



Northern Ireland Hate Crime Review

Consultation Response

ON BEHALF OF THE CHURCH OF IRELAND CHURCH AND SOCIETY COMMISSION



CHAPTER 1: HATE CRIME: DEFINITION AND JUSTIFICATION

PART 1: DEFINITION

QUESTION 1:

What do you consider to be hate crime?

A hate crime is any crime committed with the intent or likelihood of causing harm to the target motivated by the perpetrator's prejudice, malice, hostility, fear or animosity towards them based on their membership, perceived membership or association with a marginalised group or community

QUESTION 2:

Do you consider that the working definition of a hate crime discussed in this chapter adequately covers what should be regarded as hate crime by the law of Northern Ireland?

Mostly yes

Please give reasons for your answer.

While broadly a useful definition we feel it may be worthwhile to include "exploitation" among the list of "acts" which can qualify as a hate crime.

It may also be worth considering if the notion that hate speech must be considered separate from hate crime. The suggestion that there is no "non-hate" version of incitement to hatred, and thus it is not a hate crime ignores that there exists "non-hate" incitement to crime in general. Soliciting to murder is a statutory crime which could surely be committed with a hate motive, and it seems in error to suggest that such a crime is impossible.

Recent research¹ has highlighted the potential for "stochastic terrorism"² and the role of online "thought leaders", whose presence on popular platforms such as Twitter and YouTube provides a wide potential audience (usually of young people), in shifting the Overton window³ and gradually conditioning their audience towards extremist views, "funneling" their audience towards more and more extreme commentators who further perpetuate this conditioning and radicalisation. While hate speech laws may be the appropriate place to focus on combatting this, the consultation paper rightly points out:

"hate speech laws are somewhat unusual for the purpose of the criminal law. So, the Public Order (Northern Ireland) Order 1987 (the 1987 Order) is limited in its scope and prosecutions are taken infrequently."

It may be worth considering if such a division is still appropriate in a world where such incitement is becoming increasingly common and powerful, or if they should be considered as hate crimes themselves.

PART 2: JUSTIFICATION FOR HATE CRIME LAW

QUESTION 3:

Should we have specific hate crime legislation in Northern Ireland?

Yes

Please give reasons for your answer.

We feel that hate crime is particularly damaging to the sense of community, cohesion and social order as it strikes at the ideal of equality between all members of a community. In a time of changing demographics it acts to create and further cement division, isolation and bias towards vulnerable, marginalised or otherwise "outsider" groups in a way which is damaging to the social wellbeing of the community as a whole. It is important that there be a clear, effective and useable framework around which hate crime can be dealt with by the legal system, and which victims can understand and trust. CASC is confident that this is best achieved through specific and concise legislation to govern hate crime.

QUESTION 4:

Should hate crimes be punished more severely than non-hate crimes?

Largely, yes

Please give reasons for your answer.

¹ Rebecca Lewis *Alternative Influence: Broadcasting the Reactionary Right on YouTube*, Data & Society (2018) <https://datasociety.net/output/alternative-influence/>

² The use of mass public communication to broadcast rhetoric, usually against a particular individual or group, which incites or inspires acts of terrorism which are statistically probable but happen seemingly at random.

³ The range of ideas that the public will accept, i.e. those ideas that are not considered too extreme or radical.



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As noted above, the effects of hate crimes are hugely damaging. This damage is not limited just to the direct victim but radiates outward by signalling to the wider society that members of certain groups are, or are at least perceived by some to be “less than”: Less worthy of respect, less worthy of compassion, less worthy of empathy and ultimately less worthy of an equal place in society. Even those who do not share the belief of the perpetrator will potentially isolate the victim group, out of fear of being a victim themselves for showing support. The victim group will similarly be shown that there are those who do not feel they are deserving of equal treatment, which can encourage further division.

If not acted upon and treated as a serious problem hate crime can form a vicious cycle of hatred and division which damages the wellbeing of the entire community. As such CASC feels it is essential that hate crimes be considered more severe than an equivalent crime which is not motivated by hate and are punished accordingly. It should be noted, however, that for more minor crimes or those that demonstrate a more nascent xenophobia toward the victim group and in which there is seen potential for the perpetrator to be rehabilitated it should not always be that the punishment is inherently more severe. This is not to say that the punishment should be unmodified by the hate motivation or that it should be somehow lessened, but where possible CASC would wish that offenders who show the potential for reform should be sentenced in an appropriate way, potentially through a more restorative rather than a purely punitive justice method.

CHAPTER 6: OPERATION OF THE CRIMINAL JUSTICE (NO. 2) (NORTHERN IRELAND) ORDER 2004

QUESTION 5:

Do you think the enhanced sentencing model set out in the Criminal Justice (No. 2) (Northern Ireland) Order 2004 should continue to be the core method of prosecuting hate crimes in Northern Ireland?

No (If No, go to Question 7 (Chapter 7))

Please give reasons for your answer.

The existing model, which acts to contextualise the nature of the crime committed and modify the sentencing appropriately is in the opinion of the Church and Society Commission a logical means of prosecuting hate crimes. However, as the consultation document clearly outlines, the enhanced sentencing model has many drawbacks, both in transparency and how it fails to appropriately “label” the crime that has been committed. As such CASC would feel that adopting something like the Scottish model, which acts to elegantly modify an existing “basic” crime with a hate-based aggravation that is reflected in how the case is investigated by police, argued at trial, and sentenced would be a more appropriate core to hate crime legislation and prosecution. The primary advantage of this model over the English and Welsh legislation (The CDA 1998 and the CJA 2003) is that rather than setting out specific individual hate crime “versions” of a selection of “basic” crimes it instead provides a more concise and understandable hate crime framework by allowing the aggravation of any offence by the relevant statutory aggravation. Such a model also opens the door to introducing a separate aggravation, which could be similarly instituted, to provide for crimes perpetrated against or exploiting vulnerable individuals.

