



Criminal Justice (Aggravation by Prejudice) Bill 2016: A Review

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A Introduction

The Deputies are to be commended for recognising the harm that is caused by hate crime in Ireland, and the need for, as the Law Reform Commission has stated, “an overarching reform of hate crime” (Law Reform Commission, 2016: 118). A number of civil society organisations (CSOs) have called for the introduction of legislation addressing hate crime for over a decade, so the introduction of the Criminal Justice (Aggravation by Prejudice) Bill 2016 is to be welcomed in that it recognises the need for statutory attention to this issue.

This review will give a brief introduction to the expertise of the Hate and Hostility Research Group at the University of Limerick and address some issues regarding legislating in relation to hate crime generally, as well as some of the key concerns of the Group in relation to the proposed Bill. In preparation for this review, we also consulted with Dr Mark Walters, University of Sussex, leading British expert on hate crime law and co-Director of the International Network for Hate Studies about the proposed legislation and his comments are also included in this review. It should be noted that this review is preliminary in nature: a more comprehensive evaluation can be provided on request. For example, there are, of course, constitutional concerns that need to be considered in the context of hate crime legislation (including the guarantee of equality, the freedom of expression and the requirement for certainty): these are considered in a separate paper.

B The Hate and Hostility Research Group

The Hate and Hostility Research Group is the only research group in Ireland dedicated to the study of hate crime. Conducting translational research on hostility towards difference, it is an interdisciplinary group led by Dr Amanda Haynes of the Department of Sociology and Jennifer Schweppe from the School of Law. We work closely with a number of CSO partners to progress policy and legislative change in hate crime in Ireland as well as being affiliated with the International Network for Hate Studies. Both

Amanda and Jennifer are considered international experts in the area of hate crime, and have published widely in academic and other venues on the subject: they are, for example, the co-editors of the forthcoming book *Critical Perspectives on Hate Crime: Reflections from the Island of Ireland* published by Palgrave Macmillan. The work of the HHRG in the area of hate crime has been funded by the European Commission, the Irish Research Council and the Irish Council for Civil Liberties.

In 2014, the HHRG was commissioned by the then Minister for State Aodhán Ó Ríordáin and the Working Group on Hate Crime to investigate the need for, and potential form of, hate crime legislation in Ireland. Funded by the Irish Council for Civil Liberties, the findings of the research, as well as the Heads of a Bill, were published in 2015, in *Out of the Shadows: Legislating for Hate Crime in Ireland*. The Bill has the support of the Working Group on Hate Crime as well as being the subject of the popular #lovenothate campaign. The campaign is currently supported by over 60 organisations including SIPTU, IMPACT, the No Hate Speech Campaign, including umbrella organisations representing commonly targeted communities such as ENAR Ireland, GLEN and TENI.

C Formulating Hate Crime Legislation: A Brief Comment

We know from the international experience that there are three key elements that need to be considered when formulating a legislative response to hate crime:

- determining which victim groups are to be protected;
- deciding whether the “hate” element will be addressed by way of aggravated offences or aggravated sentencing;
- determining how “hate” will be established, and what “hate” is understood to be.

Different common law jurisdictions take different approaches to all these issues, and in considering the Criminal Justice (Aggravation by Prejudice) Bill 2016 under these three headings, we variously refer here to the experiences in England and Wales, Canada, and Northern Ireland.

For the purposes of clarity, the Criminal Justice (Aggravation by Prejudice) Bill 2016 is referred to throughout this review as “the 2016 Bill”; the draft Heads of Bill developed by the HHRG in consultation with the Working Group on Hate Crime will be referred to as “the WG Bill”.

D The Criminal Justice (Aggravation by Prejudice) Bill 2016

1. Victim Groups

The 2016 Bill is to be commended for its breadth in terms of the victim groups it protects, and not discriminating between identity groups as legislation in, for example, England and Wales does. However, in this regard there are numerous shortfalls:

- There is no specific reference to membership of the Traveller community, though there is reference to “race, colour or ethnic origin”. The Traveller community in Ireland is not recognised as an ethnic group, meaning that its members would be excluded from the protection of the Bill. We would also argue for the specific naming of the Roma community in hate crime legislation.
- It is unclear whether the Bill is definitively inclusive of people with developmental disabilities, such as autism, or those with chronic illnesses.
- The Bill specifies that “‘transgender identity’ includes transvestism, transsexualism, intersexuality or having changed gender under the Gender Recognition Act 2015.” Although the specific inclusion of intersex is positive, there is no mention of agender or gender fluid persons. We believe that the protection should be afforded to individuals on the basis of their “gender identity and gender expression” as per the language used in the Victims’ Directive.

