harms of hate, the additional harm to victims associated not with the base offence, but with the targeting of their identity, which in turn is linked to the greater emotional and psychological disturbances displayed by victims of hate crime compared to victims of parallel offences. The excerpt presented below demonstrates the agreement of the group of previous offenders interviewed with respect to the harms associated both with a hate motivation and the demonstration of hate in the course of an offence.

“Interviewer 2: What do you guys think, do you think it would make a difference to the victim what the context was, whether you set out to do it or whether / Participant A: / [In] the aftermath, like, after it?”

Interviewer 2: Right.

Participant A: Am... yeah I would yeah. Because like if it was a homophobic attack they'd be thinking like ... do you know what I mean ...

Participant B: Is everyone like that?

Participant A: Yeah, why did this happen to me – because of this is the way I am.

Participant C: They all know where you live and whatnot, do you know what I mean? Is it safe to walk down the road? ... am I living in the right place is it time to move on or ...?” (Previous offenders' focus group)

“Participant: If it was racist and I'm attacking you because you're a different minority or different colour or different race to me, I don't fucking like you, that's why I'm attacking you, cos I fucking hate you – that's going to have a detrimental effect on you rather than me, and [if] you're having a normal fight, there's no racism being thrown at each other and it's left like that.

Interviewer 2: What if you do use the language? /

Participant: /That's what I'm saying, it's hatred, that'll leave a bad taste in someone's mouth like.

Participant: Say if they were randomly attacked and then you found out you

²² Barbara Perry, 'Where do we go from here? Researching Hate Crime' (2003) *Internet Journal of Criminology*, 9 <<http://www.internetjournalofcriminology.com/Where%20Do%20We%20Go%20From%20Here.%20Researching%20Hate%20Crime.pdf>> accessed 1 July 2014.

²³ Neil Chakraborti and Jon Garland, *Hate Crime, Impact, Causes & Responses* (Sage 2015); Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013); Jack McDevitt, Jennifer Balboni, Luis Garcia and Joann Gu, 'Consequences for Victims: A Comparison of Bias and Non-bias Motivated Assaults' (2001) 45(4) *American Behavioural Scientist* 697.

were racially attacked, then you'd be more upset about it like".

(Previous offenders' focus group)

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.”²⁴ An OSCE document sets out a number of factors which could be considered bias indicators:

“... if a perpetrator uses racial slurs while attacking a member of a racial minority, this could indicate a bias motive and be sufficient for the responding officer to classify a crime as a likely hate crime. By the same token, the desecration of a cemetery or an attack on a gay pride parade may be bias indicators of anti-religious or anti-LGBT motivation.”²⁵

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

CONCLUSION

Having established a common understanding of hate crime, and discussed in brief the harms of hate which underscore the value of exploring the phenomenon, the remainder of this Report will detail whether and how the hate element of crimes are addressed in the Irish criminal justice process.

A note on language:

In authoring a research report on hate crime, we have necessarily drawn upon sources which, and spoken with participants who, use slurs referencing group identities in rehearsing and explaining their experiences. In reporting this material, we have chosen to asterisk such slurs used by our research participants in the course of interviews we conducted 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.

²⁴ 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 8 November 2017.

²⁵ *ibid.*

CHAPTER 2: METHODOLOGY

The purpose of this research was to understand and explore the Lifecycle of a Hate Crime in the Irish criminal justice process. The objectives of this stage 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 system according to the legislative and policy context; and
- Identify shortfalls in the legislative responses to Article 4 of the Framework Decision on Racism and Xenophobia.

To this end, we were tasked with conducting a doctrinal analysis of hate crime legislation in each jurisdiction; exploring policies pertaining to policing and prosecutorial functions in relation to hate crime; conducting a secondary analysis of statistics on the recording, prosecution and sentencing of hate crime; and conducting interviews with victims, previous offenders, judges, prosecutors and defence practitioners. Thus, this country report for Ireland was informed by qualitative research with 74 participants from across the Irish criminal justice process; the secondary analysis of data from three third party reporting mechanisms; case law analysis; and extensive desk research regarding police recorded hate crime and the character of the Irish criminal justice process, particularly the policing, investigation, prosecution and sentencing of crime in Ireland. The research sought to illuminate the period between 2011 and 2016.

DESK RESEARCH

The absence of bespoke hate crime legislation in an Irish context has resulted in what has been described as a “policy vacuum” on the issue.²⁶ There is no national plan to tackle hate crime, and no stated government policy which sets out the approach the State currently takes or intends to take in the future to address hate crime. Thus, there was a limited amount of official policy and data that could be drawn on, and even less sources of published policy and official statistics available to the research. The State has not made its statistics on recorded hate crime publically available since the end of 2014. In the 2017 An Garda Síochána Policing Plan, addressing hate crime

²⁶ 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 2016) 126.

is a policing priority, but there is no detail provided on how this priority is to be operationalised. For this reason, the vast majority of policy and statistical information we relied upon was made available to us either through personal contact with the relevant organisation, or by way of a freedom of information request.

Having conducted interviews with 38 criminal justice professionals, we are unaware of any guidance available to prosecution or judges on the manner in which a hate element should be addressed in the Irish criminal justice process. We asked the Director of Public Prosecutions, the Chief State Solicitor's Office and the Chief Justice for access to their organisations to explore their approach to addressing hate crime, but were denied access in all cases. Thus, as far as we are aware, policy documents addressing hate crime in the State as a whole are limited to policing directives, and the most recent statement of policing priorities.

The police in Ireland have, for more than ten years, exceeded the limits of legislation to record what they call “crimes with a discriminatory motive”. The Central Statistics Office has made this data available to us to support our analysis. Nonetheless, it advises caution in the interpretation of this data, which are commonly understood to underrepresent the phenomenon of hate crime. More generally, police recorded crime statistics underwent a quality review in 2016, which identified ongoing challenges with respect to valid and reliable recording.²⁷

As part of this desk based research, we also conducted an extensive literature review on hate crime internationally, and the criminal justice process in Ireland more specifically. As well as academic books and journals we also referred to reports of the Garda Inspectorate to assist us in contextualising garda investigative processes and procedures, and the guidelines issued by the Office of the Director of Public Prosecution on prosecution policy generally.

CASE LAW ANALYSIS

We conducted a database search for case law on hate crime, which included a search of Justice, Bailii, LexisNexis, Westlaw IE, and the courts service website. We also conducted a search of the Irish Sentencing Information System (ISIS). In so doing, we

²⁷ Central Statistics Office, *Review of the Quality of Crime Statistics* (CSO 2016).

designed a series of search terms that included commonly targeted characteristics accompanied by terms which linked those characteristics to cases involving criminal acts. We also conducted a search for cases involving the Prohibition of Incitement to Hatred Act 1989 for two reasons: first, to explore its interpretation by the judiciary; and second, because we were aware from previous research that it might be added to a base charge to ensure the hate element of a crime was addressed by the court.²⁸

The search terms that we employed were:

- Crime/criminal/court/ case/prosecution/defence/accused/defendant/+
- Prejudice/bias
- 1989 Act
- Incitement to Hatred Act
- Racism/Racist
- Disability/Disabled/Down Syndrome/Autism/Wheelchair/Assisted
- Trans*/Gender
- Homophobic/Gay/Lesbian/Bi-sexual/Sexual Orientation/Homosexual
- Muslim/Jewish/antisemitic/Islamophobia/Islamophobic/religion/atheist/atheism/faith

Searches were expanded using wildcards to account for differing suffixes. A very limited number of reported cases emerged from this search across all databases, all of which are analysed in the section entitled “Case Law”.

QUALITATIVE RESEARCH

The primary data in which the conclusions of this report are grounded was collected via qualitative research with 74 stakeholders from across the Irish criminal justice process. Due to their capacity to capture and probe unexpected insights into underexplored phenomena,²⁹ qualitative methods are especially appropriate to the study of the treatment of hate crime in the criminal justice process in Ireland, a jurisdiction in which the phenomenon is not recognised in legislation,³⁰ and in which the very construct is only beginning to be employed in policing policy.³¹ We utilised two methods in this regard, interviews and focus groups.

²⁸ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, ‘*Out of the Shadows*’ *Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

²⁹ Uwe Flick, *An Introduction to Qualitative Research* (4th edn, Sage 2009).

³⁰ Amanda Haynes and Jennifer Schweppe, ‘Internationalising Hate Crime and the Problem of the Intractable State: The Case of Ireland’, in Jennifer Schweppe and Mark A. Walter (eds), *The Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016) 157.

³¹ See, for example, Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) and An Garda Síochána, *Annual Policing Plan 2017* (An Garda Síochána 2017).

The qualitative interview

The qualitative interview is characterised by the pursuit of a natural, rather than a mechanistic, conversational style, which allows the skilled interviewer to develop a rapport with the interviewee, and facilitates an open sharing of experiences and perspectives.³² In this research, we had access to comprehensive interview guides prepared in collaboration with our project partners. In the course of an interview, we sought to address all of the topics included in the guide, but we did not employ the guide rigidly. We placed great emphasis on building rapport, active listening and extensive probing. We guided the interviewee through the prepared questions, but the order in which the topics were addressed, and the precise wording of the question, was dictated by the flow and tone of the conversation. In this manner we provided the space for the participant to illuminate the research questions, encouraging elaboration and tangentialism. Using active listening techniques, we recognised and responded 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 have not previously been documented.³³ In this manner we sought to maximise the advantages offered by the qualitative interview as regards drawing out the participants' expertise on an underresearched field.

Focus groups

Focus groups are a form of group interview used to yield data through communication between research participants.³⁴ 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, focus groups can be conducted with pre-existing groups where participants are already known to one another, including groups constituted expressly to share, and offer mutual support based on, stigmatized experiences or identities.³⁵ Participation in a group discussion may be less daunting if the participants have an existing knowledge of one another. 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

³² Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage 2011).

³³ *ibid.*

³⁴ Jenny Kitzinger, 'Qualitative Research: Introducing Focus Groups' (1995) 311 *British Medical Journal* 299.

³⁵ Michael Bloor, *Focus Groups in Social Research* (Sage 2001).

already known to other group members.³⁶ Moreover, the group can be a source of positive mutual support during data collection. The support of the group can facilitate people “... to speak about uncomfortable and formidable topics”.³⁷ Furthermore, where there are differences in status between the researcher and the researched, the unit can also “... provide collective power to marginalised people”³⁸ and reduce the power imbalance between researcher and participants,³⁹ amplifying the voice of the participants.⁴⁰ In this research, a focus group methodology was used with previous offenders at the request of the gatekeeper, the Probation Service of Ireland, who facilitated access to this category of stakeholder.

SAMPLING STRATEGIES

It is rarely possible for a researcher to collect data from every person with expertise in their topic of interest,⁴¹ a fact which 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. In such cases it is usual to employ either purposive or volunteer sampling methods. In this research both methods were utilized. Non-probability sampling such as this emphasise the achievement of a depth of understanding on the subject under investigation.⁴²

Purposive sampling: criminal justice professionals and offenders

The aim of purposive sampling is to select participants in a strategic way which ensures that those included in the sample are relevant to the research question.⁴³ Yin defines purposive sampling as the selection of research participants based on the anticipated richness of the experiences and understandings they can offer.⁴⁴ Importantly, in an Irish context, members of An Garda Síochána (the Irish police service) prosecute cases in summary proceedings, and so they were included among the stakeholders sampled for this reason.

³⁶ *ibid.*

³⁷ Pranee Liamputtong, *Focus Group Methodology: Principles and Practice* (Sage 2011) 114.

³⁸ *ibid.*

³⁹ Sharlene Hesse-Biber and Patricia Leavy, *The Practice of Qualitative Research* (Sage 2010).

⁴⁰ DJ 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.

⁴¹ Obstacles to collecting data on an entire population relate primarily to resource constraints and accessibility.

⁴² John W Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches*, (2nd edn, Sage 2007).

⁴³ Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012).

⁴⁴ Robert K Yin, *Qualitative Research from Start to Finish* (2nd edn, Guilford Press 2006).

From our analysis of case law, we were able to identify a number of barristers, solicitors and gardaí who had experience of addressing hate crime in the context of court proceedings. However, given the paucity of case law available to the research, we supplemented this sample through an analysis of cases reported in the media for the period of interest to the research. Drawing on Nexis, a database which publishes output from local and national newspapers throughout Ireland, we searched the database, using the same terms as we used in searching for case law for the period 2011 to 2017. Through this means we identified cases at and prior to court proceedings, which were reported in the media as having a hate element. We were thus able to identify additional criminal justice professionals who were likely to have direct experience of engaging in court proceedings involving crimes with a hate element. A small number of additional criminal justice professionals were identified through referral as having experience with respect to the prosecution of hate crime.

We formally applied to An Garda Síochána to interview police officers, and having secured this approval we were allocated a member of the research office who was tasked with assisting in contacting potential participants. This individual served as a gatekeeper contacting members of the service on our behalf. We provided the gatekeeper with the names of police officers who had been party to cases returned via our search terms. We also asked to speak with court presenters and individuals referred to us by other interviewees as having experience of investigating or prosecuting cases involving a hate element. We also interviewed a number of retired gardaí who met the same criteria.

As a result of these efforts we secured interviews with 14 barristers and solicitors who exclusively represented the defence in criminal proceedings; four barristers who acted for both the prosecution and the defence; and a further 20 individuals who were involved in the prosecution or investigation of crimes, including two prosecuting solicitors, and 18 police officers.

During the course of the research we also become aware that in order to understand official statistics on hate crime in Ireland, and indeed the manner in which the hate

element may be made evident or lost to investigators, it was necessary to understand the manner in which the hate element is treated at the point of recording. Crimes are physically recorded in Ireland by the national Garda Information Services Centre (GISC) who accept, log, and review police generated crime incident reports. Management at GISC facilitated us to interview five employees of that organisation.

To recruit previous offenders, we applied formally to the Probation Service for its assistance. The identification of previous offenders as having been involved in a hate crime would be neither possible nor appropriate in the context of the absence of a specific charge relating to hate crime in Ireland. As such, the Service offered us the opportunity to instead speak with a pre-existing group of previous offenders, without identifying their records, who had experience of the criminal justice process and could speak more generally to their perspective on the operation of processes relevant to the prosecution and sentencing of crimes with a hate element in Ireland. The Service felt that a focus group would be in the best interests of the previous offenders, and we employed this method of data collection at their request. The focus group with previous offenders proved very valuable and provided important insights into the workings of the Irish criminal justice process with relevance to hate crime. In total, ten previous offenders were recruited through the Probation Service.

With respect to both offenders and police, we were conscious that, as McFayden and Rankin assert, a gatekeeper can unintentionally or intentionally delay or block research due to personal or organisational reasons: gatekeepers may create challenges due to “moral panic” where they perceive that they may receive a backlash when the research findings are disseminated, particularly in research of a sensitive nature.⁴⁵ Bryman, further suggests that gatekeepers can seek to influence the course a research investigation follows, including how questions are framed and which participants are most appropriate. In the context of the police, Reiner⁴⁶ maintains that members of the police service are often concerned that they may be represented negatively which may be perceived unfavourably by agencies to which they are accountable. We note, however, that in the case of the Probation Service, while the Service selected the group from which we could recruit participants, it was a pre-existing group

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

⁴⁶ Robert Reiner, ‘Police Research’ in Roy King and Emma Wincup (eds), *Doing Research on Crime and Justice* (Oxford University Press 2000).

and no limitations were placed on which members could participate. In the case of An Garda Síochána we supplied the names of the individuals to whom we wished to speak to the gatekeeper, who facilitated initial contact but did not limit requests or require participation. The interview guide and focus group guide were provided to An Garda Síochána and the Probation Service respectively as part of the research approval process, and neither sought to influence the questions we asked participants.

Volunteer sampling: Victims

As a sampling strategy, volunteer sampling can be particularly useful when potential participants are dispersed throughout the community or are difficult to access directly. Volunteer samples are recruited through the advertisement of the research objectives and criteria for inclusion through channels likely to reach suitable participants, requesting people who meet the criteria to volunteer to take part in the study. An advantage of volunteer or self-selection sampling is that potential participants are likely to be committed to the study, and participants may have a greater willingness to provide more in-depth insight into the phenomenon under investigation. Some disadvantages of this sampling strategy are the likelihood for volunteer bias, given that the decision to take part may reflect the participant's inherent beliefs about the phenomenon being studied. This can either lead to the sample not being representative of the population being studied, or may lead to the exaggeration of a particular finding from the research. This caveat is something of which we ask the reader to be conscious in interpreting the findings.

We advertised for victims to contact us directly through civil society organisations who advocate for and/or support groups who commonly experience hate crime and through key influencers in commonly targeted communities. Both types of gatekeeper were asked to communicate details of the research through their distributions lists, social media sites and any other communication channels available to them. We sought participation from individuals across a range of identity groups and did not operate a quota.

Nineteen interviews were completed with victims. Two of these interviews were excluded, one because of a lack of data relevant to the subject matter of the research;

and the other for ethical reasons. Both interviewees were accessed through a civil society organisation gatekeeper. Thus, the analysis presented in this Report is based on interviews with 17 individuals who each discussed between one and three reported hate crimes. In total the participants discussed 26 hate crimes, 25 of which were reported to the police. All but three of these occurred during the period 2011-2016. The exceptions related to the period 2009-2010. We have included these crimes either at the specific request of the participant, or because they evidenced an aspect of the criminal justice process that was not represented elsewhere in the data. In presenting direct quotes from the victims' narratives, we identify the victims by whether the crime to which they are referring occurred prior to or after November 2015, the date at which the Victims' Directive became operative from a policing perspective.

Of the 26 hate crimes discussed, one crime was transphobic, one was homophobic and one was religiously aggravated, specifically Islamophobic. Twenty-three of the 26 hate crimes were perceived by the interviewees to be racist, including two cases which were perceived to be anti-Roma; one committed against a person of Eastern European origin which focused on their immigrant status; and one committed against a Black African immigrant, on the basis of the perception that they were of another EU nationality. The sample does not include any examples of disablist crime. The remainder, and vast majority of racist crimes, were committed against a Black African immigrant. In every instance, the participant perceived that they had been targeted on the basis of a single personal characteristic. No one discussed having been targeted for a range of characteristics either in a single incident or over the course of their experiences of bias related hostility.

As only one of the cases in the sample was prosecuted, we classified the remaining offence types using the victim's narrative. The crimes discussed included twelve assaults, one assault causing harm, eight cases of criminal damage, three cases of threatening, abusive and insulting behaviours (a public order offence), one case of arson, one threat to kill, and one case of making off without payment.⁴⁷ The most frequently occurring offence types are consistent with those identified by Haynes et al. in 2015.⁴⁸

⁴⁷ One incident consisted of both assault and criminal damage.

⁴⁸ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, *'Out of the Shadows' Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

That only one person in the sample had experienced a hate crime which had been the subject of court proceedings reflects the findings of this and our 2015 research that the hate element does not always reach the court. The 17 individuals whose experiences are detailed here do, however, provide important insights into the reporting, recording and investigation of hate crimes in Ireland, including into factors which are likely to have contributed to their cases failing to reach the courts. In particular, victims cite delays in and failures to take statements from both victims and witnesses.

ETHICAL CONSIDERATIONS

All aspects of this research complied with the ethical regulations of the University of Limerick and all aspects of the design were approved by the University's Faculty of Arts, Humanities and Social Sciences Ethics Committee (Approval Number 2016-02-25-AHSS). The research was also formally approved by An Garda Síochána and the Probation Service, with respect to the involvement of their members and clients respectively.

Two of the most common and important ethical principles which researchers must uphold are informed consent and confidentiality. Informed consent is the agreement of the individual to participate in the study after being informed of facts that would be likely to influence his/her willingness to participate.⁴⁹ The purpose of informed consent is to allow people to protect their own interests. All potential participants to this research were provided with information letters and consent forms detailing the purpose and objectives of the research. Potential participants were informed of their right to withdraw from the research without consequence and their right to decline to answer any question. Participants were also provided with contact details for the Chairperson of the Faculty Ethics Committee should they have queries or complaints they felt they could not address to the researcher.

Voluntarism relates to the participants' freedom to choose whether to take part in the research. Voluntarism may be threatened where there is an unequal relationship between researcher and potential participant, or between the potential participant and any third party who will have knowledge of and an interest in their participation.⁵⁰

⁴⁹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, *'Out of the Shadows' Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

⁵⁰ John W Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches*, (2nd edn, Sage 2007).

Researchers must be particularly cognisant of the manner in which relationships between potential participants and gatekeepers who mediate access, may impact upon their capacity to choose participation or non-participation.⁵¹ We were very conscious of the power relationship between gatekeepers and participants and emphasised the voluntary nature of participation. Particularly in the case of previous offenders, where the power imbalance between the participant and the gatekeeper was particularly significant, we also took the precaution of not singling out any individual to answer a question, giving each participant the option of remaining silent for the duration of data collection. Every participant chose to contribute however.

Confidentiality is achieved where the researcher can connect the identity of the participant with their data, but protects the identity of that participant.⁵² Providing for participants' anonymity or confidentiality is essential to maintaining their privacy and is a fundamental concern of social research. In the case of the police we were conscious that the gatekeeper had facilitated contact. We took account of this fact in the manner in which we reported their data, such that no data would be traceable to any individual within the group of eighteen officers to whom we spoke.

Participants must be made aware of any limits to the researchers' assurances of confidentiality, including relating to group formats of data collection.⁵³ In the context of the issue of confidentiality, a disadvantage of the focus group format is that the researcher can make guarantees of confidentiality only with regard to their treatment of the data. They can request that each participant respects the privacy of the group interview setting, but they cannot ensure that this will be upheld.⁵⁴ These limitations to confidentiality were explained to participants at the commencement of the focus group.

Ethically, it is important to note that the purpose for which secondary data addressed in this report was used did not depart from the intentions communicated to the survey respondents. In addition, there is an ethical value in maximising the use of data which is already in existence.⁵⁵ We requested that the civil society organisations provided the data to us in an anonymised format.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Sudhir Venkatesh, 'Research: The Researcher's Dilemma' (2006) 24(4) *Law and Social Inquiry* 987.

⁵⁴ Karen Kaiser, 'Protecting Respondent Confidentiality in Qualitative Research', (2009) 19(11) *Qualitative Health Research* 1632; Jenny Kitzinger, 'Qualitative Research: Introducing Focus Groups' (1995) 311 *British Medical Journal* 299.

⁵⁵ John Goodwin, *SAGE Secondary Data Analysis* (Sage 2012).

ANALYSIS OF QUALITATIVE DATA

Data collected from both the focus group discussions and the one to one interviews were subject to thematic analysis. Thematic analysis is considered one of the most common approaches to qualitative data analysis.⁵⁶ It 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.⁵⁷ 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 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 formulated 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.⁵⁸ 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.

ANALYSIS OF SECONDARY DATA

This Report draws upon an original analysis of data on hate crimes occurring in Ireland gathered by three national umbrella civil society organisations representing commonly targeted communities. Each organisation hosts or hosted an online reporting mechanism through which victims of crime can or could report their experiences anonymously. ENAR Ireland advocates with and on behalf of people from racialized, ethnic, and religious minorities; TENI represents Ireland's trans community; and GLEN was a leading organisation advocating for sexual minorities.⁵⁹ All three are or were network organisations with multiple member organisations from around Ireland.

ENAR Ireland operates a third party monitoring system called iReport, which was launched in 2013 and gathers data on racist and religiously aggravated hate incidents. TENI's STAD (Stop Transphobia and Discrimination) campaign and monitoring system was launched in the same year to monitor transphobic hate incidents and discrimination against gender variant persons, including trans, gender fluid,

⁵⁶ Alan Bryman, *Social Research Methods*, (4th edn, Oxford University Press 2012).

⁵⁷ Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (Sage 2011); Carol Grbich, *Qualitative Data Analysis: An Introduction* (Sage 2007).

⁵⁸ Carol Grbich, *Qualitative Data Analysis: An Introduction* (Sage 2007).

⁵⁹ GLEN was in the process of being wound up in 2017, after the completion of the analysis.

non-binary and intersex people. GLEN initiated its system in December 2014 to permit people to record anti-LGB, anti-transgender and anti-intersex hate crime. ENAR Ireland publishes regular quarterly reports of data recorded on the iReport monitoring system, with the first of these reports being published for the July-September 2013 period. ENAR Ireland also publishes thematic reports, for example on experiences of “Afrophobia” in Ireland.⁶⁰ TENI has launched two reports based on data gathered through STAD: the first was launched, in 2014,⁶¹ and the second for the period 2014-2016 inclusive was launched in 2017.⁶²

The HHRG worked with all three organisations to produce analyses of hate crime data collected by their third party recording mechanisms. In 2016 we published research, funded by the Irish Research Council, entitled *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?*⁶³ which aimed to provide a forum for an informed discussion of the possibility for enhancing the comparability of data collected by ENAR Ireland, GLEN and TENI, including via their alignment. This research included an original analysis, by the HHRG, of all three organisations’ data relating to hate crimes for 2015. Further, in 2017, the HHRG in partnership with Transgender Equality Network Ireland launched an analysis, conducted and authored by the HHRG, of data collected by TENI via their STAD mechanism for the period 2014-2016. This work was conducted on a pro bono basis.

A pitfall of secondary data analysis is working with data which was collected for purposes other than those of the researcher.⁶⁴ However, given that the questions we were asking aligned with the original purpose for which the data was collected, this issue did not arise in this context.

CRIME CLASSIFICATION

We have utilized the same approach to crime classification across all the above named research projects. We have found that victims often either do not recognize their experiences as criminal offences (describing them as ‘verbal abuse’ or ‘discrimination’); or identify what are best described as non-crime hate incidents or microaggressions as hate crime. For this reason, in producing findings relating to hate crime,⁶⁵ we extract, and restrict our analysis to, data relating to incidents which bear the characteristics

⁶⁰ Lucy Michael and Shane O’Curry, *Afrophobia in Ireland: Racism against People of African Descent* (ENAR Ireland 2015).

⁶¹ Transgender Equality Network Ireland, *STAD: Stop Transphobia and Discrimination Report* (TENI 2014).

⁶² Amanda Haynes and Jennifer Schweppe *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017).

⁶³ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016).

⁶⁴ Thomas Vartanian, *Secondary Data Analysis* (Oxford University Press 2011).

⁶⁵ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017) also contains a separate analysis of data relating to discrimination and non-crime microaggressions.

of criminal offences. In classifying incidents as crimes and in categorising by offence type, we rely primarily on the narrative of the incident provided by the respondent in the interview or in the online form (in relation to secondary analysis), and classify the crime in accordance with the strict legal definition of the crime category as the most objective means of classification. However, with criminal justice professionals (barristers, solicitors, and members of An Garda Síochána) interviewed for this research, we relied exclusively on the offence type referred to by the participant during the course of the interview, given their expertise and knowledge of the case to which they were referring.⁶⁶

RESEARCH LIMITATIONS

As we have stated previously, across the five jurisdictions party to this research researchers were tasked with interviewing a number of categories of participants, including prosecutors and judges. In recruiting prosecutors, we specifically sought access to the office of the Director of Public Prosecutions and the Chief State Solicitor's Office. We approached the Director of Public Prosecutions formally via letter detailing the nature of the research, its objectives and the rights of potential participants. We followed up this with a phone call and a further letter, none of which were responded to. The Chief State Solicitor's Office did reply to our letter, but refused the opportunity to speak with us. This resulted in us having gaps in our knowledge base as to whether, for example, there was any formal policy in the State regarding the manner in which cases involving a hate element are prosecuted, and what, if any, approach the Office of the Director of Public Prosecutions or the Chief State Solicitor's Office took to such cases. This was unfortunate, as having an overview of the approach of both offices to the issue of hate crime would have been an invaluable source of information for the purposes of this project, a point made in an interview with this barrister:

"Because I think the only person who ... has an overview of those cases ... an overview of cases generally is the DPP. So that's why I think if you're going to do the study you couldn't not ask for that voice to contribute."

(Barrister - Prosecution and Defence)

Thus, we are reliant on a small number of barristers who have acted for the prosecution

⁶⁶ For further information regarding the analysis of third party monitoring data, see Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism* (HHRG 2016); and Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report: 2014-2016* (TENI 2017).

in such cases, as well as perceptions of defence practitioners and gardaí, for understanding this part of the process.

In the context of judges, it is generally considered good practice to request permission from the Chief Justice before approaching any member of the judiciary to participate in research. We did this by making a formal request to Chief Justice Denham by letter, explaining the purpose of the research, its objectives, and the rights of potential participants. We were informed by letter that the Chief Justice declined permission for us to approach members of the judiciary. We wrote again to the Chief Justice requesting that she reconsider her position and did not receive a response to this letter. Again, the omission of judges' perspectives is a regrettable limitation to the research. As a result of the refusal of access, we must rely on the perspectives of other criminal justice professionals on the sentencing practices of the judiciary in Ireland in respect to hate crimes. Further, in cases in which the reasons for the sentence were not stated by the court, those present rely on their knowledge of the case, and the sentencing practices of individual judges to estimate whether the sentence was or was not aggravated as a result of the hate element.

Finally, as with much criminological research conducted in an Irish context, the dearth of official policy and statistics was a limitation to the research, ameliorated in this case by the cooperation of the Central Statistics Office and An Garda Síochána.

CHAPTER 3: CURRENT FRAMEWORK

Though there is no hate crime legislation in Ireland, hate speech and related incitement offences are addressed through the Prohibition of Incitement to Hatred Act 1989, and there are a small number of reported judgments which address the hate element more generally. This chapter will explore both of these, as well as the impact of the Victims' Directive, before discussing Ireland's international obligations in this regard. It will conclude by discussing data collected through victim surveys in an Irish context.

THE PROHIBITION OF INCITEMENT TO HATRED ACT 1989

In Ireland, the only legislative recognition of 'hate' is through the Prohibition of Incitement to Hatred Act 1989. Section 2 of the Act prohibits expressions, including the dissemination of graphic or textual materials, which have the intention of provoking hatred against "... a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation". At the time of its enactment, it was relatively progressive, including sexual orientation as a protected characteristic prior to the decriminalisation of homosexuality in 1993.⁶⁷ However, it has proved utterly ineffective at combating hate crime, with only a small number of convictions secured under the Act. This is to be expected, given its context and purpose, but Taylor observes what he calls "... 'an expectations gap' and 'a frustration gap' between community aspirations from this [the 1989] legislation and the reality of its limited application and implementation to date... [which he argues potentially]... undermines social cohesion, and a sense of the system working for all."⁶⁸ This is reflected in the findings of Schweppe et al.,⁶⁹ which found civil society organisations explicitly referencing the inadequacy of the 1989 Act in combating hate crime.⁷⁰

Described by Keogh as the "Achilles heel" of the Act,⁷¹ it is the requirement to prove that the defendant either intended to, or in the circumstances, was likely to, stir up hatred, that has arguably resulted in so few prosecutions under the Act. Byrne and Binchy ask whether it is sufficient that a few "cranks" are likely to be stirred up, or whether there is an objective element to the requirement, concluding that the

⁶⁷ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free from Fear: Legislating for Hate Crime in Ireland: An NGO Perspective* (CUES 2014).

⁶⁸ Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011) 5.2.21.

⁶⁹ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free from Fear: Legislating for Hate Crime in Ireland: An NGO Perspective* (CUES 2014).

⁷⁰ *ibid* 24-25.

⁷¹ Conor Keogh, "The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?" (2001) 6(3) *Bar Review* 178.

standard likely to be applied is essentially somewhere between the few “cranks” and the objective standard of the hypothetical juror. Daly, however, argues that the “is likely to” element of “stirring up” facilitates convictions for cases in which the expression “is either not intended to be heard by others, or simply not intended or expected to incite others to hatred”, ultimately incorporating a threshold of negligence to a criminal act.⁷²

The Law Reform Commission further observes that the Act has proven particularly ineffectual in combating online hate speech, perhaps for this reason.⁷³ It refers to the so-called “Traveller Facebook case”, in which the accused had created a Facebook page entitled “Promote the use of knacker babies for shark bait.”⁷⁴ The Commission notes that the case was dismissed in the District Court on the basis that there was reasonable doubt as to whether there had been intent to incite hatred against the Traveller community.⁷⁴ Irish Travellers, for example, are an indigenous ethnic minority group, who are subject to virulent racism.⁷⁵ Indeed, Keogh observes that such is the application of the “stirring up” requirement, that a conviction will only be secured in cases where “racist material is sent between racists but not when the victim group is directly targeted.”⁷⁶

There has only been one case exploring the scope and application of the 1989 Act, and this was done in the context of an extradition request. In *Re the European Arrest Warrant Act 2003: Minister for Justice and Law Reform v Petrášek*,⁷⁷ a question arose as to the correspondence of the Czech law of “defamation of the ethnical group, race and persuasion”⁷⁸ with the 1989 Act. The warrant stated that Petrášek verbally attacked a Roma family, and “[s]colded them, and called black swines (sic), Negro swines three women (sic) ... He shouted at them that he would speak only with whites.”⁷⁹ In addressing whether correspondence existed between Irish law and Czech law in the case, counsel for the respondent stated that the facts did not satisfy the ingredient relating to the place of commission, the ingredient relating to intention, or the

⁷² Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) *Irish Criminal Law Journal* 16.

⁷³ That said, Kane and O’Moore describe the Act as a ‘technologically neutral’ one, as appropriate to online expressions of hatred as it is to those occurring offline. Sinead Kane and Mona O’Moore, ‘The EU Directive for Victims of Crime: How it Applies to Victims of Bullying’ (2013) 23(3) *Irish Criminal Law Journal* 83.

⁷⁴ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.245, 2.246. The word ‘kn**ker’ is a racist slur referencing Traveller identity.

⁷⁵ Sindy Joyce, Margaret Kennedy, and Amanda Haynes, ‘Travellers and Roma in Ireland: Understanding Hate Crime Data through the Lens of Structural Inequality’, in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime*, (Palgrave Macmillan 2017) 336.

⁷⁶ Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) *Bar Review* 178, 181.

⁷⁷ [2012] IEHC 212.

⁷⁸ [2012] IEHC 212, para 37.

⁷⁹ [2012] IEHC 212, para 38.

ingredient of stirring up hatred. The Court was not impressed with these arguments, and, finding correspondence to the 1989 Act, Edwards J stated:

“The conduct described speaks for itself in this Court’s view, and an intention to stir up hatred in the case of the s.2 offence ... alternatively the creation of a likelihood that hatred would be stirred up in the case of the s.2 offence ... can all be inferred from the description of the underlying facts provided.”⁸⁰

Thus, while there does not seem to be any evidence that anyone was in fact “stirred up”, as has apparently been suggested as a prerequisite to a prosecution under section 2 in previous cases and as referenced by the Law Reform Commission, Edwards J nonetheless found that the facts, as presented, corresponded to section 2 of the 1989 Act. Whether this signals a potentially broader interpretation of the Act in the future remains to be seen. Whatever the true interpretation of this element of the Act, it is difficult to disagree with Daly who argues that the Act is “unacceptably vague, excessively broad in scope, and in a prosecutorial sense, effectively rudderless.”⁸¹ McGonagle agrees, and goes so far as to say that these operative notions which underpin the Act “tread the very fine line separating potential for legislative flexibility from legislative uncertainty”: a fine line which, of course, has constitutional origins.⁸²

EXPERIENCES AND UNDERSTANDINGS OF THE 1989 ACT

Three barristers interviewed for this research had experience of cases in which a charge under the 1989 Act was at least contemplated. Half the gardaí had experience of the 1989 Act, while the same number did not. The first case discussed by barristers involved an anti-religious element. In recalling the case, the barrister said that there was a “*slight kind of element, of kind of, possibly incitement to hatred*” in the case, but ultimately a prosecution was brought under section 6 of the Public Order Act 1994, which was dismissed at prosecution stage. In the second case, there was a charge under the 1989 Act, but a *nolle prosequi* was entered in relation to that charge. In that case, a guilty plea was entered for an associated offence. Even in the absence of a charge under the 1989 Act, when asked if the court took the racist element into account, the barrister responded:

⁸⁰ [2012] IEHC 212, para 42.

⁸¹ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16.

⁸² Tarlach McGonagle, ‘Wresting (Racial) Equality from Tolerance of Hate Speech’ (2001) 23(1) Dublin University Law Journal 21.

“He did, undoubtedly so. So that’s an example of, I suppose, the normal criminal law offences being sufficient to deal with [hate crime], so long as the judge does take into account that there was a racist undertone to it and that that is an aggravating factor.” (Barrister – Defence)

In the third case discussed by participants, the garda sought a direction from the Director of Public Prosecutions on taking a charge under the 1989 Act. Here, the DPP’s office directed that a charge not be brought under the Act, and a guilty plea was accepted in the District Court for an associated offence. There, there was also a racist element to the case, and we asked whether this was either raised during the course of the plea hearing, or addressed by the court at sentencing.