QUESTION 6:

If you think the enhanced sentencing model should continue to be the core method of prosecuting hate crimes in Northern Ireland, do you think it requires amendment?

N/A

CHAPTER 7: OPERATION OF THE CRIME AND DISORDER ACT 1998 AND THE CRIMINAL JUSTICE ACT 2003 IN ENGLAND AND WALES AND THE MODEL IN SCOTLAND

QUESTION 7:

Do you think the statutory aggravation model as used in England and Wales and Scotland should be introduced into Northern Ireland law?

Yes (If Yes, go to Question 8)

QUESTION 8:

If you think that the statutory aggravation model used in England and Wales and Scotland should be introduced into Northern Ireland law, should it be introduced as well as or instead of the enhanced sentencing model?

CASC agrees that it would be important that the hate-based aggravation be represented in both the conviction and the sentencing, as such a statutory aggravation model (in particular that used in Scotland, which seems to be proving the most effective at accomplishing the goal for which it was introduced, and avoids pitfalls in the English and Welsh models) must contain



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appropriate enhanced sentencing (or *altered* sentencing, if a restorative model is to be applied in some circumstances) to properly reflect the seriousness of the crime.

QUESTION 9:

Irrespective of whichever model is used (aggravated offences or enhanced sentencing), should there be specific sentencing guidelines for hate crimes in Northern Ireland?

Yes

Please give reasons for your answer.

It is important to avoid the situation present in some English and Welsh cases of overloading courts with too many frameworks and guidelines on one issue, and so legislation and any guidelines should be clear and easily understood, however, CASC would feel that it is worthwhile to provide a guideline on sentencing for hate crimes, so as to help ensure appropriate and equitable sentencing in cases.

QUESTION 10:

Irrespective of which model is used (aggravated offences or enhanced sentencing provisions), do you think that courts should be required to state in open court the extent to which the aggravation altered the length of sentence?

Yes

Please give reasons for your answer.

CASC agrees that sentencing (and the court system as a whole) should be transparent and understandable to everyone involved. As such it is quite appropriate for the court to state clearly how aggravation altered the sentencing of a relevant case. This will provide a clear demonstration to the offender, the victim and the public of the significance of the hate crime aspect of the crime committed.

CHAPTER 8: PROTECTED GROUPS - SHOULD ADDITIONAL CHARACTERISTICS BE ADDED?

QUESTION 11:

Should gender and gender identity be included as protected characteristics in Northern Ireland hate crime legislation?

Yes

Please give reasons for your answer.

There is clearly potential for a person to be the target of a hate crime where their gender or gender identity represents at least a partial motivating factor. There are many recent examples of abuse, threats, harassment and even fatal violence against female political representatives in the U.K. The disparity between this and abuse directed towards male representatives gives a clear indication of gender playing a part in the motivation of these crimes. In addition the rising tide of anti-feminist reactionary movements has given rise to what are unequivocally and often self-identified anti-women groups, which bear all the hallmarks of more traditional hate groups. As such CASC agrees that it is only reasonable to include gender and gender identity as protected characteristics

In addition it is worth considering the definition of gender used in this characteristic. It should be sufficiently defined as to recognise the existence of and protect cisgender people but also intersex, transgender and non-binary people. An appropriate definition, which recognises that for many people gender is a spectrum made up of many different, fluctuating societal norms and that it is more often a person's gender *identity* or gender *expression* by which they are perceived by can alleviate the need to specifically define separate protections for transgender, non-binary and other gender non-conforming individuals, while still ensuring they are adequately protected by the legislation.

QUESTION 12:

Should Transgender identity be included as a protected characteristic in Northern Ireland hate crime legislation?

Yes

Please give reasons for your answer.

CASC agrees that there is a need to protect transgender individuals and no doubt that they are victims of hate crime. The current policy of pursuing hate-based cases against trans individuals in Northern Ireland as being based on "sexual orientation" is wildly outdated and in need of amendment, being as it is at odds with not just U.K. legislation on the matter but also the PSNI's Appropriate Language Guide which itself notes that while "because of common experiences of discrimination and shared use of social spaces, there are many links between lesbian, gay, bisexual and trans communities" it remains "important not to confuse the issue of gender identity with that of sexual orientation; the majority of trans people identify their sexual orientation as heterosexual."⁴

⁴ PSNI Equality and Diversity Unit, "The Appropriate Language Guide for the workplace and wider community" (2013), 14 <https://www.psni.police.uk/link/b5ed9b26b6074fd0bfff7f7938a2e07fb.aspx>



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Transgender individuals should be protected under Northern Irish hate crime legislation but it should be noted (as stated above) that if gender or gender identity are included as protected characteristics then they should be defined in such a way as to include trans individuals. They do not need to be specifically labelled as a separate category, and choosing to include them under the category of gender is likely to be the most up-to-date way of doing so and more “future-proof” than regarding gender/gender identity as a single protected characteristic and transgender identity as a distinct separate protected characteristic.

QUESTION 13:

Should Intersex status be included as a protected characteristic in Northern Ireland hate crime legislation?

Yes

Please give reasons for your answer.

As with women and transgender individuals CASC agrees it is important that intersex individuals are protected under hate crime legislation as they have historically been victims of hate crime. A sufficient definition of gender or gender identity/expression should cover the majority of cases related to intersex persons but it may be worth providing a separate protection for intersex persons as they do encounter unique issues, particularly regarding coercive, forced or otherwise involuntary sterilization and other ethical and human rights abuses.