As well as these concerns with respect to the inclusivity of the definitions of those groups named, there are further issues we would raise:

- There is no reference to religion, belief or lack thereof, which, given the incidence of Islamophobic hate crime, the international significance of antisemitic hate crime, and the recognition of both as priorities at a European level, is a significant omission.
- In omitting to specify gender as a protected ground, the Bill excludes persons who are targeted on the basis of their cisgender identity. For example, the Bill excludes from protection women who are subject to misogynistic hate crime, a category recently afforded protection by police forces in England and Wales.
- Sexual orientation might include “or none” for the purposes of inclusivity, though this still excludes individuals who are pansexual.
- The inclusion of residence status would usefully extend protection to those who are targeted because of their status as refugees or asylum seekers.
- There is no reference to protecting people who are targeted on the basis of their age, excluding from protection those who are targeted because of their status as elderly people or children for example.

We would recommend consideration of the full list of protected groups specified in the Victims’ Directive, and indeed it is this list that we draw upon in the WG Bill.

2. Aggravated Offences v Aggravated Sentencing

The decision as to whether address to hate through sentencing or by creating new offences is perhaps the most crucial decision to be made in the context of hate crime legislation. The 2016 Bill represents a hybridisation of aggravated sentencing and substantive offences and borrows significantly from Scottish legislation.

The research conducted by the HHRG in 2015 finds that in the Irish context it is necessary to name an offence in order for system to recognise it, reflecting the experiences of other jurisdictions: put simply, addressing hate crime through aggravated sentencing provisions simply does not work. This was recognized by ODIHR which stated, “a penalty enhancement, while easier to implement, may not fulfill the expressive function of recognizing and condemning a prohibited bias” (OHIHR 2009, 36).

Informed by research with barristers, solicitors and, in particular, members of An Garda Síochána, as well as by the experiences of other common law jurisdictions, the HHRG concluded that new offences have the greatest potential to address hate crime because they provide for a system-wide response to the criminalisation of the hate element of crimes in a manner which enhanced sentencing alone does not. The creation of new offences will create public and professional awareness of the criminalisation of the hate element of crime. They will require changes to the recording of crime, including permitting the recording of hate crime offences. They will require charges to be brought which name the hate element of the crime and reflect its character. They will require that the hate element of crime is addressed in court. They will permit the identification of hate crime offenders, including repeat offenders, for the purposes of sentencing, Garda vetting and educative or restorative interventions. They will ensure that the ‘hate’ element is not pleaded out. None of these outcomes are likely or indeed possible in the absence of dedicated offences.

In Northern Ireland, where enhanced sentencing provisions are used within a common law system more similar to ours than the hybrid Scottish system, many commentators argue that they are not effective:

“March 2007 - October 2010 there were only 11 occasions when the judge imposed an enhanced sentence under the Criminal Justice (No2) (Northern Ireland) Order 2004” (PBNI, 2010: 80)

“... current legislation and practice does not work ...” (Robbie McVeigh, forthcoming)

“ ... evidence suggested that the system was struggling to develop a co-ordinated response and to effectively hold perpetrators of hate crime offences to account.” (Neil Jarman, forthcoming)

“Criminal Justice Inspection Northern Ireland asserted that conviction rates were impacted by two key factors. The first was a requirement on the prosecuting barrister to formally highlight the aggravating factor when prosecuting a case, rather than be able to rely on a flag on the case file. If the aggravating factor was not verbally raised by the barrister it was not recorded by the court. The second was the failure of the Court Service to adequately record that the aggravating factor was raised in a prosecution, even if it was highlighted by the prosecuting barrister (CJINI, 2007 32-35). Conversely, the NIACRO research found that while there were shortfalls in the Court Service recording of hate crime offences, the main problem appeared to have been the failings of the prosecuting barrister in highlighting that they were seeking to prosecute a hate crime. Where this did not happen the case would not be recorded by the court as a hate crime and if a conviction was secured it would exclude the possibility of the judge increasing the sentence for the aggravating element.” (Neil Jarman, forthcoming)

In short, we assert that utilising aggravated sentencing alone is neither useful nor desirable: the legislation will not be used and will create an expectation in community groups for protection which will not be available to them.