*“Interviewee: I think the guard⁸³ in his facts might have referred to it briefly as the impetus you know or the facts of the case ... but because slurs were being thrown back and forth on both sides it didn’t really feature to be honest. It wasn’t a big element of the case. Not on a guilty plea.
Interviewer: Did the court refer to it in sentencing?
Interviewee: No.” (Barrister – Defence)*

While a number of gardaí had experience of the 1989 Act, it was only in relation to seeking a direction to prosecute from the Director of Public Prosecutions: no participant had experience bringing a case under the 1989 Act to trial. Again, where different charges were brought, the majority spoke to the hate element being taken into account by the court at sentencing:

“The hate element was absolutely taken into account.” (Garda)

This garda stated that, in the event that a prosecution under the Act was declined, the hate element would still be raised:

“... invariably they will direct a prosecution for a public order simpliciter we’ll call it. And then ... the thrust of that case is what was said to the person. Do you know what I mean? So like, it’s something I certainly would be very conscious of.” (Garda)

⁸³ Colloquial term for An Garda Síochána and its members.

More generally, a number of barristers discussed the efficacy and scope of the 1989 Act, and those that did spoke to the high standard of proof required under the Act:

"I suppose the standard of proof and to establish an offence under the 1989 Act, it's quite an unwieldy piece of legislation and legal practitioners have difficulty understanding what it actually means or is meant to achieve."
(Barrister – Defence)

Another barrister developed this point, noting the fact that there may need to be a requirement to establish that someone has been incited under the legislation in order for a prosecution to be successful – echoing Keogh's aforementioned suggestion that it is the "Achilles heel" of the Act⁸⁴:

"Most criminal legislation is directed equally across the board. Whereas this really is directed to persons who might fall foul of this prohibition, need to intend, there has to be the intent. And then there has to be something else, a likelihood the act would stir up hatred. Now how is that to be defined or how is that to be interpreted? - That's the real nub of the issue. And whether a prosecution would be required to find somebody that actually would come to court then give evidence, 'Yeah well, I saw that and it really got my gander up. I wanted to get these guys, you know.' Whereas the normal Joe Citizen will say it was an outrageous thing to [say]. It wasn't going to have any effect on them other than to abhor racism or whatever, but it certainly wouldn't incite them. So that in itself is an unusual offence because it's directed at a certain segment and even that segment have to ... before they'd be found guilty of an offence under the section there must be some likelihood that it would have stirred up hatred." (Barrister - Defence)

This was echoed by a garda who stated that the Director of Public Prosecutions refused a prosecution under the Act because that element was not present:

"the ingredients weren't there – that while it was an attack on people, probably of their racial background, the incitement to hatred of getting others to get involved was missing from it." (Garda)

⁸⁴ Conor Keogh, "The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?" (2001) 6(3) Bar Review 178.

One practitioner speculated on the manner in which the Director of Public Prosecutions would approach a file sent forward with a request that a prosecution be taken under the Act:

“When they get a file, they will examine the different offences that might be available to them. So I don’t think they’d shy away from it. But if there is another offence which will fit the facts, which is easier to prosecute and not having as difficult mental elements ... you couldn’t blame the DPP for going for that offence.” (Barrister – Defence and Prosecution)

Four gardaí spoke about the relatively complex nature of the Act. Two discussed how they had decided not to pursue a prosecution under the Act for the sake of prosecutorial expediency, one of whom framed this response in the context of the needs of the victim:

“a lot of times whenever you’re dealing with something you’re thinking about court and whether you’re right or wrong you’re thinking about the most simplified version of something ... whereas the act doesn’t seem to be that accessible to use in these situations.” (Garda)

“I know the Incitement to Hatred Act is rarely used probably because the simplest charge is often preferable from our point of view, not just our point of view but from the victim’s point of view as well, because if you were to try and investigate something as Incitement to Hatred and try and mould it into some of the legislation under that, you have to do a file to the DPP, it has to be with the DPPs’ agreement, whereas if it related to something like you know... that would fall under the public order legislation, you’re getting a quicker result from the victim, you’re getting it into court quicker and you’re getting a charge quicker.” (Garda)

One garda, acknowledging the difficulties involved in taking a prosecution under the Act stated that it was incumbent on them to do so, in order to send a message that this behaviour was not acceptable or tolerated:

“I think there’s a responsibility on us as investigators to seek out all the evidence to highlight this particular type of crime and to get convictions and highlight it in the court as a deterrent to other people who might engage in it.”
(Garda)

One garda stated that he was dissuaded from seeking a decision to prosecute under the 1989 Act by his supervisor for the purposes of expediency:

“Interviewee: I mean, I remember trying to - you know that incitement to hatred, - put in couple of files over that over the years and ‘What are you doing? Jesus, we’ve to feckin’ send this off to the DPP and the whole lot. It’s a Public Order ... Jesus’. You know. There was some incident in a [place] and some fella went in ‘Chinese bitch’ the whole lot, well that’s incitement to hatred – ‘Don’t go there like, keep it simple’. So there’s that kind of thing as well.
Interviewer: And that was from the higher ups?
Interviewee: Yeah.” (Garda)

Reform of the 1989 Act

There have been many suggestions made regarding reform of the 1989 Act, and all consider the balance which needs to be struck between the freedom of expression, as protected by Article 40 of the Constitution and Article 10 of the European Convention on Human Rights, and the rights of minoritised communities to be protected from attack and persecution. Currently, as McGonagle cogently argues, the Act “falls between two stools” and recommends a “profound recalibration” of the policy objectives underpinning the Act.⁸⁵ Daly reviews the 1989 Act, and the manner in which hatred and intolerance manifested in Irish society up to and including 2007. Critiquing earlier recommendations for reform, Daly recommends the introduction of specific legislative measures targeting offensive private communications, modelling the UK Malicious Communications Act 1988. Schweppe and Walsh suggest minor changes to the Act, particularly in the context of online hate speech. The Law Reform Commission have further analysed the utility of the Act in an online context.⁸⁶ Given the fact that the internet, as the Commission observe, offers a “substantial means to promote

⁸⁵ Tarlach McGonagle, ‘Wresting (Racial) Equality from Tolerance of Hate Speech’ (2001) 23(1) Dublin University Law Journal 21. See also, Dermot Walsh and Jennifer Schweppe, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI, 2008) 164-171 for an assessment of reform options under the Act.

⁸⁶ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016).

hatred and facilitate hate speech”⁸⁷, if the 1989 Act were to have any application, it is perhaps in this context that it could be most readily utilised. The Commission notes that online hate speech is criminalised by the Act, but any difficulties already identified in terms of the efficacy of the Act offline are essentially compounded in an online context. Referring to the so-called “Traveller Facebook case”, the Commission recommends that the Act and the criminalisation of hate speech be subject to broad reform. This is particularly relevant in a context where, as the Commission observe, “[o]nce an abusive comment is made it can spread very fast, be viewed by many people and remain accessible long after the content was posted.”⁸⁸

A further limitation to the Act is the fact that it is limited in terms of its protection of groups. By only naming race, colour, nationality, religion, ethnic or national origins, membership of the Traveller community or sexual orientation, the Act ignores incitements to hatred against other communities, most obviously disabled people, intersex and transgender people, asylum seekers and refugees, and, arguably, the Roma community. The exclusion of disabled people from the scope of the Act was described as a significant and notable absence in the legislation by Kilcommins et al.⁸⁹ Again, this gap in legislative protection is recognised by groups who advocate for these communities:

“People with an intellectual disability are particularly vulnerable to violence or the threat of violence ... The Prohibition of Incitement to Hatred Act, 1989 does not include disability as an aggravating factor. The exploration of violence against people with a disability as a hate crime should be addressed.”⁹⁰

It is clear that the 1989 Act requires reform: whether this is wholesale reform, as suggested by Daly, or a more modest amendment, as per Schweppe and Walsh, should be determined by legislators. Whichever approach is adopted, however, must particularly take into account the context of cyber hate crime, as well as ensuring that victims generally are protected, which at a minimum must include reference to gender identity, gender expression and disability.

⁸⁷ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.245.

⁸⁸ *ibid* para 2.247.

⁸⁹ Shane Kilcommins, Claire Edwards and Gill Harold, ‘Victims of Crime with Disabilities in Ireland: Invisible Citizens within an Adversarial Paradigm of Justice’ 2013 23(2) *Irish Criminal Law Journal* 45.

⁹⁰ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free From Fear: Legislating for Hate Crime in Ireland – An NGO Perspective* (CUES 2014) 21.

THE CRIMINAL JUSTICE (VICTIMS OF CRIME) ACT 2017

While historically, the decision to prosecute was often made by the victim,⁹¹ in the 19th and 20th century the role of the victim was reduced to reporting the crime itself and giving evidence as a witness in the case if needed. Thus, until recently, in the Irish criminal justice process, the victim was “little more than an ordinary witness and a source of evidence against the accused.”⁹² Victims had few rights, and their role in the trial process was limited.

However, this traditional “sidelining” of the victim has been changing in the last number of years. Kilcommins et al.⁹³ observe that victims are now no longer a “non-entity” in the criminal justice process, but are rather stakeholders whose interests and opinions matter: however, they further acknowledge that shortcomings in the criminal justice process remain “stubbornly persistent”, which relate to:

“... the provision of information to victims, underreporting, attrition rates, the lack of private areas in courts, delays in the system, the lack of opportunity to participate fully in the criminal process, and inadequate support services.”⁹⁴

The Victims’ Directive addresses the needs of victims of hate crime in the context of court proceedings, provisions which have been transposed in the Criminal Justice (Victims of Crime) Act 2017. Article 22(1) of the Directive states that, 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.” Section 15(2) of the 2017 Act sets out the context for this assessment and provides that:

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

⁹¹ Barry Vaughan and Shane Kilcommins, *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland* (Routledge 2008).

⁹² Vicky Conway, Yvonne Daly and Jennifer Schweppe, *Irish Criminal Justice: Theory, Process and Procedure*, (Clarus 2010) 222.

⁹³ Shane Kilcommins, Claire Edwards and Tina O’ Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (ICCL 2013).

⁹⁴ *ibid* 23.

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

The equivalent section in the Bill was amended at Committee Stage⁹⁵ to remove the words “the personal characteristics of the victim referred to in paragraph (d)” and substitute “the personal characteristics of the victim, *including such characteristics* as are referred to in paragraph (d)”. This takes account of recommendations by the HHRG and the Irish Human Rights and Equality Commission that the legislation make it clear that hate crime is not limited to those explicitly set out in the list of personal characteristics.⁹⁶

However, we further recommended that, in order to effectively identify victims of hate crime, clear definitions as to what constitutes a hate crime; clear understandings as to the protected characteristics available; and legislation which addresses the hate element of a crime should be introduced as a matter of urgency. We further suggested that all actors in the criminal justice process require training on these issues, with Ethnic Liaison Officers and LGBT Liaison Officers requiring particularly intensive and ongoing training on supporting victims of hate crime. Garda training, while welcome, has so far been provided only for these specialist liaison officers.⁹⁷

⁹⁵ Amendment 82 to Criminal Justice (Victims Of Crime) Bill 2016

<<https://www.oireachtas.ie/documents/bills28/bills/2016/12116/B12116d-DCN.pdf>> accessed November 2017.

⁹⁶ Hate and Hostility Research Group, ‘Submission on the Heads of the Criminal Justice (Victims of Crime) Bill 2015’ (HHRG 2015) 4; Irish Human Rights and Equality Commission, ‘Observations on the Criminal Justice (Victims of Crime) Bill 2016’ (IHREC 2017) 6 <<https://www.ihrec.ie/app/uploads/2017/02/Observations-on-the-Criminal-Justice-Victims-of-Crime-Bill-2016.pdf>> accessed 8 November 2017.

⁹⁷ An Garda Síochána, ‘Annual Report 2016’ (Garda.ie, 2016) 12

<<http://www.garda.ie/Documents/User/Annual%20Report%202016.pdf>> accessed 8 November 2017.

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

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

None of the criminal justice professionals we spoke with had experience of these special measures being either applied for or considered in the context of a prosecution.

In its Victims’ Charter, An Garda Síochána has committed to providing victims of crime with information regarding the process of their case, including:

- “respond quickly to calls and investigate complaints;
 - give the victim the name, telephone number and station of the investigating Garda and the PULSE incident number;
 - explain what will happen during the criminal investigation and keep the victim informed of the criminal investigation process, including writing to the victim when they charge/summon or caution a suspect in relation to the incident; and
 - provide the victim with details about the Crime Victims Helpline and other support services;
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- where a suspect is due to appear in court, provide the victim with details in relation to:
 - whether the suspect is being held in prison or on bail and any conditions of the bail;
 - the time, date and location of any court hearing;
 - details of support the victim can avail of from voluntary organisations in relation to being a witness;
 - details regarding when/if the victim can give a victim impact statement;
 - details regarding court expenses payable; and
 - the final result of the criminal trial”⁹⁸

In order to support victims in a more meaningful way, a number of Garda Victim Service Offices have been established across the country which are intended to ensure a consistency of approach in terms of the services provided by An Garda Síochána to victims. A 2014 report of the Garda Inspectorate made further recommendations in relation to changes that it would suggest be made in order to further support victims through the criminal process.⁹⁹ It found that, despite the guarantees made in the Victims’ Charter, there was generally poor follow-up with victims, and that there was an inconsistent approach to updating victims. With particular relevance to hate crime, there was found to be no garda policy or procedure for dealing with people who are repeat victims of crime.

Participants were asked their views on the relevance of the Victims’ Directive to crimes involving a hate element, given the obligations in the Directive in that regard. Only four defence practitioners offered views on this with reference to victims of hate crime. One participant observed that translation services will be required to keep victims informed of the process, as well as to facilitate the delivery of victim impact statements. Another was of the view that the Directive would require the State to record characteristics of victims, which they felt would be important in terms of capturing the prevalence of hate crime with respect to particular communities.

⁹⁸ An Garda Síochána, *Victims Charter* (An Garda Síochána 2010).

⁹⁹ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) part 7.

One solicitor was of the view that, as victims are more integrated into the process, and have more rights in terms of both receiving information regarding the case as well as making a statement, this would impact on the manner in which cases are presented in court:

“Obviously if you have a guard dealing with a case – even in the District Court and included in the statement of the victim is all this stuff about how they insulted them for their race or sexuality or whatever, then they’re going to be saying ‘You never said anything about that’ and then the guard is worried he’s going to be complained about. So that is definitely going to affect how stuff is presented in court.” (Solicitor – Defence)

Another was of the view that the element of the Directive which protects victims from having to engage with the accused person was potentially constitutionally problematic:

“... the victim now has a right not to be confronted by the accused person but the accused person himself technically has a right to be confronted by the victim if you know what I mean... I can’t see how it can be in the case where a stranger is the victim that someone is intimidated by the very presence of the accused and I think that could throw up issues ... I think if you’re trying to defend the person ... who has a right to cross examine ... has the right to effectively face their accuser.” (Solicitor – Defence)

Gardaí were more cautious in their discussions about the impact of the Victims’ Directive, with the vast majority stating that they had not seen the operational impact of the Directive in the context of hate crime. The lack of an explicit and formal link between the work of specialist ELO/LGBT Officers and the work of the Garda Victim Service Offices was criticised, and according to interviewees, there was no clear evidence that the gardaí staffing the offices had any training on the treatment of victims of hate crime, or any of the particular special measures that should have been in place for them.

In conclusion, although the Directive does not require legislation to be introduced which imposes a harsher penalty on the offender, nonetheless, it does require that such victims be treated in a particularly protective manner by the criminal justice process as a whole in the context of the investigation and prosecution of a hate crime. On the face of it the legislation and prosecutorial guidelines appear compliant with the Directive. However, where a system is, as we will go on to show in chapter four, often 'blind' to the hate element of a crime, 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.

IRISH CASE LAW

Given the absence of any legislation on the issue, it is unsurprising that there is extremely limited case law on hate crime in Ireland. Indeed, used in this context the terms 'hate', 'hatred' or 'hate crime' do not appear in any written judgment delivered in the history of the State. As we showed in a previous study, a major difficulty hindering any material factor of racism or other bias motivation from being considered by a court is that, at each stage of the criminal justice process, the hate element of a crime has been unlikely to be identified and recorded.¹⁰⁰ Hence, there is a paucity of reported judgments to consider.

Racist motivation as an aggravating factor

The first written judgment in which the question as to whether a racist motivation is an aggravating factor was given in *Director of Public Prosecutions v Elders*.¹⁰¹ In this case, the racist element was present at the beginning of a series of events which took place where the appellant said to the injured party: "'eff off'... 'eff off Packi bastards'".¹⁰² The sentencing judge assessed the offence as being at the top end of seriousness, and that "the racist element was an aggravating factor" and sentenced the appellant to a term of five years imprisonment, the maximum sentence available for that offence.¹⁰³

¹⁰⁰ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, *'Out of the Shadows' Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

¹⁰¹ [2014] IECA 6.

¹⁰² *ibid* para 2.

¹⁰³ *ibid* para 7.

In assessing whether the sentence imposed was appropriate in the Court of Appeal, Birmingham J discussed the aggravating factors:

“Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact”.¹⁰⁴

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

The second case in which this issue was addressed is *People (DPP) v Collins*.¹⁰⁵ As there was disagreement between the parties as to whether the offence in question was in fact racially motivated,¹⁰⁶ the comments of Birmingham J are, strictly speaking, obiter, but none the less worth observing:

“It is not clear what role, if any, this concern about a possible racist motivation had when it came to the selection of sentence. Undoubtedly it is the case that if an offence is racially motivated that would be regarded as an aggravating factor.”¹⁰⁷

The only other written judgment in which a racist element was considered by the court is *DPP v Shattock*.¹⁰⁸ Here the appellant was convicted of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997 and was sentenced to three and a half years imprisonment with the final eighteen months suspended. He stopped to speak with the injured party and the cousin of the injured party, after which a group of young people arrived and started calling the injured party and his cousin “Pakis”. The appellant threw a stick at the injured party which ultimately led to the injured party losing his eye. He had what the trial judge referred

¹⁰⁴ *ibid* para 11.

¹⁰⁵ [2016] IECA 35.

¹⁰⁶ “In relation to the judge taking account of the fact that the offence may have been racially motivated, he was prompted to do this by a sentence in the probation report which quotes their client as saying ‘he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend’. By reference to this sentence the judge said that he felt that it was highly probably that the attack had some element of racism to an unspecified degree.” (para 15).

¹⁰⁷ *People (DPP) v Collins* [2016] IECA 35 para 16.

¹⁰⁸ [2016] IECA 82.

to as “perfect mitigation”. Asides from a reference to the fact that the racist remarks were made by members of the group, there is no evidence that the sentencing court took that racist element into account in sentencing. The Court of Appeal said very little regarding the racist element, except to observe that the appellant was not the initiator of the racial abuse.

Disability as an aggravating factor

In *People (DPP) v Moran*,¹⁰⁹ in an application for review of a sentence on grounds of undue leniency, it was argued by the Director that the sentencing judge failed to take sufficient account of a number of aggravating factors in sentencing the respondent. One of these factors was that the injured party who suffered from a “mental disability” and thus was, as the Director argued, “vulnerable”, was subjected to a series of aggravated burglaries in his own home.¹¹⁰ Further, it was argued by the Director that the sentence “similarly did not reflect the fact that the respondent carried out the second and third aggravated burglaries being aware of his victim’s vulnerability and with a view to extorting money from him.”¹¹¹ In giving judgment for the Court of Appeal, while Sheehan J found that the sentence imposed was indeed unduly lenient as the sentencing judge “failed to give sufficient weight to the many aggravating factors,”¹¹² neither the particular vulnerability of the victim nor the fact that the victim seems to have been targeted because of this vulnerability was explicitly mentioned as an aggravating factor.

In *People (DPP) v DO’D* the Court considered the imposition of a five year sentence on the accused following his conviction under section 5 of the Criminal Law (Sexual Offences) Act 1993.¹¹³ The Court of Appeal was asked to consider inter alia whether the level of mental impairment of the injured party should have been treated as an aggravating factor in determining the sentence of the accused. On this issue, the sentencing court stated that the following was treated as an aggravating factor:

“The fact that the injured party, obviously, was mentally impaired, and the level of mental impairment, and the level of support that she needed, and

¹⁰⁹ [2015] IECA 141.

¹¹⁰ *People (DPP) v Moran* [2015] IECA 141 para 11.

¹¹¹ *ibid* para 25.

¹¹² *ibid* para 36.

¹¹³ Section 5 provides for a specific offence of having or attempting to have sexual intercourse or committing or attempting to commit buggery on a person who is ‘mentally impaired’.

her particular circumstances and particular way that the mental impairment impinged on her ability to form any relationship.”¹¹⁴

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

“In general, the more mentally impaired a victim is, and consequently the more vulnerable he or she is, the greater will be the culpability of the offender. Conversely, the milder the victim’s mental impairment, the lesser the offender’s culpability will generally be.”¹¹⁵

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

Kilcommmins et al.¹¹⁶ observe that, as there is little jurisprudence on the question, there is “no reason why a sentencing judge in Ireland could not regard the fact that the crime was committed against a person with a disability as an aggravating factor.”¹¹⁷ That said, there is, of course, nothing requiring a court to take it into account as an aggravating factor either. Furthermore, to treat the fact that an individual has a disability as a hate-aggravated factor would require something of a paradigm leap. Taylor posits that “the inherent vulnerability categorisation remains hegemonic in the current Irish context.”¹¹⁸ As he observes, the focus in Ireland is on “the construction of disabled people in public policy as an inherently vulnerable group.”¹¹⁹ Winter also highlights this focus on vulnerability instead of rights, suggesting that “rather than protecting and promoting human rights of people with disabilities, Ireland’s legislative and policy framework may contribute to reinforcing negative stereotypes of people with disabilities.”¹²⁰

¹¹⁴ *People (DPP) v DO'D* para 5.

¹¹⁵ *ibid* para 10.

¹¹⁶ Shane Kilcommmins, Claire Edwards and Tina O' Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (ICCL 2013).

¹¹⁷ *ibid* 51.

¹¹⁸ Seamus Taylor, 'The Challenges of Disablist Hate Crime', in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 225.

¹¹⁹ *ibid* 224.

¹²⁰ *ibid* 234.

Observations

Due to the extremely limited number of cases, we can draw very limited conclusions on the manner in which the judiciary have addressed hate crime in Ireland to date. We can say with some degree of certainty that where a racist motivation is present, the Court should treat that as an aggravating factor. It is unclear, however, the extent to which the racist element should aggravate the sentence, or what “race” means in this context. While the courts have addressed the question of whether disability should be treated as an aggravating factor, this is based on a presumption of vulnerability, rather than an assessment as to whether the offence was motivated by anti-disability bias. Other commonly targeted grounds have not been explicitly considered in reported cases.

The principle of certainty

It is not clear what level of proof is required in order to establish a hate element. In *DPP v Collins* the trial judge seems to have taken into account the fact that the offence “may have been racially motivated”.¹²¹ Birmingham J stated:

“He was prompted to do this by a sentence in the probation report which quotes their client as saying ‘he (that is the accused) says he watched two foreign nationals cross the road to his girlfriend.’ By reference to this sentence the judge said that he felt that it was highly probable that the attack had some element of racism to an unspecified degree.”¹²²

The Court of Appeal did not take the opportunity to consider whether this amounted to proof of racist motivation on the part of the accused, nor whether such evidence was appropriate to consider as proof of a racist motivation. While the Court did not explicitly criticise the sentencing judge for treating statements in the probation report as proof of a racist motivation to the offence, it did state that it was “not clear” what role, if any, this concern regarding a racist motivation had when it came to determining the sentence.

The case of *Shattock* is perhaps even more unclear. There did not seem to be any evidence established regarding racist language being used by the appellant, nor any

¹²¹ *DPP v Collins* (2016) para 15.

¹²² *ibid.*

evidence that he had a racist motivation, nor any evidence of the racist element being established through conspiracy or participation. To be fair, neither is there any evidence that the sentencing judge treated the racist element as an aggravating factor. It is perhaps, then, puzzling why there is any reference to the racist element in the case. Further, in the cases involving victims with disabilities, there was no assessment as to whether the offence was motivated by an anti-disability bias or any other factor.

All that said, Irish courts are currently inconsistent in treating a hate element as an aggravating factor in sentencing. O'Malley is of the view that Irish courts are "clearly entitled" to take evidence that a crime was motivated by hatred or prejudice as an aggravating factor for two reasons: first, the court in *DPP v Elders*¹²³ made it clear that the Circuit Court judge "very properly" highlighted the fact that the racist dimension was an aggravating factor in the case; second, he states that the constitutional principle of proportionality in sentencing requires that courts consider the circumstances of the offender and take the circumstances of the offence into account in determining the appropriate penalty to be imposed in the case – which, he believes, could rightfully be considered to require courts to consider a hate motivation also. While the *Elders* case is limited to the racist motivations of the offender, O'Malley speculates that a religious, disablist, or homophobic motivation would rightfully be considered equally aggravating.

However, along with the principle of proportionality, courts must also consider the principle of certainty and legality in sentencing.¹²⁴ While most commonly litigated in the context of the criminal offence itself, the requirements of accessibility and foreseeability also apply in the context of the specification of penalties. In *People (Director of Public Prosecutions) v Geraghty*¹²⁵ the court stated:

"The principle of legality is at the heart of the criminal justice system. This implies that a citizen is entitled to order his or her affairs based on a system of clear rules and penalties which prescribe criminal conduct and the penalties which apply thereto."

¹²³ [2014] IECA 6.

¹²⁴ See also, Jennifer Schweppe, 'Defining Victim Groups in Hate Crime Legislation: Certain and Precise?' (HHRG 2017) <https://ulir.ul.ie/bitstream/handle/10344/6363/Schweppe_defining.pdf?sequence=2> accessed 8 November 2017.

¹²⁵ [2014] IECA 2; see also, (2013) 57 EHRR 21, page 1053 as cited in Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 61.

Indeed, once the contexts and circumstances of hate motivated crime are considered, the applicability of the principle of certainty becomes compelling in cases involving a hate element. Two specific core elements to a hate crime deserve particular mention in this context: first the range of victim categories to which this discretion applies; and second, the manner in which the hate element is evidenced. When we consider the requirement for certainty in the context of these three elements a compelling argument can be made for finding judicial discretion used in this context unconstitutional.

The first issue to be addressed in this context is the range of protected characteristics to which the discretion apparently applies. As we have observed, the courts have been clear that racism should be considered an aggravating factor. In this context, two questions arise: first, what is “race” and what is “racism”? For example, it is unclear whether “race” encompasses hostility towards an individual because of their national origin.¹²⁶ It is also unclear if it includes hostility directed towards an individual where there may be an intersection of cultural and religious identity as in anti-Muslim or anti-semitic hate crime. Second, the range of core characteristics that should be considered as aggravating an offence is not clear. It is not clear whether the focus is on the hostility, thus meaning that all personal characteristics are protected including ones which would not typically be considered worthy of protection in the context of hate crime, such as the colour of a person’s hair, or the fact that they are a paedophile.¹²⁷

The second question which the principle raises is the extent to which the hate element should be instrumental in the offence. For example, in England and Wales, a hate element will aggravate an offence where the offence is either motivated by hostility, or where there is a hate element demonstrated towards the offender during the course of the offence. It is unclear whether Irish courts require the higher standard of motivation, or if simple demonstration of hostility suffices to move the offensive language from simply part of the fabric of the case to being considered an aggravating factor. If the offender uses offensively descriptive language during the course of an assault, the question remains as to whether that should be considered an aggravating factor, or if there should be evidence that the offence was motivated by prejudice. If the latter, again it is unclear if prejudice should be the only motivating factor, or if

¹²⁶ See, for example, *R v White* [2001] 1 WLR 1352 in which the court asked whether the word ‘African’ described a ‘racial group’ as per the 1998 Act.

¹²⁷ See *Dunn v R* [2007] NSWCCA 312 in which the court in New South Wales found that hate crime legislation should be extended to protect an individual who was attacked because the offender believed he was a paedophile.

partial motivation suffices. It is plain that some degree of evidence is required, though practitioners were of the view that some sentencing judges have perceived a hate element to be present in a case even when it was not, and treated the case as such.

When we examine other factors which are considered aggravating elements, the question as to whether the aggravating element is present is typically a question of fact: was there a weapon used during the course of the offence; did the offender abuse a position of trust; was the offence committed while the offender was on bail?¹²⁸ Establishing a hate motivation is not quite so simple, and while we may instinctively believe that a racist element should be considered an aggravating factor, it could certainly be argued that that is such an unclear and abstract concept that aggravating a sentence on that basis might be in violation of the requirement for certainty.

Barristers and solicitors interviewed for this research broadly considered this question, and some felt that, as the hate element is not relevant to the proofs of the offence, it should be excluded from evidence on that basis:

"I would say something like 'Well this religiously disparaging comment doesn't pertain to the offence therefore is irrelevant strictly' because I think the State ... I mean they're entitled to adduce any relevant surrounding circumstances but that doesn't relate to the offence of theft. So ... as counsel I'd be looking at the ingredients of theft and saying this should be excluded ..."

(Barrister - Defence)

In a similar line of argument, a solicitor was of the view that, were a bias motivation explicitly treated as an aggravating factor at sentencing stage, the sentencing decision could be appealed:

"I think you would have to advise a person that an irrelevant factor had been taken into account. Because the assault complained of ... is particularised ... based on the language in the relevant statute. Nowhere is it to be found in any statute a reference to the particular victim ... or any reference to their gender, ethnicity, political persuasion, sexual preference or anything like that because then you're into differentiation on the basis of a particular victim and it lacks precision. I think it would be ... in danger of violating the right of an accused

¹²⁸ See more generally, O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 208-226.

person to know exactly ... the offence with which they're charged and therefore the likely penalty on conviction." (Solicitor)

A barrister, however, explicitly dismissed this line of argument:

"So the evidence would be relevant as build-up and the judge would also be entitled to take into account that this person was exhibiting hatred towards a person of Islamic faith or a person who was Black or a person who was wearing clothing for their religious purpose..." (Barrister – Defence and Prosecution)

However, the participants to the focus group of previous offenders were particularly animated about this line of argumentation, and raised it amongst themselves as an issue they believed would give rise to immediate grounds for appeal:

"Participant: Cos, he can't, cos, because if he did ... if someone appealed like he made a point - I'm giving this person more jail because it was race motivated - that person can appeal it, how can they give me more for race because there's no laws there, do you get me?"

Interviewer 2: I do yeah. I do.

Participant: I'd agree with that.

... Participant: Could [appeal] if the judge made a point of law. If the judge said, if the judge said, 'I'm giving this man an extra two years because it was racially motivated' your solicitor can stand up and say 'Hang on a minute there's no race laws in Ireland so how can you give him an extra two years for being...' 'D'you know? Understand? You can still get charged with assault, but the words ... the words race can't be mentioned in your trial because it's going to be biased against you man."

(Previous offenders' focus group)

"Participant: The judge has to work within his boundaries as well. Because of appeals do you know what I mean? Give the person an advantage on his appeal like because there's no laws for hate crime and you're trying to get

someone done for it, like.

Participant: /That's exactly the point I was trying to say a while ago ... if they do charge you with a hate crime and /

Participant: /how are you going to defend yourself?/

Participant: /You're charged with that, how can they charge you with a racist crime if there isn't any legislation there?" (Previous offenders' focus group)

"... if a judge made a point like, saying I'm giving him four years because the reason was he stabbed a Black person solely because he was Black, I don't think a judge can mention that because he lodged his appeal he'd say 'There's no racism laws, why can he charge me with that.' Do you get me?"

(Previous offenders' focus group)

While the participants in this focus group were more concerned about the absence of an offence in this context, the applicability of the requirement for certainty which attaches to penalties could also be considered in the context of hate aggravated offences.

Conclusion

Given the very low number of reported cases on hate crime (and the fact that the term "hate crime" has never been used in a reported case) it is difficult to draw any conclusions on the approach that is taken by the judiciary in relation to hate crime. This is particularly the case in assessing the evidential burden required in determining if a hate crime occurred or the range of characteristics protected. It can be said with some degree of certainty that the Court of Appeal treats a racist motivation as an aggravating factor, but there is no *requirement* on the sentencing courts to do so. The assessment of the court as to the degree of disability of the injured party will seem to determine the level of aggravation of the sentence, rather than the motivation of the offender. There does not seem to be any case reported in Ireland regarding religious (e.g. antisemitic or Islamophobic) hate crime; or in relation to anti-LGB or anti-transgender hate crime. In summary, our findings support the view that Irish courts cannot be said to consistently treat a hate element as an aggravating factor at sentencing.

IRELAND'S INTERNATIONAL OBLIGATIONS

Incorporation of Art 4 of the Framework Decision on combating racism and xenophobia

The 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law requires Member States, under Article 4, to “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties”. The deadline for transposition was 28 November 2010, and Ireland has yet to introduce legislation to ensure compliance with the Decision. In a 2012 publication on hate crime in the EU, EUFRA noted specifically that Ireland, in addition to engaging in limited data collection, is “also limited because criminal law does not define racist or related hate offences as specific offences, nor does it expressly provide for the taking into account of racist motivation as an aggravating factor...the 2008 Irish Crime Classification System...does not cover offences with a suspected hate motivation.”¹²⁹

In responding to its obligations under Article 4 of the EU Framework Decision of 2008, Ireland has simply stated that “motivation can always be considered by the courts.”¹³⁰ According to ENAR Ireland, a request has been made to the EU Commission to take infringement proceedings against the State because of its failure to appropriately implement the Framework Decision.¹³¹ A report by the Commission and the Council also criticised Ireland in 2014, emphasising that “The Framework Decision requires Member States to specifically address racist and xenophobic motivation in their criminal codes or, alternatively, ensure that their courts take such motivation into consideration in the determination of penalties ... [Ireland and Luxembourg] simply state that motivation can always be considered by the courts.”¹³²

¹²⁹ Fundamental Rights Agency, *Data in Focus Report: Minorities as Victims of Crime* (Publications Office of the European Union 2012) 37.

¹³⁰ 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 8 November 2017.

¹³¹ ENAR, *ENAR Ireland Triggers European Parliament Investigation of Ireland on Hate Crime* (ENAR 2016) <<http://enarireland.org/enar-ireland-triggers-european-parliaments-investigation-of-ireland-on-hate-crime/>> accessed 8 November 2017.

¹³² 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 8 November 2017.

Other International Obligations

European Commission on Racism and Intolerance

In its fourth and most recent report on Ireland in 2013, ECRI repeated concerns that it had raised in its previous reports regarding the lack of criminal law specifically designed to combat racist and xenophobic offences as distinct crimes. It also expressed concern in relation to the absence of statutory obligations on members of the judiciary to consider racism as an aggravating motivation at sentencing. ECRI made specific reference to its General Policy Recommendation No. 7 which states that specific provisions to address racism (and broader, “hate”) across the legal system have a “symbolic effect...[raising] the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect.”¹³³

ECRI notes that the Department of Justice, having conducted a review of the 1989 Act, characterised the jurisdiction’s incitement to hatred provisions as “sufficiently robust”.¹³⁴ More significantly, the Report notes the Department’s assertion that “... Ireland was in compliance with the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law by virtue of the provisions in its existing criminal law - Prohibition of Incitement to Hatred Act 1989 and public order legislation.” Clearly disagreeing with this assessment, ECRI again highlights Ireland’s failure to introduce aggravated offences or place aggravated sentencing on a legislative footing. The Commission reiterates the point that leaving the aggravation of sentences on the basis of racist motivation entirely at the discretion of the judiciary is insufficient. Citing the CERD report from 2011, ECRI adds the finding that “... according to various sources, the racist motivation was not consistently taken into account by judges when sentencing”,¹³⁵ a conclusion which our research also supports.¹³⁶

International Convention on the Elimination of all forms of Racial Discrimination

In its Concluding Observations in response to the first and second joint reports submitted by Ireland, UNCERD suggested that in order to fight racism, the Irish State should introduce legislation that specifically defines hate crimes based on race as

¹³³ European Commission against Racism and Intolerance, *ECRI Report on Ireland: Forth Monitoring Cycle*, (ECRI 2013) 12 <<https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-CbC-IV-2013-001-ENG.pdf>> accessed 8 November 2017.

¹³⁴ *ibid.*

¹³⁵ *ibid.* 13.

¹³⁶ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, ‘*Out of the Shadows*’ *Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

distinct offences or place in statute an obligation on members of the judiciary to consider racism as an aggravating factor at sentencing. In its more recent Report, the Committee was more specific, recommending that legislation be introduced that prohibits racist organisations; that racism as an aggravating circumstance be consistently considered at sentencing; and that members of the judiciary undertake training to raise awareness of racism as a factor in criminal offences.