QUESTION 14:

Should age be included as a protected characteristic in Northern Ireland hate crime legislation?

No

Please give reasons for your answer.

In CASC’s discussion with Judge Marrinan he noted the idea of age as a protected characteristic as one which had been raised to him. It cannot be argued that such hate crimes never occur, however age is usually seen as providing only an avenue for opportunistic crime rather than being a motivation or source of animosity. CASC feel that while crime and particularly exploitation against the youths and the elderly is a significant issue it is not one which should inherently dealt with in hate crime legislation. CASC would favour the introduction, as discussed in the Scottish Hate Crime Review, of a separate model for aggravating offences regarding crimes and exploitation targeting particularly vulnerable members of society.

QUESTION 15:

Should a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability be introduced into Northern Ireland hate crime legislation?

Introduced, but ideally separate from hate crime.

Please give reasons for your answer.

CASC agrees that providing a statutory aggravation related to crimes perpetrated against and the exploitation of a victim who is a vulnerable member of society would be a positive move for Northern Irish legislation. Such legislation need not define any specific relevant groups such as age and could instead be used on a case-by-case basis by the judiciary.

However, while the effects of crime against vulnerable individuals or member of vulnerable groups are broadly similar it may be worth introducing this aggravation separate from hate crime legislation. This would remove the need to fundamentally alter the nature of current hate crime legislation from one which applies to cases of identity hostility into one which shows merely discriminatory selection, while still providing censure for behaviour which seeks to exploit the most vulnerable elements of society. Lord Bracadale, in the final report of his review of Scottish hate crime legislation addressed this and, in chapter 4⁵ of the Scottish Hate Crime Review made the following recommendation:

“Recommendation 11

The Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.”

QUESTION 16:

Should homeless status be included as a protected characteristic in Northern Ireland hate crime legislation?

Yes

Please give reasons for your answer.

Homeless individuals should be protected from hostility motivated and bias crime but it may be more appropriate for their protection to fall under the above discussed aggravating offence for targeting/exploitation of vulnerable members of society. However, given that the effects of the crimes are so closely aligned to those of hate crime, that crimes perpetrated against homeless individuals do often come from a place of malice and contempt and homelessness is not a “chosen” characteristic like political affiliation it would not be wrong to include it in hate crime legislation and would not risk diluting the meaning of such legislation.

⁵ Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (2018), 49
<https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report>



QUESTION 17:

Do you consider any other new characteristics should be protected in Northern Ireland hate crime legislation other than those mentioned above?

Yes/No

Please give reasons for your answer.

QUESTION 18:

Do you consider that intersectionality is an important factor to be taken into consideration in any new hate crime legislation?

Yes (If Yes, go to Question 19)

Please give reasons for your answer.

It is significant to note that an intersection of characteristics can be relevant to motivating or partially motivating a crime which would be considered a hate crime. Sectarianism is a classic example of an intersectional bias. It would not always be possible to argue that someone committed a sectarian crime against another because the victim was a protestant or a catholic, or because they were unionist or a nationalist or because they were of Irish or English ancestry nor because they supported one football team, political party or public figure over another. Rather it should be noted that hate crimes can be motivated in part or completely by the combination of many individual factors. Likewise, a person in a specific instance may not be targeted because they are transgender or because they are part of an LGBT group or because of the colour of their skin but because the intersection and combination of all of these factors and what they represented as a whole motivated their being the target of a hate crime.

QUESTION 19:

If you consider intersectionality to be an important factor to be taken into consideration in any new hate crime legislation, what is the best way to achieve this?

Please give reasons for your answer.

It must be noted in any new legislation that no one element of these identifiers may wholly encompass the reason for the crime and may not, alone, be considered a clear enough indication of hostility against the target but that the intersection of many aspects was the reason behind the targeting of the crime. An example of implementing this in existing legislation could be, using The Criminal Justice (No. 2) (Northern Ireland) Order 2004, Article 2, (3) for example a simple addition to each clause noting that individual characteristic or group memberships are not strictly required to be considered in isolation:

- (1) *For the purposes of this Article an offence is aggravated by hostility if—*
 - (a) *at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on—*
 - (i) *the victim’s membership (or presumed membership) of a racial group;*
 - (ii) *the victim’s membership (or presumed membership) of a religious group;*
 - (iii) *the victim’s membership (or presumed membership) of a sexual orientation group;*
 - (iv) *a disability or presumed disability of the victim;*
 - (v) any combination of the above; or**
 - (b) *the offence is motivated (wholly or partly) by hostility towards—*
 - (i) *members of a racial group based on their membership of that group;*
 - (ii) *members of a religious group based on their membership of that group;*
 - (iii) *members of a sexual orientation group based on their membership of that group;*
 - (iv) *persons who have a disability or a particular disability;*
 - (v) any combination of the above;**

This could go a long way towards clarifying that the victim and prosecution do not need to pick an individual aspect of a victim’s identity, where they are a member of many marginalised groups or possess many characteristics of those groups, to hang the entire motivation of the crime upon.

CHAPTER 9: TOWARDS A NEW HATE CRIME LAW FOR NORTHERN IRELAND

QUESTION 20:

If the enhanced sentencing model remains as the core provision for dealing with hate crime in Northern Ireland, should it be amended to provide for the recording of convictions on the criminal record viewer?

Yes

Please give reasons for your answer.

CASC agrees with the point noted in the consultation paper in sections 7.32 and 7.33⁶ appropriate recording of convictions is essential to allowing police and courts to deal with perpetrators appropriately and to tackle recidivism.