3. What is “hate”

There are two elements to how “hate” is established in legislation. The first is how “hate” is defined. The term “bias” is favoured across the United States of America, while England and Wales prefers to use “hostility” as a synonym for “hate”. Northern Ireland similarly uses the term “hostility” in its legislation. Canada uses “bias, hostility or hate”. The proposed Bill uses the terms “malice or ill-will”. The term “malice” is quite outdated. The term “ill-will”, while useful in some contexts, is perhaps a relatively low threshold to meet in the context of a criminal statute and may not indeed reach the threshold required for criminal conduct. In the WG Bill, we define hate as “hostility, prejudice, bias or hatred”.

The second issue that hate crime legislation should address is the manner in which the “hate” is evidenced during the course of the commission of the offence. Again, different jurisdictions use different terminology. In England and Wales and Northern Ireland, there is a differentiation made between “motivation” and “demonstration” of hostility. The WG Bill uses a relatively sophisticated blend of motivation and demonstration in its legislation, utilising the “demonstration” test only for those offences to which expression of hatred is a fundamental component (such as public order offences, or criminal damage for example). The 2016 Bill utilises the term “evinces”. The only example of this term being used in an Irish legislative context is in the Garda Síochána (Discipline) Regulations 1926: it is not a term generally associated with criminal legislation in this jurisdiction.

Finally, the use of the term “shall” in relation to the fettering of judicial sentencing discretion is generally considered inappropriate: the term “should” is more generally accepted in the Irish context.

E Comment from Dr Mark Walters, co-Director of the International Network for Hate Studies

Dear Deputies,

I write to you concerning the proposed Criminal Justice (Aggravation by Prejudice) Bill 2016. I note that the legislation is a redrafting of the Scottish legislation aimed at tackling hate crime. The Houses of the Oireachtas should note that the original Scottish legislation was drafted in the context of a hybrid legal system (civil and common). This is generally not considered to be immediately adaptable to a common law system such as Ireland or England and Wales. There are a number of issues with this legislation, including that it uses outdated language (such as “malice”) and the fact that legislation applies at sentencing only - as against a more purposeful re-shaping of the criminal law. Indeed, the Law Commission for England and Wales has only recently highlighted that addressing hate crime through sentencing alone can be deeply problematic. Rather than drawing on Scottish legislation as guidance, the authors of the Bill might consider looking to England and Wales for advice on how to legislate against hate crime - a jurisdiction that records and successfully prosecutes more hate crime offenders than any other country in the world. I am aware of the Bill proposed by the Hate and Hostility Research Group (HHRG) which has conducted extensive research in this area and has reviewed the laws of other countries across the world. I would strongly recommend that the Houses of the Oireachtas take the Bill drafted by the HHRG into consideration as being far more appropriate to the Irish context, indeed it goes further in its scope than even England and Wales.

Yours sincerely,

Dr Mark Walters
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University of Sussex

F Legislative Options

The HHRG in its most recent Report *Out of the Shadows* included the draft heads of a Bill on hate crime. The Heads draw on, but develop and improve on current legislation in England and Wales based on the recent Law Commission report, as well as making that legislation fit for purpose in an Irish context based on extensive interviews with criminal justice practitioners in Ireland and our own expertise in Irish criminal law and procedure. International experts said of the proposals:

[The] proposals will bring Ireland fully in line with EU and broader international standards, and their innovative approach in developing a set of specific offences will put Ireland at the forefront of international legislative practice, showing what can be done to support the effective investigation and prosecution of this most damaging violence, thus meeting the needs of victims and practitioners alike. Joanna Perry, co-chair of the International Network for Hate Studies

I believe that the proposals in this report provide a positive route to improving state responses and, whilst the implementation will always need strong and inclusive leadership, these proposals will provide the foundations for an effective solution. Mike Ainsworth, Chair of the Independent Advisory Group to the United Kingdom Government

G Conclusion

The HHRG notes that the development of effective hate crime legislation has proved challenging in many jurisdictions and consequently we have engaged in extensive research and consultations in Ireland, and with respect to experiences in other common law systems, to inform our proposals for reform. We note in particular the concerns expressed by the Law Reform Commission of England and Wales (2014: 12) that inappropriate hate crime legislation is likely to have adverse consequences for victims. In addition to being ineffective, “Worse still, they may result in hostility aggravation not being addressed at all in the final outcome of cases ... It send the wrong message to potential hate crime perpetrators, offenders and wider society about the seriousness with which the law takes hate crime.”

The Deputies are again to be commended for seeking to address hate through the criminal law. They recognise, as one of our interviewees said to us, “... *theft you are going for the value of the object but [with hate crime] you are going for the value of the person...*” The Deputies are to be applauded for attempting to ensure that Ireland is not found to be in breach of its obligations under Article 4 of the EU Framework Directive on Combating Racism and Xenophobia. We look forward to working with you in developing this issue further.