In its 2009 *Combined Third and Fourth Reports by Ireland*, the Irish state responded to CERD's criticisms of the sufficiency of its legislative provisions in regards to racist crime by noting that it was not required to transpose the Convention into domestic law and argued that, in any case, its existing provisions were adequate.¹³⁷ In its follow-up observations to the UNCERD Report, Ireland stated that "the introduction of racially aggravated sentencing would involve a restructuring of penalties for basic criminal offences (assault or criminal damage, for example) to increase sentences and have wider implications for the criminal law".¹³⁸ This assertion is patently untrue: requiring a court to treat a hate motivation as an aggravating factor in sentencing does not necessitate any restructuring of penalties.

OSCE/ODIHR

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) has been publishing reports on Member States' practices and legislation in relation to hate crime for almost a decade. ODIHR has criticised the potential in Ireland for inconsistency in enhanced sentencing for hate crime offences, given the discretionary manner in which this can be applied by judges.¹³⁹ Reference is also made to the restrictive manner in which Ireland collects data on hate crime. In order to increase its utility, the need for sensitive data collection in relation to hate crime that details the situation of a diverse range of vulnerable communities is stressed.¹⁴⁰ In relation to legislative measures, ODIHR has consistently underscored the need for specific

¹³⁷ Office of the Minister for Integration, *Combined Third and Fourth Reports by Ireland*, (Pobal 2009) 18 <<https://www.pobal.ie/Publications/Documents/Combined%203rd%20and%204th%20Reports%20to%20UN%20CERD%20by%20Ireland%20-%20OMI%20-%202009.pdf>> accessed 8 November 2017.

¹³⁸ Committee on the Elimination of Racial Discrimination, *Information on Ireland's follow-up to recommendations contained in the Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) following examination of Ireland's Combined 3rd and 4th Periodic Report by UNCERD*, (Integration, 2012) 4. <[http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-8VMK3F15323926-en/\\$File/Concluding%20Observations%20Recommendations%20Response.pdf](http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-8VMK3F15323926-en/$File/Concluding%20Observations%20Recommendations%20Response.pdf)> accessed 8 November 2017.

¹³⁹ See, Joanna Perry, 'Ireland in an International Comparative Context' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017).

¹⁴⁰ *ibid.*

legislation and enhanced punitive sentences if hate crime is to be challenged effectively.¹⁴¹ The OSCE Ministerial Decision No.9/09 made in 2009 is particularly relevant in this regard. It explicitly encourages Member States, in addition to ensuring thorough investigative practices and comprehensive data collection; to “[e]nact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes.”¹⁴²

United Nations Human Rights Council’s Universal Periodic Review

The first report in the UPR process submitted by Ireland was examined in October 2011, with the second examination in 2016. In its first Report, UPR observers recommended that Irish authorities take steps to challenge racism and xenophobia through the introduction of legislation; furthermore, recommendations were also made that members of the judiciary and police undertake human rights training.

In March of 2014, in response to the United Nations Human Rights Council’s Universal Periodic Review (UPR), the Irish State published an interim report, which again argued that existing legislation (the 1989 Act) was fit for purpose and that the established generic criminal law is sufficient to the task at hand. Furthermore, the State argued that the judiciary do consider racist or xenophobic motivations at sentencing, as robust measures were already in place in Ireland to challenge hate crime.¹⁴³ No evidence was presented to support these conclusions regarding sentencing practices. Equally, Ireland’s response to OSCE criticisms has been to argue that Ireland is fully compliant with its international obligations. Perry’s view however is, “this is not a satisfying or effective response ... The current tactic of the Irish state is to leave it up to judges to consider bias motivation at sentencing. Without statutory guidelines, this is impractical.”¹⁴⁴

As she points out:

“the European Court of Human Rights has held that states have positive obligations under the European Convention on Human Rights and

¹⁴¹ Organization for Security and Co-operation in Europe, *Hate Crimes in the OSCE Region; Incidents and Responses-Annual Report for 2012* (OSCE 2013).

¹⁴² Organisation for Security and Co-operation in Europe Ministerial Council, *Decision No. 9/09 on combating hate crimes*, (OSCE 2009) 2 <<http://www.osce.org/cio/40695>> accessed 8 November 2017.

¹⁴³ Government of Ireland, *Universal Periodic Review IRELAND: National Interim Report*. (Government of Ireland 2014).

¹⁴⁴ Barbara Perry, ‘Legislating Hate in Ireland: The View From Here’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds.), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland*, (Palgrave 2017) 75.

Fundamental Freedoms to investigate the potential for racial motivation of crimes. In the landmark decision of *Nachova and Others v. Bulgaria*, the court held that the state has the responsibility to explore racist motives underlying violence by state actors; *Secic v. Croatia* upheld the same duty with respect to violence by citizens.”¹⁴⁵

One of the 20 issues addressed by a civil society coalition submission to the UPR Working Group concerned hate crime and discrimination. Endorsed by 63 organisations and three private individuals, this Report noted that none of the recommendations made and accepted had been implemented: there was no successor to the National Action Plan against Racism published; the State had failed to reform the Prohibition of Incitement to Hatred Act 1989; and there was no implementation of measures to promote reporting and recording of hate crime. The Report made three key recommendations:

- “Legislate to introduce aggravated offences and enhanced sentencing where evidence of bias as a motivating or demonstrable factor exists;
- Monitor the implementation of hate crime laws from inception, focusing on training, reporting, recording, investigation, prosecution, and sentencing;
- Mainstream a victim orientation throughout the criminal justice system.”¹⁴⁶

A number of recommendations were made as part of the UPR process in the context of hate crime, which were partially accepted by the State. However, in only partially accepting those recommendations, the State once again repeated its position on hate crime, stating:

“Where criminal offences such as assault, criminal damage, or public order offences are committed against a person based on their race, religion, etc, the trial judge can take aggravating factors (eg motivation based on a victims religion, race, etc.) into account at sentencing.”¹⁴⁷

It further stated that the Government had “recently” approved a review of the Prohibition of Incitement to Hatred Act 1989; that anti-racism initiatives would be taken under the new Integration Strategy; and that Ireland’s legislation was compliant with the provisions of ICERD.¹⁴⁸

¹⁴⁵ *ibid* 73-74.

¹⁴⁶ Civil Society Stakeholder Report, *Your Rights. Right Now.* (ICCL 2015) 25.

¹⁴⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Ireland – Addendum – Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (Human Rights Council 2016) 6.

¹⁴⁸ *ibid.*

General observations

In summary, the response of Ireland to international organisations' criticism of the current legislative position has been:

1. Generic criminal offences are sufficient to combat hate crime and the courts do consider racist or xenophobic motivations at sentencing (though they have provided no evidence that this is the case);
2. The criminal law alone would be insufficient to challenge hate crime which requires a broader educative measure to combat it;
3. Introducing aggravated sentencing provisions would have broader ramifications for the criminal law, including a restructuring of penalties for basic offences.

EU FRA SURVEYS

The purpose of this section and the following one is to present the findings of victim surveys on the prevalence and manifestation of hate crime in Ireland. Three EU FRA reports disclose relevant information regarding hate crime against the LGB and T communities and in relation to antisemitism.

EU FRA LGBT Survey

In its 2012 LGBT survey, the European Union Agency for Fundamental Rights (FRA) collected information on experiences of discrimination, hate-motivated violence and harassment from persons who self-identified as lesbian, gay, bisexual or transgender. The data revealed the extent to which respondents' experiences and perceptions varied according to their national context. The findings revealed that respondents in Ireland generally experience a social environment that is less inclusive of LGBT people and where they are more likely to be victims of violence, harassment and discrimination than many States surveyed. This online survey, which was conducted across the 27 Member States of the European Union and Croatia (which was in the process of accession), collected information from 93,079 persons aged 18 and over who identified as lesbian, gay, bisexual or transgender.

Across the participating States, six per cent of respondents reported having been “physically or sexually attacked or threatened with violence” on the basis of their sexual orientation or gender identity in the twelve months prior to the survey. Fifty-nine per cent of Irish LGBT participants stated that the last incident of violence they had experienced in the twelve months prior to the survey being conducted happened partly or entirely because they were perceived to be LGBT. The findings of the survey revealed that 34 per cent of all hate motivated violent incidents in Ireland were attacks rather than threats of violence. Twenty-four per cent of respondents were found to have experienced hate-motivated harassment in the preceding twelve months. The findings also revealed that, in Ireland, of those respondents who had experienced harassment 59 per cent had been subjected to both verbal and non-verbal insults, 34 per cent had endured verbal insults only and five per cent experienced non-verbal insults only. Importantly, only three per cent of Irish respondents stated that they had reported their most recent incident of hate-motivated harassment to the police.

EU FRA: Being Trans in the European Union

Drawing on the same data from the EU FRA LGBT survey, the FRA study *Being Trans in the European Union* represents the largest collection of empirical evidence of its kind to cast light on transgender persons’ experiences in Ireland.¹⁴⁹ 13 per cent of respondents from Ireland reported having experienced hate motivated violence, and 31 per cent of respondents had experienced hate motivated harassment in the twelve months prior to the survey being conducted. Almost two-thirds (66 per cent) of trans respondents stated that they avoided certain places and 43 per cent of respondents stated that they avoided gender expression due to fear of assault, threat or harassment.

EU FRA Report on Antisemitism

The European Union Agency for Fundamental Rights report on antisemitism documents manifestations of antisemitism as recorded by official and unofficial sources in the 28 European Union Member States.¹⁵⁰ In their description of their methodology, FRA states that data was collected by three different methods: the first involved the collection of of-

¹⁴⁹ Fundamental Rights Agency, *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 8 November 2017.

¹⁵⁰ Fundamental Rights Agency, *Antisemitism: Overview of data available in the European Union 2006-2016* (FRA 2017).

official data, which was drawn from the Office for Democratic Institutions and Human Rights and the European Commission against Racism and Intolerance; the second method employed was to gather data by way of a request to government offices; and the third was to access data collected by civil society organisations, referred to as “unofficial data” in the Report. For Ireland, official figures for antisemitic incidents reported to the police in 2011, 2012, 2013 and 2014 are three, five, two, and four incidents respectively. No unofficial data were provided by Irish civil society organisations.

EU-MIDIS Survey

The European Union Minorities and Discrimination Survey (EU-MIDIS) which was last published in 2008, and the second wave of which is now concluding, aims to address the lack of comparable data on manifestations of discrimination, racism, and related intolerances in Europe. Encompassing all 28 Member States, and 25,000 participants, this research will provide useful comparable data on the actual impact on the ground of EU and national anti-discrimination and equality legislation and policies. The first data on Roma and on Muslims had been selectively released at the time of writing but these parts of the research did not extend to Ireland.¹⁵¹

CIVIL SOCIETY MECHANISMS AND REPORTING HATE CRIME

Police-recorded crimes can be compared with reports made to civil society organisations. These third-party reporting mechanisms are not wholly measuring the same phenomena as police records: in particular, the crimes are self-defined by the victim or the recording body, rather than categorised as such by police classification tools. They do however provide valuable insights into under-reporting and into what communities themselves are recalling as experiences of victimisation. Such mechanisms may provide for the collection of data on hate crime where the state does not, or for recording categories of bias motivation which the state does not provide for.¹⁵² They also provide an alternative means of reporting for communities who may distrust and even have been victimised by police.¹⁵³ As such, these data on hate crime are important to both identifying and addressing gaps in official data.

¹⁵¹ Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey: Roma – Selected findings* (FRA 2016) <http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf; Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey (EU-MIDIS II) Muslims – Selected findings* (FRA 2017).

¹⁵² Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016) 2.

¹⁵³ Nathan Hall, *Hate Crime* (2nd edn, Routledge 2013) 126.

A small number of Irish civil society organisations operate, or have operated, third-party reporting systems for particular types of hate crime, in some cases for many years. The National Consultative Committee on Racism and Interculturalism (NCCRI), an independent expert body funded by the Department of Justice, began recording racist incidents in 2001 and continued to do so until 2008, when it ceased operation as a consequence of budget cuts.¹⁵⁴ During that time it enabled researchers to highlight the contrast between its records and the significantly smaller number of hate incidents recorded by An Garda Síochána.¹⁵⁵

In recent years three national civil society organisations have operated recording mechanisms which have gathered data on hate crimes - the European Network Against Racism Ireland (ENAR Ireland), the Transgender Equality Network Ireland (TENI) and the Gay and Lesbian Equality Network (GLEN). All three organisations have partnered with the HHRG across two projects, both of which required the HHRG to produce an original analysis of raw data gathered by the civil society organisations. As such, this section presents a synopsis of our analysis of the civil society organisation's data, which in each case applied the same classification criteria. The approach is described in the methodology section to this report.

Anti-LGB and T crime

TENI and GLEN set up third-party reporting systems for trans and LGBTI people respectively in 2013 and 2014. GLEN is in the process of being wound up in 2017. TENI continues to collect data via its Stop Transphobia and Discrimination (STAD) reporting mechanism.

TENI's STAD mechanism recorded 74 transphobic incidents in the Republic during the period 2014-2016. Of those reports, 32 related experiences of non-crime hostile actions including discrimination, harmful digital communications and everyday microaggressions. The remaining 46 incidents detailed a total of 57 anti-transgender criminal offences occurring in the Republic between 2014 and 2016.¹⁵⁶ The offences are set out in Table 1.

¹⁵⁴ Catherine Joyce, 'Racism is on the Increase in Europe and Ireland is no exception', *Irish Examiner*, (Cork, January 2010).

¹⁵⁵ Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011) 18.

¹⁵⁶ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017) 22.

Table 1: Criminal offences reported to TENI 2014-2016

Crime Classification	2014	2015	2016
Aggravated sexual assault	1	0	0
Assault	5	6	7
Assault causing harm	1	0	1
Harassment	3	5	1
Possession of a knife	0	1	0
Production of an article capable of inflicting serious injury	0	0	1
Public order	8	6	3
Rape	0	0	1
Sexual assault	3	1	1
Threat to kill or cause serious harm	1	1	0

The mechanism probes for the presence of bias indicators. In 38 of 46 reports, transphobic language was identified.¹⁵⁷

Of the 46 incidents, only six were reported to An Garda Síochána, and the percentage reporting has fallen year by year. Respondents were asked to provide details of their reasons for not reporting, which were in turn categorised by the HHRG as follows:

¹⁵⁷ *ibid* 27.

Table 2: Reasons for not reporting (TENI data)

	2014	2015	2016	Total
I did not think the police could or would do anything	5	3	0	8
I did not think it would be taken seriously	1	6	0	7
I didn't think it was serious enough to report	1	2	1	4
I thought it would be too much trouble to report	1	1	1	3
I have reported incidents previously to the police in Ireland and have had negative experiences	1	1	1	3
Fear	2	0	0	2
Perceived as too emotionally demanding	1	0	1	2
Victim was not 'out'/feared 'outing' themselves	0	1	1	2

The most common reason provided for not reporting was the belief that An Garda Síochána could or would not do anything, followed closely by a belief that members of the police service would not take the complaint seriously. In some cases, these statements spoke to a lack of confidence in the ability of gardaí to detect the crime. In other cases, they related to a perception that gardaí would be unwilling to aid a trans victim. In a minority of cases, the victim's sense of futility was based not in perception, but on past experience of reporting. Of the six people who reported their experiences to An Garda Síochána, three classified the response of gardaí as supportive and three dismissive, with one of these further characterising officers as mocking and insulting:

“... there was zero empathy, he didn't even record it as a case, because he said that I didn't know the perpetrator's name. He said, 'If he knows your name, you must know his', which is ridiculous ... his attitude was more distressing than the crime.”¹⁵⁸ (2014)

Williams and Tregidga found that, in a Welsh context, the likelihood that a trans person will advise others to report their experiences to the police is primarily contingent on their own past experiences of reporting. Although their All Wales Hate

¹⁵⁸ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017).

Crime Project found that “transgender hate crime victims were more satisfied with police contact than any other protected characteristic”¹⁵⁹ trans people participating in Nadal et al.’s US-based study were more likely to find that reporting hate crime opened them up to police mistreatment.¹⁶⁰

GLEN began collecting data on homophobic, biphobic and transphobic crimes in December 2014 via their online reporting mechanism ‘stophatecrime.ie’. Eleven incidents, each relating to a single criminal offence, were recorded as occurring in or throughout 2015. The offences are set out in the table below.

Table 3: Criminal offences reported to GLEN 2015

Crime Classification	2015
Assault	5
Assault causing harm	1
Criminal damage	1
Public order	3
Sexual assault	1

GLEN asked respondents to log their perception of the offender’s motivation. Nine respondents perceived the offender to have been motivated by homophobia, one perceived the offender to have been motivated by both homophobia and transphobia. One further individual responded to a question as to why they perceived the incident to be homophobic and/or transphobic that there appeared to be no other motivation.

Six of the eleven reports stated that homophobic/transphobic language was used in the commission of the offence. A seventh report specifies that the offender expressed a bias against same-sex couples expressing affection towards one another in public. An eighth report described a targeted location which is widely known to be frequented by LGBT people. A ninth report linked the targeting of a private residence to the display of posters supporting equal access to marriage for same-sex persons¹⁶¹.

¹⁵⁹ Matthew Williams and Jasmine Tregidga, *All Wales Hate Crime Research Project* (Cardiff University 2013) 221

<<http://orca.cf.ac.uk/60690/13/Time%20for%20JusticeAll%20Wales%20Hate%20Crime%20Project.pdf>> accessed 3 October 2017.

¹⁶⁰ Kevin L. Nadal, Avy Skolnik and Yinglee Wong, ‘Interpersonal and Systemic Microaggressions toward Transgender People: Implications for Counseling’ (2012) 6(1) *Journal of LGBT Issues in Counseling* 55.

¹⁶¹ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016).

Only three of the eleven reports states that the offence described was reported to the police. Selecting from a list, respondents described their reasons for not reporting as follows.

Table 4: Reasons for not reporting (GLEN Data)¹⁶²

	2015
I didn't think there was anything the police could do.	5
I didn't feel like it was serious enough to report	5
I didn't think the police would take me seriously	3
Unsatisfied with previous experience with the police	1
I am not out/was not out at the time	1
The police are homophobic and/or transphobic	1

The individual who felt unable to report the crime to the police because they perceived them to be homophobic/transphobic was the victim of sexual assault.

Racist and religiously aggravated crime

ENAR Ireland invites members of the public to log details of racist and religiously aggravated incidents on its iReport.ie online racist incident reporting system. The system was launched in July 2013 and since then has received 1355 reports.¹⁶³ It is intended to be compatible with the monitoring requirements of the UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the EU Fundamental Rights Agency (FRA), ODIHR, ECRI and other international human rights bodies.¹⁶⁴

ENAR Ireland collect data on incidents across the continuum of hostility which includes crimes, discrimination and non-crime microaggressions. We present our original analysis of ENAR data for 2015 relating to criminal offences specifically. We requested data relating to criminal offences only for 2013, 2014 and 2016 from ENAR Ireland, however they were unable to provide these prior to publication.

¹⁶² *ibid.*

¹⁶³ ENAR, iReport, (ENAR 2017) <<https://www.ireport.ie/about-ireport-ie/> accessed 8 November 2017.

¹⁶⁴ Shane O' Curry, 'Combating Racist Crime: An NGO Perspective' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor, (eds.), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 303.

ENAR Ireland received 143 reports relating to incidents occurring in 2015 which bore the characteristics of criminal offences via its iReport third party monitoring system. Of those reports, 133 involved a single criminal offence, seven described two criminal offences, two related to three criminal offences and one described four criminal offences. In summary, iReport received reports of 157 crimes occurring in 2015.

The following table disaggregates the specific criminal offences identified by the HHRG in analyzing this data.

Table 5: Criminal offences (ENAR Ireland)¹⁶⁵

Crime classification	2015
Assault	25
Assault causing harm	1
Breaking and entering	1
Burglary	1
Communication act	1
Criminal damage	37
Demanding money	0
False imprisonment	0
Harassment	24
Making a false report	1
Possession of a knife	1
Public order	58
Robbery	4
Sexual assault	0
Threat to kill or injure	1
Trespass with a knife	1
Violent disorder	1

¹⁶⁵ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016) 16.

In 2015 the iReport questionnaire only prompted respondents to address the presence of language as a bias indicator. Of 143 reports, a total of 99 identified racist or religiously aggravated language: 16 reported both forms of hostility, 78 reported only the use of racist language and five reported only the use of language against the victim's religion.¹⁶⁶

In only 35 of the 143 reports relating to racist and religiously aggravated crimes occurring in 2015 received by ENAR Ireland, did the respondent state that the crime or crimes had been reported to An Garda Síochána. The reasons provided by the participants were as follows:

Table 6: Reasons for not reporting (ENAR Ireland)¹⁶⁷

I did not think the police could or would do anything	42
I did not think it would be taken seriously	33
The incident was too common an occurrence to report	23
I didn't think that I would feel comfortable talking to the police about it	19
I didn't think that what happened was a crime	16
I didn't think it was serious enough to report	15
I thought it would be too much trouble to report	14
Other	13
I didn't know how or where to report it	12
I was concerned of reprisals or retribution from the perpetrator(s)	11
I didn't think I would be believed	11
I would have had to disclose personal details about myself that I did not wish to make known	10
I have reported incidents previously to the police in Ireland and have had negative experiences	9
I felt ashamed or embarrassed	7
I thought I would be blamed for what had happened	5
I didn't want to get the person involved in trouble	3
I have had negative experiences with police in another country I lived in	2

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

CHAPTER 4: THE LIFECYCLE: INVESTIGATION TO SENTENCING

This chapter presents the main findings of the research with respect to the treatment of the hate element of a crime as it traverses through the Irish criminal justice process. The chapter begins by presenting interviewees' understandings of the construct of hate crime and the legitimacy of sanctioning a hate element. We then address police reporting and recording of hate crime with a particular focus on the identification and forward communication of the hate element. We then elaborate our findings regarding the investigation of hate crimes, their prosecution and sentencing. We conclude by presenting participants' perspectives on the introduction of hate crime legislation in Ireland.

UNDERSTANDING HATE CRIME IN THE ABSENCE OF LEGISLATION

Garland and Chakraborti¹⁶⁸ highlight conceptual variations across the EU in how stakeholders understand hate crime as deleterious to effective and inclusive responses to the problem. Although the majority of criminal justice professionals (that is legal practitioners and gardaí) interviewed for this research were of the view that if a hate element is established in a case, it should aggravate the penalty imposed, this inconsistency in their definitions and understandings of hate crime as a construct was evident. In the absence of any definition of hate crime, either through prosecution policy or legislation, this is perhaps unsurprising.

Linked to this conceptual ambiguity, legal practitioners differed greatly in their assessment of their degree of experience of cases involving hate crime, with some individuals stating that they had significant experience, and others stating that they had minimal exposure, observations which were sometimes dependent on how the participant themselves framed the concept:

"I have been involved in cases where maybe in the course of an assault or in the course of criminal damage maybe racial terms might have been used or in the course even of a threat – but I have to say I haven't ... I can't think off hand of an offence I dealt with that I could categorically place in [the] hate crime category – that I could say no two ways about it, this was purely motivated by the colour of that person's skin and nothing else ..."

(Barrister – Prosecution and Defence)

¹⁶⁸ 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 38-51.

This individual had stated earlier in their interview that they had never come across any case in which there was a hate element:

“I mean [racist language] is very common in assaults. More often than not you’ll see very descriptive language of all sorts...” (Barrister - Defence)

Thus, in recounting their general experiences, some practitioners considered offences as hate crimes only where the sole or primary motivation was the hate element, rather than those offences in which there was a bias element to the offence itself. In England and Wales for example legislation extends to, but makes clear distinction between, demonstrations of hostility and hostile motivations. In Ireland, practitioners and other stakeholders have no such legislative guidance.

Legal practitioners who took a broader understanding of the construct of hate crime spoke of being involved in a number of cases in which there was a hate element. They were of the view that the most common types of offence prosecuted which included a hate element were public order, assault, criminal damage, and theft.

A number of legal professionals expressed surprise that they had not been involved in, or aware of, more such cases.

“Interviewer: You said you find it surprising.

Interviewee: Just because I would have seen it myself just walking around, would have seen that sort of thing happen even socially, just would have witnessed it, but it’s never come into my work.” (Barrister – Defence)

“Interviewer: Do you see many cases of say anti-disablist crimes?

Interviewee: I haven’t really.

Interviewer: Or anti-LGBT?

Interviewee: Again no. Surprising.” (Solicitor)

Reflecting the views of a number of legal practitioners who considered the prevalence of hate crime against the Traveller community, and commented specifically on their lack of experience of this type of case, one solicitor remarked:

"I suspect it happens all the time, but I think there's a variety of reasons why the system doesn't end up, as in the justice system, doesn't end up dealing with it. Number one, I don't think the Travelling community feels the system is there for them as much as it is for settled people. Number two, I don't think the system is there for them as much as it is for settled people. I think their perception of discrimination, of prejudice, is a well-founded one. Thirdly, I think the culture within the Travelling community is often to deal with these things themselves ... For a combination or variety of those different reasons I think that's why you don't get criminal cases involving Travellers as victims as often as you do settled people." (Solicitor)

Joyce et al. have raised the underreporting and underrecording of anti-Traveller hate crime and the community's relationship to the justice system as a particular issue in Ireland.¹⁶⁹ Irish Travellers are an indigenous ethnic minority group, who are subject to virulent racism.

Another solicitor remarked on the fact that hate crime has become normalised in some communities, leading to low reporting rates:

"...I had a security guard who told me one day, if he reported every single racial abuse that was hurled at him he'd never be off the phone to the ... garda station ... But it's also underreported not just because there is this almost ... expectation that's a part of my daily life, that then they'll look at the legal system and then you know the response from officialdom will be 'Well, what are we going to do about it ... what can we do about it?'" (Solicitor)

Australian research emphasises the ability of the police to recognise hate crime as core to the successful operationalisation of legislation intended to address the phenomenon.¹⁷⁰ While barristers and solicitors sometimes defined hate crime quite narrowly, gardaí tended to take a broader understanding of the concept from a general policing perspective. However, gardaí discussing the investigation and prosecution of offences, framed their responses by referring to the absence of legislation to guide their operational approach to the issue.

¹⁶⁹ Sindy Joyce, Margaret Kennedy, and Amanda Haynes, 'Travellers and Roma in Ireland: Understanding Hate Crime Data through the Lens of Structural Inequality', in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime*, (Palgrave Macmillan 2017) 336.

¹⁷⁰ Rebecca L. Wickes, Sharon Pickering, Gail Mason, Jane M. Maher, Jude McCulloch, 'From Hate to Prejudice: Does the New Terminology of Prejudice Motivated Crime Change Perceptions and Reporting Actions?' (2016) 56 (2), *The British Journal of Criminology*, 239–255.

“Obviously they’re happening. There’s no doubt about that. But again I’d say when members are dealing with something, again they’re solely honing in on what legislation is available. So a lot of the cases when people are drunk and they might shout a comment or they might say a remark to a person - that’s just considered a Public Order offence. And they mightn’t be categorised appropriately. It mightn’t capture exactly what happened. And it comes before the court then as a Public Order incident rather than a hate crime or a racially motivated incident.” (Garda)

Those gardaí involved in the investigation and prosecution of crimes generally held that public order, criminal damage, and assault were the most common forms of hate crime. A minority mentioned harassment.

Identifying commonly targeted communities, criminal justice professionals most often referred to racist and homophobic motivations, with a small minority referencing disablist, transphobic, and ageist motives. A small number of professionals explicitly understood sexual crimes as being hate crime, with this solicitor equating the two due to the power imbalances and inequalities that are so commonly present in such offences:

“... of course the big hate crime is rape. And when I started out ... I naively equated a rape to a sexual crime when the reality of it is, it’s a violent crime. It has nothing to do with sex. I learned that very early on ...[V]ery often I get the impression that there’s very little sexual satisfaction taken out of it. It’s really about dominance and domineering and I suppose that comes within the definition of a hate crime as you define it.” (Solicitor)

A number of participants explicitly mentioned alcohol as being a factor in this type of offence:

“I would say alcohol is definitely a huge feature absolutely yeah. In terms of you know verbal abuse definitely.” (Garda)

Nearly half of all criminal justice professionals explicitly mentioned taxi drivers as a category of victim they believed to be most impacted by hate crime:

“And I keep coming back to the taxi driver thing. That’s the dominant thing that’s in my head you know, that most of the interactions ... had been taxi drivers and very good reason for that because they’re at the coal face ... at the flashpoint.” (Garda)

“I’ll just give an example of a taxi hijacker. I mean if you have ten taxi hijacks in the city, eight of them are on Nigerian or Asian or Indian drivers and two are on white Dubliners or whatever – I mean you could certainly say there’s a pattern there.” (Solicitor)

Previous offenders were familiar with hate crime as a construct, citing entertainment and news media as their sources of information. Participants addressed racist, religiously aggravated, homophobic, disablist and transphobic hate crimes in the course of the focus group discussion, and recognised each as manifesting in Irish society.

While previous offenders were generally of the view that Ireland was more progressive than it had been in the past, particularly with respect to the acceptance of lesbian and gay identities, they did not perceive the same level of social acceptance with respect to trans people. One cited an example of a transphobic hate crime which they had observed:

“Participant: ... I was walking down [street] one day and there was about six or seven young fellas [details of incident] do you know what I mean?”

Interviewer 1: Off of?

Participant: A trans ... fella who wears women’s clothes, what do you call him?”
(Previous offenders’ focus group)

Previous offenders were aware of religiously aggravated hate crimes that had occurred in the local area, and while a minority held that people with disabilities are

not subject to hate crime, others were able to cite an example of a recent disablist hate crime:

“Participant: They do get targeted because about six months ago above in [place] there was a fella [details of incident].

Interviewer 1: Oh really in [place] was it?

Participant: The kids had their great craic with the [details of incident] until adults went over and stopped it.

Participant: That’s cruel.” (Previous offenders’ focus group)

As a group, the previous offenders were particularly disparaging about this manifestation of prejudice and regarded disablist hate crime as particularly unacceptable and worthy of their personal intervention:

“Participant: I think that does happen. It does happen, but it’s not accepted.

Participant: No it’s not.

Participant: Yeah.

Participant: If anyone seen anyone at a disabled person, I don’t care who they are, you’d have to step in. No way you could not

Participant: If I seen someone picking on someone, then I just think that could be my mother, my grandfather, do you know what I mean?”

(Previous offenders’ focus group)

In the case of homophobic and disablist hate crimes in particular, some participants’ general awareness and rejection of such bias motivations was informed by kinship ties to members of these minority groups. Thus, people marginalised on the basis of disability or sexual orientation, were held to be more deserving of protection than more socially distant minorities.

“Interviewer 1: Yeah, so does that make a difference to you, that like you actually have family members and /

Participant: /Yeah I have family members, they’re all in wheelchairs like and I if saw someone in a wheelchair getting attacked anymore I would kinda

jump in to help them.

Participant: If it was a black fella getting kicked in the head - walk on.

Participant: Yeah more than likely walk on."

(Previous offenders' focus group)

Some previous offenders expressed a view, also expressed by some criminal justice professionals and victims that hate crime would become an increasingly pressing social problem in the future:

"Participant: I think in years to come it is going to be massive, do you know what I mean? Due to the influx of immigrants from all other countries coming in to Ireland.

Participant: From all around the world." (Previous offenders' focus group)

SHOULD A HATE ELEMENT BE CONSIDERED AN AGGRAVATING FACTOR?

Although there is currently no legislation in Ireland which requires a court to take a bias motivation, or a demonstration of bias, into account when determining the appropriate sanction to impose in a given case, it is possible for a judge to do so.¹⁷¹ Participants in this research were asked whether they believed that a hate element should lead to an enhanced punishment for an offender.

The majority of legal practitioners were of the view that if a hate element is established in a case, it should aggravate the penalty imposed. A minority were unsure that the presence of a hate element should be treated differently by the court:

"I just don't know ... from a really legalistic point of view if the result is the same and if the impact is the same and if the offending behaviour is exactly the same it's difficult to see why a distinction should be drawn because of an attitude that one person has over an attitude that another person has."

(Barrister – Defence and Prosecution)

Of those who expressly stated that a hate element should lead to a harsher penalty, the majority justified their position on the basis that the criminal justice process should

¹⁷¹ DPP v Elders [2014] IECA 6.

send a message that engaging in this form of behaviour is unacceptable:

“... I think for a number of reasons, but primarily because we do have to show ... we do have to demonstrate the particular unacceptability of offences where it is intentionally done on the basis of somebody’s vulnerability or background or life experience ... so yeah, I’d have no difficulty even from a defence practitioner’s point of view to share the idea that hate crimes need to be reflected in the sentencing policy.” (Solicitor)

Other legal practitioners framed their justification for enhanced penalties from a human rights perspective:

“Because we have a constitution, both people are equal. So its [a] breach of people’s fundamental rights, everyone is entitled to choose their own direction and we are what we are in relation to our backgrounds and our colour.”
(Barrister – Defence and Prosecution)

Restorative justice advocates argue for the use of this approach as an alternative to conventional penalties which they argue often fail to appropriately meet the needs of the victim, the offender and their communities.¹⁷² A significant minority of legal practitioners emphasised the potential value of rehabilitative measures in the context of hate crime offending, with some stressing restorative justice measures in particular.

“I think in relation to a hate crime, getting locked up for six months isn’t going to do you any good ... I think if something is a true hate crime, the solution is more to do something along the lines of restorative justice and education ... restorative justice is nonsense generally but in this case it’s the only fix.”
(Barrister – Defence)

Of those practitioners that discussed the merits of rehabilitation, most recognised that an enhanced sentence would still be justified in some cases:

“... I wouldn’t say an enhanced sentence but I think they should undergo some

¹⁷² John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989); Mark A Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (OUP 2014).

form of rehabilitation ... it should be there within the probation services to say look ... what's going on here? Because I don't know if an increased sentence ... maybe - certainly in certain circumstances I've no doubt, yes. But there must be something to address that ... whatever is forming that opinion let that be addressed and hopefully nullified." (Solicitor)

The importance of securing a balance between ensuring that the experiences of the victim were acknowledged, while at the same time addressing the offending behaviour was expressed succinctly by one practitioner:

"I think there has to be some acknowledgement in it for the victim, that this was done because of my background or whatever personal characteristic it was done because of, and within that in the sentencing then even if it's not enhanced in terms of a custodial penalty, that there is something to do ... that the person has to undergo some sort of rehabilitation ..." (Solicitor)

All gardaí were of the view that the hate element of a crime should be considered an aggravating factor in sentencing; only one of these stated that rather than aggravating the sentence, a hate element should trigger a process of rehabilitation:

"I think ... that they should go through a programme of education. Because they'd understand about what it's like to be marginalised." (Garda)

Thus the vast majority of all criminal justice professionals were of the view that the hate element of a crime should be considered an aggravating factor at sentencing. Nonetheless gardaí and legal practitioners offered differing reasons for supporting their shared position.

Defence practitioners articulated two primary views on the issue in justifying their position: first, that the law should be used to send a message to society that the targeting of people on the basis of their personal characteristics is not acceptable and will not be tolerated; and second, they relied on human rights concerns. Gardaí articulated three main reasons for believing that the hate element of a crime should

be considered an aggravating factor. The first, reflecting the views of defence practitioners, was that the law should be used to ‘send a message’:

“If you have a hate crime and you have a good prosecution, couple of prosecutions, and the whole lot and then people are going to say right ... I’m not going to you know ... probably it’s not a good idea to abuse the Black guy or whatever, this kind of thing. It’s going to set a standard for us as a community, as a society. Our institutions do not tolerate racism full stop.”
(Garda)

One garda added that in sending this message, victims’ faith in the criminal justice process would be bolstered:

“I think it would kind of de-stigmatise it a bit as well for victims, if they see more people being charged with these offences they’re probably more likely to come forward.” (Garda)

The second reason given by gardaí was that hate crime had a more profound impact on its victims than non-hate motivated offences:

“I’ve seen it, I’ve sat down with the people who are victims of racist abuse, it’s horrendous like. And they carry it through with them and d’you know ... it’s hugely upsetting ... it’s not just regular threatening, abusive language it’s much deeper than that ... And that should be brought in and presented to the judge then. To give more weight than the ordinary, just threatening, abusive and insulting behaviour.” (Garda)

The third reason given by gardaí for justifying their position that perpetrators of bias motivated offences should have their sentence aggravated was their belief that this type of offender is more culpable:

“I feel that if somebody is targeting a particular class of person that they should be taken more seriously because there’s massive amounts of intent there.” (Garda)

Previous offenders were also, in the majority, in agreement that those targeting people on the basis of their personal characteristics should be sanctioned, including by the criminal justice process:

“Interviewer 1: ... do you think if somebody sets out to attack somebody because of who they are, because they’re gay or because they’re Black / Participant: /They should be locked up yeah.”
(Previous offenders’ focus group)

Previous offenders, in justifying this position, focused on the relative culpability of the offender. They clearly distinguished between those individuals who set out to commit a hate crime, and those for whom (they perceive) the hate element was almost accidental – or certainly incidental – to the commission of the offence. Thus, the previous offenders unconsciously distinguished between the two limbs of the legislation which applies in England and Wales, in which a hate element may be established by way of proof of motivation or demonstration of hostility.¹⁷³

“Participant: Rather it’s like a misdemeanour. Basically, do you know what I mean? Because you didn’t go out ...I’m saying hypothetically speaking, because you didn’t go out with the intent to slander you, or to fucking degrade your name or your race or your background or your colour. Do you get me? But you attacked me, I lost my cool, called you a Black bastard, monkey whatever.” (Previous offenders’ focus group)

Although the majority held that hate crime should be sanctioned, only a minority of previous offenders believed that a hate element merited an enhanced sentence specifically. Some were definitive that a hate element should not enhance a penalty:

“Interviewer 2: And do you think you should be treated any differently by the courts?”
Participant: No.
Participant: No.” (Previous offenders’ focus group)

The exception was disablist crime where there was widespread agreement amongst

¹⁷³ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014) para 2.18 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316103/9781474104852_Print.pdf> accessed 8 November 2017.

previous offenders that where the crime has an anti-disability motivation, this should be considered an aggravating factor.