⁶ Independent Hate Crime Review, *Hate Crime Legislation in Northern Ireland - an Independent Review: Consultation Paper* (2018), 85-86



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QUESTION 21:

Do you believe there is a need to introduce a statutory aggravation model of hate crime law similar to that which exists in Scotland and in England and Wales under the Crime and Disorder Act 1998?

Yes (If Yes, go to Questions 22 -25)

Please give reasons for your answer.

As clearly outlined in the consultation document, the current mechanism of using only enhanced sentencing to deal with instances of hate crime as is the core of Northern Ireland's current approach is not sufficient in isolation. We believe a statutory aggravation model appropriately covers many of the weaknesses, as noted above.

QUESTION 22:

In dealing with an aggravated offence, should the court state on conviction that the offence was aggravated?

Yes

Please give reasons for your answer.

CASC feels that just as hate crime is a "signalling" crime, so to must the court signal to perpetrators, victims and wider society that such crimes are not considered acceptable by the public in Northern Ireland. Offenders must understand that what they have done is not just legally wrong but morally unacceptable. Stating the aggravating factor in the offence clearly on conviction acts to reinforce this. Additionally it shows clearly to the victim that it was not simply the basic offence for which the perpetrator was convicted but that the hateful motivation is considered important and relevant also and that the justice system understands the importance of that distinction to the victim.

QUESTION 23:

In dealing with an aggravated offence, should the court record the conviction in a way that shows that the offence was aggravated?

Yes

Please give reasons for your answer.

As noted above, it is important to all parties involved that such an offence be recorded, as in the Scottish system, to appropriately censure the behaviour of the perpetrator. Recording the conviction as such also provides more information in the case of recidivist individuals to allow them to be treated appropriately.

QUESTION 24:

In dealing with an aggravated offence, should the court take the aggravation into account in determining the appropriate sentence?

Yes

Please give reasons for your answer.

CASC feels it is appropriate that the manner in which hate crime violates Northern Irish social ideals and the profound impact it has on victims and their community means that it should, as with the current enhanced sentencing system in Northern Ireland, be treated as different and as appropriately more significant than the "basic" crime which was committed. Additionally as noted below in our response to Question 26 CASC would suggest that in some cases this aggravation can signal that a partially or entirely different form of justice, such as a restorative approach, could be used in certain cases where it is considered that it may have a more positive impact in rehabilitating the offender and bringing a sense of justice to the victim.

QUESTION 25 (Part 1):

In dealing with an aggravated offence, should the court state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference?

Yes

Please give reasons for your answer.

It was noted by Judge Marrinan in CASCs meeting with him that the existing legislation is underutilised and/or its use is underreported by the courts where it is used. It was agreed that one way to combat this would be to more clearly require courts to state a) that the aggravation was taken into account in sentencing and if so b) how it altered the sentence.

OR

QUESTION 25 (Part 2):

In dealing with an aggravated offence, should the court otherwise state the reasons for there being no such difference?

Yes

Please give reasons for your answer.



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As above, we agree it is important for the court to identify how the aggravation changed sentencing and, to ensure transparency, if the aggravation did not change it the reasoning for this should also be required to be clearly stated.

QUESTION 26:

Do you consider that aggravated offences should be recorded as such in criminal justice records so that statutory agencies and others are aware of the hostility element of an individual's criminal history?

Yes

Please give reasons for your answer.

CASC believes it is important to note that no individual is born with a hatred or malice towards a group of people. Hostility and hatred such as that which motivates hate crime is learned behaviour and is likely to escalate, rather than appearing fully formed. It is significant that offences aggravated by hate be recorded and be clearly available to statutory agencies so that an escalating pattern of behaviour that may demonstrate that an individual is becoming increasingly radicalised can be treated appropriately. This allows for sentencing to reflect on how previous sentencing succeeded or failed in combating this radicalisation. It would also allow police to utilise a problem profile understand how certain events (such as a demonstration or parade by a particular group) may be likely to trigger the individual to reoffend.

CHAPTER 10: ADEQUACY OF THE CURRENT THRESHOLDS FOR PROVING THE AGGRAVATION OF PREJUDICE

QUESTION 27:

If any new hate crime law in Northern Ireland follows the statutory aggravation model as in Section 28(1) of the Crime and Disorder Act 1998, do you consider that the current thresholds of (a) demonstration of hostility, and (b) motivation are appropriate or should there be a third threshold: the "by reason of" threshold?

A third threshold should be added, or the motivation threshold should be replaced

Please give reasons for your answer.

CASC agrees that the motivation threshold is unreasonably difficult to prove in practice and that this damages the effectiveness of the CDA 1998 as a result. A "by reason of" threshold or indeed a mixed group selection and animus model would be appropriate to include. Alongside including a separate statutory aggravation relating to the victim's vulnerability would likely improve the legislation and avoid the idea of "diluting" hate crime offences.

QUESTION 28:

If you consider that there should be a third threshold, do you consider that this should be in addition to the two thresholds of "demonstration of hostility" and "motivation", or should there be a third threshold to replace the motivation threshold?

Replace

Please give reasons for your answer.

It is not clearly essential to choose one path over the other but, especially in the case of a mixed selection/animus phrasing it is most likely appropriate to replace the motivation threshold. It is unlikely, given the history of how difficult the motivation threshold is to prove, that it will see much use if it is retained and so removing it might be the best option so as to keep the legislation as clear and simple as possible, and to avoid leaving it as a "trap" which less experienced prosecutors might wade into.

QUESTION 29:

Do you consider that there should be a statutory definition of the term "hostility"?