In the context of a general agreement that a hate element merits sanction, and debates among participants regarding the relative merits of restorative justice measures which seek to help offenders recognise the impact of their actions, we asked previous offenders for their perspective on the communicative value of sentencing decisions. There are numerous reasons why judges should give reasons for their sentence, underpinned as O'Malley observes, by a mixture of normative and instrumental concerns.¹⁷⁴ 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 might be expected to deter them from future hate crime offending. Thus, we sought to understand the extent to which the previous offenders participating in this research listened to the sentencing decision of the court, and the extent to which they absorbed the judges' reasons in the case. It is worth noting that in Ireland, while there has been much discussion on this issue,¹⁷⁵ there is still no requirement on judges to explain the reasoning behind their decision when delivering the sentence of the court.

In speaking about their experiences, previous 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:

"But if you're going on a not guilty plea you're listening so you can call your solicitor and say here, pull him there ... or argue that point or fight that point for me – d'you get me?" (Previous offenders' focus group)

"Participant: Yeah you've more interest in the case then because you're after pleading not guilty; you're more entertained in the case. Whereas if you're after pleading guilty it's just 'Well I'm after pleading, I'm waiting for the sentence to come'. If you're pleading not guilty you're going to listen to / Participant: /Every detail that's there." (Previous offenders' focus group)

¹⁷⁴ Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 782.

¹⁷⁵ See, for example, Niamh Maguire, 'Consistency in Sentencing' (2010) 2 *Judicial Studies Institute Journal* 14; Claire Hamilton, 'Sentencing in the District Court: 'Here be dragons'' (2005) 15(3) *Irish Criminal Law Journal* 9; Law Reform Commission, *Report on Sentencing* (LRC 53-1996).

In the context of a guilty plea, the majority of previous offenders stated that they typically paid little attention to the reasons for the sentence:

“If you’re going on a guilty plea, you don’t really give a fuck what’s said. It’s mumbo jumbo.”

“It’s the sentence. You’re listening for the sentence.”

“I think you’re just listening for the sentence. I think that’s really only what you’re listening to. If it’s less than what you have in your head, own it, and if it’s more you’re smashed.”

“If you plead guilty, at the start you’re just ‘Hurry on give me my sentence get it over and done with.’ (Previous offenders’ focus group)

REPORTING TO THE POLICE

This section addresses the police reporting of hate crime, as a factor influencing official statistics and knowledge of the phenomenon.

The vast majority of gardaí were of the view that hate crime was underreported, and thus the criminal justice process did not have a full picture of the issue as it exists:

“But I would say it is happening without a doubt and there’s a lot more racial crime happening out there than is reported. I’d say what’s reported is only a small per cent than what’s taking place in the real world.” (Garda)

One garda discussing the underreporting and underrecording of hate crime, suggested that An Garda Síochána needed to amend its practices and approaches to ensure that the State is not blind to the phenomenon:

“... if you look at it from historical clerical sexual abuse, for argument’s sake – how long did it take us to get to the point whereby we now know that what was going on in respect of that? I don’t want to be coming back in ten years’ time and believing or understanding or thinking I was doing a great job down

here when in fact we were covering up all this hate crime. That's from a policing perspective, that's where I'm coming from. I think that the essence of society in my belief is that we need to change with the times. And if our society is gone multicultural well then we need to look at strategies that would work around that..." (Garda)

Third party reporting mechanisms in Ireland have documented a range of reasons for underreporting, the most common of which include the belief that gardaí could or would not do anything, that gardaí would not take the report seriously, and that the incident was too common or not serious enough an occurrence to report.¹⁷⁶

Schweppe, Haynes and Carr¹⁷⁷ assert that shortfalls in trust between An Garda Síochána and marginalised communities in Ireland can impact the propensity to report. A civil society organisation representative participating in our 2014 research suggested that An Garda Síochána are:

*"understaffed and undertrained in these areas, our experience (through client reports) is that they are reluctant to get involved or follow up complaints. In a small number of incidents it was alleged that gardaí themselves were actually racist towards them."*¹⁷⁸

A number of the victims participating in this research spoke to the relationship between An Garda Síochána and minority communities as an obstacle to reporting:

"Yes. But you have to know there's a lot of people that experience racism in Ireland, but people are not brave enough to report it. Especially the Gardaí, you have to know the relationship between Gardaí and immigrants are not that great because immigrants feel intimidated to report cases. ... A lot of things have happened to a lot of people there and they wouldn't say a word. They just let things go. They are afraid. As well ... they are afraid of jeopardising their residency or afraid of being deported ... cos some were asylum seekers. So ... people are terrified of the guards especially asylum seekers. Terrified. Terrified." (Victim of a Crime pre-Victims' Directive)

¹⁷⁶ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016) 17.

¹⁷⁷ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free from Fear: Legislating for Hate Crime in Ireland: An NGO Perspective* (CUES 2014).

¹⁷⁸ *ibid* 26.

"I know some of them. I know he is going to do the job right. But some of them are just ... it's like the institution is racist. I'm sorry to use this word but we have to be factual here. It's like the police institution is ... institutionally racist. I have to tell the truth here. ... People don't have confidence in them. Some people don't want to report anything. They say 'What am I going to report – policeman will see being beaten, stabbed – he will come and tell you that why did you provoke him instead of him telling the other guy why did you stab him.' People just don't have the confidence in a lot of the police here to be honest." (Victim of a Crime pre-Victims' Directive)

A third Black African immigrant described communicating this point of view to a high ranking police officer:

"I told the superintendent, I said, stop the Blacks that is going on the road, I said about like six will tell you the same stories. The other four they won't talk. They are afraid." (Victim of a Crime pre-Victims' Directive)

While victims across all identity groups addressed themselves to the willingness or capacity of the police to respond effectively to hate crime, this perception of unequal access to justice for minority communities was a particular theme among Black African men and a victim of anti-Roma crime. The Roma participant perceived that, while some members of the police are "ok", others stereotype Roma:

"We are guilty, like, you know." (Victim post-Victims' Directive)

The participant described experiences within their immediate family of being stopped and searched by police on patrol, required to produce ID and threatened with court proceedings if this was not made available. The participant also asserted that Roma are ethnically profiled at road traffic checkpoints:

"They stop all the times because what's happened and some Romanian had no insurance with the car, like, you know. We had all the times. Because of them, they stop all the times the Romanian Gypsy, all the times – just for no reason in the car at the check point to check for the insurance and tax. Because they're Gypsies." (Victim post-Victims' Directive)

In our sample, one individual who chose not to report one of two hate crimes to which they were subject – again a Black African immigrant – stated that they abandoned an attempt to report a hate crime because of their treatment by the police:

“... finally we got inside and the garda said I should shut up, he want to hear from [the suspected offender] first.” (Victim post-Victims’ Directive)

Access to justice

Access to justice is a fundamental human right protected by a multiplicity of international agreements and conventions. In order to guarantee access, minoritised communities must be provided with both procedural and substantive supports to ensure their rights are protected.¹⁷⁹ However, these supports operate on the presumption that the communities in question trust the system to act in their best interests. For minoritised communities, however, this is not always the case. In England and Wales, the approach of the criminal justice process to hate crime was reorganised and in some ways reconceptualised due to a recognition of the existence of prejudice within the criminal justice process, and an acknowledgment of the effect that this could have on access to justice.¹⁸⁰

There have been some studies done on relationships between minoritised communities and the police or legal system in Ireland, which without exception demonstrate lower levels of trust by such communities in those institutions than the majority population.¹⁸¹ The European Social Survey is a cross-national representative survey of attitudes and behaviours which has been conducted in Ireland since 2002.¹⁸² From 2012-2016, all participants were asked to rate their trust on a scale of 0-10 in four key state institutions: the parliament; the legal system; the police; and politicians. All participants were also asked whether they were a member of a group that was discriminated against (referred to here as “the minoritised population”). When the results for both questions were cross-tabulated, the minoritised population consistently had lower levels of trust in all four institutions.

¹⁷⁹ Deborah Rhode, *Access to Justice* (Oxford University Press 2004). We define a minoritised community 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.”

¹⁸⁰ Neil Chakrabarti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (2nd edn, Sage 2015).

¹⁸¹ Aogán Mulcahy and Eoin O’Mahony, *Policing and Social Marginalisation in Ireland*, Working Paper 05/02 Dublin: (Combat Poverty Agency 2005) 5; Amanda Haynes and Jennifer Schweppe, *Policing Beyond the Binary: The Relationship between the Trans Community and An Garda Síochána* (TENI, forthcoming);

¹⁸² Analysis of the ESS data was provided to us by the postdoctoral researcher attached to the European Social Survey for Ireland, Dr Amy Erbe Healy.

When asked to indicate their levels of trust in the legal system on a scale of 0 to 10, with 10 equating to complete trust, for individuals from the majority population the mean score was between 5.29 and 5.5 across the three years (see Figure 1). In answering the same question, the minoritised population responded with scores ranging from 4.24 to 4.61. Results for trust in the police (see Figure 2) were higher, but again the gap in trust remains between the majority (ranging from scores of 6.69 in 2012 to 6.23 in 2016) and the minoritised population (ranging from scores of 5.67 in 2012 to 5 in 2016).¹⁸³

Figure 1: ESS - Trust in the legal system

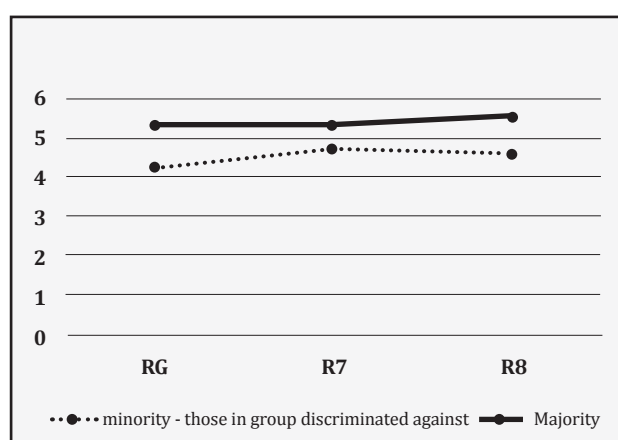
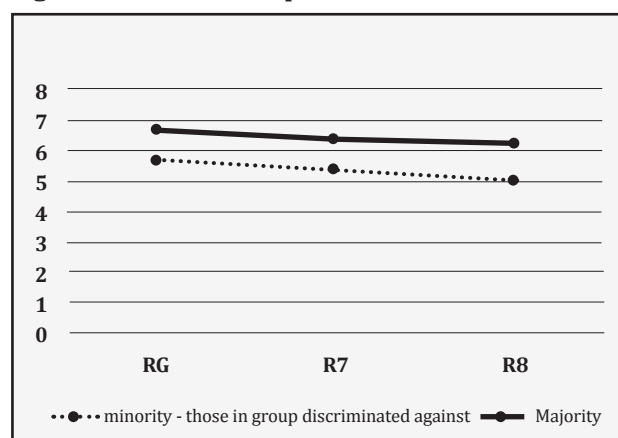


Figure 2: ESS - Trust in police



¹⁸³ Results for trust in the country's parliament for the majority ranged from scores of 3.63 in 2012 to 3.86 in 2014 to 4.51 in 2016; for the minoritised population the scores ranged from 2.91 in 2012 to 3.11 in 2014 to 3.65 in 2016. Results for trust in the country's politicians for the majority ranged from scores of 3.12 in 2012 to 3.37 in 2014 to 3.76 in 2016; for the minoritised population the scores ranged from 2.8 in 2012 to 2.67 in 2014 to 3.1 in 2016.

Another potential means of determining whether minoritised communities are exercising their rights of access to justice comparably to that of the majority community is through an examination of the first point of contact that victims have with the criminal justice process: the point of reporting the crime. The Garda Public Attitudes Survey reveals a very high rate of reporting by victims of crime generally, with a rate of 86 per cent of crimes reported to An Garda Síochána in the latest data, Quarter two of 2017.¹⁸⁴ A lower rate of reporting is demonstrated in the Quarterly National Household Survey Crime and Victimisation Module.¹⁸⁵ Here, 62 per cent of household crime was stated to have been reported to An Garda Síochána, with 54 per cent of crime against individuals reported to An Garda Síochána.¹⁸⁶

When we examine the reporting rates of victims of hate crime specifically, the figures are demonstrably lower. Our analysis of third party reporting mechanisms found that, of the 143 crimes reported to ENAR Ireland in 2015, only 24 per cent were reported to An Garda Síochána¹⁸⁷ Of the eleven crimes reported to GLEN in the same year, only three were reported to the gardaí, representing 27 per cent.¹⁸⁸ For members of the trans community, the figures give cause for concern: in 2014, 25 per cent reported their experiences to An Garda Síochána.¹⁸⁹ This dropped to five per cent in 2015, with no reports being made to An Garda Síochána in 2016 by those who reported to TENI.¹⁹⁰

In our 2015 study,¹⁹¹ it was suggested by some practitioners that members of minoritised communities may have a lack of faith, not just in the police, but in the criminal justice process generally due to the treatment of individual members by actors in that system. Thus, where an individual was discriminated against by one actor in the criminal justice process because of their ethnicity or racialized identity, that individual – and perhaps their community – may have less faith in the process to assist them when they are a victim of a crime. Thus, instances of discrimination may lead to the further exclusion and marginalisation of individuals from the protection of the criminal law.

¹⁸⁴ An Garda Síochána, *Public Attitudes Survey Bulletin Q2 2017* (An Garda Síochána 2017).

¹⁸⁵ Central Statistics Office, *Crime and Victimisation, Quarterly National Household Survey Q3 2015* (Central Statistics Office 2016).

¹⁸⁶ *ibid.*

¹⁸⁷ Jennifer Schweppe and Amanda Haynes, *Monitoring Hate Crime in Ireland: Towards a Uniform Reporting Mechanism?* (HHRG 2016) 16.

¹⁸⁸ *ibid.* 27.

¹⁸⁹ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017).

¹⁹⁰ *ibid.*

¹⁹¹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, *'Out of the Shadows' Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

While victims interviewed for this research focused on their relationship with gardaí, legal practitioners spoke to bias presenting at all stages in the criminal justice process, from the police, as the first point of contact, to the judge. The vast majority of interviewees were of the view that minoritised communities faced prejudice and discrimination within the system:

"I think it's very much in the minority but I have seen it on the bench. And I have seen it by guards. I've probably seen it by my own colleagues in defence probably treating people of - foreign nationals - differently. And I think yeah ... I mean there is racism not only against foreign nationals but against members of the Traveller community etc., definitely inherently built within the system."
(Solicitor – Defence)

"I unfortunately have experienced racism from the bench ...In some courts you'd see it a lot. Actually I think it's quite a big problem ... That's my experience and I don't think I'd be alone in that." (Solicitor – Defence)

This solicitor was of the view that the criminal process as a whole is not designed to cater to the needs of diverse communities and a diversity of victims:

"I think because in general terms the justice system in Ireland is set up to deal with a particular type of complainant or a particular type of victim. It's not gender specific. But I think it's set up to deal with someone who is white, reasonably well to do, not necessarily wealthy but not dirt poor either. Moderately educated and reasonably accepting of authority or compliant with authority figures. And as soon as you step outside too many of those strictures, you're going to have a bad experience of the Irish justice system. It is not well suited to cater for diversity. There are exceptions. But I think the exceptions are very much down to individual excellence rather than a standard maintained by the system. I would stand over that as a general statement." (Solicitor – Defence)

Given the vital importance of the relationship between victims and the criminal justice process, and the significance of such attitudes and behaviours, to the faith that a community might have in the organs of the State set up and designed to protect them, these attitudes are particularly concerning.

“It takes the glean off the harp sitting behind the judge when you’re sitting there watching this charade go on.” (Barrister – Defence)

Given space constraints with this Report, we intend to return to this matter, and the responses of participants on this subject, in a later piece of research.

Deciding to report

This research specifically sought to sample victims who had experience of reporting a hate crime. All 17 victims whose experiences are discussed in this report had made a complaint to the police. Only one offence was not reported. In this instance, the individual said that the incident, which consisted of threatening, abusive and insulting behaviour, was defused by witnesses.

Of those 25 cases reported to the police, 19 were reported by the victim, three were reported by witnesses, one by a bystander who came upon the bleeding victim and two were reported by the owner of a commercial premises which was the scene of the crime. With one exception, the crimes were reported while in progress or in the immediate aftermath, and to access assistance. Those targeted at home invariably discussed reporting in order to prevent further victimisation, an issue which is discussed further at a later point in this chapter.

A minority of participants discuss reporting as a means of protecting others from similar harm.

“... it’s not possibly about me, it’s about the community and it’s about the future of the State itself. Because basically what is happening and my experience is, I might be able to stand up for myself and say no I don’t want this I want that but there are some thousand and one people that might not be able to speak out, that might not be able to write to the guard to challenge the guard position on their cases and they be the victims of the racist issues both by the guards and other people that are perpetrator of these crimes.” (Victim of a crime pre-Victims’ Directive)

In this wider context, many victims spoke to the societal impact of hate crime:

“You can’t just let it go like that. Because then ... it’s not only about me, it’s about the whole racism thing that’s very common in Ireland, and I needed to do something about it. It’s not something I’ll just let go of it, I wanted to make an example and to make sure that people live in a free society. I can’t just lay back and take it with a pinch of salt. I have to do something about it. And it is my principle to do something. I can’t let it go, so I decided to report to the guards and follow up and make sure that the case goes to the court and make sure that I’m there to correct that to make sure that our children don’t experience the same thing in future generations.”
(Victim of a crime pre-Victims’ Directive)

“... the children they deserve something better. And they don’t deserve to know hate. And to grow up with hate and to grow up hating someone. Because they will hate. They don’t deserve to be abused or to become abusers. It’s the society we live in. I told you it’s a jungle on the street.”
(Victim of a crime pre-Victims’ Directive)

One person held that they themselves had begun to internalise the divisive impacts of hate crime:

“... maybe that’s how he’s feeling ... the same as me ... maybe it’s better if I stick with my own kind.” (Victim of a crime pre-Victims’ Directive)

The victim of anti-Muslim hate crime asserted that the phenomenon would increase further in the future:

“Everyone has heard of us at least, maybe not dealt with us but at least heard of Muslims. And that’s why as I said ... I’m not an analyst, I’m just saying what I think you know. So they should do something about it. Because it’s gonna increase. Sounds really bad, but those attacks that happened, those terrorist things, fricken ISIS are all over the place. These attacks are gonna get worse because they’re still there you know.”

(Victim of a crime pre-Victims’ Directive)

RECORDING HATE CRIME

This section of the Report documents the findings of the research regarding the official recording of hate crime in Ireland. In addition to analysing official statistics, we investigated the police recording of hate crime in order to inform our interpretation of those statistics, and to understand the communication of the hate element through the system. In this jurisdiction, hate crime is recorded by the police as part of their operational duties and as part of their remit in collecting crime data. Police recorded data is provided by the police to the Central Statistics Office (CSO) who are responsible for the assessing the quality of the data, collating statistics, and disseminating information.

Police recording practices

It has been noted that the Republic of Ireland does not have hate crime laws. Despite this, An Garda Síochána surpassed the limits of legislation with respect to recording over a decade ago and have been proactive in facilitating the recording of what they refer to not as hate crime, but as crimes with a discriminatory motive, since 2002.

The recording of discriminatory motives occurs at the point at which a garda on operational duties logs a crime onto PULSE, the computer-based national incident recording system. The purpose of the system was to centralize the collection of data relating to criminal offences, providing garda management with a platform to inform

policies and practices in this regard.¹⁹² According to a Central Statistics Office report published in June 2015, the most common variables used in recording a criminal offence include: the date and time of incident occurrence; date of incident report; incident type; detection status; date of birth of victims and suspected offenders (where applicable); narrative of incidents; location of incident; and the modus operandi (MO) of the crime.¹⁹³

Recording methodology prior to 2015

Recording commenced in 2002 as a result of Garda HQ Directive No 188/2002, which established that racist motivations were to be captured on PULSE. Recording was later extended to include categories for homophobia, antisemitism, sectarianism and xenophobia. The category of xenophobia quickly became defunct and the Central Statistics Office reports¹⁹⁴ that by 2006, no data was being recorded for xenophobic motivations. The category was discontinued from 2007.¹⁹⁵ This same year the 2002 Directive was replaced with Directive 04/2007 which retained the perception test, but did not expand reference to any category beyond racism.

Discriminatory motivations were available to select within the database relating to criminal offences only. Within that database, the categories were included on the incident details screen, as five among an alphabetised list of more than 40 motivations, including corruption, domestic violence, extortion, jealousy, and monetary gain. Taylor notes in a 2010 discussion of how PULSE works:

“There is no mandatory field which must be completed at the recording stage to note whether an incident had a racist aspect. As a result a lot depends upon the victim’s reporting and insistence on identifying the racist aspect, and furthermore a lot depends on Garda discretion as to what is written into the narrative section of the PULSE recording system”.¹⁹⁶

Until 2015, while a motivation for the offence had to be selected, there was no compulsion on PULSE users to specifically address the question of whether a crime might have had a discriminatory motive specifically.

¹⁹² National crime Council, *Report of the Expert Group on Crime Statistics*, (NCC 2004) <<http://www.crimecouncil.gov.ie/downloads/ExpertGroupStats.pdf>>; National Focal Point, *Analytical Study on Racist Violence*, EUMC RAXEN3 Report on Ireland, http://www.nccri.ie/pdf/RacialViolence_RAXEN3.pdf

¹⁹³ Central Statistics Office, *Review of the Quality of Crime Statistics* (CSO June 2015) <<http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2015/reviewofcrime.pdf>> accessed 6 October 2017.

¹⁹⁴ Email communication with the Central Statistics Office, (2017).

¹⁹⁵ Central Statistics Office, *Crimes with a Discriminatory Motive: Information Note*, (May 2017).

¹⁹⁶ Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011) 18.

Police recorded data to 2014

The table below presents Irish official statistics on the numbers of crimes recorded as having a discriminatory motivation for the period 2006-2014.

Table 7: Discriminatory motivations 2006-2014 ¹⁹⁷

Discrimination type	2006	2007	2008	2009	2010	2011	2012	2013	2014
Anti-Semitism	1	1	2	5	12	3	4	2	4
Homophobia	21	11	9	32	13	21	17	17	13
Racism	171	210	165	122	111	132	93	93	93
Sectarian	6	11	1	2	3	4	3	6	4

As we can see, the number of crimes recorded as having a racist motivation peaked in 2007, with 210 such crimes reported, dropping to a low of 93 such crimes across 2012-2014. Crimes recorded with a homophobic motivation peaked in 2009 with 32 such crimes, falling to only 13 in 2014. The number of crimes recorded with an antisemitic motivation reached a high of 12 in 2010. Figures for sectarian crime peaked in 2007.

It has been widely acknowledged both by members of An Garda Síochána and by civil society organisations that the figures presented here were an underrepresentation of the number of crimes with discriminatory motives occurring in Ireland. Members of An Garda Síochána to whom we spoke in the course of our 2015 research fully accepted that police recorded data represents a significant undercount of hate crime occurring in Ireland.¹⁹⁸ Gurchand Singh, the Head of Analysis, observed that the official figures:

“... are not a reflection of the trends, extent, depth of hate crime in Ireland... [we cannot] assume that all incidents are reported to us. The challenge is knowing what [the] proportion of incidents reported to us are ...”¹⁹⁹

Recording from 2015: PULSE 6.8

The 2014 Crime Investigation Report recommended that An Garda Síochána ensure that all crimes containing elements of hate or discrimination were flagged on PULSE

¹⁹⁷ Central Statistics Office, Email Communication (CSO 2017).

¹⁹⁸ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, ‘Out of the Shadows’ *Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

¹⁹⁹ *ibid.*

and the creation of clear modus operandi features on PULSE that allow the accurate recording of the nine strands of the Diversity Strategy.²⁰⁰ In November 2015, in anticipation of the Victims' Directive, a new way of recording crimes with a "discriminatory motive" was introduced, which made changes to both the recording categories and the recording process. As part of an update called PULSE 6.8, the five pre-existing recording categories were replaced. In November 2015, An Garda Síochána began recording eleven categories of discriminatory motives which were generated to reflect the police service's strands of diversity, in collaboration with the Garda Racial and Intercultural Diversity Office: Ageism, anti-disability, anti-Muslim, anti-Roma, antisemitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia.

This was a significant change, providing for the recognition of hate motivations towards quite a comprehensive range of commonly targeted groups. On a critical note, neither religion, nor a lack of religion or belief, were included as discrete recording categories, therefore there is no marker to identify religiously aggravated crimes that are not antisemitic or anti-Muslim. Nonetheless, the expansion of the range of recording categories under PULSE 6.8 reflects Professor Barbara Perry's assertion that we need to recognise the historically and culturally contingent character of hate crimes.²⁰¹ Thus, the sectarian and anti-Traveller categories would not necessarily be as relevant in other jurisdictions, but allow for the recording of important local manifestations of hate in Ireland:²⁰²

Possibly an equally significant methodological change is that made to the process of recording. PULSE 6.8 has altered the location of the discriminatory motive recording categories within the incident recording system for criminal offences. First, it has introduced a discrete question on discriminatory motives, rather than requiring that the user locate the eleven categories within a general motivations question. Second, the new discrete question on discriminatory motives is located in a dialogue box on the Victim Needs Assessment screen, which requires gardaí to indicate where the victim requires an individual needs assessment as a result of their status as a child, a person

²⁰⁰ *ibid.*

²⁰¹ Barbara Perry, *In the Name of Hate* (Routledge 2001).

²⁰² John O'Connell, *Travellers in Ireland: an examination of discrimination and racism: a report from the Irish National Co-ordinating Committee for the European Year against Racism (Lenus 1997)*; James Carr, *Experiences of Islamophobia: Living with racism in the neoliberal era* (Routledge 2015).

with a disability, a person with emotional or mental needs, a repeat victim,²⁰³ a victim of domestic violence, or the presence of a discriminatory motive. The question on discriminatory motives offers the person logging the report a choice of the eleven discriminatory motives, plus an option which indicates that no discriminatory motive was present; one of these twelve options must be selected. Further, selecting an indicator of a discriminatory motive on the Incident Details screens automatically populates the discriminatory motives markers on the Victim Needs Assessment screen. Equally, selecting a discriminatory motive on the Victim Needs Assessment screen automatically populates the wider-ranging motives tab on the Incident Details screen.

This change suggests that information on discriminatory motives is sought for the purposes of victim support rather than investigation, a position which is supported by research interviewees who confirm that the selection of the marker shapes neither the investigation nor prosecution of a crime (see the relevant sections of this Report for a more detailed discussion of these points): however, the eleven discriminatory motives are ostensibly more visible under 6.8 than they were previously. The visibility of the question is copper fastened by its mandatory status: under PULSE 6.8 all users logging incidents by phone with GISC (the civilian service tasked with populating the crime incident database) are asked to complete the Victim Needs Assessment screen and must address the question of whether or not the crime had a discriminatory motive. Given that the 2017 *Report of the Expert Group on Crime Statistics*²⁰⁴ asserts that every addition of mandatory data involves “legal, administrative and technical implications”, the compulsory nature of the question on discriminatory motives indicates a commitment to fulfilling the State’s obligations under the Victims’ Directive to identify victims of hate crimes in order to provide them with access to appropriate supports.

The number of crimes recorded as having a discriminatory motive increased dramatically following the introduction of this technical innovation: from 114 in 2014 to 308 in 2016:

²⁰³ The Garda on the scene checks PULSE to ascertain whether the victim is a repeat victim.

²⁰⁴ Department of Justice, *Report of the Expert Group on Crime Statistics*, (Justice 2017) 8 <http://justice.ie/en/JELR/Report_of_the_Expert_Group_on_Crime_Statistics_2017.pdf/Files/Report_of_the_Expert_Group_on_Crime_Statistics_2017.pdf> accessed 8 November 2017.

Table 8: Discriminatory motivations 2016 ²⁰⁵

Ageism	38
Anti-Disability	12
Anti-Muslim	13
Anti-Roma	*
Antisemitism	*
Anti-Traveller	25
Gender related	31
Homophobia	28
Racism	152
Sectarianism	*
Transphobia	*
Total	308

Nonetheless, the Central Statistics Office, which uses police recorded data to compile official crime statistics, advises caution in interpreting the data, noting that in 2016 (the first full year for which post-PULSE 6.8 discriminatory motives data is available):²⁰⁶

“The overall number of incidents recorded with discrimination motives is quite low and with an increased number of more specific options available, the number of incidents for each motive type tends to be lower than prior to 2016.”

In interpreting data relating to discriminatory motives, the Central Statistics Office also advises that data users take into account the findings of their 2016 quality review of crime statistics in Ireland,²⁰⁷ which was in turn prompted by concerns raised in the 2014 police inspectorate report *Crime Investigation*.²⁰⁸ This Review found that there are significant shortfalls in the quality of Irish police recorded crime data generally. Key among their findings is the conclusion that in 2015 between 16 per cent and 17 per cent of crime reported to An Garda Síochána was not logged on PULSE, the system from which data used to generate official crime statistics are

²⁰⁵ * Indicates that there were between 1-3 crimes recorded in this category, but that the number of cases did not meet the Central Statistics Office's minimum frequency rules for the purposes of reporting. The CSO was not in a position to disaggregate by offence type.

²⁰⁶ Central Statistics Office, *Crimes with a Discriminatory Motive: Information Note*, May 2017.

²⁰⁷ Central Statistics Office, *Review of the Quality of Crime Statistics 2016* (CSO 2016) <<http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2016/reviewofcrime.pdf>> accessed 8 November 2017.

²⁰⁸ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014).

drawn. While the increase in the number of recorded crimes with a discriminatory motive in 2016 certainly indicates a higher rate of recorded hate crime, it is likely that underrecording remains a challenge.

Our 2015 research,²⁰⁹ found that the point of recording is the first, and potentially the most significant, point at which a hate element can be disappeared from the criminal justice process. Where a hate element is not recorded at the point of reporting, it is unlikely that it will be investigated and prosecuted.

Awareness of recording categories pre-PULSE 6.8

One of the challenges to the reliable recording of crimes with a discriminatory motive is police awareness of the recording categories. Having spoken to ELO/LGBT officers about their awareness of the pre-PULSE 6.8 recording categories in 2015,²¹⁰ in 2017 we spoke both to members of An Garda Síochána and civilians working as call takers (Incident Creation Representatives) in the Garda Information Services Centre who log reports to PULSE on behalf of the police.

In interviews with gardaí conducted in 2012, Clarke found that officers differed in their understanding of recording procedure for racist crime – and that most did not know the definition of racism used by the service, or even that the service was required to record the numbers of racist crimes.²¹¹ Our 2015 research found that, pre-PULSE 6.8, police were broadly aware of the racist discriminatory motive. However, while all of the interviewees were aware that it was possible to record a crime as racially motivated using the drop down motivations menu, there was less consistency in awareness of the other available prejudice-related categories. Few garda interviewees mentioned the category of antisemitic motivations. None mentioned sectarian motivations. While there were generally high levels of awareness of the potential for homophobic crime, one ELO/LGBT officer was unaware that it was possible to record a homophobic motivation on PULSE.

“Interviewer: Do you know if you can record a homophobic motivation?”

Interviewee: No. Definitely not.

Interviewer: You can’t?”

²⁰⁹ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, *‘Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

²¹⁰ *ibid.*

²¹¹ Helen Clarke, *Recording Racism in Ireland* (Integration Centre 2013) 14.

<<http://www.integrationcentre.ie/getattachment/d70f7539-ce06-403d-98d7-da21f7d46426/Recording-Racism-in-Ireland.aspx>> accessed 8 November 2017.

*Interviewee: Could you flag it as homophobic? ... apart from the narrative? I don't think you can."*²¹² (Garda)

We raised the question of how bias-related motivations such as transphobia and disablism which are not available through the motivations menu on PULSE might be recorded. Responses varied; some interviewees suggested that they would use the menu entry for homophobia in flagging transphobic motivations:

"Interviewer: What about transphobic now?

Interviewee: We have to record it under homophobic because there is no other place for it. The workaround at the moment ... is to include transphobia in the narrative." (Garda)

Others suggested that they would just note the motivation in the narrative section of the report. In one case the garda interviewee was unable to say how they might record either a transphobic or a homophobic motivation.

Although the Garda Inspectorate Report *Crime Investigation*²¹³ refers to the existence of an organisational definition of both racist and homophobic incidents, An Garda Síochána interviewees referred only to an organisational definition of racist incidents.

"Interviewer: Is there a definition of homophobic crime in An Garda Síochána?

Interviewee: No." (Garda)

While we saw earlier that some ELO/LGBT officers worked on ensuring that transphobic motivations were recorded, others had no understanding of the concept as we can see here from this participant.

"Interviewer: What about transphobic crimes?

Interviewee: Transphobic crimes? Tell me what a transphobic crime is?" (Garda)

²¹² Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, 'Out of the Shadows' Legislating for Hate Crime in Ireland: Preliminary Findings (ICCL 2015).

²¹³ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014).

Awareness of recording categories post-PULSE 6.8

Following the introduction of a discrete and mandatory question on discriminatory motives in November 2015 as part of the PULSE 6.8 update, GISC call takers interviewed in 2017 for this research unanimously agreed that they initially listed all eleven discriminatory motives available each time a report was made. Over time, however, this practice faded out they explained, with some call takers prompting officers where they perceived a particular discriminatory motive to be relevant to the incident details, and others asking an open question on whether any discriminatory motives were present in the case:

"I suppose with experience you kind of would list the ones relevant to the category. D'you know because if it was an elderly person ... you would say well it's age related or something like that. So as a call taker you do ... you kind of ... you do tailor it to whatever incident is being created at the time."
(GISC Employee)

"I don't list it anymore. I just ask if there's any discriminatory motives."
(GISC Employee)

Gardaí interviewed in 2017 displayed little awareness of the recording categories when we asked them to recall the categories of discriminatory motive available:

"Interviewer: Do you recall what the categories are?"
Interviewee: I don't ... I can't recall, no." (Garda)

"I know there are tick boxes there." (Garda)

"Interviewer: On that, have you noticed a change in the manner in which hate crime, well the discriminatory motive marker, is being used since the introduction of PULSE 6.8?"
Interviewee: Not particularly no." (Garda)

"Interviewer: Do you know ... there are a number of motivations in there"

relating to the hate element – do you know what they are, would you be familiar with them?

Interviewee: Am ... I think there is racial ... I think it just says racial motivation. I think that's one or racially motivated ...I can't think of others..." (Garda)

We then prompted participants by asking if they were aware of the presence of particular discriminatory motives available. Again, participants evidenced very low levels of awareness of specific categories:

"Interviewer: Is there an anti- Traveller motivation that's possible on PULSE?

Interviewee: I'll have to check that and come back to you." (Garda)

"Interviewer: Were you aware for example that anti-disability is listed as a discriminatory motive?

Interviewee: No." (Garda)

Indeed, the only individuals with a comprehensive knowledge of the available recording categories worked primarily with victims and in the Garda Racial and Intercultural Diversity Office.

Understanding of recording categories post-PULSE 6.8

Awareness of a suitable range of recording categories is valuable but not enough by itself. Our 2015 research noted that, with the exception of the brief HQ Directives which govern the recording of discriminatory motives in Ireland, there was no other documentation detailing recording protocols, nor any training on the subject.²¹⁴

An Garda Síochána began delivering diversity training to specialist officers since 2002 through the Garda and Racial Intercultural Office (GRIDO) with the assistance of representatives of minority groups²¹⁵, but this training is not mainstreamed nor, according to interviewees, does it specifically address the recording of discriminatory motives.

²¹⁴ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, 'Out of the Shadows' *Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

²¹⁵ Dave McNerney, 'Policing Racism on the Island of Ireland' in in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime*, (Palgrave Macmillan 2017) 422.

In 2017, we found that training had been provided to alert members of the service to the introduction of new screens and questions in PULSE 6.8, although it appeared that not all members had had access to this training over a year following the rollout of the update:

“In theory they were supposed to know about all the changes that come through. But with all the cutbacks and everything a lot of them weren’t getting their CPD.” (GISC employee)

“I can’t think of any specific training.” (Garda)

Interviewees unanimously agreed that neither civilian call takers nor police officers had had access to either training or documentation on protocols for recording a discriminatory motive specifically, for example the circumstances under which a discriminatory motive should be recorded (see section below on the perception test) or the definitions of the various constructs referenced in the recording categories to be used.

“I went into [PULSE] recently, the tab for ... an injured party for a person and I just went in and it was all these different tabs. I filled them out ... you’re asking me what they are, I don’t know. ... Like no doubt I was given an e-mail. But they get lost.” (Garda)

In the absence of institutional definitions, both police officers and call takers had to rely on common sense understandings and individualised interpretations of the constructs referenced.

“Interviewer: So you didn’t get any training in terms of this is what transphobia is or?”

Interviewee: No. I think it’s just taken you’d know yourself which sounds a bit weak really.” (Garda)

Consequently, both groups evidenced variation and uncertainty in interpreting recording categories. These issues are exemplified in the following excerpts from

interviews with police officers in which they discuss their understanding of the recording category “gender-related”:

“I don’t know whether it comes down to transsexual?” (Garda)

“I presume it’s LGBT?” (Garda)

“... if you have a female present and there is abuse hurled at her.” (Garda)

“A crime against someone because a suspected offender doesn’t like a female or a male.” (Garda)

In discussing such challenges, a senior officer emphasized that:

“Training is more effective than guidelines” (Garda)

Prior to any such training, however, detailed protocols for the recording of discriminatory motives are required, including agreed definitions of the eleven recording categories.

“Interviewer: Did you get any guidance on what the different discriminatory motives mean?”

Interviewee: Not really. They don’t really. It’s ageism and that’s it. It’s just one phrase. Doesn’t give specifics as to what that is. Or it could be racially motivated but it doesn’t specify anything else, it’s just racial. D’you know?”
(GISC employee)

Operationalization of the perception test

The Garda HQ Directive No 04/2007 retained perception as the criterion for recording a racist discriminatory motive. This criterion, was developed initially in England and Wales in the 1999 Macpherson Report²¹⁶, the product of an inquiry set up in the wake of the racist murder of Stephen Lawrence to examine the investigation of racially motivated crimes by London’s Metropolitan Police Service (MPS). In the UK, the Macpherson Report “has been identified as the most significant driver for the

²¹⁶ James C Macpherson, *Macpherson Report on Tradition and Education, Towards a Vision of Our Future* (Department of Indian Affairs and Northern Development, 1991).

recognition of targeted victimisation.”²¹⁷ England and Wales’ College of Policing, in its 133 page long 2014 *Hate Crime Operational Guidance*, explains the perception test as follows:

“For recording purposes, the perception of the victim, or any other person ... is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime. The victim does not have to justify or provide evidence of their belief, and police officers or staff should not directly challenge this perception. Evidence of the hostility is not required for an incident or crime to be recorded as a hate crime or hate incident ...If the facts do not identify any recordable crime but the victim perceived it to be a hate crime, the circumstances should be recorded as a non-crime hate incident and not a hate crime.”²¹⁸

As noted above, the Macpherson definition of a hate crime or incident covers any incident which is perceived to be hate motivated “*by the victim or any other person*.”²¹⁹ This is clearly a remarkably subjective definition – its purpose is to ensure effective and appropriate investigation. In Ireland, Garda HQ Directive No 04/2007 states that any incident which is perceived by “the victim or any other person” – for example the police officer, a witness, or a person acting on behalf of the victim – to have a racist motivation should be recorded as such.

Awareness of the perception test

In 2015 we had noted low levels of awareness of the relevance of the perception test to the recording of discriminatory motives in Ireland. In 2017, we found no evidence that awareness of the perception test had been mainstreamed. In this research, there were mixed understandings of the circumstances in which a discriminatory motive would be selected, with this garda stating that he would require evidence of a racist motive before the box would be ticked:

“Interviewee: So once you’re satisfied that the incident ... or that the statement complies with what you believe to be a racially motivated incident well then that’s when you tick it.

²¹⁷ Gail Mason, JaneMaree Maher, Jude McCulloch, Sharon Pickering, Rebecca Wickes, Carolyn McKay, *Policing Hate Crime: Understanding Communities and Prejudice* (Routledge 2017) 16.

²¹⁸ College of Policing, *Hate Crime Operational Guidance*, (Coventry, 2014) 6.

²¹⁹ William Macpherson, *Inquiry into the matters arising from the death of Stephen Lawrence* (UK Home Office 1999) 45.15-16.

Interviewer: So the person will say I think it's racially motivated and then ... do you need to verify that? Is that what you're saying to me?

Interviewee: Yeah, it's like an allegation of an assault. You can't put someone down as being a suspected offender in an assault until you know the facts of the case. So that ... that pretty much goes in line with that. Until you're 100 per cent certain or satisfied ... you know it's your opinion as to what you're hearing from that person. You believe its bona fide allegation so you tick it."
(Garda)

Two gardaí described circumstances in which they would tick the box which approximated implementation of the perception test, but when we asked why they would take this approach, they responded that it was not because of any training, but rather, their own gut instinct.

Only those police officers who worked exclusively with victims and who had additional training on hate crime had any knowledge of the perception test. McNerney emphasises that full training for all officers in applying the Macpherson definition is essential.²²⁰ One individual who explicitly referred to the perception test had become aware of it through a course outside An Garda Síochána. A second, who undertook a training course delivered to all gardaí in the area, said to us that the trainer themselves was unaware of the circumstances in which an incident would be recorded as racist, and the garda had to instruct and correct the trainer on the perception test:

"Interviewer: So what was the trainer's perception of when you would tick the box for a racist motivation?

Interviewee: If the guard believed it was racist then he'd tick the box ... The lads delivering the course were great and everything ... and said we didn't actually know that, you know. And that training was delivered to all the guards in [the District] and nobody knew what they were talking about." (Garda)

Whatever methodology is adopted, the absence of clear protocols regarding the circumstances under which a discriminatory motive should be recorded impacts the reliability of the data collected. It is clear that at present members of An Garda Síochána differ in their belief as to whether it is the victim, or the police officer's perception,

²²⁰ Dave McNerney, 'Policing Racism on the Island of Ireland', in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime*, (Palgrave Macmillan 2017) 430.

which determines recording, and more specifically, whether evidence is required. At present, victims cannot be certain of the protection proposed by the perception test against individual or institutional bias preventing the recording – and likely the investigation - of a hate element.

Victims' perspectives on police recognition

Of the 17 victims to whom we spoke, only one demonstrated any familiarity with the manner in which a hate element might be recorded on PULSE via the discriminatory motives marker. Perhaps unsurprisingly therefore, none of the participants discussed having specifically asked for a discriminatory motives marker to be selected. Equally, none were certain whether the crimes they reported had been logged on PULSE as having a discriminatory motive.²²¹

Although none of the participants were able to say definitively whether a crime they reported had been logged on PULSE as having a discriminatory motive, some relayed that a member of the police service had at least named the hate element to the crime. In line with the findings of the Garda Inspectorate Report in 2014²²² which found that “hate crime” is not a term used by An Garda Síochána, participants overwhelmingly report that Gardaí, either individually or as an organisation, identified crimes as associated with specific form of prejudice, e.g. racism, rather than using the term “hate crime” or indeed “discriminatory motive”.

Three individuals – one making a report after the commencement of the Victims' Directive, and two making reports before this date – felt certain that An Garda Síochána had acknowledged the crime against them as having a hate element. One of these participants was able to show the interviewer a letter from An Garda Síochána in which a crime reported after the commencement of the Victims' Directive was explicitly described as racist. This was despite the fact that the participant had felt

²²¹ Indeed, the only victim who demonstrated a clear awareness of the possibility of recording a racist element to a crime, was unsure as to whether any crime, or non-crime incident, they reported was recorded as such. *“I don't think they recorded it as race ... there's a criteria where they can classify incidents as racial ... cos I was never asked, do you feel ... I told them I thought it was racist but they never ... even in their questioning and all that ... I didn't think that they were trained to identify racial crime or just crime ... that's my own opinion.”* (Victim of a crime pre-Victims' Directive). This point was made in relation to a non-crime incident which the person experienced, but which is outside of the scope of this report. Nonetheless, it is worth mentioning that the participant was unaware that it is not possible to record a discriminatory motive in relation to non-crime incidents in Ireland. Indeed, it may not have been clearly explained to them that the incident they had reported did not meet the threshold for a criminal offence.

²²² Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) <<http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf>>

that the responding officers had sought to minimise the racist elements of the crime – perhaps in a misguided effort to comfort them:

“... But then I what I was getting was that you know, it’s not all (place) people. Of course I know it’s not all of the people in (place) that are racist, there are still good people. But they never actually ... you know made it clear that look, this is a racist case.” (Victim of a crime post-Victims’ Directive)

This contrasts with the experience of an individual reporting prior to the commencement of the Directive, who was unaware of whether the crime reported was marked as having a discriminatory motive, but who received affirmation of their perception verbally from the Garda who took their statement.

“The specific guard, I remember his name very vividly, he said this is the worst racial abuse I’ve ever seen in my life. That’s what he said. It’s like his words are ringing in my head. I remember him saying that. He said I’ve never seen something like this.” (Victim of a crime pre-Victims’ Directive)

Two victims recalled that individual police officers had expressly rejected their perception that the crime they reported was associated with a hate element. None of these crimes were reported after November 2015. In one case, police overtly dismissed a participant’s assertion that the crime was hate motivated. Relating one conversation, the participant recalls:

“I told him what happened and I kept telling him ‘I’m pretty sure it’s a racial attack’ and he goes ‘Why would you say that? There’s been loads of antisocial behaviour around the place and you can’t be sure it was racially attacked’. I’m like ‘How else would you explain me and my other [Black] neighbour being attacked - only us’. He really was trying to show me that it’s not ... he just told me it was antisocial behaviour. Plain and simple.” (Victim of a crime pre-Victims’ Directive)

Both participants describe the impact of disbelief on their trust in the police.

"I felt undermined, I felt I wasn't believed anyway. So ... what's the point really? (Victim of a crime pre-Victims' Directive)

"Undermined, really disrespected, really angry with the system. The only person who is supposed to protect me isn't believing me – where else can I go?" (Victim of a crime pre-Victims' Directive)

The importance of being believed was emphasised by a number of participants, both those who held that the police had accepted their perception of a crime as hate motivated and those who did not.

"Beginning from the guard. I want it from the bottom to be acknowledged that it was a racist attack." (Victim of a crime pre-Victims' Directive)

It is vitally important, not only that the hate element of a crime is recognised by An Garda Síochána, but also that victims believe that gardaí take this element of the crime seriously.

Recording non-crime hate incidents

In previous research with Ireland's trans community²²³ we have noted that the continuum of hostility may be experienced as indivisible - legal distinctions and gradations do not always mirror the severity of the impact experienced by the victim. In some cases, it may be the most recent non-crime incident, in a series of crimes, discrimination and microaggressions, which is the most emotionally and psychologically damaging.

"And then when I go and tell the parents, I'll be called names and told to get out of this place, I don't belong here. And my kids were being called names, and being called monkey, and that they look like poo, and the zoo is missing a monkey, they should go back to the zoo. I remember, I had a lady minding them so she had to walk them to the bus and wait for them at the bus stop and bring them home. They couldn't even walk to the estate by themselves, my kids could not play outside, and that's bad for children." (Victim of a crime pre-Victims' Directive)

²²³ Amanda Haynes and Jennifer Schweppe, *STAD: Stop Transphobia and Discrimination Report 2014-2016* (TENI 2017).

“... sometimes we stay in the housing and we didn’t play too much outside or stay too much outside. What can we do? If you are in strange country, we don’t have the power ... we don’t know the rules or that kind of things, because we are Gypsy we don’t know too much. We’re used to taking this.”
(Victim of a crime post-Victims’ Directive)

It is important that authorities respond to persistent targeting. It may be that over time every day hostility reaches the threshold for harassment. Even where the activity does not constitute a criminal offence, the police can play an important role in ensuring that there is a record of all the incidents, crime and non-crime, and in signposting the best channels through which a victim might address the problematic behaviours. In England, the tragic death of Fiona Pilkington and her daughter Francesca highlighted the possible consequences of a failure to respond: In October 2007, Fiona Pilkington doused her car in petrol and set it on fire, killing herself and her 18 year old daughter Francesca. The coroner’s court declared a verdict of suicide on Fiona and unlawful killing of Francesca. The jury also commented that both social services and the police had contributed to the deaths after many unanswered calls for help. Fiona had made 33 complaints about their harassment to Leicestershire Police between November 1997 and October 2007. During this time a gang of young people had set fire to the family’s fence, thrown eggs and stones at their house, urinated in their garden, and stolen a chequebook. The final complaint recorded by the police from Fiona was that “two girls were jumping over the hedge into her garden and imitating the way that Francesca walked. She was told that no officer could attend, but was advised to close the curtains and ignore the abuse.”²²⁴

The manuals on hate crime used by the police in England and Wales since 2005 have emphasised the recording both of crimes and of incidents which do not constitute a criminal offence.²²⁵ A similar approach is used in Scotland and Northern Ireland. In Ireland, non-crime incidents cannot be recorded as having a discriminatory motive. This represents a loss of intelligence relating to geographic concentrations of hate incidents, and relating to the character of repeat victimisation. Haynes and Schweppe²²⁶ note that

²²⁴ Carmel Capwell, Sue Ralph and Liz Bonnett, ‘The continuing violence towards disabled people’, (2015) 15(3) *Journal of Research in Special Educational Needs* 211-221.

²²⁵ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes & Responses* (2nd edn, Sage 2015) 119.

²²⁶ Amanda Haynes and Jennifer Schweppe, *Policing Beyond the Binary: The Relationship between the Trans Community and An Garda Síochána* (TENI, forthcoming).

repeat victims often experience targeted hostility as a continuum of crime and non-crime incidents, both of which can also manifest within a series of incidents between the same offender and victim. By not recording crimes with a discriminatory motive in non-crime databases, this information is lost.

We further note that the Central Statistics Office quality review of 2016 found that three per cent of incidents classified to *Attention and Complaints* should have been classified as a crime.²²⁶ As it is not possible to record a discriminatory motive on the non-crime databases on PULSE, corrections to the misclassification of hate incidents will necessarily happen without access to a clear record of the relevant category of discriminatory motive.

Eight of the 17 victims to whom we spoke cited multiple experiences of bias related crime. Participants were not only subject to criminal offences however. Many experienced what we have referred to as a continuum of hostility, consisting of criminal offences, discrimination and non-crime incidents that we conceptualise as microaggressions.²²⁷ One participant had experienced a total of three crimes which they reported to the police as bias related, within a six year period. They and another two participants, in addition to criminal offences, had also been subject to non-crime incidents on the part of children living in their estate:

“Knocking, putting eggs and shouting “Romanian, Gypsy”. (Victim)

A fourth person continued to be subject to ongoing microaggressions by a neighbour. Three of these four participants had reported these non-crime incidents to the police and the police had attended the scene. Participants sometimes described the responding officer as dismissive however and, in at least one case, a participant asserts that an officer (prior to the commencement of the Victims’ Directive) used foul language, they believe to express their frustration at having being called to attend a non-crime incident. On another occasion, and with a different officer, the same participant received a very different response to the reporting of a non-crime incident.

²²⁶ Central Statistics Office, *Review of the Quality of Crime Statistics 2016* (CSO 2016) 4 <<http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2016/reviewofcrime.pdf>> accessed 8 November 2017.

²²⁷ Nadal et al define microaggressions as, “brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, which communicate hostile, derogatory, or negative slights and insults towards members of oppressed groups”. Kevin L. Nadal and RJ Mendoza ‘Internationalised Oppression and the Lesbian, Gay, Bisexual, and Transgender Community, in EJR David (ed) *Internalized Oppression: The Psychology of Marginalised Groups* (Springer 2014).

“That was the lady, she said that it’s unfortunate that the people like this are given everything and they’re allowed to misbehave and commit whatever, and really she felt sorry for me, like people like us are hardworking ...”

(Victim of a crime pre-Victims’ Directive)

Another participant, who had been distressed by what they perceived as a patrol officer’s dismissive response to their reporting of a criminal offence, felt that they had been taken very seriously by a more senior officer in reporting what we classify as a non-crime incident prior to November 2015.

Emphasising the apparently idiosyncratic nature of responses received to both non-crime and crime reports, another participant who had received dismissive responses from the police to the reporting of non-crime incidents notes that they were originally advised to report all such incidents by a sympathetic member of the police:

“He suggested it to me, you should come and get them to write it down every time something happens. Make a note of it.”

(Victim of a crime post-Victims’ Directive)

In our data participants expressed frustration where no action appeared to have been taken by police in relation to non-crime incidents. This frustration in turn impacted on their trust in the police:

“So it’s like you’re being a nuisance, and the reason they’re coming out is some of them they don’t want to be reported [to the Ombudsman] or something ... because nothing was ever done about the whole thing ... the people continued doing ... the harassment and intimidation.”

(Victim of a crime pre-Victims’ Directive)

Some of the participants’ frustration might have been assuaged by the responding police officers’ signposting of appropriate avenues for reporting and support, as well as a clear explanation that the incident was not a criminal offence and thus did not merit a criminal justice response.

INVESTIGATING HATE CRIME

The 2014 Garda Inspectorate report *Crime Investigation*, found many cases where there were unnecessary delays in progressing an investigation of a crime. The Inspectorate highlighted the current system for crime investigation with the majority of investigations remaining with regular unit gardaí. Many of these officers were investigating high volumes of crime without any investigation time built into their working roster. The Inspectorate recommended many changes to crime investigation practices, including the adoption of minimum standards of investigation and the introduction of dedicated investigation units. It was suggested that most crime investigations should be completed within a 28 day period. The Inspectorate maintained that this needed to be supported by enhanced technology, to allow for crime investigations to be accurately recorded and cases tracked through an electronic case management system.²²⁸

Garda perspectives

While gardaí 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. By far the most common reason for this was the absence of legislation. Gardaí discussed their investigative approach, which is led by legislation and the proofs required to secure a conviction. Thus, they stated, in the absence of legislation, and thus the absence of any stated proofs, the hate element is simply not prioritised:

“Because there isn’t actually legislation there, it takes a secondary role to the actual, the facts and the proofs that actually need to substantiate where it actually does sort of get recorded under legislation because that’s the primary function by the time it moves towards actually prosecution, you can only prosecute what’s actually legislative work.” (Garda)

“You need a box of tools. You need something to operate with. The job of the police is to land perpetrators in a court room. You have to have tools to do that ... ok. But one of the tools that was absolutely missing for us was that

²²⁸ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) <<http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf>> accessed 8 November 2017.

whole idea of ... you know ok it was just an assault, because it's far more serious. It was an assault, because that person happened to be gay, Traveller or whatever.” (Garda)

Indeed, this garda elaborated that while they would be individually aware of the racist element of the offence, the absence of official policy meant that it was not given attention:

“... it wasn't in our consciousness that this was ... sorry while it might have been in your individual consciousness that this was done because, right, but there was no tool there, there was nothing to take out of the box and say, 'Well ok, I need to use ... as well as the charge for damage or whatever or breach of peace'. There was nothing to aggravate it.” (Garda)

While garda resources were perceived by defence practitioners as the primary reason why the hate element was not investigated, only a small minority of gardaí suggested that this was the case suggesting that an absence of resources would lead to the discriminatory motives marker box not being ticked due to the additional resources required to investigate that element:

“... when that box has to be ticked it now takes on a whole life of its own. Because, not saying it would be left or ignored, but now there's a requirement that this gets a higher level of investigation. You get one hundred of them or 50 of them and where's the resources coming from to investigate that? And what happens then is I believe we begin to associate that with a problem.” (Garda)

Two gardaí who worked in community policing were of the view that the reason the hate element was not appropriately investigated was the fact that gardaí “on the regular”, or those who are the first responders to incidents, do not understand the impact of hate crime, and thus will either not recognise a hate crime when it is presented, or will not appreciate the significance of such offences to the victim:

"I feel ... that it's something that requires the officer to understand the complexity of it. To understand the sensitivity in relation to the victim. I think it needs a more specialist approach." (Garda)

"... the investigating guard has a stack of stuff and he's getting through stuff and he sees this, it's an assault, off you go and the whole lot." (Garda)

Only one garda was of the view that the hate element of a crime would typically be investigated appropriately:

"In my opinion, from my perspective I think it's well investigated by the guards. And that's not just the guards backing the guards. I think at this stage unlike in the past maybe ten, twelve, fourteen, fifteen years ago, we're acutely aware of the racist element or potential in relation to victims and offending generally." (Garda)

Legal practitioners' perspectives

In the absence of any policy on appropriate protocols for the investigation of a crime, it is unsurprising that legal practitioners gave mixed responses to the question of how they believed the hate element of a crime was investigated:

"I've seen specific cases where they've gone way beyond you know ... what would normally be expected and I've seen other cases where they don't lift the phone." (Solicitor)

"Well it isn't investigated really at all in my view ... I just don't really think it's considered at all." (Barrister - Defence)

Some practitioners did take the view that some gardaí investigated hate crimes appropriately. Those who held that such crimes are not investigated properly gave a number of reasons, summed up succinctly by one solicitor:

"Don't have the resources to do that, don't have the knowledge base to do that, don't have the tools to do it, we don't have the people to do it, we don't have the expertise to do it ... you know there's always why you can't do something." (Solicitor)

The first reason, perhaps unsurprisingly, was resources, linked to the second reason, ie, the absence of training or specific policies on the issue:

“... you’re just putting in sulphur into an already sort of sulphuric situation – do you know what I mean? It’s an added layer of raising a temperature significantly – do you know what I mean? And he might feel, because there’s no specific offence, then you know, ‘Why am I going down this road?’” (Solicitor)

“It could be, I mean, a funding element in that, a training element maybe for Gardaí in terms of picking that out ... and maybe saying look, you know, this is how you deal with this, this is how you prosecute it and this is how we’re going to deal with it...” (Solicitor)

“But whether or not you know that this ... that they’re trying to grab this and do something about it and that’s probably a policy decision as opposed to you know within the lower ranks of An Garda Síochána I would imagine...” (Solicitor)

Garda discretion and approaches to investigation broadly were also mentioned by legal practitioners, but as issues which impact on the investigation of crime generally, rather than hate crime specifically:

“This is a complete broader problem that the guards generally speaking very often and I say generally speaking within a small context, but does happen when they don’t take a statement it can be for those reasons that they don’t believe the individual or they don’t accept it or they don’t think it’s worth going to trial, small assaults, minor assaults, road traffic matters, it does happen an awful lot where they actually don’t take statements from the victims or investigate it fully or properly.” (Barrister - Defence)

“The methodology employed by An Garda Síochána [in taking statements] is to ask questions and to write the answers to those questions down in the form of a narrative. But it’s not a free flowing narrative it’s a narrative that is

constructed based on linked statements elicited through often very leading questions. People's accounts are shaped according to the priorities and motivations of the police officer and sometimes that is obvious when reading a statement. And I think you would get a shaping of narratives that would quite honestly and innocently avoid any mention of racial or gender or sexual orientation." (Solicitor)

Finally, one participant asserted that the manner in which the crime was investigated depended on the status of the victim in the eyes of the garda:

"I think if you have the nice Chinese couple who run the Chinese or ... you have a nice Muslim doctor or you have somebody from Nigeria who is working wherever else, I think it would probably be investigated pretty well ... If it's ... a Roma or Traveller or a Chinese person who is here illegally ... if it's if any of the less socially acceptable minority groups ... I don't think the Gardai particularly care..." (Barrister – Defence)

Victims' perspectives

We asked victims interviewed for this research for any information they might have had on the manner in which the crime they reported was investigated. It is important to note that this information represents their perception as individuals lacking familiarity with police procedure. Nonetheless, the victims' recall of garda responses to, for example, their availability to provide statements, or their direction to CCTV footage or other forms of evidence, can at the very least provide insights into investigative factors impacting the gathering of evidence of a hate element.

Making a statement and making a complaint

Given the Central Statistics Office's published findings on failures to log crimes to the national crime incident recording system,²²⁹ PULSE, it is worth noting at the outset that there are instances where victims' description of their interactions with the police make it unclear that a report was logged. For example, a victim recounts that in one instance in 2014 they approached an officer on patrol to address a crime which had just occurred and where the offender was still on the scene. The officer asked the

²²⁹ Central Statistics Office, *Review of the Quality of Crime Statistics* (CSO June 2015) <<http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2015/reviewofcrime.pdf>> accessed 6 October 2017.

participant to stand apart from the offender. The participant states that they observed the garda speak with the offender, who laughed and left the scene.

“I was standing in the door and watching and at some stage I saw them talking. She was talking with guard; she looked back and laughed and kept walking, looking back and laughing. And I closed the doors and I went and I started to cry in the bathroom.” (Victim of a crime pre-Victims’ Directive)

In total, victims recounted four hate crimes, the most recent of which occurred in 2014, which they understand to have been concluded informally by police at the scene. None of the four report having received a PULSE number.

It goes without saying that the statement of the victim is vitally important evidence in criminal justice proceedings. In Ireland, the victim’s statement has additional significance: practice states that the failure of a victim to provide a statement commonly results in a case being closed. According to the Central Statistics Office, the current crime counting rules permit a crime to be marked as detected if “A victim or essential witness refuses or is unable to attend the court proceedings.”²³⁰

At a public session of the Policing Authority in 2017, the Head of Analysis at An Garda Síochána, Gurchand Singh, noted that:

“if the Garda became aware of a crime and the victim did not want to make a statement, that offence was recorded and classified as detected.”²³¹

In respect to seven of the ten hate crimes reported from November 2015, the victim states that they did not make a signed statement. In one case, the victim abandoned their report while it was in progress because they felt they were being treated unfairly by the police officer. In a second case, a victim who had made reports of crime and non-crime incidents states that they were informed that someone would be sent to take their statement in relation to their telephone complaint, but this did not materialise. In a third case, frustrated by delays in the police attending the scene to examine criminal damage, the victim attended the station of their own initiative and received a PULSE number but was not asked to make a signed statement.

²³⁰ Central Statistics Office, *Review of the Quality of Crime Statistics 2016* (CSO 2016) 26 <<http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2016/reviewofcrime.pdf>> accessed 8 November 2017.

²³¹ Conor Lally, ‘Authority finds Garda inflated detection figures’, *The Irish Times* (Dublin 29 September 2017).

It is of concern that, with one exception, victims did not clearly differentiate between making a complaint and making a statement. They used the latter term to describe either process. In relation to each case, we therefore made the point of asking them whether they had made a *signed* statement. In the majority of cases, as noted, the response was a clear negative. This leads to two particular points of concerns. First, the lack of a signed statement from the victim may have resulted in the case being marked as detected – in any case, members of the police have confirmed that it is difficult to proceed with an investigation in the absence of a statement from the victim. Second, the victim was often under the impression that they had made a statement, having made only a complaint. Thus, where a signed statement was not made by the participant, this was not because they were unwilling, but because they had not been invited to provide one. It is important to note that, in the absence of a clear appreciation of the difference between a complaint and a statement, and indeed, the significance of a victim's statement to initiating an investigation, victims would not have appreciated the importance of pursuing this issue.

Of the ten hate crimes which were reported from November 2015, when the Victims' Directive came into effect, only three victims recalled with clarity making a statement.²³² One of these three participants, an EU citizen who was the only victim to demonstrate a clear awareness of the importance of making a signed statement, states that having been attended at the scene by the police, they pursued the issue until they were facilitated to make a statement. In the aftermath of the incident, they were visited twice by members of the police, who did not take a signed statement on either occasion:

"... they just took literally my name, address, my DOB, my phone number and that's it, when they were supposed to take a statement from me."
(Victim of a crime post-Victims' Directive)

²³² In the first case, the participant states that the statement was the basis for a decision as to whether to charge the participant or another party - the participant was subsequently ascribed the status of victim. The second participant was also initially detained but never charged. *"That guy didn't take a statement from [me] that day because they said I was the one wrong on which I had to prove I wasn't wrong."* (Victim of a crime post-Victims' Directive) They pursued making a signed statement and state that they succeeded in this two months after the incident occurred. The delay was contributed to by the investigating police officer being on holidays, according to the participant.

Eventually they state that they attended a station without an appointment and refused to leave until their statement was taken. They state that this was at least a month following the commission of the hate crime.

“Yeah and I said that I want to make a statement about hate crime, and the guy there asked me am I really sure I want to do it, and I said yes I want to do it, and I said I’m not leaving the station without getting my statement done.”
(Victim of a crime post-Victims’ Directive)

CONTENT OF THE STATEMENT

With respect to the inclusion of the indicators of the hate element in the statement, this last victim ensured that the language indicating the hate element was included. One of the two remaining victims, who made a statement post Victims’ Directive, stated that the racist language used was not included in the statement because the expressions of racist hostility were made by an associate of the individual who struck them, rather than by the person who had initiated physical force against them. The third individual felt they had been thorough in making their statement, but was unclear as to whether the language used by the suspected offender was included explicitly.

Language is one of the clearest indicators of a hate element. In the case of 17 of the 26 hate crimes discussed, victims clearly stated that language identified the hate element of the crime(s). Offenders frequently used slurs targeting the participant’s identity in the course of the offence. The language used was both offensive and overtly biased. In cases of criminal damage such expressions might be emblazoned on someone’s property. In two additional cases, participants referred to a verbalisation of hostility on the part of offender, not during, but in the period before or after the offence.

Gathering physical evidence

In five cases, all in relation to incidents involving criminal damage, interviewees pointed, not to language, but to a pattern of victim selection which spoke to a hate motivation. For example, two unconnected Black African-Irish participants spoke of criminal damage to their cars where, of all the cars parked in a row, only cars owned

by Black people were vandalised. In the case of two crimes, the participant stated that they perceived them to be bias-related based on the fact that there was simply no other reason for the crime. In one case the offence was described as an unprovoked assault on the participant.

Evidence such as CCTV footage can be important to proving the hate element of a crime. In some cases, participants expressed frustration that the police did not respond in a timely fashion to their identification of CCTV or audio visual footage as important evidence. Participants reported that there was CCTV footage available in relation to five of the crimes reported and audio visual recordings either made by the participant or a witness in two further cases.

In one case occurring prior to the commencement of the Victims' Directive, the participant asserts that the police were very proactive in ensuring that they got access to the CCTV footage before it was deleted or overwritten:

"... they said they spoke to (company) and basically it's there for three days and then it's gone. So it happened (day) and it would have been gone by (day). But they spoke to (company) and they told them to keep it there. And they actually got the footage ... (Victim of a crime pre-Victims' Directive)"

On the other hand, another participant who identified the availability of CCTV footage to the police states that they received a different quality of response.

"Interviewee: No, he just told me they'll have a look at the CCTV, but as far as he's concerned this happens all the time, it was antisocial behaviour."

Interviewer: Was there any follow up then from the guards afterwards?"

Interviewee: No. I did the follow up. I called in four times and I never heard back." (Victim of a crime pre-Victims' Directive)"

In this case the participant had had access to the footage and, having seen the faces of the offenders, believes that it was possible to identify them.

One of the participants who reported having to pursue the making of a statement, felt the investigation of their case did not commence until they had succeeded in doing so. Thus they did not receive assurances from the police that they would examine the CCTV footage that was available in relation to their assault until two weeks after it occurred. A second individual reporting a crime occurring after the Victims' Directive took effect, reports precisely the same issue.

Two individuals cite the availability of audio-visual recordings made on a mobile phone. In one case the participant asserts that the police, arriving at the scene, attempted to stop them recording the crime which was in progress.

In the period from November 2015, half of the crimes reported had witnesses, however, participants were unaware of whether individuals present at the scene were approached by the police to provide evidence in all but two cases. In one of these cases the participant, who commends the response of what they refer to as "armed gardai", states that at least two witness statements were taken. In a second case, the participant states that they personally know a number of the witnesses, none of whom they assert were asked to make statements.

In relation to one crime reported prior to the commencement of the Victims' Directive, the participant asserts that there were long delays in obtaining statements from the suspected offenders whom they had identified to the police.

"So the guards came, they took a statement and they said because of the time of night or early hours in the morning, they can't go ... they're not allowed it's not like before. Now they've a new law they can't do that. So they'll come back and take statements from them. ... the woman they said she was on break it was maybe like a month later. And also I had to be calling and asking and what's happening – and they had not even gone to speak to the perpetrators and it's been a while now and this incident happened ... "
(Victim of a crime pre-Victims' Directive)

The criminal investigation and the role of ELO/LGBT Officers

The Garda Síochána Diversity Strategy and Implementation Plan 2009-2012 provides for the amalgamation of Ethnic Liaison Officers and LGBT Liaison Officer to one role, ELO/LGBT Officers. Such officers, according to the plan, are tasked to:

- “Liase with representatives of all of the nine strands of diversity;
- Inform diverse community groups of the relevant local and national Garda support services;
- Support integration through involving the diversity population in Garda/Community social events;
- Attend Diversity Information Seminars and participate in online training;
- Ensure reporting of all consultation meetings to the Diversity Strategy Board.”²³³

In the context of hate crime, the Plan states that ELO/LGBTLOs should:

- “Assist, where required, in the investigation of racist and homophobic incidents and ensure appropriate support mechanisms are available to ethnic minority communities and the lesbian, gay, bi-sexual and transgendered communities;
- Monitor the recording of racist and homophobic incidents within the district on a weekly basis.” (sic)

The problematic language and exclusionary nature of this definition is a cause for concern. Further, given the fact that such officers, despite being called “ELO/LGBT Officers,” were responsible for all nine strands of diversity with significant and diverse populations, including age, disability and “race”, the fact that the Plan explicitly and emphatically states that the roles “are not full-time positions” is surprising.²³⁴ This was remarked upon by one interviewee:

“... the Ethnic Liaison Officer may be used for everything in the station. He or she could be just on call and reacting to the call, they don’t have time to engage

²³³ Garda Síochána, *Diversity Strategy and Implementation Plan 2009-2012*, (An Garda Síochána, May 2009).

²³⁴ *ibid.*

with you, they're under pressure for results. They're going for interview maybe and they have to get so many summonses in and they have to get so many penalty points, they have to get so many charges." (Garda)

In fact, the merger of the two roles was criticised by the Garda Inspectorate which recognised that while the roles are similar, they deal with very different communities, with different training needs associated with each.²³⁵ The Inspectorate recommended review of the decision to merge both roles, a recommendation we support. Further, as the 2009-2012 Diversity Plan requires ELO/LGBT Officers to be responsible for communities across all nine strands of Diversity, the complexities of the role are much more than simply the two roles highlighted by the title. Despite this, the time allocated for training was not increased to accommodate the broader responsibility of the role:

*"Interviewer 2: And it's two days training to cover all nine grounds in the context of every aspect of that level of community policing?
Interviewee: Yeah."* (Garda)

In this context, while the Plan envisages appropriate and ongoing training being provided to such officers, not one individual we spoke with was of the view that such training was appropriate:

"It was more about speakers coming in telling their stories. But like, which is fine you got a picture of it, but then how do you put that into practice? How do you put this model into practice? How do you sustain it? You take it away, you've all this information. What do you do with it? That's the thing." (Garda)

"You go to Templemore for a day and you listen to a couple of guys talking and you're trained. That's the extent of the training." (Garda)

It was also unclear who is responsible for training ELO/LGBT Officers, with both the Garda Racial, Intercultural, and Diversity Office (GRIDO) as well as the Training College in Templemore being mentioned as training providers. Those delivering such training were unaware of what was being taught by their counterpart in the other organisation, which potentially leads to confusion and mixed messaging, as well as duplication of efforts and thus a waste of resources and training opportunities.

²³⁵ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014)
<<http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf>> accessed 8 November 2017.

Three gardaí we spoke to did not know who the ELO/LGBT Officer was in their local area:

“Interviewer: How many LGBT or Ethnic Liaison Officers are based here?”

Interviewee: I wouldn’t know.

Interviewer: Are there any?”

Interviewee: See ... I left and I came back in [year] ... everyone I knew retired.

(Garda)

Interviewer 1: Do you have Ethnic Liaison Officers here in (place)?

Interviewee: I think we do.

Interviewer 1: Do you have LGBT Liaison Officers?”

Interviewee: I’m not sure about the LGBT, don’t hold me on that.” (Garda)

One garda was of the view that there were none in their area, and that such officers were located in Dublin:

“Interviewer: And do you have Ethnic Liaison Officers and LGBT Liaison Officers?”