No

Please give reasons for your answer

(including, if appropriate, a suggested definition of the term "hostility")

While a strictly defined term is appealing to courts, as it provides a clear and quantitative guideline to when it is or is not appropriately fulfilled it is, in this case, possibly best left undefined. It must be understood that hate crimes and their effects on the victim are primarily seen in their emotional impact. There is a risk in attempting to define every element of the legislation that one loses the purpose for which it was created. It would be better to work to reflect the importance of what the experience and impact of the crime on the victim was in the statute than to attempt to define hostility.

QUESTION 30:

Whether or not you believe that the term "hostility" should be defined or not, do you consider that this term should be expanded to include other terms such as "bias, hostility, prejudice, bigotry or contempt"?

Yes

Please give reasons for your answer.

While individual terms listed above may be more or less appropriate, the problem of defining any one term is likely to be lessened rather than magnified by providing more reference terms as together they have the potential of conveying the intended meaning of the statute more clearly. Again it should be noted that, for an issue so tied to emotion, however it is worded the intent of the



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law and the behaviour that it wishes to discourage is the most important factor and it should be phrased so as to be clear in intent, rather than to act as a semantic maze which must be navigated.

Obviously CASC understands that the nature of court proceedings means that any word used and the specific, technical application of the will be important, but to the best of their ability legislators should convey the intent of the law so that the court can apply it appropriately.

CHAPTER 11: STIRRING UP OFFENCES

QUESTION 31:

Do you consider there is merit in adding equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 to the Public Order (Northern Ireland) Order 1987?

Yes

Please give reasons for your answer.

As noted in the consultation paper these sections are useful and relevant in allowing threats, abuse, hate speech, and harassment to be tackled and classified appropriately. As there is no direct equivalent in the Public Order (Northern Ireland) Order 1987 their inclusion would be worthwhile.

QUESTION 32:

Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be retained?

No

Please give reasons for your answer.

While this defence was clearly intended to prevent the criminalisation of private conversations that others, outside of the intended "audience", may have (intentionally or unintentionally) overheard it is clearly outdated and cannot be considered reasonable in its current form. With the perspective of time and particularly with the advent of the internet it is clear that one can quite stir up hatred, arouse fear and incite dangerous behaviour from the comfort of one's own home. Especially with the internet providing the potential for private individuals to broadcast their writing and speech to a potentially unlimited audience instantaneously and with little to no barrier to entry and no required middle-men.

QUESTION 33:

Do you consider the requirement that the Director of Public Prosecutions gives consent to any prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 to be necessary and appropriate?

Yes

Please give reasons for your answer.

Given the potential risks involved with criminalising speech, even that which disturbs or offends, it is worthwhile to have an individual in place to act as an extra safeguard on misuse of the legislation.

QUESTION 34:

Do you consider the term "hatred" as the appropriate test to use in the Public Order (Northern Ireland) Order 1987?

Uncertain

Please give reasons for your answer.

CASC agrees that there are strong arguments against lowering the thresholds for such a crime and care must be taken to ensure freedom of speech and freedom of expression are maintained. However, the requirement that the DPP consent to any prosecutions taken under part III of the order does already act as something of a "safety net" to catch spurious cases. Ultimately it is important to ask if the legislation, rarely used as it is, is solving the problem it was intended to solve and whether it was intended to act as a rarely used tool against only the most extreme cases or to be more commonly applied.

QUESTION 35:

If gender, gender identity, age or other groups are included in the protected groups, should they also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987?

Yes

Please give reasons for your answer.

CASC agrees that it would be important that any amendment to one element of hate crime/hate speech legislation in NI be reflected in the other elements of legislation which it operates in tandem with. It would be unreasonable to create a situation where, for example, an assault motivated by racism and an assault motivated by transphobia could both be prosecuted as hate crimes and considered equally serious in the eyes of the court but a speech which attempts to stir up hatred or arouse fear based on racism would be considered worthy of prosecution but a near identical speech based on transphobia would not be considered illegal. If it is decided that a group is vulnerable, marginalised and at risk of hate motivated crime then they should be protected to the same extent as any other protected group.



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QUESTION 36:

Should the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation be specifically added as defences to Part III of the Public Order (Northern Ireland) Order 1987?

No

Please give reasons for your answer.

As noted above, the order is currently rarely used and has two high “barriers to entry” in the form of the “hatred” test and the requirement for the DPP to consent to any prosecution. In addition article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provides a host of freedoms of expression which are protected. With these factors in mind it seems reasonable to argue that further specific defences are not needed for regarding religion and sexual orientation. It would be particularly damaging to the public perception of the courts if the order both offered a protection for certain groups against hateful incitement while simultaneously making it impossible, in practical terms, to use the order to for that purpose.

QUESTION 37:

Should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the Public Order (Northern Ireland) Order 1987 be retained in law or repealed?

Retained.

Please give reasons for your answer.

The issue of same-sex marriage in Northern Ireland is a contentious one about which many feel quite passionately. The defence which has been added is carefully worded and notes that discussion or criticism of “marriage which concerns the sex of the parties to marriage is not to be taken of itself to be...” considered intended to stir up hatred or arouse fear. The specific note that such a discussion or criticism is not to be considered “of itself” to fall under the remit of the order still leaves room for the order to be used in cases where such a criticism or discussion is expressed in a particularly threatening, abusive or insulting manner. CASC agrees that this is an appropriate way to legislate for a contentious topic which is important to many and likely to arouse passions as it allows for discussion which, while potentially hurtful to some, is an important aspect of any democratic debate while not offering a blanket protection to any who wish to use the discussion as a vehicle to abuse or threaten others.