Interviewee: In our division – no. No. I’d imagine that’s in Dublin.” (Garda)

The Diversity Plan states clearly that ELO/LGBT Officers should assist where possible in the investigation of racist and homophobic incidents. However, anyone who discussed the role of ELO/LGBT Officers in the context of such crimes was clear that their role was limited to victim support, and that they had no investigative function:

“... they were not directly involved in the investigation at the investigation stage but they were heavily involved in the victim management, victim statement stage...” (Garda)

“... the people that are in community engagement are seen as the soft side of policing and not terribly relevant to what’s going on in the division that they’re useful for holding hands and getting the good news stories, get the photo in the paper presenting the positive side of policing. But apart of that they don’t really add much value. The real value is out there catching the bad guys and putting out the parking fines and issuing summonses.” (Garda)

However, three experienced officers with knowledge of the work of ELO/LGBT Officers were clear that such officers should be more fully integrated into the investigative process:

“I think myself that if the Ethnic Liaison Officer was tasked with investigating it and bringing it to its conclusion, and training the Ethnic Liaison Officer up properly in how to investigate, how to bring it forward, and the Ethnic Liaison Officer is the contact ... person getting back to the victim. There’s that contact feedback to the victim and the whole lot. And I think the Ethnic Liaison Officer should bring it to its conclusion, bring it on that journey.”
(Garda)

The Inspectorate recommends a review of the decision to merge the two roles.”²³⁶ This recommendation is welcome but does not go far enough: the skills needed for dealing with, for instance, disability hate crime²³⁷ are different again and cannot be subsumed easily within these roles. We recommend a full scale review of the role of the ELO/LGBT Officer.

Garda training

In other jurisdictions, hate crime training initiatives are provided to the police to support them in recognising and investigating hate crime and in some cases is a requirement for future police officers during law enforcement academy training.²³⁸ Police services in England and Wales have published guidance on investigating hate crime since 2000,²³⁹ following on from the Macpherson Report on the racist murder of Stephen Lawrence.²⁴⁰ Currently, national guidance for officers in that jurisdiction is set out in the *Hate Crime Operational Guidance*²⁴¹ and the *National Policing Hate Crime*

²³⁶ Garda Inspectorate, Crime Investigation (Garda Inspectorate 2014) Part 46 and Recommendation 6.19

<<http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf>> accessed 8 November 2017.

²³⁷ Seamus Taylor, ‘The Challenges of Disablist Hate Crime’ in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 224 and Jim Winter, ‘Intellectual Disability and Hate Crime’, also in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 234.

²³⁸ Phylis B Gerstenfield, *Hate Crimes: Causes, Controls and Controversies* (Sage 2017).

²³⁹ William Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* CM 4262-I (TSO 1999) <<http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>> accessed 8 November 2017.

²⁴⁰ *ibid.*

²⁴¹ College of Policing, *Hate Crime Operational Guidance* (2014)

<<http://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf#search=hate%20crime>> accessed 8 November 2017.

Strategy.²⁴² There is also a significant body of action plans and additional training materials at the national level,²⁴³ developed with the assistance of external partners. Evaluation of progress is carried out by the national policing inspectorate.²⁴⁴

Furthermore, there is a plethora of materials on related matters such as equality, diversity, use of stop and search powers, treatment of victims, and specific strands of discrimination and hate ranging from transphobia to sectarianism. The Hate Crime Operational Guidance for officers in England and Wales is particularly thorough. It includes:

- agreed definitions of hate crime, with case study examples
- summaries of relevant legislation
- information on the individual strands of monitored hate crime
- reasons for under-reporting
- appropriate responses to hate crimes and incidents, and minimum standards for response, investigation and supervision. (Since 2005, hate crime guidance has emphasised recording not only hate crimes but also incidents which do not constitute a criminal offence²⁴⁵)
- working with partner organisations and community engagement
- performance targets and indicators
- specific areas such as hate crime around sports, inciting hatred, internet hate crime, and hate crime within the police services themselves.

The guidance also focuses on practical insights, such as advice on making positive first impressions when responding to victims from minority communities.²⁴⁶ Applied

²⁴² College of Policing, *National Policing Hate Crime Strategy* (2005) 2
<<http://www.college.police.uk/What-we-do/Support/Equality/Documents/National-Policing-Hate-Crime-strategy.pdf#search=hate%20crime>> accessed 8 November 2017. For Northern Ireland, see Police Service of Northern Ireland, *Service Procedure: Hate Crime/Incidents* (PSNI 2016).

²⁴³ See e.g. Gail Mason, JaneMaree Maher, Jude McCulloch, Sharon Pickering, Rebecca Wickes and Carolyn McKay, *Policing Hate Crime: Understanding Communities and Prejudice* (Routledge 2017) 18-19.

²⁴⁴ Familarly known as HMIC, its full title is now HM Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS). See for example its three 'Winning the Race' reports in 1997, 1998 and 2001. For Northern Ireland and Scotland, see the relevant thematic reports and reviews: <<https://www.nipolicingboard.org.uk/thematic-reports>> accessed 8 November 2017.
<<http://hmics.org/sites/default/files/publications/Thematic%20-%20pride%20and%20prejudice%20-%20race%20relations%20-%20Jun%202003.pdf>> accessed 8 November 2017.

²⁴⁵ Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses* (2nd edn, Sage 2015) 119-20. A similar approach is taken in Scotland and Northern Ireland.

²⁴⁶ *ibid.*

training, however, is more variable. Other than online packages produced for the College of Policing by the National Centre for Applied Learning Technologies (NCALT), training is arranged service by service. Some police services provide additional local training,²⁴⁷ but Trickett concludes that overall, training remains of varying quality, and warns in particular against focusing only on e-learning.²⁴⁸

Indeed, the requirement for training across the service was highlighted by a number of participants in this research:

“... you can train all the community guards as you say ... they’re disposed towards that kind of thing. But then you’re the Muslim lady and you’re going into the counter above in [the local garda station] or whatever and you’re meeting some guy that has no training, that’s your first point, you know you’re not going to jump in and meet the community guards straight away. So those are the people that need to be trained up and understand you know.” (Garda)

The potential for secondary victimisation was highlighted by one garda:

“But the harm ... can actually be amplified and it can be exacerbated by garda inaction or the perception of garda inaction.” (Garda)

Gardaí spoke to a number of issues they felt should be included in training. There was no general agreement on what should be included, perhaps due to the fact that the gardaí we spoke to came from across a range of specialisations. However, the most common issue that gardaí stated should be included in training was the human impact of hate crime. This, gardaí felt was required not only to ensure members of the service 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:

“So again especially for ourselves prosecuting ... again I suppose the various effects it might have on injured parties and so on in case they don’t give a victim impact statement. That guards when they’re taking the statement off

²⁴⁷ See for example the Lancashire Police package summarised in HMCPSP and HMIC, *Joint Review of Disability Hate Crime Follow-up* (HMCPSP 2015) 28-29. <<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/joint-review-of-disability-hate-crime-review.pdf>> accessed 8 November 2017.

²⁴⁸ Loretta Trickett, *Hate Crime Training of Police Officers in Nottingham: A Critical Review* (Nottingham Trent University 2016) 188. <<http://irep.ntu.ac.uk/id/eprint/28089/7/5642Trickett.pdf>> accessed 8 November 2017.

them, an injured party statement maybe if it's taken a few days later, they could say well look, to incorporate in that – what has happened since, and how they're feeling.” (Garda)

“Look, listen you're dealing with a victim here who is very sensitive to the motive for the commission of the crime more so than the actual substantive offence and for the police this is going to more sort of a sensitive type of approach to any other type of investigation.” (Garda)

From a more operational perspective, garda participants also spoke to the need to reinforce the perception test across the service:

“And that you know the basic, they've to understand that that person perceives that as a hate crime, that will be hate crime. Not up to the guard to decide or the witness. The witness can say it's a hate crime no problem, but it's not up to you to say 'Ah Jesus the window was broken, don't be worrying at all it's not because you're Black'. If he or she says, 'I believe that window was broken because of my colour', we'll go along with that. You've got to tell the police officer that. That can be difficult for some people to understand.” (Garda)

“I think there should be particular emphasis paid towards the Macpherson definition and how it is orchestrated in other jurisdictions and how other jurisdictions are dealing ... So an awareness of what's going on in other jurisdictions and where we wish to go I think would be better for policing.” (Garda)

Others emphasised the need for cultural and diversity training and awareness across the service:

“... if I'm a tax payer, I'm paying for those police to be trained sufficiently well and to be able to leave their biases outside the door or at least not to make them visible to me, that if I arrive in I expect I should get equal and equitable

treatment. That for me is that every police officer should be in a position to deal with my issue.” (Garda)

“I think even on cultural things, knowledge is power really. If you know the cultural differences really between everybody at least you can relate to them a little bit better than not knowing, d’you know. Even we’ll say as a female I would have come across Muslim men that probably wouldn’t be very comfortable with me, you know I suppose I could have been offended by it but when you look at cultural differences ... d’you know can’t really be offended as such.” (Garda)

Some gardaí emphasised the need for training on how to effectively investigate and prosecute a hate crime, in which the tools, policies, and legislation available to gardaí should be presented:

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

This garda spoke of equivalent training in the context of domestic violence and sexual assault, and was of the view that those who interview victims of hate crime have particular training needs to ensure they ask questions to elicit the requisite information:

“... it’s really important to understand that if somebody is stealing with a bias, you know we have to factor in they have feelings about that. They might feel ashamed, they might have other issues that they don’t feel comfortable

in coming forward. So I suppose we should be more sensitive but also kind of ... probing towards getting towards the root of the issue. I think that would require training in itself because if you're feeling particularly vulnerable and someone comes in like a bull in a china shop hitting you with all these questions. Like if you're dealing with a sexual assault you're starting with 'I have to ask certain questions that may make you feel uncomfortable. Please don't feel judged and if at any point you feel that we need to stop ... we will'. And every guard will do that when dealing with somebody of a sexual crime. If we could bring that understanding over to a hate crime arena I think it would go further. Because people don't want to address the elephant in the room, they don't want to say I'm going to say things and if you take me up wrong or if I communicate wrong ... definitely don't be afraid to ask the questions but again that's training. Sensitivity training, probing training." (Garda)

Only one garda we spoke to was of the view that they had sufficient training to accurately record, investigate and prosecute a hate crime. However, this person in explaining their approach to addressing diversity in the context of criminal investigation and prosecution, and explaining why they do not need training, stated:

"... just try to treat everyone equally. I know ... I'm not just rattling off buzz word but I think that is the only way to go and then ... I wouldn't treat anyone any different regardless of what their ethnicity is. That's the way I try and deal with it and try to be as professional as I can and if they think there was a hate crime in what they're reporting and I'd take it on board and I'd record it as well." (Garda)

We would argue, on the other hand, that equal outcomes often precisely require differential treatment.

Garda Diversity and Inclusion Strategy

The *An Garda Síochána Modernisation and Renewal Programme 2016-2021*

committed to the development and implementation of a new *Garda Diversity and Inclusion Strategy* by Q3 2016.²⁴⁹ The 2017 *An Garda Síochána Annual Policing Plan* committed to the implementation of a new *Garda Diversity and Inclusion Strategy* by

²⁴⁹ An Garda Síochána, *Modernisation and Renewal Programme* (Garda.ie, 2016) 13
< <http://www.garda.ie/Documents/User/Garda%20Strategy%20final%202014.7.16.pdf> > accessed 8 November 2017.

Quarter 3 2017.²⁵⁰ As far as we are aware, this later deadline has not been met. The absence of any updated plan in the context of the implementation of the Victims' Directive, the development of Garda Victim Services Offices, and the inclusion of increasing reporting as a garda priority is to be lamented. In the absence of such a clear plan, with associated training and policies, it is unsurprising that there is such a lack of clarity around the reporting and recording of hate related incidents.

PROSECUTING HATE CRIME

The DPP has issued guidelines on how the decision to prosecute should be taken for anyone so tasked, which are intended to ensure uniformity and consistency. Unlike the position in England and Wales, whereby there are specific and explicit guidelines in this regard, there is little explicit reference to hate crime motivations in these guidelines other than a requirement in paragraph 3.6 that prosecutors shall “comply fully with the relevant requirements of the European Union Victims' Directive 2012/29/EU as discussed in Chapter 12” and that prosecutors should:

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

That said, some of the guidance provided is relevant to hate crime. In particular, the guidelines have been revised to take into account the Victims' Directive²⁵¹ which requires that victims be treated in a particularly protective manner by the criminal justice process as a whole in the context of the investigation and prosecution of a hate crime.

In making the decision to prosecute, a fundamental consideration is an assessment as to whether the prosecution is in the public interest.²⁵² In coming to this decision, it will first be ascertained whether there is enough evidence to support a *prima facie* case,

²⁵⁰ An Garda Síochána, Annual Policing Plan 2017 (Garda.ie 2017)

<<http://www.garda.ie/Documents/User/Policing%20Plan%20English%20Version.pdf>> accessed 8 November 2017.

²⁵¹ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 12

<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 8 November 2017.

²⁵² *ibid*, Separate considerations apply in the context of the prosecution of children. See chapter five of the Guidelines.

and then consider the strength of the evidence to support that *prima facie* case.²⁵³ Where this is the case, the Prosecutor will then ask whether the public interest favours a prosecution, or whether there is any public interest reason not to prosecute.²⁵⁴ In assessing the strength of the evidence, factors to consider which are relevant in the context of prosecuting hate crimes include:²⁵⁵

- the reliability of witness evidence, including an assessment as to whether the evidence could be affected by “the condition of the victim”;
- the consistency of that witness evidence;
- how likely the witness is to stand up to cross-examination; any previous convictions of the witness which might weaken the prosecution case;
- the “competency” of witnesses;
- in the context of “persons with an intellectual disability,” whether they “are they capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the Criminal Evidence Act 1992?”²⁵⁶;
- reliability of identification evidence.;

Once the prosecutor has established that there is sufficient evidence, they must then go on to assess if the public interest requires that a prosecution be pursued. The more serious the offence, the more likely it is that the public interest will dictate its prosecution, though there are further aggravating and mitigating factors to be considered. Those aggravating factors relevant in the context of the prosecution of hate crime include:²⁵⁷

- if the accused was in a position of authority or trust and the offence is an abuse of that position;
- where the accused was a ringleader or an organiser of the offence;
- where the offence was carried out by a group;

²⁵³ Details as to how this assessment is made are available at pp. 12-13 of the Guidelines.

²⁵⁴ In this context, where the suspect is a victim of crime (for example, where the suspect is a victim of human trafficking) the Guidelines state that the prosecutor should consider whether the public interest is served in prosecuting the suspect.

²⁵⁵ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 15
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 8 November 2017.

²⁵⁶ This section allows evidence to be given by a child or “a person with mental handicap” (sic) without them taking either an oath or affirmation. However, if they do give evidence which he or she knows to be false or does not believe to be true, section 27(2) provides that they shall be guilty of an offence and liable to be dealt with as if he or she had been guilty of perjury.
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 8 November 2017.

²⁵⁷ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 16
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 8 November 2017.

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- where a weapon was used or violence threatened or the victim of the offence has been otherwise put in fear, or suffered personal attack, damage or disturbance - *the more vulnerable the victim the greater the aggravation*²⁵⁸;
 - where there is a marked difference between the age or mental capacity of the accused and the victim, and the accused took advantage of this;
 - where the accused has previous convictions or cautions which are relevant to the present offence;
 - where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct.

In addition to those factors affecting the seriousness of the offence, the Director then goes on to set out other matters that may arise in assessing whether the public interest requires a prosecution. Again, in the context of the prosecution of hate crimes, the relevant factors include:²⁵⁹

- the availability and efficacy of any alternatives to prosecution;
- the prevalence of offences of the nature of that alleged and the need for deterrence, both generally and in relation to the particular circumstances of the offender;
- the need to maintain the rule of law and public confidence in the criminal justice system;
- the attitude of the victim or the family of a victim of the alleged offence to a prosecution;
- the likely effect on the victim or the family of a victim of a decision to prosecute or not to prosecute;
- whether an offender who has admitted the offence has shown genuine remorse and a willingness to make amends.

The Director further observes that the assessment of the criteria cannot be reduced to “something akin to a mathematical formula.”²⁶⁰

²⁵⁸ Emphasis added.

²⁵⁹ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, DPP 2016) 17
<<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>> accessed 8 November 2017.

²⁶⁰ *ibid.*

As with the investigation of hate crime, as far as we are aware, there are no policies on how hate crimes are to be prosecuted in courts. When asked how well they thought hate crimes were prosecuted in Irish courts, the majority of criminal justice practitioners were of the opinion that there were deficiencies in ensuring that the hate element of an offence was presented to the sentencing judge. There were two primary reasons given for this.

Of those that were of the opinion that the hate element of a crime was not properly prosecuted, the majority of respondents believed that the reason for this was the absence of legislative and policy guidance which led to training gaps:

“Perhaps one of the reasons is legislation isn’t there. I think that certainly has to be taken up a gear, has to be addressed.” (Solicitor)

“Well if it’s not a crime, like this is a major issue, if it’s not a crime then in those circumstances you can’t expect the DPP to go ‘Who will we prosecute for hate crime?’” (Barrister - Defence)

“... prosecutors are going in to a system then where it’s not been readily identified because they’re not being trained in at the outset to identify that and to prosecute it.” (Solicitor)

The second reason given for the hate element of an offence not being presented in court by prosecutors was expediency – that is, that it was perceived that it is preferable to prosecutors to secure a guilty plea in the absence of a hate element rather than go to trial to ensure that the hate element is included:

“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.” (Solicitor)

“I think there would be a serious tendency ... with the prosecution authorities in Ireland to just convict ... accept the plea to the lesser offence. Based on my

experience of dealing with a DPP in Ireland I don't think they would go as far as the CPS in Britain [which only allows the hate element of an offence to be pleaded out only in exceptional circumstances]." (Solicitor)

A minority of criminal justice practitioners were of the view that once the hate element of a crime is appropriately investigated, it will typically be properly prosecuted:

"If a victim tells the Gardaí and puts it in their statement he called me x or he called me y, well undoubtedly that is adduced. No question about that ... So if the victim says and he called me x that's the evidence that's in the case."
(Barrister – Defence and Prosecution)

"Because in general if that element is there it's given in evidence and your client is penalised very much so for anything that comes into the hate category. So I think that it is generally well catered for." (Solicitor)

Only two gardaí, speaking about their approach to prosecuting crimes, were of the view that the hate element of a crime would always be introduced:

"I have dealt with a few cases where the element of racist language came into it and I would always highlight that." (Garda)

One of those stated that the reason for this was the victim, and ensuring that the victim is of the view that their case was presented appropriately and reflected their experience:

"Again you've an injured party to consider. Because ... all these are reported in the local papers ... And if the injured party reads about their case and ... we leave out half of it then ... there could be a complaint and obviously it's not fair on the injured party." (Garda)

However, a majority of participants again stated that in the absence of legislation, the presentation of the hate element at prosecution stage depends on the individual approach taken by the prosecutor:

"The point I'm trying to make is that you need specific racist legislation. Like how ... the way it stands currently if you have somebody out there abusing a Muslim and the same guy goes out tomorrow and abuses his white neighbour, those two incidents will be treated the same. Because how can you differentiate between them?" (Garda)

"Interviewee: "Sometimes you will sanitise these things.

Interviewer: Why?

Interviewee: Sometimes you will package them in a particular way that fully describes what happened without getting into the nitty gritty of what was said, where the nitty gritty of what was said is not hugely material to the offence that's being committed, if you know what I'm saying." (Garda)

"Sometimes it's not repeated in court, it wouldn't be required." (Garda)

This garda spoke to the fact that, in the same way as investigating gardaí are driven by the proofs required for the charge in question, so too is the Office of the Director of Public Prosecutions:

"... there's no legislation to cover it. And invariably what the DPP will say to me, lookit, that is the legislation. Have you got your proofs, what are your proofs. I can tell you the racist part of that may have nothing to do with that." (Garda)

A minority of gardaí were of the view that because the individual prosecuting will not have investigated the case, and thus, they believe, will not be as invested in the proceedings, the hate element may be lost:

"But the difficulty is that you actually have another individual who is not invested, you know, making the determination on the case ... You know, you're dealing with an unknown in that particular instance and you're hoping that individual ... would actually also understand the context." (Garda)

"It's just seen as the clinical breach of the act or certain proofs we need to have, threatening, abusive and insulting behaviour in a public place, you prove

it's a public place and you prove there was a threat and you prove the language and that's it, you've ticked the boxes for the ... the court presenter ticks the boxes for the incident. That's it." (Garda)

Using the discriminatory motivation marker in prosecuting

Prosecuting barristers and solicitors most commonly held that they never had access to PULSE reports in prosecuting a case, with only one individual stating that they would routinely be given the PULSE report in a case. We probed with gardaí what the impact of the PULSE marker was on the prosecution of a case, and whether the presence of the discriminatory motivation marker would impact on the manner in which the case was presented in court. Prosecutors were very clear that the PULSE report would not be part of the prosecution file, and that the presence or absence of a PULSE marker on a case would have no impact on the manner in which the case was prosecuted:

"PULSE wouldn't ever be a feature to the file. The prosecution file would have the statements from the guards and summary of the evidence and previous convictions and copy of the charge sheets. But you wouldn't have the PULSE printouts." (Garda)

"Interviewer 1: Is there a relationship between the PULSE report and the précis? Does one shape the other?"

Interviewee: PULSE is only just internal. It's for the guards. The précis is actually what's presented before court, so that's what's evidenced. So you know it's a précis of evidence ... it's supposed to be a summary of the facts ... of the case. And I suppose proofs, facts ... that's what we're really sort of looking at." (Garda)

A senior garda made it clear to us that the purpose of the discriminatory marker was not to inform the investigation or prosecution of the case, but rather to facilitate appropriate support services being provided to the victim:

"At present therefore, the purpose of the discriminatory motives markers is to identify and provide the relevant resources, for example an Ethnic Liaison

Officer who is trained to listen and support the victim who will be required to provide the evidence.” (Garda)

What became very clear during the course of interviews was that the victim assessment screen – and thus the discriminatory motive marker – were there purely for the purposes of victim support, and were not typically of concern to crime investigation, or to inform the prosecution of the case.

Gardaí spoke – often in a frustrated manner – about the clear delineations between the role of community police and Diversity Officers on the one hand, and investigation gardaí, on the other.

Pre-trial discussions and ‘plea bargaining’

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

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

Further, a plea should not be accepted if to do so would “distort the facts disclosed by the available evidence and result in an artificial basis for sentence.”²⁶¹

In determining whether or not to accept a plea, the DPP sets out a number of considerations which should be taken into account where relevant: none of these are particularly relevant to hate crime. Prior to making a decision to minimise or

²⁶¹ *ibid* 38.

eliminate the hate element from a case, prosecutors should consider the impact that will have on the victim, as well as the requirement to ensure that the facts of the case are not distorted, as per the DPP Guidelines.

While the term “plea bargaining” was seen as problematic by some participants, there was common agreement that pre-trial discussions take place, and these two barristers discussed the purposes and aims of such discussions:

“... plea bargains do sort of happen you know. I mean you know that right? So it can happen that they say ‘We will agree to this, but this fact is not included in it’ and the DPP may accept that. And then it wouldn’t be given in evidence.”

(Barrister - Defence)

“It’s not plea bargaining but it’s almost plea bargaining in a sense and I use that term loosely – you’re not agreeing charges, you’re not agreeing sentence like the classic plea bargaining but yeah, absolutely. You’re agreeing facts.”

(Barrister – Defence)

Confirming our 2015 findings,²⁶² the majority of the lawyers in this study clearly stated that 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:

“You probably know we don’t have plea bargaining in Ireland but sometimes if somebody is going to plead guilty to an offence it would be to an agreed set of facts. So if the actual truth is somebody assaulted someone because the victim was gay or whatever that bit could be left out. So the facts could just be offered as ... there was an assault.” (Barrister – Defence)

One solicitor particularly recalled this occurring in the context of a racially aggravated public order offence:

²⁶² 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.

"[They] ended up pleading as opposed to contesting them ... the facts were toned down. It was agreed. It went back to the prosecuting member and they were toned down somewhat. It was a diluted version. It's on a case by case basis." (Solicitor)

Another highlighted the fact that this approach led to the hate element of the offence disappearing from the case:

"I suppose this is the problem and it's the problem with the whole issue, we would routinely - especially in the District Court - talk to either the guard themselves or the inspector in the court ... say 'Look plead guilty to this, you leave this, this, and this out, we'll do whatever we have to do in relation to this and we'll plead guilty.' Everyone is happy with that. There's no issue. And obviously it makes for recording of certain aspects of it very difficult." (Barrister - Defence)

While these participants were of the view that the pre-trial discussion process was relatively informal, and that an aggravating element would typically be omitted to secure a conviction, a minority of participants were of the view that the process was more formalised, and that such evidence would not be routinely diluted.

"...something isn't just going to be left out of evidence just because you don't like it ... you have to have a legal reason ultimately to say this won't work legally and it's unfair to lead that evidence." (Barrister – Prosecution and Defence)

"Interviewer: In your experience, have guards left out the racist element at your request?"

Participant: I would say more than often no, they would not leave it out." (Solicitor)

"... [the hate element] may appear on the summary of facts and ... your client accepts everything else apart from that. If you go back to prosecution and say

well look, everything else is accepted apart from that comment, then they might take instructions and see ... whether they're willing to prosecute without that element. And they may have [a] problem proving that or maybe the evidence isn't strong in that particular part, and if they have a weakness there they might accept to plea to the facts without that element. But again that would be rare." (Solicitor)

While a majority of barristers and solicitors were of the view that the racist element of a crime would be minimised in the context of plea, gardaí were much more likely to say that the hate element would not be lost in these circumstances, with only a small minority stating that they would accept a plea in return for the hate element being eliminated from the facts presented to the court.

"... as regards racially committed crime, certainly I wouldn't expect that any garda will be saying I will drop that and we'll go with this. Like, it is taken very seriously within An Garda Síochána." (Garda)

"From my perspective if it's a fact it's a fact. I'd normally go with the facts. I don't water them down ... I'd be very disappointed if I thought that incidents of that nature were being watered down to the extent that a person was going to get away with a €50 fine as opposed to 240 hours service as opposed to a term of imprisonment." (Garda)

The most common reason given for not allowing the hate element to be pleaded out was the injured party:

"Interviewee: I've never seen that no, no. In other words give the facts and leave out that part?"

Interviewer: Right.

Interviewee: No. no. And I wouldn't either, definitely no.

Interviewer: Why not?

Interviewee: Again you've an injured party to consider." (Garda)

One court presenter stated that while he would not necessarily remove the hate element in the context of a plea agreement, in certain circumstances he would choose

to leave the hate element out, knowing that it would have an aggravating impact on the case:

“Yeah, I suppose it’s a case that it could be a moral decision to do it yourself as a court presenter. That you read it yourself and say, ‘Hang on this is not going to look good for him in front of the judge.’ ... It’s never a case that you’re told what to say or what not to say. It’s your reading of the facts of the case is how you present it.” (Garda)

Another, however, referred to the Guidelines issued by the Director of Public Prosecutions in the context of prosecuting crimes generally in this context, and took a different view of his role:

“... you look at the DPP’s guidelines ... they will tell you to put forward the case at a reasonable level ... to be objective in relation to evidence ... not to advocate for particular outcomes ... and that type of thing. So you know, you just sanitise what happens.” (Garda)

This garda was of the view that he could never accept a plea on those circumstances:

“In my position I can’t plea bargain. Say for example if it was an assault and Public Order I couldn’t drop the Public Order and plea to an assault or likewise. That maybe the Inspector or Superintendent or DPP would deal with that. But if a statement is made, if we have facts we can’t really cover [up] the facts.” (Garda)

The majority of previous offenders we spoke with had experience of engaging in plea discussions, with a majority having experience in this regard:

*“Interviewer 1: Do you know will the guards negotiate with your solicitor?
Participant: I don’t know.
Participant: They will yeah.
Participant: They have to don’t they?” (Previous offenders’ focus group)*

The previous offenders we spoke with also discussed the manner in which pleas are negotiated from their perspective. In coming to a decision as to whether to accept a plea, there were two factors mentioned, the most common one being the likely sentence to be imposed in the case:

“Interviewer 2: So what would you say to your solicitor?

Participant: Am I going to be charged?

Participant: What’ll I get if I go guilty?

Participant: What’s my outcome, what am I looking at – bars?”

(Previous offenders’ focus group)

One individual held that he would weigh up the relative weight of the prosecution’s case in determining whether or not he would take a plea, using weak evidence as a tool to leverage the plea:

“Participant: Sometimes they can come back, if they have no evidence on the charge. Say if they charge me with a Section 4 [assault] and they have no real evidence or no statements they’ll probably come back, and if my solicitor goes out and says he’s pleading not guilty, they’ll come back and say ‘Will ye plead guilty to a Section 3?’

Participant: Lesser charge.

Participant: Then you know like, if I take it to trial yeah there’s a high chance I’m going to lose, so I’ll take the Section 3 and probably come way down - three to four years. If they’re looking to drop the charge they must have nothing on me, so I’ll take it to court and I’ll fight it. I’ll see can I walk ... whether you’re guilty or not.” (Previous offenders’ focus group)

They discussed the decision as to whether or not to plead guilty as one that is taken in consultation with their legal representative.

“Participant: /You should advise the solicitor really. Obviously he knows the law so he’s going to tell you ...

Participant: You give him what you know and he’ll tell you what he knows.

What’s the best way to go about this and what’s the best way to go about that.”

(Previous offenders’ focus group)

Evidential issues²⁶³

Byers et al.²⁶⁴ assert that prosecuting hate crime is not a straightforward task and that the requirement to prove a hate motivation is a burden additional to the work of proving the base offence. In our 2015 research, legal practitioner and garda interviewees discussed the question of whether the hate element could be introduced in a trial or hearing and whether it would be challenged where it was introduced.²⁶⁵ A number of practitioners in that research suggested that prosecutors would be typically wary of introducing such evidence as its introduction would be challenged by the defence as being either prejudicial to the case or irrelevant to the proof of the offence. Others took the view that that a hate element would be admissible and indeed would routinely be introduced.

Participants to this research discussed the question as to whether there were legal arguments to be made which would lead to the exclusion of the racist element to the case. Almost all participants were of the view that, while legal arguments *could* be made to exclude such evidence, it was highly unlikely that such arguments would be successful – a perspective summed up in the statement from this barrister:

“You could see people possibly trying to argue something like hearsay. But I think they’d be wrong on that. You could see people trying to say it’s irrelevant, that it’s the actual assault or something like that. Again, I think they’d be wrong on that ... Certainly, whoever is giving their evidence, if they say they witnessed an assault and they heard the defendant saying X, Y and Z, I think that’s definitely admissible ... I wouldn’t have thought there was a great legal point to exclude it automatically.” (Barrister - Prosecution and Defence)

However, a second barrister was of the view that, even if there were such an argument to be made in this exact context, it would not be strategic to make such an argument:

²⁶³ Gardai did not explicitly address the question of how the rules of evidence would apply in cases, but rather framed their knowledge of the rules of evidence in the context of their training and role as garda prosecutors.

²⁶⁴ Bryan Byers, Kiesha Warren-Gordon and James A Jones, ‘Predictors of Hate Crime Prosecutions: An Analysis of Data from the National Prosecutors Survey and State-level Bias Crime Laws’ (2012) 2(3) *Race and Justice* 203.

²⁶⁵ Amanda Haynes, Jennifer Schweppe, James Carr, Niamh Carmody, and Shannen Enright, ‘*Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings* (ICCL 2015).

*“Interviewer: Would you ever challenge that element of evidence?
Interviewee: Depends. It’s a strategic thing more than anything else.
Predominantly not. You’re not going to touch it if you’re not charged with it ...
So by challenging it, you’re highlighting it and you’re aggravating it...”*
(Barrister – Defence)

Participants reflected on the relevance of two principles in the context of cases involving a hate element: first, the requirement that any evidence admitted is probative to the case, and is not prejudicial to the rights of the defendant; second, the requirement for contemporaneity.

In Irish law, a judge has the discretion to exclude evidence which is otherwise relevant and admissible when either it is “of little probative value but is prejudicial” or it is “of greater probative value but nevertheless its prejudice outweighs its true probative value”.²⁶⁶ The rights under the Irish Constitution to a fair trial and fair procedures underpin this, and judicial tradition has been to assess the discretion on a case by case basis rather than precisely delineate its limits.²⁶⁷ Evidence of bad character is vulnerable to being regarded as unduly prejudicial in Ireland²⁶⁸ as in most jurisdictions, and without clear judicial guidelines, it could be argued that evidence showing prior hostility could be excluded as inadmissible “bad character” evidence. It is noteworthy to mention that similar examples of prior racist behaviour have successfully been presented before courts in hate crime cases in the US, where there are Constitutional protections similar to those in Ireland which govern such evidence. In the US, the prior evidence of hate-related hostility must be probative of motive for the offence before the court, rather than merely prejudicially suggestive of bad character.²⁶⁹ In Ireland, Heffernan states, the justification for when bad character evidence can be admitted “is twofold: first, that the evidence in question is highly relevant to an issue at trial, and second, that its admission does not unduly prejudice the defence.”²⁷⁰

²⁶⁶ *People (DPP) v Carney* [2011] IECCA 53 [7-8], as cited in McGrath, Declan Evidence (Round Hall 2014)19-20.

²⁶⁷ Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence*, (LRC 117, 2016) para 18.

²⁶⁸ See, on bad character evidence, Liz Heffernan and Una Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) paras 3.17–3.24.

²⁶⁹ David P Leonard, ‘Character and Motive in Evidence Law’ (2001) 34 *Loyola of Los Angeles Law Review* 439, 457, 508-9.

²⁷⁰ Liz Heffernan and Una Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) paras 3.22.

In analysing whether a hate element would be considered prejudicial or probative to the case, practitioners were of the view that while arguments could be made as to the admissibility of such evidence, such arguments would be unlikely to be successful:

"I think it is logically probative because it certainly depicts the offender's state of mind at the time." (Barrister – Prosecution and Defence)

"... That's linked to the offending behaviour in itself. And that shows ... a demeanour at the time of the offending behaviour and if you're making those types of comments it could go some way to proving your guilt or innocence." (Barrister – Prosecution and Defence)

"[In an unprovoked racist assault, the racist language is] part of the fabric of the case. It's integral to the case and it would be only ... inadmissible if it was quite remote to the case you know." (Barrister – Prosecution and Defence)

With regard to the requirement of contemporaneity, three scenarios were posed by participants in exploring whether such evidence would be admitted. The first was where an individual made racist remarks in relation to the victim during the course of a garda interview following the offence, which participants generally thought would be admissible:

"I mean if somebody had assaulted somebody and in the course of an interview with the Gardaí they said 'Sure he was only an X', I think that's probative because that shows that's indicative of an attitude towards this person which is indicative of their guilt - So I think that would be more difficult to exclude." (Barrister – Prosecution and Defence)

Another scenario considered was where the offender is part of a racist gang, and is charged with an offence. Here, there was a difference of opinion between the two legal professionals who considered this scenario:

"If it's ... oh this person is well known to hate Black people and is the Irish leader of the KKK that's not probative of anything. It means they're an awful human being. But it's not probative of anything even if their victim is Black, it's prejudicial ... I think in that case you'd probably lose because I think it is probably probative." (Barrister - Defence)

"If there was evidence to show that the actual person committing the crime was a member of some sort of racist group, could you introduce that in evidence to show there was some racist motive? I think that would be prejudicial to be honest. I think if it didn't come across in the actual crime itself, it may well have driven the crime but if it didn't factor in the actual commission of the crime, can you introduce the fact that he was a member of some sort of anti-fascist group or ... I think it probably would be prejudicial." (Solicitor)

The last scenario considered was where the individual had publically expressed racist views prior to the offending behaviour. Participants were of the view that this would be excluded as being prejudicial rather than probative.

"... The fact that somebody stood outside the Chinese two nights before shouting about Chinese people and then got in a fight with a Chinese person doesn't necessarily have a probative value to it." (Barrister - Defence)

Training: Legal practitioners

Given the apparent absence of any formal training on hate crime, or policies regarding the prosecution of hate crime in Ireland, legal practitioners were probed on the need for, and potential form of, training or policies.

In responding positively to this need, participants placed emphasis on the investigation, prosecution, or sentencing of the offence, drawing attention to the need for training and policies at this point in the process. 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:

“Do they need to more readily identify whether or not there is some form of sexism or racism within the incident, ask questions about that but not lead somebody into it. But draw it out if it is there. And if it is there investigate it ... start joining the evidence in relation to it and then say ‘Look, it’s quite clear that this element does exist in this crime. We have evidence of that and we wish for this evidence to come out during the course of the trial.’ (Solicitor)

“I suppose the start of that would have to come with the files that are put together by the Gardaí.” (Barrister - Prosecution and Defence)

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

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

In the context of training of legal practitioners, a number of participants mentioned CPD²⁷¹ as a vehicle through which this awareness raising could be delivered:

“It’s all about education isn’t it? There’s plenty I could learn. We do CPD lectures and so on and probably you know to introduce something along those lines. You know probably do no harm actually to make it a priority ... We have a number of compulsory hours we have to perform every year, you could make it a compulsory hour of our 13 or 14 hours ...” (Solicitor)

²⁷¹ Law Society of Ireland Professional Training.