QUESTION 38:

Under Article 9(1) of the Public Order (Northern Ireland) Order 1987, should the test remain referring to a person using “threatening, abusive or insulting words or behaviour or displaying any similar written material which is threatening, abusive or insulting” or should the words “abusive” or “insulting” be removed from the test for the commission of the offence?

Retain

Please give reasons for your answer.

Changing the test to refer only to words or behaviour which is threatening would seem like a significant change which would further narrow the applicable cases for the order to be used in. Retaining the words “abusive” and “insulting” allows for incitement of sufficient extremity which, while not directly threatening or using threatening terms, is still be considered to be stirring up hatred or fear or likely to stir up hatred or fear to be appropriately charged. Given the increasing tendency for hate groups to use so-called “dog whistles”⁷ and otherwise couch hateful and even violent rhetoric in seemingly inoffensive terms, symbols and phrases it is important that laws regarding hate speech be able to appropriately prosecute all cases where the intent is to stir up hatred or arouse fear.

QUESTION 39:

If there are to be offences dealing with the stirring up of hatred against protected groups, do you consider that there needs to be any specific provision protecting freedom of expression?

No

Please give reasons for your answer.

Freedom of expression is an essential aspect of the democratic process, however it should be noted that with the European Convention of Human Rights and other similar overriding guidelines and legislations it is not essential to reiterate the freedom in every relevant piece of legislation. Rather the courts should be trusted to judge the law in an individual case against the inherent right to expression of the individual.

⁷ A form of communicating using coded language which, to the general populace has one meaning but which carries an altered/additional/more specific meaning to a target group. These are widely used in politics (see, for example, those who state their commitment to “family values” in United States politics to signal a traditional, conservative viewpoint, opposing ideas such as same-sex marriage without outright stating support for any particular conservative policy that could be argued against) and among hate groups can act as both a way of communicating ideas which would not be welcome in public discussions and as a furtive shibboleth of sorts.



CHAPTER 12: ONLINE HATE SPEECH

QUESTION 40:

Should social media companies be compelled under legislation to remove offensive material posted online?

Yes

Please give reasons for your answer.

Major social media companies have proven, time and again, that when it is in their interest they are capable of swiftly and efficiently removing any content they wish to. There should be no reason why legislation cannot require a system to quickly remove any content deemed to be in breach of legislation. Care should be taken not to create overly draconian requirements which would be open to significant misuse, but this is true of any law. Smaller companies may require some leeway in compliance, but the large social media networks, which are run by a small handful of wildly profitable companies are well able to meet demands far in excess of what would be required. The extent of the proliferation of several social media platforms renders them almost indistinguishable from a broadcaster (excepting that most operate at a larger scale and have orders of magnitude greater reach) and they should be regulated in the same manner.

QUESTION 41:

Are there lessons from the English and Welsh experience of the Public Order Act 1986 that may apply for Northern Ireland?

Yes/No

Please give reasons for your answer.

QUESTION 42:

Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be amended/removed?

Yes

Please give reasons for your answer.

Given the advent and proliferation of the internet and social media it is no longer reasonable to argue that being within ones dwelling can be reasonably believed to have had “no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling”.

QUESTION 43:

Should the term “publication” in the Public Order (Northern Ireland) Order 1987 be amended to include “posting or uploading material online”?

Yes

Please give reasons for your answer.

If the order is to remain up to date in how it is to be implemented it will be necessary to expand it to include material posted publicly to the internet. Similar laws in other jurisdictions have been either replaced or updated for similar reasons.

QUESTION 44:

Should there be an explicit defence of “private conversations” in the Public Order (Northern Ireland) Order 1987 to uphold privacy protection?

Please give reasons for your answer.

QUESTION 45:

Should gender, gender identity, age and other characteristics be included as protected characteristics under the Public Order (Northern Ireland) Order 1987?

Yes

Please give reasons for your answer.

As noted above, there is a strong argument for including gender identity and other characteristics as protected characteristics in hate crime law and if they are to be recognised in one element of legislation it is important that their recognition be uniform.

QUESTION 46:

Should the Malicious Communications (Northern Ireland) Order 1988 be adapted to deal with online behaviour?

Yes

Please give reasons for your answer.

The equivalent legislation in other jurisdictions has been successfully adapted for this purpose. The spirit of the order is clearly intended to cover any form of article or message which is sent to another person and so it is entirely reasonable to adapt it to online behaviour.



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QUESTION 47:

Should the wording of the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 use terms such as “grossly offensive”, “indecent” and “obscene”?

No

Please give reasons for your answer.

Cases such as the DPP v James McConnell (2016) NIMag 1 clearly show that extreme cases which would be reasonably expected to be charged under these acts have been deemed to not reach the high threshold set by the terminology of “grossly offensive”. Compared with the requirements of public order legislation, which only need to show that the perpetrator intends or is likely to “stir up hatred or arouse fear” it could be argued that there is quite a disparity in thresholds based on precisely which statute is used to prosecute the case. Regardless of what level the threshold is set at, whether it is decided that speech should be criminalised only in the rarest and most carefully chosen circumstances or that hateful speech is to be more generally censured there should be some level of reasonable parity between the laws governing it.

If not outright replaced it may be worthwhile to amend the somewhat outdated terminology, particularly in relation to what is considered indecent or obscene, which would aid in making the threshold clearer to all.

QUESTION 48:

Are the offences under the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and Communications Act 2003 too broadly drafted and require some modification to clarify and narrow their application?

Yes

Please give reasons for your answer.

While specificity can be of use in many elements of legislation the broad wording of these pieces of legislation is clearly intended to provide a blanket censure of attempting to harm another through means of a letter or other message. This broadness relies upon the court to appropriately judge the extent of the legislation, but avoids being overly specific and requiring a patchwork of amendments to cover loopholes or edge cases.

However, it is clear that the legislation is in many cases unusably broad. The scenario it creates, where the justice system places artificial limits upon itself to ensure it does not use the legislation improperly is not appropriate. A modification of the legislation with the intent of updating and clarifying its role, while eliminating some of the unintended applications would be ideal.

QUESTION 49:

Should online harm be part of a general law applying to hate crime?

Yes

Please give reasons for your answer.

Overall CASC agrees that one of the most difficult aspects of existing hate crime and hate speech legislation in Northern Ireland is how fragmented it is. An ideal scenario would see fewer overall applicable statutes. Including online harms and the malicious use of online messaging would be a good first step to coordinating and combining the myriad legislation in use.

Specifically it seems appropriate that harm caused through hateful and malicious online behaviour should be considered at the same level as any other form of verbal assault or harassment which is aggravated by hate. This may indeed be the clearest and most concise manner of implementing it in law.

QUESTION 50:

Is the current law contained in the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 sufficiently clear to protect freedom of expression?

No

Please give reasons for your answer.

As stated above, it could be argued (and the consultation paper also notes) that the broadness of the malicious communications act and orders requires the court and prosecution service to limit itself in how they choose to apply them. This suggests that the legislation is overly open to abuse. The 2003 act seems clearer in many ways but still retains a very broad scope. That being said it is important to remember that freedom of expression guaranteed in human rights legislation outside of these and could be seen as a sufficient limit.

CHAPTER 13: SECTARIANISM AND HATE CRIME LEGISLATION IN NORTHERN IRELAND



QUESTION 51:

Would you support a specific reference to the term ‘sectarian’ within any new hate crime legislation?

Yes

Please give reasons for your answer.

Sectarian divisions, animosity and hostility are an undeniable issue in Northern Ireland. While some of the currently protected categories, such as religion and ethnicity can be used to categorise sectarian incidents (and are important in understanding the roots of the division), this broad categorisation ignores the nuances of the issue and creates potential issues in the form of a defence that argues that an incident was not driven by ethnic or religious hatred but instead cites an aggravation related to political/sporting/class animosity. In addition, such a categorisation would skew the data in those categories.

For these reasons it is likely to be useful to specifically reference sectarian incidents in new hate crime legislation and provide clarity around the use of other categories to ensure they are understood to relate to non-sectarian incidents. Ideally this should provide useful data on both sectarian incidents and non-sectarian religion-based incidents.

QUESTION 52:

Should the list of indicators for sectarianism (i.e. religious belief and political opinion) be expanded?

Yes

Please give reasons for your answer.

While specifically defining sectarianism may prove more complex and troublesome than useful a list of potential indicators would be likely to be useful. Particularly in that it allows incidents which are not themselves traditionally considered hate crimes (those based on political, class, sporting, and even local geographic differences) but are understood to be extensions of sectarian division, or which are often seen as synonymous with a particular “side” of the issue, to be correctly classified as sectarian incidents (if that is understood by the police/PPS to be the true nature of the animosity) and treated correctly.

CHAPTER 14: REMOVING HATE EXPRESSION FROM PUBLIC SPACE

QUESTION 53:

Should the law relating to the duties of public authorities to intervene to tackle hate expression in public space be strengthened or further clarified?

Yes

Please give reasons for your answer.

CASC agrees that there should be further clarity of the positive action expected, required and deemed appropriate of public authorities in intervention.

CHAPTER 15: RESTORATIVE JUSTICE

QUESTION 54:

Should restorative justice be part of the criminal justice process in dealing with hate crime in Northern Ireland?

Yes

Please give reasons for your answer.

CASC agrees that there is an understandable desire among many for a situation where “less serious” offenses could be treated in a restorative manner rather than a more traditional punitive/retributive system. Alongside improvements to mechanisms for recording hate crime convictions this could have a potential to lead some offenders out of a potential cycle of hate. So long as this process has the consent of the victim it seems appropriate to employ.

QUESTION 55:

Should restorative justice schemes be placed on a statutory footing?

If needed

Please give reasons for your answer.

Ideally, restorative justice should be part of the general options available to and functions of the court system. Guidelines regarding its use in any case would exist and a mechanism of oversight and monitoring would be in place. Given that no clear mechanism exists to implement the practice in adult offenders in Northern Ireland it may require it to be introduced at a statutory level, but where possible this would be a more fundamental change to the justice system.

QUESTION 56:

Should there be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime?

Yes (If Yes, go to Question 57)

Please give reasons for your answer.



If restorative justice is to be implemented at a state level as part of sentencing guidelines there will need to be a central agency with the authority and capability to oversee the process and ensure it is implemented appropriately each time.

QUESTION 57:

What role do you envisage for the accredited community based restorative justice organisations in the delivery of adult restorative justice for hate crime?

Please give reasons for your answer.

These community based organisations will have invaluable expertise in delivering restorative justice and how to do so most effectively, as well as the impact it has on their local area, alongside more general local expertise. They would be ideally suited to act in an advisory role to a central agency.

QUESTION 58:

Do you consider diversion from prosecution is an appropriate method of dealing with low level hate crimes as per the practice in Scotland?

Yes

Please give reasons for your answer.

A diversion method would be ideal so long as it is based on the consent of the victim and, as per the Scottish system, failure to engage by the offender will see the case prosecuted as normal.

CHAPTER 16: VICTIMS

QUESTION 59:

Do you have any views as to how levels of under reporting might be improved?

Yes

Please give reasons for your answer.