Only one defence barrister was of the view that there was no need for any such training or policies. Some participants differentiated between training needs on the one hand, and policies, on the other. For example, when asked about the explicit CPS policy on prosecuting racially and religiously aggravated hate crime, which limits the circumstances in which a guilty plea to a lesser offence will be accepted, these two very opposing opinions were presented:

"I don't think it should be pleaded out. I think you'd have to leave open ... as it seems they've done. The possibility there might be exceptional circumstances. Because there might be evidential difficulties, they mightn't be able to prove that element of it so it might make more sense to get the plea ... things like that. But yeah that sounds sensible." (Barrister - Defence)

"I think the CPS policies in England are a disgrace. An absolute disgrace. Everything about the CPS in England is a disgrace ... It is a service which has become political. It is looking to be politically correct and not independent ... I mean legislative policy is one thing but there is prosecution policy which is there as well which should be just to apply the law. And not put some category of offences in a special thing ... where you know, you should assess a sexual assault file the same as you'd assess a public order or a file for racial hatred or incitement to hatred. This thing of creating categories like that is it's unprincipled, it's politicised and it means different standards are being applied which is bad for the prosecution and contrary to any sense of fairness ... And I think it's another part of their culture in England where they have got in to this mind-set where they need to put everything on a piece of paper on guidelines and structure and sentencing principles and they haven't improved their system one whit because of it." (Barrister – Defence and Prosecution)

In relation to training and policies more generally, legal practitioners variously placed emphasis on different parts of the process with little agreement on the specificity of such training initiatives. Some of the suggested developments included; a concerted

campaign to encourage the reporting of such crimes to the police, others placed emphasis on the investigation, prosecution, or sentencing of the offence, drawing attention to the need for training and policies at this point in the process.

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:

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

Or, as one participant stated perhaps more succinctly:

“I think everyone would need training – across the board.” (Solicitor)

Training for garda prosecutors

The Director of Public Prosecutions is now ultimately responsible for most prosecutions in Ireland, though the Attorney General, An Garda Síochána, some statutory agencies and citizens retain a right to prosecute in various circumstances.²⁷²

The Prosecution of Offences Act 1974 guarantees that the Director is independent from government in the prosecution of offences, which the DPP has stated is essential to safeguard citizens against unjust or improperly motivated prosecutions.²⁷³

Section 8 of the Garda Síochána Act 2005 provides that a garda can prosecute cases in courts of summary jurisdiction, but only in the name of the Director of Public Prosecutions. Thus, members of An Garda Síochána have no independent powers of prosecution. Generally speaking, a member of An Garda Síochána can institute and

²⁷² Government Ministers are often given prosecutorial powers for summary cases in relation to offences under a particular Act relevant to their Department. For instance, s 272 of the Social Welfare (Consolidation) Act 2005 provides that proceedings for a relevant offence will only be instituted by or with the consent of the Minister for Social Welfare or an officer authorised by the Minister (Vicky Conway, Yvonne Daly and Jennifer Schweppe, *Irish Criminal Justice: Theory, Process and Procedure*, (Clarus 2010).

²⁷³ *ibid.*

conduct prosecutions in the District Court, whether it is a summary or an indictable offence. However, certain offences, though chargeable summarily, can only be prosecuted by An Garda Síochána with the consent of the Director of Public Prosecutions: charges under section 2 of the Prohibition of Incitement to Hatred Act 1989 are an example of this.²⁷⁴ Further, where the multiplicity of charges, the previous record of the accused, or other aggravating circumstances suggest that summary disposal would be inappropriate, or that a twelve month sentence would be inadequate, then the garda should also consider forwarding the case to the DPP for consent to prosecute. Even where the case is of a summary nature, where the case involves an unusual question of law, where the charge is without recent Irish precedent, or where the matter has, or is likely to, arouse unusual public interest, the garda is further encouraged to seek direction from the DPP.

Outside the Dublin Metropolitan District, summary prosecutions are normally presented in court by a Superintendent or Inspector of An Garda Síochána, whilst inside the Dublin Metropolitan District, “straightforward” prosecutions are presented by members of An Garda Síochána, whilst solicitors from the Office of the Director of Public Prosecutions will present more complex cases.

The fact that gardaí prosecute cases marks Ireland as unique amongst the five countries studied for this project. This policy was justified by one research participant who explained:

“I mean I think it’s a necessary feature perhaps of Gardaí that they test themselves in prosecuting cases by themselves and I think it makes them better guards and it makes them understand the rules of evidence more ... and I think that’s probably one of the reasons why court presenter systems aren’t everywhere so it gives gardaí ... particularly junior gardaí – some experience.”
(Solicitor)

For this reason, gardaí were interviewed as prosecutors, but an unexpected theme

²⁷⁴ A full list of offences for which a member of An Garda Síochána must seek permission to prosecute are listed in General Direction No 3 issued by the Director of Public Prosecutions available here: Office of the Director of Public Prosecutions, Section 8 Garda Síochána Act 2005 General Direction No.3 (DPP 2005) <http://dppireland.ie/filestore/documents/General_Direction_No_3.pdf> accessed 8 November 2017.

arose during the course of the research: whether it was appropriate for gardaí to have this role, and whether there was a parity of arms between gardaí as prosecutors when the defendant is routinely represented by a solicitor and/or barrister. As this theme arose through interviewing members of An Garda Síochána, not all defence lawyers were probed on this issue. Of those that were, all participants observed that as trained legal practitioners, they had an advantage over garda members:

“Well you’ve got somebody who is a trained lawyer as opposed to somebody who ... he’s got to deal with some accident and emergency as well as know every single minute piece of law in relation to a relevant proof. Now, you get some exceptionally good guards who ... I go down there and I just know there’s not going to be any wriggle room there for me. But, you know, overall you know ... it’s difficult. I mean to go up against somebody who was trained in the law. It’s not balancing of arms. Do you know what I mean?” (Solicitor)

Indeed, two participants discussed the fact that they would use the lack of legal training on the part of the prosecuting garda to their advantage:

“I think it’s probably safe to say that I have definitely won cases where I think I shouldn’t have where, had there been more informed legal knowledge on the other side, different arguments could have been made.” (Barrister – Defence)

“[In appreciating] the pertinence of what you would call ... a hate element to a crime, they might not be aware of that ... and I would say I’d be convincing enough to say to a presenting officer ‘this comment isn’t relevant to the charge before the court it needs to go out’. I’d say nine times out of ten quite possibly that would work.” (Barrister – Defence)

Conversely, two participants suggested that gardaí abuse their position as prosecutors:

“... on a day that’s not the day the criminal matter is in court, you know the guard might meet the accused person on the street and the accused person will say look whatever ... might have a chat and quite casually the guard will say

'Oh yeah remember that matter? I'll withdraw it. I understand what happened and I'll withdraw the case'. So the person doesn't attend court on that basis and the guard for whatever reason doesn't withdraw it and there's a bench warrant issued and then the person is picked up and taken into custody because they fail to appear when they ought to have appeared. So ... that would happen regularly enough. That would happen regularly enough.'
(Barrister – Defence)

"I'm very conscious of the fact that gardaí overegg in certain circumstances and particularly in the context of [a] hearing, I have absolutely no doubt that situations as outlined in court bear no resemblance to reality." (Solicitor)

We spoke with a number of dedicated garda court presenters, as well as gardaí who had prosecuted their own cases in the District Court. Gardaí expressed mixed views on whether having members prosecute cases was a good or bad policy, summed up neatly in these two opposing views:

"So we've great interest in obviously because we're involved in the detection of the thing in the first place, the investigating of it in the second case, and thirdly gathering all the evidence and I would say I have a great interest in making sure that we do the best we can to secure a prosecution. I know that the big argument against changing it was that you might not have the same level of commitment maybe coming from somebody that was just prosecuting along. And they had no interest or maybe no knowledge of how the case came about." (Garda)

"It's an unusual mix that you're involved in the investigation and the prosecution. Probably a lot of ink been spilt on it over the years. There are certain conflicts potentially ... It's probably desirable ultimately that there'd be a separation there. What the Gardaí have done is they have, in as much as you can within a force the size of what we have, isolated the people that are involved in prosecution from investigation. So you'd never have situations where they're mixed totally. But there's an uncomfortable connection there all

right yeah ... You can see where conflicts would arise. They're involved in the investigation, they're involved in the decision to institute proceedings and then ultimately they prosecute." (Garda)

Not one of the gardaí we spoke to believed that that training they had either prior to prosecuting their own cases, or prior to their role as a court presenter was adequate. Court presenters typically spoke about doing an examination prior to promotion and being eligible for the role, but they all stated unequivocally that they did not have sufficient training for the role. In answer to the question, "what training did you get", typical answers were:

"Zero." (Garda)

"I got none." (Garda)

"Interviewee: Pretty much watch and observe the prosecutors in the court house ...

Interviewer: So you had four days observation then you were ...

Participant: Thrown into the deep end..." (Garda)

While some court presenters will have had previous experience prosecuting their own cases in the District Court, and thus will have been familiar with court practice and procedure to some degree, this would not always be the case:

"There are newly promoted inspectors there who have never been operational, don't have a clue ... And then suddenly they're in court and they have to just learn as they go. The promotions system is ridiculous in that way, people are just thrown in at the deep end.

Interviewer: I hadn't realised that that was a possibility.

Interviewee: So you could come from the [specialised] unit and you've always been a sergeant in [that] unit and then you could be in court presenting the next week. It's that bad." (Garda)

One individual said that he was aware of court presenters who were paying or had

paid for further education by way of university or professional qualifications to ensure that they had appropriate training for the job:

“Interviewee: But basically they’re up-skilling themselves.

Interviewer: And they’re paying themselves, so that they can do their job properly.

Interviewee: Correct.” (Garda)

We then asked gardaí how they felt about prosecuting cases where the defence was represented by either a barrister or solicitor. The vast majority of gardaí we spoke to stated unequivocally that they perceived there to be an imbalance of legal expertise.

“Legal jargon, being honest you could get caught up ... you could get your hands tied because it could just go over your head. But the worst thing about it, you could probably know the answer to it ... but it’s the legal jargon could confuse you. Obviously you have well educated solicitors who start using words and their previous experience on how to confuse maybe prosecuting sergeants and inspectors.” (Garda)

One court presenter was of the view that the role was the “least desirable part of the work”: when asked why, he responded:

“Interviewee: Because it’s very demanding. And there’s a fear factor in it.

Interviewer: What is that?

Interviewee: That’s you’ll do something wrong.” (Garda)

Some gardaí stated that, were they presented with a legal argument they could not respond to, they would seek an adjournment in the case to have the issue considered by their superior, which, combined with the inevitable waiting for cases to be called, leads to delays in the system and a waste of garda and State resources.

Concerns about the role of gardaí as prosecutors have been expressed for many years: a report in 1985 found that some cases were being struck out in court because gardaí failed to appear to prosecute or produced inadequate evidence.²⁷⁵ More recent

²⁷⁵ David Rottman and Philip Tormey, *Report of the Committee of Enquiry into the Penal System* (TSO 1985) cited in Ciaran McCullagh, ‘Crime in Ireland: Facts, Figures & Interpretations’ (1986) 75:297 *Studies: An Irish Quarterly Review* 11, 17. More recently, however, Caroline O’Nolan in *The Irish District Court: A Social Portrait* (Cork UP 2013) maintains that this is a problem only in the Dublin courts.

observations of gardaí by the Garda Inspectorate reinforce concerns about competence:

“The Inspectorate found a wide variation in who actually presents cases in court and the abilities of those performing this role. The Inspectorate observed several members in courts and while most were very proficient, some lacked the skills to perform this role. ... Without any performance data available on individuals prosecuting cases, there is no evidential basis to identify those that are very good at securing convictions and those who have training needs.”²⁷⁶

The problem is not seniority of staff, but appropriate skills. The report also notes that during visits to garda divisions, “the Inspectorate found that many district officers were not aware of the requirement to review unsuccessful prosecutions, and no evidence was provided that this takes place.”²⁷⁷ Other concerns voiced include the “[a]bsence of good data created and shared between the Court Service, the DPP, An Garda Síochána and other agencies involved in the prosecution process”²⁷⁸ and the lack of resources to formally train officers at an early stage in their careers in the skill of disclosure of evidence for court cases and interviewing suspects, despite this being “a crucial skill required by all gardaí that are interviewing suspects and preparing prosecution files.”²⁷⁹ Delays in getting prosecutions to court²⁸⁰ and some less serious cases lapsing altogether²⁸¹ are also highlighted.

The report notes, “[m]ost other jurisdictions have a clear line of separation between investigators and prosecutors” but adds that it “supports the use of the court presenters ... The Inspectorate advocates that this scheme should, in the absence of a state prosecution scheme for District Courts, not only deal with first hearings but also present all not guilty cases at District Court level.”²⁸² It maintains however that presenters should be selected on skill levels and that more junior officers should be

²⁷⁶ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) Part 11, 32.
<<http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf>> accessed 8 November 2017.

²⁷⁷ *ibid* Part 11, 2.

²⁷⁸ *ibid* Summary, 37.

²⁷⁹ *ibid* Part 6, 18.

²⁸⁰ *ibid* Part 11, 31.

²⁸¹ *ibid* Part 6, 50.

²⁸² See also in Recommendation 11.17 “The Inspectorate recommends that in the interim, the Garda Síochána extends the role of the court presenters scheme to include all the prosecution role in courts, across all divisions.”

selected, rather than district superintendents and inspectors.²⁸³ It added that the matter was to be reviewed in the Haddington Road report: this report is however now available and it does not appear to have been covered.²⁸⁴

In a later report in 2015, the Inspectorate drew attention to the time spent on prosecuting cases and concluded that District Court prosecution was one of the areas which might be suitable for transfer in the long run to the prosecution service²⁸⁵ or at least for regionalisation and amalgamation between divisions.²⁸⁶ Although senior gardaí expressed the view to the Inspectorate that “conducting prosecutions allows superintendents to assess crime in their areas and to monitor the work of personnel within the district”, the report responded that “the Inspectorate does not believe that a superintendent needs to attend court to determine those types of issues.”²⁸⁷

In the shorter run, the 2015 report suggested, efficiency in prosecution could be promoted by the creation of the post of Superintendent Criminal Justice and Support responsible for prosecuting all District Court cases in the division and for working with key criminal justice stakeholders such as the DPP, State Solicitors and local courts so that these partners would not have to contact several individual districts.²⁸⁸

SENTENCING HATE CRIME

As discussed above in the section on *Other International Obligations*, the Irish government has stated that judges will routinely exercise their discretion to aggravate a sentence where a hate motivation is evident. Nonetheless, Ireland has been criticised by ECRI and others for failing to ensure that such motivations are *consistently* taken into account during sentencing.²⁸⁹ The hate element is too easily “disappeared” during the recording, investigation and prosecution stages, and at the sentencing stage there is no obligation on members of the judiciary to enhance a sentence due to the presence of a hate motivation.²⁹⁰

²⁸³ Garda Inspectorate, *Crime Investigation* (Garda Inspectorate 2014) part 11, 32-33. <<http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf>> accessed 8 November 2017.

²⁸⁴ See John Horgan, *Haddington Road Agreement: Review of An Garda Síochána* (2016) <[http://www.justice.ie/en/JELR/Horgan%20Review%20\(Dec%202016\).pdf/Files/Horgan%20Review%20\(Dec%202016\).pdf](http://www.justice.ie/en/JELR/Horgan%20Review%20(Dec%202016).pdf/Files/Horgan%20Review%20(Dec%202016).pdf)>

²⁸⁵ Garda Inspectorate, *Changing Policing in Ireland: Delivering a Visible, Accessible and Responsive Service* (2015) 280 <http://www.gsinsp.ie/en/GSINSP/1286-ChangingPolicinginIreland_Low-Full.pdf/Files/1286-ChangingPolicinginIreland_Low-Full.pdf>

²⁸⁶ *ibid* 111-112.

²⁸⁷ *ibid* 280.

²⁸⁸ *ibid* 103.

²⁸⁹ Jennifer Schweppe and Amanda Haynes, ‘Internationalising Hate Crime and the Problem of the Intractable State: The Case of Ireland’, in Jennifer Schweppe and Mark A. Walter (eds), *Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016) 164.

²⁹⁰ Jennifer Schweppe, Amanda Haynes and James Carr, *A Life Free from Fear: Legislating for Hate Crime in Ireland: An NGO Perspective* (CUES 2014).

Statistics on sentencing hate crime

ODIHR²⁹¹ has published data for 2013, which states that, of the 109 hate crimes recorded by the police service in Ireland that year, twelve individuals were sentenced. It is not clear how this figure was determined, for example, whether the sentences took the hate element was taken into account, or whether a sentence was simply imposed for a base offence which was recorded as having a bias element. It is not even clear if the hate element was raised during the court proceedings. The Central Statistics Office has confirmed that the data relating to the 2013 sentences did not originate with their office.²⁹² Equally the Department of Justice and Equality confirmed in a letter dated 19th of January 2017 that they do not hold this data.

“The Department of Justice and Equality have no role in the investigation of crime and therefore, we do not have the information which you are seeking above i.e. the courts in which the sentences were imposed, gender, ethnic origin of those involved.”²⁹³

Neither body was in a position to provide us with similar data for other years. We note that 2013 was the only year for which data on sentences was provided to ODIHR. No such data was provided prior to 2013, or thereafter.²⁹⁴

Hate as an aggravating factor

In contrast to the investigation and prosecution of a hate crime, for which there are no apparent policies, the Court of Appeal has stated that where a racist element is present in a case, it should be considered an aggravating factor in sentencing. Practitioners were asked whether, in their experience, the hate element of a crime was treated as an aggravating factor by judges. A slight majority of participants were of the view that, once presented to the court, a hate element will always be considered an aggravating factor:

“Undoubtedly. It’s an aggravating factor.”

²⁹¹ Office for Democratic Institutions and Human Rights, Hate Crime Reporting, (OSCE 2017) <http://hatecrime.osce.org/ireland> accessed 14 November 2017.

²⁹² Email communication with the Central Statistics Office, (29 April 2016).

²⁹³ Letter communication from the Department of Justice and Equality (19 January 2017).

²⁹⁴ Central Statistics Office, *Review of the Quality of Crime Statistics 2015* (CSO 2015) <<http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2015/reviewofcrime.pdf>> accessed 8 November 2017.

(Barrister - Prosecution and Defence)

"It is absolutely an aggravating factor. And can be the difference between imprisonment and non-imprisonment." (Solicitor)

A significant minority of participants were, however, more cautious in answering this question:

"... hopefully it's the modern tier of judges who will view it like this."
(Barrister - Defence)

A minority of participants were of the view that while the judge may mention the hate element in sentencing, it would not necessarily aggravate the sentence:

"Judges will be quite smart about it ... They know to pay lip service to it, call it an aggravating factor but perhaps not vary the sentence they're giving on the basis of it." (Solicitor)

As with defence practitioners, those who investigated or prosecuted crimes gave mixed perspectives on whether the hate element of a crime would be taken into account at sentencing. Some were of the view that the hate element would routinely be taken into account at sentencing:

"... it's taken very seriously by the courts." (Garda)

"[T]he courts ... would be very indignant and I know of no judge who wouldn't be indignant at the racist connotations of any crime." (Solicitor – Prosecution)

Others were of the view that it depends on the judge in question as to whether the hate element would be taken into account or not:

"I think it probably does depend on the judge..." (Garda)

"In the District Court when they sentence, ok, 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 ..." (Garda)

Previous offenders' perspectives on sentencing

We asked the previous offenders to think back to their experiences in court.

At the level of the District Court in particular, court cases in Ireland are often subject to repeated and long delays before they are finally heard. Consequently, suspected offenders will spend long periods observing court proceedings while awaiting the hearing of their own case. We asked the participants if they had ever witnessed a racist or homophobic element being addressed during court proceedings, and none of the ten participants had ever heard a judge address either racism or homophobia.

"Interviewer 2: Can I ask if anyone has ever heard a judge talk about racism or homophobia?"

Participant: No.

Participant: No.

Participant: Still new here." (Previous offenders' focus group)

"Interviewer 1: Have you ever heard a solicitor or a barrister use the term hate crime or a judge?"

Participant: No.

Participant: No.

Participant: No." (Previous offenders' focus group)

We then asked the participants whether they thought a hate motivation would be considered an aggravating factor in sentencing. The majority were of the view that it would, with no participants disagreeing with this statement:

"That's what I'm saying. Like, if I assaulted a Black person and there's no legislation, so if I went to court for stabbing a Black person or something and my sole reason for doing that is because he's Black and if that came to the light of the court, they'd use that and that would maximise my sentence. Because that's for nothing, there's no mitigating factors for my offence ... if I went out simply to stab a Black person that's a hate crime that's racism, so I think even though there's no laws the sentence would be more severe. Do you get what I'm saying?" (Previous offenders' focus group)

This participant enumerated the difference they felt a racist element would bring to a sentence:

“They’ll give you a longer sentence [than] the normal drinking and Public Order you’d probably get three months. If you were up for slagging someone that’s foreign you’d probably get twelve or 13 months.”

(Previous offenders’ focus group)

Others held that the base offence with which the accused is charged would be the determining factor and evidence of a hate element would be irrelevant:

“Participant: I don’t think it would affect the sentence though.

Interviewer 2: You don’t think it would affect the sentence.

Participant: I don’t think it would.

Participant: I think it would.

Participant: If you stab someone you stab someone. I reckon a judge is going to look at that, he stabbed someone, Black, White, Brown”.

(Previous offenders’ focus group)

One person was of the view that a hate element would not be considered aggravating by the court, but placed the blame for this with An Garda Síochána rather than the judge:

“Participant: You’d get more for robbing a pint of milk outside the door of a house than you would for fucking getting a coloured person in town.

Interviewer 1: Do you think?

Participant: I know so.

Interviewer 1: So do you think the judge doesn’t care then?

Participant: No, the guards don’t care.” (Previous offenders’ focus group)

Newton hearings

In England and Wales, the Crown Prosecution Service guidance is clear as to the relevance of ‘Newton hearings’ in the context of prosecuting hate crimes. Again, while the DPP Guidelines do not specifically mention hate crime, they do discuss the

relevance of Newton hearings, though they do not refer to them by that name. The Guidelines provide that, where there is a “significant” difference between the factual basis upon which the guilty plea is based, and the case contended by the prosecution, “there is an adversarial role for the prosecution to seek to establish the facts upon which the court should base its sentence.”²⁹⁵ Equally, where there is an agreement not to include an aggravating factor, “no inconsistent material should be placed before the sentencing judge.”²⁹⁶

The question as to whether a Newton hearing would be run to determine the factual basis upon which the defendant would be sentenced, was probed with participants. Only a small minority of research participants had any experience of running a Newton hearing:

“I have experience of running Newton hearings.”
(Barrister – Defence and Prosecution)

“You can have a Newton hearing but it’s really unusual. It used to happen more. When I started you would have them more. Now they’re still rare, you haven’t heard of a Newton hearing for years.” (Solicitor – Defence)

The vast majority of participants stated that though they knew of Newton hearings in theory, they had no experience running one:

“I’ve never come across them. I have heard of one or two instances where they were used.” (Barrister – Defence)

They don’t seem to happen here, I’m afraid I don’t know why ... Dare I say it, does it seem much more lax in this jurisdiction? Perhaps in some respects. I don’t really know how to answer that. It just seems a bit more lax.
(Solicitor - Defence)

“I mean what you can do, you can ask for what they call a Newton hearing which is a hearing within the fact that it’s plea of guilty to say ... and challenge the evidence of the fact that that didn’t happen. But I’ve never seen one of them

²⁹⁵ Office of the Director of Public Prosecutions *Guidelines for Prosecutors* (4th edition, 2016) 31.

²⁹⁶ *ibid.*

go on either. Certainly [not] in the District Court.” (Solicitor - Defence)

Generally speaking, there was agreement that where such hearings took place, it would only be on indictment, and that they would not take place in the District Court.

“Not in a District Court. In the Circuit Court yes. But again very rarely from what I can gather.” (Solicitor - Defence)

However, one individual felt very strongly about whether such a process was appropriate in an Irish context, particularly in hearings on indictment:

“We don’t do Newton hearings. Newton hearings are a disaster ... There is very few times they happen in Irish court rooms. I think they’d be constitutionally suspect ... You see if someone is going to plead guilty to an attack with a racial element, it has to be proved against them that there was a racial element. If they don’t accept that, that’s a matter for a jury.”
(Barrister – Prosecution and Defence)

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 process as such. Practitioners were in agreement that, unless the individual had been charged under the 1989 Act, it would not be apparent on the criminal record of the defendant that they had committed hate crimes in the past:

“It wouldn’t be readily identifiable if you didn’t know.” (Barrister - Defence)

In this context, this practitioner was of the opinion that, were this type of previous offending behaviour known to the court, it would change the manner in which the judge approached the sentencing decision:

“And I think really that would carry a lot of punch if that did happen. In a conviction I mean if you’re reading out somebody’s previous and they go ... and he has three, four (do you know what I mean?), involving racism or three are

involving sexism or something like that. I think you know that would carry a punch.” (Solicitor)

Gardaí agreed that the only way a prosecutor would be aware of an offenders’ past bias motivated behaviour would be accidental, where they had knowledge of the individual in question by being involved in the investigation or prosecution of a case in the past.

“... see previous convictions only give you the date of the court and the date of the offence and what the offence was for. You don’t have any detail of what that was about you know.” (Garda)

Indeed, gardaí were clear that even were an individual minded to investigate whether any of the prior convictions were hate motivated, it would involve significant amounts of work, and the hate element would not necessarily be apparent on PULSE.

“... and even the inspector who is presenting [in] court and giving the previous convictions, they will read to the judge what the previous convictions are but they won’t even know. PULSE does not itemise that. So there is no way of knowing. Even me I would have to physically go on to PULSE and go into every single incident, that you can’t even do from the conviction it’s so poor.” (Garda)

Gardaí were of the view that if an offender had previous convictions for bias motivated behaviour, that would be relevant to the sentence, and was something that the court would want to be aware of:

“Interviewer: And why would it make a difference to know he was racist before?

Interviewee: Oh Jesus it would make an awful difference to me. Ah Christ above ... I mean you’d say well what difference does that make but I mean, it would make a huge difference. I would expect You know any of us is entitled to do something stupid once. ... so say for example any of us ... made the monumental error, blunder, of calling somebody a Black so and so and we shouldn’t have done it, and if you were to do it a second time on a different occasion totally

unrelated, I mean it does show the thinking of that person ... the belief of that person ... motivation of that person. It would be hugely beneficial to know that in the context of outlining to the judge ... he's a previous conviction and he has previously erred in this very same way." (Garda)

"... if the judge can see this happening frequently like, I'd imagine the sentences would get heavier if it's becoming a regular occurrence, they're targeting some one because of a certain hate element they have towards them." (Garda)

One garda said that following our conversation, where they were prosecuting a hate crime, they would now conduct an in-depth search of the record of the individual to determine if they had relevant prior convictions, such was the importance of bringing this issue to the attention of the court:

"... it's something that I'd probably do now is that when I would have a case like that again I would automatically check the guy to find out if he ever had done this before." (Garda)

Only one garda was of the view that this process of reviewing the context of prior convictions is something that would be done routinely:

"Interviewee: Well I suppose you have to have an understanding of the garda PULSE system here. Because - we'll say this particular offender here carries out something tomorrow - obviously he's an offender, so you'd look at his catalogue and you can see the previous incidents that are associated to him, and in those then you can see the narrative of what the incident was about and there would be a file linked to that particular incident which would be stored in the District Office, and you can take out the files I have here and you can see the details of what's involved in it you know.

Interviewer 2: Would you typically do that when you're going in, you know in terms of the previous convictions? Would you typically do that sort of archaeological dig?

Interviewee: Well that'd be the responsibility of the investigating member to put all the facts in the report and to outline previous convictions or previous incidents that occurred and what's involved you know." (Garda)

Training for Judges

As was the case with all other criminal justice professionals, our interviewees spoke to the need for judicial training in the context of hate crime:

"In the context of our poor track record to date in the ROI on hate crime convictions under existing law, some would argue that there is an urgent need for greater training of legal practitioners and the judiciary through avenues such as CPD. Furthermore, given the enhanced opportunities for online harassment and hate crime via social media and internet platforms, that need for hate crime training has become even more acute, as cyber creates and facilitates new kinds and categories of hate crime offending not previously encountered."
(Barrister – Prosecution and Defence)

"I have never been on a CPD course around hate crime I have never seen one. I would sign up for it in the morning if it was there. I would take the view that the judiciary are probably in the same position." (Solicitor)

REVIEWING THE LEGISLATIVE FRAMEWORK

The absence of bespoke legislation was referred to across criminal justice professionals as one of the reasons the hate element of a crime was not addressed in a consistent way across the process. The Department of Justice and Equality has committed to reviewing the current legislation on racially motivated crime during 2017, "with a view to strengthening the law against hate crime".²⁹⁷

The vast majority of both defence practitioners and gardaí responded positively to the question as to whether hate crime legislation should be introduced. Across all criminal justice professionals, the primary reason given for supporting the introduction of such legislation was the fact that it would provide the criminal justice process the tools with which it could address hate crime:

²⁹⁷ Department of Justice and Equality, *The Migrant Integration Strategy: A Blueprint for the Future* (2017) 33.

"I've sat down with the people who are victim of racist abuse, it's horrendous like. And they carry it through with them and d'you know ... it's hugely upsetting. More than a regular public ... it's not just regular threatening, abusive language, it's much deeper than that. And that should be reflected in the investigation as well. How that impacted on the person. And that should be brought in and presented to the judge then. To give more weight than the ordinary, just threatening, abusive and insulting behaviour." (Garda)

Only a minority of practitioners (all defence, and a minority of those) reacted negatively to the proposal to introduce such legislation. There was no consistency in the reasons provided in this regard with some practitioners focusing on the need for a rehabilitative rather than a criminal justice response and others focusing on various technical obstacles.

That said, even those practitioners who spoke positively about the impact that hate crime legislation might have, in both ensuring that the hate element was presented throughout the case as well as sending a message to society that this type of behaviour was not tolerated, highlighted drawbacks and issues. The first was that it might be stigmatising for the offender with the added caveat that this might lead to pleading out the hate element. Empirical research in England and Wales on prosecution of racially aggravated offences has found that defendants emphatically resist and will contest what they regard as a label of "racist". This can impact upon the trial process because defendants then plead guilty only to the basic charge, and their counsel call additional witnesses to testify to the accused's "non-racist" character.²⁹⁸

"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 – Solicitor)

The second major issue with introducing such legislation suggested by practitioners was the fact that it would be difficult to prove. Interestingly, only defence practitioners raised this: gardaí did not express concerns with getting the necessary proofs in this regard:

²⁹⁸ Elizabeth Burney and Gerry Rose, *Racist offences – how is the law working?* HORS 244 (TSO: 2002) 20, 91-92.

"Insofar as if it's a racially motivated assault or a race assault, the prosecution have a much tougher [task] in proving both elements that an assault was occasioned and that it was racially motivated or there was a racial element and they need to come up to proofs on both sides, and if one half is missing then all of it's out, where it's easier way for them to prosecute on a simple assault and just introducing the evidence ... by way of context ... So I think strategically even if it was ... even if there was an act with all of those sections and all of those types of crimes, there's probably a time and a place for them to be used but I wouldn't think that they would be over used in the District Court, it's easier for them to prosecute under the others."

(Solicitor - Defence)

Pauline Walley, SC who both prosecutes and defends criminal cases, argues that image based sexual abuse, or so-called 'revenge porn' can, on occasion, be a category of a hate crime, and may be treated as such. She lamented the failure of the State to introduce legislation addressing this form of online abuse which has been successfully implemented in other jurisdictions such as the UK since early 2015, and was part of the proposed reforms suggested by the Law Reform Commission in its Report on Harmful Communications and Digital Safety in 2016:

"Revenge porn is often a category of hate crime, if - for example, the perpetrator targets a number of victims who are unconnected to him/her, and who are targeted simply by virtue of their gender. It is lamentable that there are currently no dedicated revenge porn laws in the ROI. The offence of harassment under Section 10 of the Non-Fatal Offences against the Person Act 1997 was formulated in the pre-digital age to deal with stalkers. It often fails to capture this type of offending as the Act requires proof of a course of conduct by the offender, and not one single act. With the Internet, one non-consensual online publication of intimate images may be sufficient to destroy a victim's life, especially if this is posted on porn and stalker sites. Furthermore, the material remains permanently online unless the ISP is persuaded to take it down; accessible to all with the click of a switch, and capable of further global dissemination via hyperlinking. This can, in turn, attract further online abuse and harassment from other

unconnected third parties, and the cycle of hate continues... In the context of cyber space, we need to reconceptualise what we mean by hate crime, and we need to think in about offending behavior and the criminal law in a much wider way which covers digital behaviour and fits in the 21st century."
(Barrister – Prosecution and Defence)

Participants in the focus group carried out with previous offenders had reservations about the introduction of hate crime legislation in Ireland. One participant in particular was vocally opposed to legislating against hate crime. He had argued that the targeting of individuals on the basis of their personal characteristics is socially unacceptable, but he expressed firm conviction that any laws criminalising a hate element would be abused by the authorities, specifically the police. Research from the United States suggests that some minoritised groups fear that hate crime laws which broaden police surveillance and discretionary power may increase the chances of police intrusion in communities which historically have experienced police violence.²⁹⁹ This previous offender held that this subjective element to the ascription of offender and victim statuses was open to abuse by the police:

*"If a Black fella robs me now and I thumped the head off him right and there is hate laws, I'm hitting him cos he robbed me but yet the guards are going to charge me ... as I said this is where it depends on whether guard's nice c**t or bad c**t. If you hit him cos he's robbing you yeah, and then you ... the guard doesn't like you he's going to get you done with the race card isn't he."*
(Previous offenders' focus group)

The individual, who was most vocal in his assertion that hate crime laws would be misused, raised the subjective character of the hate element as a problem, arguing that the police might charge a suspected offender with a hate crime based only on the relative minority/majority statuses of the parties to an altercation:

"Yeah I personally think the guards will abuse that. Because as I said you're walking down the road and you've an argument with some fella and he happens to be from some fucking where else, they're going to go, 'Well, might be racist, we'll charge him with racism just in case it might have been' They'll abuse it." (Previous offenders' focus group)

²⁹⁹ Doug Meyer, 'Resisting Hate Crime Discourse: Queer and Intersectional Challenges to Neoliberal Hate Crime Laws' (2014) 22 (1) Critical Criminology 120.

During the course of the focus group, participants also expressed the view that members of minorities might themselves invoke hate crime legislation to strengthen their position where there was no hate motivation to a crime:

“Even the victim could use it, the victim could use it. Just say like the Black fella, he’s after starting trouble with you, you have a fight, he comes off the worst of it, he could go up to the barracks and say fella racially fucking attacked me downtown there. So it’s going to be abused. It’s going to be abused by victims and the guards.”

(Previous offenders’ focus group)

We have identified that the hate element of the crime is - not in every case, but routinely - overlooked, minimised or excluded at the points of recording, investigation and prosecution. This leads to what EUFRA refers to as the filtering out of the hate element of the crime, or what we call the “disappearing” of hate crime from the criminal justice process. The next chapter in this Report will summarise our conclusions and set forth our recommendations for improving the treatment of hate crime by the criminal justice process in Ireland.

CHAPTER 5: CASE ANALYSIS: ADDRESSING HATE CRIME IN THE COURTROOM

This chapter presents a detailed analysis of 42 specific cases described by criminal justice practitioners in which they had acted and where a hate element was present, 19 in which the interviewee was acting for the prosecution and 23 in which the interviewee was acting for the defence.

PROSECUTION EXPERIENCES OF ADDRESSING HATE IN THE COURTROOM

We spoke with four prosecuting barristers, two prosecuting solicitors, and nine gardaí who had experience prosecuting crimes. The barristers and solicitors generally recalled having experience prosecuting cases in which a hate element was present. Again, in this context, we are limiting our discussion to only those cases in which a verdict was rendered by the court. All sixteen gardaí we spoke with had experience investigating, or assisting in the investigation of crimes involving a hate element, but seven had no direct experience prosecuting a case in court. The cases recalled by these gardaí which did not result in a prosecution, or in which the charges were dropped or withdrawn, are not included in this analysis.

Offence characteristics

Of those specific cases discussed, the vast majority identified a racist motivation, which was said to be present in 16 of the cases. There were homophobic motivations in two cases, and disablist motivations in another two. Participants discussed one case involving each of age related, gender related, and anti-Traveller motivations.