Under-reporting is a complex issue which is driven by a lack of trust and a fear of retribution or social stigma. Improving the situation will require a great effort to improve clarity and transparency in the system, so that victims understand the process involved and the potential outcomes. Trust can only be fostered through community involvement by public authorities and by allowing victims to see that the process works and produces concrete results. The development and use of "problem profiles" related to hate crime in Northern Ireland, recommended by the NI Policing Board in 2017⁸ seems to have been an area in which the PSNI has made progress and shows a desire for further improvement⁹. This sort of activity is likely to see a positive impact both on the incidence of hate crime and upon reporting, as local groups see that their assistance is valued and may prove a model for further improvement.

Ultimately CASC agrees that under-reporting is an issue which must be tackled in an ongoing manner and it is unlikely that any legislative change will be able to improve the situation directly.

QUESTION 60:

Do you consider that the Hate Crime Advocacy Scheme is valuable in encouraging the reporting of hate crime?

Yes

Please give reasons for your answer.

All evidence available seems to clearly establish that the HCAS, in tandem with Victim Support NI, has increased community engagement and provided essential support to victims. This has already shown improvements in reporting and has the potential to continue to do so going forward.

QUESTION 61:

Do you consider that the Hate Crime Advocacy Scheme is valuable in supporting victims of hate crime through the criminal justice process?

Yes (If Yes, go to Question 62)

Please give reasons for your answer.

In this aspect too it seems clear that the HCAS has been a valuable program.

QUESTION 62:

How might the current Hate Crime Advocacy Scheme be improved?

Please give reasons for your answer.

⁸ Northern Ireland Policing Board *Thematic Review of Policing Race Hate Crime* (2017), 125
<https://www.nipolicingboard.org.uk/sites/nipb/files/media-files/race-hate-crime-thematic-review.PDF>

⁹ Northern Ireland Policing Board *Annual Report and Accounts* (2019), 83



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The clearest difficulty that the HCAS currently faces is in regards to funding, which itself seems to be tied to the scheme being treated somewhat as still a pilot programme. It is likely that the scheme could be fundamentally improved by providing a clear consistent form of reliable funding (likely directly through the Department of Justice) and cementing it as an ongoing part of the justice system's approach to tackling hate crime and helping the victims of hate crime.

QUESTION 63:

Do you consider that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis as opposed to the present annual rolling contract model?

Yes

Please give reasons for your answer.

As noted above this funding model is a key problem with the scheme. The rolling contract creates unnecessary instability, staff turnover and loss of institutional expertise by not providing a permanent position for expert staff. Reforming this is likely to lead to a significant improvement.

QUESTION 64:

Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?

Yes (If Yes, go to Question 65)

Please give reasons for your answer.

CASC is aware of many situations in which such reporting could be damaging to the victim in a number of ways. And has the potential to invite retribution. As such there should be a process in place to protect the identity of the complainant.

QUESTION 65:

In what circumstances should a restriction on press reporting of the identity of the complainant in a hate crime be permissible? Please give reasons for your answer.

There are a range of circumstances under which it would be appropriate to impose such a restriction, but the best approach may be to provide a broad allowance for the restriction to be enforced in any case where the victim has reason to believe that the publication of their identity will lead to further harm or social exclusion.

CHAPTER 17: LEGISLATION: CONSOLIDATION AND SCRUTINY

QUESTION 66:

Do you believe that there is benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation?

Yes

Please give reasons for your answer.

Having taken some time to come to grips with the legislation as it stands, the variety of elements involved and the permutations which impact their use CASC would be quite confident that consolidation would lead to a more transparent and understandable system.

The existing legislation already shows indications that attempts have been made over the years to keep different elements in line with one another, but the unequal division of these attempts has meant that significant differences remain. The patchwork legislation also creates a great deal of difficulty by having overlap, where a single crime could be prosecuted under several different, distinct legislative frameworks, with varying thresholds and requirements, depending on the choice of the PPS.

Given the CASCs impression that the vast majority of legislation involved needs to be at the very least amended and some aspects require a complete overhaul it is also clear that such an overall consolidation and re-writing of the legislation would likely be the most efficient manner of implementing the changes CASC recommends.

Overall the implementation of a single, modern, and considered piece of legislation regarding hate crime and hate speech is likely to be of significant benefit to all parties.

QUESTION 67:

Should any new legislation on hate crime be subject to post-legislative scrutiny?

Yes (If Yes, go to Question 68)

Please give reasons for your answer.

The public has shown a clear interest in reform of the existing hate crime legislation, indicating a desire to see improvements made to how hate crimes are prosecuted in Northern Ireland. Any change made must ensure that the community is served and improvements are made. Post-legislative scrutiny and a full comparative assessment (examining if the changes have had the intended effect, if public confidence and satisfaction in the system has improved, if victims satisfaction levels have been improved



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and ultimately if there has been any resultant change in hate crime statistics) would be essential to ensuring the efficacy of any legislative change and if any additional amendments are required.

QUESTION 68:

In what way should post-legislative scrutiny be provided for?

Please give reasons for your answer.

The department of justice should follow up on the good work already done in this review and commit to an ongoing program of recording, tracking and reviewing hate crime statistics (including the elements mentioned above) for a period of perhaps five years. Any pattern of differences following legislative change should be examined. In this way the changes can be part of a larger overall scheme to tackle hate crime and ensure that the department is dealing with the issue in the most effective way possible.

RESPONDENT INFORMATION

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On behalf of the Church of Ireland Church and Society Commission.

- Rt Rev Dr Kenneth Kearon (Chair)
- Mr Ken Gibson (Honorary Secretary)