The most prevalent offence was assault, with seven cases discussed by participants, with a further three cases of assault accompanied by other charges (one of possession of an article, one involving public order, and one criminal damage). There were six public order offences discussed. There was also one case of robbery, two of theft, one of criminal damage, one of use of an offensive weapon, one of rape, and one of murder.

Evidence presented in court

While with defence practitioners, in the vast majority of cases discussed in detail by the participants, the evidence of the hate motivation was presented in court, in the context of those acting for the prosecution, this was not always the case. In the context of disablist and ageist offences, the participants spoke to the personal circumstances

of the victim as evidencing the biased motivation of the offender.

In the majority of cases, the hate element was explicitly introduced either by way of plea agreement or in the course of a hearing or trial.

“Yeah, the garda gave evidence of the things he had said prior to assaulting the man in question yeah.” (Barrister – Prosecution and Defence)

“[The language] was put across. In an unsanitised form. I think that’s ... from my memory I made a decision to do it that way.” (Garda)

Two individuals stated that they could not introduce the racist element, as it was not relevant to the charge, or because there was another motivation:

“... certainly I couldn’t have advanced the proposition for either side that there was some kind of racial motivation to the attack because there was other involvement as well” (Barrister – Prosecution and Defence)

“Because the offence is threatening, abusive and insulting behaviour. Doesn’t matter what nationality the person ... what colour, what sexual orientation, what religion doesn’t matter. It’s a person.” (Garda)

In a minority of cases, the hate element was minimised, but here the prosecutor stated clearly that they hoped that the judge would look around the corners of the case to see the hate element:

“They would have offered a plea ‘We’re accepting the facts judge.’ You get a brief summary of the facts, you give it ... you’re hoping that the judge is reading between the lines.” (Garda)

The hate element was contested in two cases, and in one of those the garda admitted on cross examination that the offence was not racially motivated.

Sentencing

We asked interviewees whether the hate element of the crime was taken into account

at the sentencing stage. In eleven of the cases, the prosecutor was of the opinion that the sentence was aggravated due to the hate element:

"The hate element was absolutely taken into account..."

(Solicitor – Prosecution)

*"But that is a very high sentence and I've no doubt that the huge aggravating factor there was the n****r development in it ... the fact the man was a Black man driving the taxi." (Garda)*³⁰⁰

In six cases, the participants were of the view that the hate element was not taken into account:

"Interviewer: ... do you think the sentence was aggravated because of the racist element?"

Interviewee: No." (Garda)

In those cases in which the hate element was either not presented, or where the prosecutor sought to have the judge 'read between the lines' in the case, participants stated that the hate element was not taken into account:

"... the court didn't sentence on that basis."

(Barrister – Prosecution and Defence)

In one case, there was absolutely no evidence presented that the crime was racially motivated, though it was clear the prosecutor was of the view that it was a racist attack:

"Interviewer: Was there an explicit racist element to that?"

Interviewee: There was.

Interviewer: What was that?

Interviewee: Well ... reading between the lines [the participant gave details regarding the circumstances of the offence]

Interviewer: And were there any racial slurs used the course of the attack?

Interviewee: Well ... there wasn't any allegation of that but ... the reason for that maybe is he didn't have a great understanding of English.

Interviewer: So there was no overt racism in the case. Is that fair to say?

³⁰⁰ Reference to a racist slur used in the commission of the offence.

Interviewee: No ... I mean it was quite clearly a racist crime.”
(Solicitor – Prosecution)

Nonetheless, the court in sentencing referred to the crime as a racist one:

“... racist, he call[ed] it that and described it as a vicious assault on a foreign national where weapons were used, deeply disturbing that the victim was a non-national.” (Solicitor – Prosecution)

DEFENCE EXPERIENCES OF ADDRESSING HATE IN THE COURTROOM

In total, defence practitioners detailed 23 cases in which they had acted where a hate element was present. Each offence discussed in detail was coded by the researchers by offence type; the characteristic targeted; the bias indicator; what the plea was in the case; what evidence was presented to the court; and whether the aggravating element was considered by the court in sentencing. As practitioners recalled the cases with differing levels of detail, not all of this information was present in all cases.

Of the 18 defence practitioners with whom we spoke,³⁰¹ all but one of the participants generally recalled having experience with cases in which a hate element was present.³⁰² Some practitioners initially spoke of having no or limited experience of dealing with hate crime cases, but as the conversation progressed, they then began to recall cases which were relevant to the discussion:

“Although just even the first question you said there about ... the very first thing you asked me - have I any experience of it. Just on reflection there’s probably two or three cases...” (Barrister – Defence)

Of those defence practitioners who had acted in cases involving a hate element, after speaking generally about their experiences, all but three discussed in detail specific cases in which they believed a hate element was present. In this context, we are limiting our discussion to only those cases in which a verdict was rendered by the court. A number of practitioners spoke to cases in which they were involved, but which did not result in a prosecution, or following a prosecution in which the charges were dropped or withdrawn, which are not included in this analysis.

³⁰¹ In this categorisation, we include barristers who act for both the prosecution and defence, when we are referring to cases which they specifically cited as ones in which they acted for the defence.

³⁰² The one individual who had no experience with cases having gone to trial acted in a case in which there was a suggestion that a prosecution be taken under the Prohibition of Incitement to Hatred Act 1989.

In total, defence practitioners detailed 19 cases in which they had acted where a hate element was present. The reasons given for detailing these specific cases generally fell into three categories: (1) the case happened recently; (2) the particular facts of the case were so distinct that they resonated and stayed with the practitioner; (3) the case detailed was a typical example of a number of cases in which they had acted. Each offence discussed in detail was coded by the researchers by offence type; the characteristic targeted; the bias indicator; what the plea was in the case; what evidence was presented to the court; and whether the aggravating element was considered by the court in sentencing. As practitioners recalled the cases with differing levels of detail, not all of this information was present in all cases.

Offence characteristics

Of those specific cases discussed, the vast majority identified a racist motivation, which was said to be present in twelve of the cases. The nationality of the victim was the motivation in one further case. In four cases, the victim was targeted because of their sexual orientation. The victim was targeted because they were homeless in one further case, and because of a disability in one other.

The most prevalent offence was assault, with 8 cases discussed by participants, with a further three cases of assault accompanied by other charges (one of use of a weapon, one involving dangerous driving, and one of theft). There were four public order offences discussed, and two of violent disorder, one of which also involved a charge of criminal damage. There was also one case of robbery, and one of criminal damage.

Evidence presented in court

Unsurprisingly, given the fact that we particularly asked participants to think of cases in which a hate element was present, in the vast majority of cases discussed in detail by the participants, the evidence of the hate motivation was presented in court.

"It was a guilty plea and ... in fairness to the police officer they would have indicated what was said and was put before the court." (Barrister - Defence)

"[The prosecution] were straight up about it..." (Solicitor)

In the context of public order offences, given the fact that language is so fundamental to the context of the case, this participant explains that it would not be possible to omit references to the language used:

“... they were both public order incidents and the whole background to them was the words that were used. That was the offence. So it didn’t make sense in that context to try and get it out. They were charged with using threatening, abusive and insulting words and behaviour, that’s’ the offence.”

(Barrister – Defence)

In one case, the participant stated that the hate motivation was minimised in evidence presented to the court:

“I think the guard in his facts might have referred to it briefly as the impetus you know or the facts of the case ... but because slurs were being thrown back and forth on both sides it didn’t really feature to be honest. It wasn’t a big element of the case. Not on a guilty plea.” (Barrister – Defence)

In two cases, the evidence of the racist motivation was not presented in court because of the way in which the plea agreement was reached:

“we plea bargained out what was said to the Black guy ... the aggravating aspect of it wasn’t brought into play.” (Barrister - Defence)

“In that case the homophobic element didn’t come out as part of the plea ...”
(Solicitor)

Sentencing

In justifying the absence of specific hate crime legislation in Ireland, the State has repeatedly argued that, where the hate element of an offence is presented in court, it is routinely treated as an aggravating factor by the sentencing judge. Indeed, there is now a decision of the Court of Appeal which at least suggests that a racist element should be considered an aggravating factor in sentencing. In cases detailed by those who had acted for the defence, the hate element aggravated the sentence just as often as it did not.

In approximately half the cases, practitioners were clear that the hate element aggravated the sentence.

"That was treated as an aggravating factor yeah. It was particularly mean spirited." (Barrister - Defence)

"certainly [the racist element] ... was reflected in [the judge's] judgement, in her sentence." (Solicitor)

In this context, in one case in which a charge under the Prohibition of Incitement to Hatred Act 1989 was brought, but ultimately withdrawn, the participant stated:

"He did [take it into account], undoubtedly so. So that's an example of, I suppose, the normal criminal law offences being sufficient to deal with, so long as the judge does take into account that there was a racist undertone to it and that that is an aggravating factor." (Barrister - Defence)

However, in almost an equal number of cases where the hate element was presented to the court, participants stated that the hate element did not aggravate the sentence:

"I think that the context and the manner, the judge would have commented more generally not specifically on the language but how the event happened and what was said surrounding the event, but not necessarily that hate crime aspect of it." (Barrister - Defence)

"Interviewee: Can't remember what they got. But it certainly wasn't any more than normal."

Interviewer: So you don't think the sentence was aggravated?

Interviewee: Not in those cases no." (Barrister - Defence)

"Interviewer: So if the racist element was taken out of it, do you think the sentence would have been the same?"

Interviewee: I think it would have been."

Interviewer: So you don't think the sentence was enhanced

Interviewee: No..." (Solicitor - Defence)

Naturally, in those two cases in which the hate element was not presented in evidence due to the manner in which the plea agreement was reached, the court did not consider the hate element in sentencing:

"No, because you see they were found guilty of assault but ... he didn't take it into account because it wasn't explicit in the evidence you know."
(Solicitor - Defence)

This is completely uncontroversial: a judge should not aggravate a sentence where there was no evidence presented to the court of the hate element. However, in two cases, the participants were clear that there was no evidence of a hate element presented to the court in the context of a guilty plea:

"there didn't seem to be any particular words spoken of ... that you could say it was racially motivated." (Barrister - Defence)

"Interviewer: So there was no, I suppose, overt bias motivation there?"
Interviewee: No. That's the truth of it. There really wasn't."
(Barrister - Defence)

Nonetheless, the participants stated that the personal characteristics of the individual in question led the judge to treat what they considered to be a hate element in the case as an aggravating factor:

"it was quite clear the judge took it as a grossly aggravating factor."
(Barrister - Defence)

"The judge absolutely tore into him for what had occurred and told him it was a disgrace..." (Barrister - Defence)

While it is clear that a hate element should be considered an aggravating factor in sentencing, it is equally clear that a judge should not peer around corners in a case, and assume a hate element is present in a case where it is not, and aggravate a sentence on that basis. The experiences of these practitioners are possibly explained

through the recollection of another who discussed the context of a case with the prosecuting garda, the result of which was an agreement that a particular fact was not relevant to the case, and thus would not be presented in evidence:

“... well in our views it wasn’t part of it, the judge read it and commented on it at a later date. So the judges aren’t supposed to be reading the books ³⁰³ but obviously he did have access to it and brought it up at a later date as I said. It’s something I didn’t deem to be relevant. But the judge deemed it to be relevant.”
(Barrister - Defence)

Finally, a small number of participants spoke to judges referring to the hate element in their sentencing decision, but were clear that it did not aggravate the sentence:

“the judge did mention the issue of racism in her sentencing, - wasn’t the reason for giving him a custodial sentence the assault itself was - but she did mention it actually on that occasion.” (Barrister – Defence)

Thus, the hate element was mentioned at sentencing, but participants were of the view that that was not linked to the sentence imposed.

VICTIM EXPERIENCES OF ADDRESSING HATE IN THE COURTROOM

Only one victim had experience of court proceedings. This crime was committed prior to Nov 2015 and the court proceedings also occurred before that date. The participant expressed satisfaction with their treatment by the investigating officer, including in respect to communication. The officer was responsive when the participant initiated contact and accepted phone calls even when not rostered.

“He’ll always tell me , (Name), we’re still waiting for the courts to decide on the day and I’ll let you know’ and he did let me know, most of the time.”
(Victim of a crime pre-Victims’ Directive)

Nonetheless the participant asserts that their own persistence, and that of a supportive NGO, was a factor in the case reaching the courts:

³⁰³ Book of evidence.

"I was just persistent that the case go ahead. ... Because I had that element of not trusting this case would go ahead - it would just disappear. That was one of the things." (Victim of a crime pre-Victims' Directive)

The participant was of the view that members of racialized minorities are unlikely to pursue justice and that they do not receive equal treatment in the Irish criminal justice process.

"Interviewer: And why did you feel that – why did you feel it might disappear?"

Interviewee: Because I knew ... I lived there [Ireland] for 13 years and I knew I was the only person that was prepared to take this forward and I felt you know that ... it may not be that way. I mean the first person to take someone to court and get justice is not an easy thing ... so you know I had that kind of ... feeling that you know ... the system, the case might just fall off the system and disappear. So I did follow up. There was that element of mistrust in me. But as well, as I know I mean like, I do know that Irish people, and there is some element of racism in the garda as well.... So I decided, listen, I have to follow this one up ... something had to come out of it." (Victim of a crime pre-Victims' Directive)

The individual states that the case was heard in the District Court. They received a summons to appear. They state that they did not receive any information on the Irish criminal justice process or any other form of preparation prior to the court date, nor did anyone from the prosecution or the police speak to them at the court.

"Then what happened was they just ... read my name and they called me up, and called him up, and asked him questions, and they also asked me what happened and I explained, and that was it."

(Victim of a crime pre-Victims' Directive)

As might be expected in a system in which the victim's role is that of witness, the participant did not feel central to the proceedings.

"I didn't feel like I was part of it. You know. I was just there that's it."

(Victim of a crime pre-Victims' Directive)

The defendant pled not guilty. The participant recalls that in giving evidence they did relate language used towards them by the offender which expressed a hate motivation. The participant believed that the defendant's solicitor accepted that bias related language had been used, but not that it spoke to motive.

"He [the defence solicitor] said that (defendant) may have been under the influence, but you know he doesn't look at it as a racist attack, he just thinks it was of someone that was under the influence of alcohol. But he didn't take it serious". (Victim of a crime pre-Victims' Directive)

There is no way of assessing whether the hate element was taken into account as an aggravating factor. The participant nonetheless believed that the hate element had been recognised and consequently was satisfied with the outcome of the court proceedings:

"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 of a crime pre-Victims' Directive)

OFFENDER MANAGEMENT (POST-CONVICTION) POLICY

There is no publically available information regarding how the Probation Service addresses hate crime. In a European context, McNally and McIlroy observe, the Council of Europe's Council for Penological Co-operation (PC-CP) published draft guidelines in September 2015 for prison and probation services regarding radicalisation and violent extremism, including hate crime.³⁰⁴ Describing the current approach of the Probation Service in Ireland to hate crime, McNally and McIlroy stated:

"In the absence of specific hate crime offences and related data, Probation Officers work with offenders whose offending is not defined as hate crime but effectively meets the criteria defined above as they do other offenders. The Probation Service does not, at present, have population data

³⁰⁴ Council of Europe, *Promoting More Humane and Socially Effective Penal Sanctions* (COE 2017) <http://www.coe.int/t/DGHL/STANDARD_SETTING/PRISONS/PCCP%20documents%202015/PC-CP%20%282015%29%202%20Rev%203_E%20Guidelines%2023%20September.pdf> accessed 9 November 2017.

differentiating hate crime and related offending from other forms of offending. Hate or prejudice motivation in offending is, therefore, addressed where it is identified on a case-by-case basis as part of the individual assessment and case management plan. It is, unfortunately, not readily possible to calculate or differentiate in management reporting how many cases are hate or prejudice motivated.”³⁰⁵

Further, there is no hate crime or degree of prejudicial attitudes “flag” attached to individual cases enabling them to be readily identified in the population subject to supervision. However, McNally and McIlroy do observe that where a hate element is present, the Probation Officer will develop an intervention plan which will “identify specific actions to challenge and change these attitudes and behaviours.” They also note that the service is including hate-related issues in policies and practice guidance,³⁰⁶ although again these are not publically available. The service has also worked with the Gay and Lesbian Equality Network (GLEN) to develop “diversity champions” and promote inclusiveness in its policies, culture and service to users.³⁰⁷ Nonetheless, neither the Strategic Plan for 2015-2017³⁰⁸ nor the most recent annual report³⁰⁹ address any hate-related topics.

Below this level, there are policies within the service that engage directly or indirectly with issues of relevance to hate crime. The Probation Service National Victim Services Team, established to meet the requirements of the Victims’ Directive, commits to:

- Provide a single point of contact on a regional basis for all victims, including hate crime victims, who contact the Probation Service for information on Court orders or Probation practice or expressing concern in relation to the harm they have experienced,

³⁰⁵ Gerry McNally and Eithne McIlroy, ‘Probation Practice and Offending Motivated by Hate and Discrimination: An All-Ireland Perspective’, in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 449.

³⁰⁶ *ibid*, 448,450.

³⁰⁷ Collette Byrne, ‘LGBT* Diversity: Implications for Probation Practice’ (2016) 13 Irish Probation Journal 225.
<[http://www.probation.ie/EN/PB/0/61AE16B1B1E7E9608025805E002B4534/\\$File/ColletteByrne_IPJ.pdf](http://www.probation.ie/EN/PB/0/61AE16B1B1E7E9608025805E002B4534/$File/ColletteByrne_IPJ.pdf)> accessed 8 November 2017.

³⁰⁸ The Probation Service, *Lasting Change through Offender Rehabilitation: Probation Service Strategy 2015–2017* (Probation Service 2017)
<[http://www.probation.ie/EN/PB/0/454E459245D70BA58025802E00474308/\\$File/Probation+Service+Strategy+2015-2017.pdf](http://www.probation.ie/EN/PB/0/454E459245D70BA58025802E00474308/$File/Probation+Service+Strategy+2015-2017.pdf)>
accessed 8 November 2017.

³⁰⁹ The Probation Service, *Annual Report* (Probation Service 2016) accessed 8 November 2017.
<[http://www.probation.ie/EN/PB/0/E2CB568BA6CBC8F68025811E0032F923/\\$File/FINAL%20-%20Probation%20Service%20Annual%20Report%202016.pdf](http://www.probation.ie/EN/PB/0/E2CB568BA6CBC8F68025811E0032F923/$File/FINAL%20-%20Probation%20Service%20Annual%20Report%202016.pdf)> accessed 8 November 2017.

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- Engage directly with victims, listen to concerns, respond appropriately and advise on relevant victim support services if required,
 - Respond effectively to victim requests for a restorative justice intervention,
 - Ensure that information is accurate, up to date and available electronically and in hard copy which facilitates victim access to the service,
 - Ensure that all staff are aware of the service for victims and how it is accessed,
 - Ensure that victim concerns are addressed in Service Policy/Guideline documents e.g. hate crime, domestic violence and report preparation.
 - Liaise as appropriate with the Victims of Crime office and with designated victim support staff in the wider criminal justice system.³¹⁰

Restorative justice and related initiatives

In the Irish context, the National Commission on Restorative Justice define restorative justice as “a victim sensitive response to criminal offending, which, through engagement with those affected by crime, aims to make amends for the harm that has been caused to victims and communities and which facilitates offender rehabilitation and integration into society.”³¹¹ Restorative justice has been highlighted in the UK as a response to everyday crime, with research suggesting that, in the short term at least, it can reduce recidivism if combined with other preventive strategies. The message of taking hate crime seriously need not focus on enhanced punishment alone: evaluations indicate that restorative justice can be beneficial for tackling hate crime if victims’ participation is not pressured, and if they are informed and empowered and the facilitators are adequately trained. Its use in hate crime has not however yet been extensive.³¹²

In Ireland, the Probation Service funds two community-based organisations, Restorative Justice in the Community (formerly Nenagh Community Reparation)

³¹⁰ Gerry McNally and Eithne McIlroy, ‘Probation Practice and Offending Motivated by Hate and Discrimination: An All-Ireland Perspective’, in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave 2017) 451-2.

³¹¹ National Commission on Restorative Justice, *Final Report* (Department of Justice 2009) <<http://www.justice.ie/en/JELR/NCRJ%20Final%20Report.pdf/Files/NCRJ%20Final%20Report.pdf>> accessed 8 November 2017.

³¹² Mark Walters and Rupert Brown with Susann Wiedlitzka, *Preventing Hate Crime: Emerging Practices and Recommendations for the Improved Management of Criminal Justice Interventions – Final Report* (Sussex Crime Research Centre and the International Network for Hate Studies 2016) 23-24. <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=preventing-hate-crime-final-report.pdf&site=539>> accessed 8 November 2017.

and Restorative Justice Services (Tallaght), both of which offer an offender reparation panel and a victim offender mediation service.³¹³ Between them they engaged with 430 offenders in 2015. Other restorative justice measures supported and funded by the Probation Service include family conferences under the Children Act 2001, and the Circles of Support and Accountability service offered by PACE (a voluntary organisation which supports people through the transition from prison and offending into a non-offending lifestyle) which “operates on restorative justice principles to recruit, train and support volunteers to work in a group setting with people convicted of harmful sexual behaviour who are classified as being of medium to high risk of re-offending.”³¹⁴

None of these has yet focused specifically on hate crime, however, McNally and McLroy also point to other work of more direct value to hate crime intervention being carried out in Northern Ireland. The results are being shared with their southern counterparts.

In Ireland, the Probation Service published its Restorative Justice Strategy: *Repairing the Harm – A Victim Sensitive Response to Offending in 2013*.³¹⁵ Informed by, amongst other things, the Victims’ Directive, the Strategy explicitly mentions “faith community”, “local community members” and “national Non-Governmental Organisations” as indirect stakeholders in the process.³¹⁶ However, it does not specifically mention victims of hate crime or their particular needs at any point, despite the requirements of the Victims’ Directive in this context. It appears that, although valuable work is now being carried out in Ireland and although close relationships have been developed with Northern Ireland partners, the service is yet to express these explicitly at the highest policy level where values can be promoted in an organisation and where large-scale goals are set out and structures created.

³¹³ Emily Sheary, ‘What Does Justice Require? Participant Views of Restorative Justice’ (2016) 13 Irish Probation Journal 161.

<[http://www.probation.ie/EN/PB/0/46A893B2DC16C0438025805E002B682F/\\$File/EmilySheary_IPJ.pdf](http://www.probation.ie/EN/PB/0/46A893B2DC16C0438025805E002B682F/$File/EmilySheary_IPJ.pdf)> accessed 8 November 2017.

³¹⁴ Office of The Secretary General, Department of Justice and Equality, Comptroller & Auditor General Special Report 93: Annualised Hours in the Prison Service and Appropriation Accounts 2015- Vote 21: Prisons (*Oireachtas.ie*, 2017) <http://data.oireachtas.ie/ie/oireachtas/committee/dail/32/committee_of_public_accounts/submissions/2017/2017-03-09_correspondence-noel-waters-dept-of-justice-and-equality-Len.pdf> accessed 8 November 2017.

³¹⁵ The Probation Service, *Restorative Justice Strategy: Repairing the Harm: A Victim Sensitive Response to Offending* (Probation Service, 2013) <[http://www.probation.ie/EN/PB/0/9586ED794EEFA7C5802580270044D2E5/\\$File/Restorative+Justice+Strategy+November+2013.pdf](http://www.probation.ie/EN/PB/0/9586ED794EEFA7C5802580270044D2E5/$File/Restorative+Justice+Strategy+November+2013.pdf)> accessed 9 November 2017.

³¹⁶ *ibid* 6.

CHAPTER 6: SUMMARY CONCLUSIONS AND RECOMMENDATIONS

This chapter presents a synopsis of the conclusions of the research on the lifecycle of hate crime in Ireland and our recommendations. We have some general recommendations, which are followed by recommendations which address each stage in the criminal justice process:

GENERAL RECOMMENDATIONS

- Publication of an updated Garda Diversity and Inclusion Strategy.
- The reform of the Prohibition of Incitement to Hatred Act 1989, in particular to address cyber hate and to protect a more inclusive range of groups.
- The introduction of legislation incorporating aggravated offences and sentencing provisions specific to hate crime as recommended in *'Out of the Shadows' Legislating for Hate Crime in Ireland*.
- The development of mechanisms to gather and publish data regarding the prosecution and sentencing of crimes which have been flagged as having a discriminatory motive.

RECORDING

Despite significant improvements to the recording of discriminatory motives under PULSE 6.8, it is clear that police recorded data continues to underrepresent the true figure of hate crime in Ireland, and that this figure is impacted both by underreporting and underrecording. The State does not routinely gather data on the prosecution or sentencing of crimes with a discriminatory motive. Although the establishment of the discriminatory motive as a mandatory question under PULSE 6.8 and the expansion of the range of categories recorded represents a significant improvement, there remains no marker for motivations informed by hostility towards a faith other than Islam or Judaism or by hostility towards someone of the basis of an absence of religion or faith.

While training has been provided to some members of the police on the technical update, no training or documentation had been provided to establish a shared understanding of the meaning of the categories of discriminatory motivation, 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 GISC call takers.

Although the Garda HQ Directive No 04/2007 retained perception as the criterion for recording a racist discriminatory motive, this principle has not been mainstreamed within the service: interviewees differed in their belief as to whether it is the victim, or the police officers' perception, which determines recording, and more specifically, whether evidence of a hate element is required to legitimate the recording of a discriminatory motive. The Directive does not address other recording categories.

More generally, the data on discriminatory motivations gathered via PULSE are intended to be used to inform victim support, rather than investigation or prosecution. 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. In our view, such a protocol would increase the opportunities for police officers to investigate a hate element, and for prosecutors to present it in evidence in court. More generally, the discriminatory marker, as it becomes more established, should be valued for the intelligence it can provide with respect to geographic and demographic distributions of hate activity, as well as the repeat victimisation of individual victims. On this last point, the absence of a discriminatory motivation question from non-crime databases is limiting.

We recommend

- All members of An Garda Síochána and GISC to be given access to documentation and training on protocols for recording a discriminatory motive, including elaborated definitions of the recording categories and the perception test and protocols governing the circumstances in which a discriminatory motive should be recorded.
- The addition of recording categories for religion and for lack of religion or belief.
- A public awareness campaign to encourage members of the public to

report crimes with a discriminatory motivation, and to ask for the discriminatory motivation marker to be selected when they do so.

- The discriminatory motivation question to be added to all non-crime databases and Garda Victim Service Offices' staff to be provided with contact details for authorities responsible for addressing common non-crime hate incidents.

INVESTIGATION

Just as in the case of legal professionals, members of the police in Ireland describe their work as investigators as driven by legislation: the law determines the charges which can be brought, which in turn determine the proofs which must be investigated. As such, while gardaí held that the hate element will sometimes be considered during the course of an investigation, the vast majority were of the view that it is not a priority at the investigation stage. Both gardaí and legal professionals overwhelmingly responded positively to the question as to whether hate crime legislation should be introduced, arguing that it would provide the criminal justice process the tools with which it could address hate crime. Solicitors and barristers also perceived that deficits in resources, training and policy impact the investigation of the hate element. Certainly, victims were not always clear that prejudicial language, a key indicator of a hate element, was included where statements were taken. Some victims also perceived that police did not respond in a timely fashion to their identification of evidence.

Interviews with victims highlighted the need for education regarding the Irish criminal justice process. It was found that victims were often under the impression that they had made a statement, having made only a complaint.

Although the ELO/LGBT Officer is the only cross divisional specialist role within An Garda Síochána with a specific remit in respect to assisting in the investigation of hate crimes, all gardaí interviewed who addressed the role were clear that, in practice, the remit of the ELO/LGBT Officer is limited to victim support, and that they had no

investigative function. Despite the extensive responsibilities assigned to the role, of which hate crime is only one part, these are not full-time positions and only two days training is allocated to introduce the initiate to their responsibilities. Training is provided by two sections of An Garda Síochána - The Garda Racial and Intercultural Diversity Office and the national police training college. We found that each was unfamiliar with the content of the other's curriculum. More generally, we found varying levels of awareness of the role among gardaí whom we interviewed.

We recommend

- The development of protocols for the explicit communication of the discriminatory motive marker to the responsible investigator and the prosecution.
- Published guidelines on the investigation of a crime with a discriminatory motive.
- The development of a specialist hate crime investigation unit in each of the six Garda regions.
- Training on the investigation of crime with a discriminatory motive to be provided to all stakeholders involved in crime investigation.
- Full scale review of the role of the ELO/LGBT Officer.
- Automatic inclusion of specialist officers into hate crime investigations.
- An expansion of the number and range of specialist liaison officers available nationwide and a programme of continuous professional development for officers occupying these roles.
- The incorporation of specialist liaison officer roles into rostering arrangements, such that at least one specialist officer will be available 24/7 in each of the 109 Garda districts.
- The development of a formal link between the work of specialist officers and the work of the Garda Victim Liaison Offices.

PROSECUTION

Criminal justice professionals interviewed in the course of this research have varying understandings of the construct of hate crime. Although the majority hold that a hate element should be an aggravating factor, they differ in their evaluation of what constitutes that element. While barristers and solicitors sometimes defined hate crime quite narrowly, gardaí, who prosecute most crime in Ireland, tended to take a broader understanding of the concept from a general policing perspective.

There are no policies on how hate crimes are to be prosecuted in courts. The Director of Public Prosecution's guidelines on how the decision to prosecute should be taken include little explicit reference to hate crime motivations. Paragraph 3.6 states that prosecutors shall "comply fully with the relevant requirements of the European Union Victims' Directive 2012/29/EU as discussed in Chapter 12" and:

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

Some of the general guidance provided with respect to assessing the strength of the evidence and assessing if the public interest requires that a prosecution be pursued are relevant to hate crime, but there is nothing specifically which addresses hate crime.

It is unsurprising therefore that criminal justice professionals interviewed in the course of this research spoke to inconsistencies in the manner in which the criminal justice process in Ireland treats hate crime. Prosecutors identify varying approaches to whether and how to introduce evidence of a hate element to the court, some of

which result in the minimising or disappearance of the hate element, and include examples of the hate element being pleaded out.

The majority of criminal justice practitioners interviewed were of the opinion that there were deficiencies in ensuring that the hate element of an offence was presented to the sentencing judge. The majority of those who were of the opinion that the hate element of a crime was not properly prosecuted, pointed to the absence of legislative and policy guidance as leading to training gaps. The second reason given for the hate element of an offence not being presented in court by prosecutors was expediency – that is, where it was perceived that it is preferable to prosecutors to secure a guilty plea in the absence of a hate element rather than go to trial to ensure that the hate element is included.

Only two gardaí, speaking about their approach to prosecuting crimes, were of the view that the hate element of a crime would always be introduced. A majority of garda interviewees stated that, in the absence of legislation, the presentation of the hate element at prosecution stage depends on the individual approach taken by the prosecutor.

This research identified two key points at which the hate element may be lost to the court: first, as aforementioned, PULSE records identifying a discriminatory motive are unlikely to be available to prosecutors. Prosecutors interviewed for this research were clear that the PULSE report would not be part of the prosecution file, and that the presence or absence of a discriminatory motivation marker on a case would have no impact on the manner in which the case was prosecuted.

Second, the hate element may be disappeared through pre-trial discussions in which either a plea or ‘facts’ are agreed. The majority of legal practitioners were clear that 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. Conversely, gardaí were much more likely to say that the hate element would not be lost in these circumstances, with only a small minority stating that they would accept a plea in return for the hate element being eliminated from the facts presented to the court. The DPP does not, to our knowledge, have any policies in relation to plea bargaining specific to hate crime.

It is noteworthy that almost all participants were of the view that, while legal arguments could be made to exclude evidence of a hate element, it was highly unlikely that such arguments would be successful. This viewpoint extended to the requirement that any evidence admitted is probative to the case, and is not prejudicial to the rights of the defendant; and the requirement for contemporaneity.

We recommend

- The development of specific guidelines on prosecuting hate crime by the Office of the Director of Public Prosecutions, with particular reference to:
 - Considerations in determining whether to prosecute a hate crime
 - Introducing a hate element in court
 - Pre-trial discussions (plea agreements) in respect to hate crime
- Published guidelines for prosecutors working with victims, witnesses or offenders in a case involving a hate element.
- Bespoke training for all prosecutors on identifying, recognising and prosecuting hate crime.
- Full scale review of the role of gardaí as prosecutors.

SENTENCING

The Court of Appeal has stated that where a racist element is present in a case, it should be considered an aggravating factor in sentencing. However, there is no obligation on members of the judiciary to enhance a sentence due to the presence of a hate motivation. The Irish government has stated that judges will exercise their

discretion to aggravate a sentence where a hate motivation is evident. Nonetheless Ireland has been criticised by ECRI and others for failing to ensure that such motivations are consistently taken into account during sentencing.

When asked to detail their recall of specific cases, criminal justice professionals reported inconsistencies in the manner in which hate crime was treated at the point of sentencing. While, our interviewees in the majority agreed that a hate element will aggravate a sentence if presented in evidence, there was not complete agreement on this point with some defence practitioners citing examples of cases in which evidence of a hate element had been presented but they believed it had not been taken into account. In addition, there were a small number of reports of judges enhancing sentences on the basis of a perception of a hate element which was not presented in evidence.

In respect to the question of whether a recidivistic hate crime offender - in the scenario we presented, a racist offender – would, or could, be treated by the criminal justice process as such, practitioners were in agreement that, unless the individual had been charged under the 1989 Act, it would not be apparent on the criminal record of the defendant that they had committed hate crimes in the past. Gardaí interviewed were clear that even were an individual minded to investigate whether any of the prior convictions were hate motivated, it would involve significant amounts of work, and the hate element would not necessarily be apparent on PULSE.

More generally, in the absence of legislation, we believe that there are concerns regarding the treatment of a hate element as an aggravating factor in the context of the principle of certainty, particularly regarding the range and definition of protected characteristics, and extent to which the hate element need be a factor in the motivation for the offence. Legal professionals spoke tangentially to this issue, though previous offenders raised it as a serious issue of concern, and one they believed would give rise to an appeal. The declaratory impact of associating a hate element with an offender should be understood by the court, particularly where that hate element has not been appropriately substantiated/evidenced.

We recommend:

- The introduction of a specific statutory provision which requires courts to consider the hate element of an offence in all cases.
- Bespoke training for all judges on recognising and sentencing hate crime.

POST-SENTENCING

While the vast majority of all criminal justice interviewees were of the view that the hate element of a crime should be considered an aggravating factor at sentencing, a significant minority of practitioners (but only one garda) emphasised the importance of rehabilitative measures in the context of hate crime offending, with some particularly placing emphasis on restorative justice measures.

Neither the Probation Service of Ireland's Strategic Plan for 2015-2017³¹⁷ nor the most recent annual report³¹⁸ address hate crime.

We recommend:

- Including the development of provisions with respect to crimes with a discriminatory motive in the Probation Service of Ireland's next Strategy Plan.
- Continued co-operation with the Northern Ireland Probation Service towards this end.

PROHIBITION OF INCITEMENT TO HATRED ACT 1989

Our research finds that the Prohibition of Incitement to Hatred Act 1989 is manifestly not fit for the purpose of addressing hate crime.

To be effective as a hate speech provision, the 1989 Act requires reform, taking particular account of the context of cyber hate crime, as well as ensuring that victims

³¹⁷ The Probation Service, *Lasting Change through Offender Rehabilitation: Probation Service Strategy 2015–2017* (Probation Service 2017) <[http://www.probation.ie/EN/PB/0/454E459245D70BA58025802E00474308/\\$File/Probation+Service+Strategy+2015-2017.pdf](http://www.probation.ie/EN/PB/0/454E459245D70BA58025802E00474308/$File/Probation+Service+Strategy+2015-2017.pdf)> accessed 10 November 2017.

³¹⁸ The Probation Service, *Annual Report* (Probation Service 2016) <[http://www.probation.ie/EN/PB/0/E2CB568BA6CBC8F68025811E0032F923/\\$File/FINAL%20-%20Probation%20Service%20Annual%20Report%202016.pdf](http://www.probation.ie/EN/PB/0/E2CB568BA6CBC8F68025811E0032F923/$File/FINAL%20-%20Probation%20Service%20Annual%20Report%202016.pdf)> accessed 10 November 2017.

generally are protected. The Act ignores incitements to hatred against other communities, most obviously disabled people, intersex and transgender people, asylum seekers and refugees, and, arguably, the Roma community.

We recommend

- The reform of the Prohibition of Incitement to Hatred Act 1989, in particular to address cyber hate and to protect a more inclusive range of groups.

DECEMBER 2017

Hate & Hostility Research Group - University of Limerick – *(Ireland)*
In IUSTITIA *(Czech Republic)*
Irish Council for Civil Liberties
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Umeå University *(Sweden)*
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