



# Hate crime legislation in Northern Ireland

Independent Review

## Executive Summary

## **EXECUTIVE SUMMARY**

### **Background to the Review**

1. In 2017, following calls for a review of hate crime legislation in Northern Ireland from a range of sources, a commitment was made by the then Minister of Justice, Claire Sugden MLA, to come back to the Assembly and confirm whether she intended to initiate a review of the legislative framework on hate crime. Whilst a response was not provided prior to the dissolution of the Assembly, a commitment to review hate crime legislation was included in the draft Programme for Government. On 6 June 2019, the *Department of Justice* announced the appointment of an independent review into hate crime legislation in Northern Ireland to be conducted by me and to write a report with recommendations for the Minister of Justice.

### **Scope of Review**

2. The remit for the Review is set out in chapter 1 of the final report.

### **Acknowledgements**

3. I have been supported by a small review team comprising of Noel Marsden, senior review manager, Ken Mack, senior information officer, Ciara McFall, Victoria Mullan and Zell Blake, office managers, and researchers Claire Milliken, Dr Arlene Robertson and Dr Katy Radford. Secretarial support was provided by Karen Caldwell.

4. I have been very fortunate in having such talented and dedicated people work with me on this review. Their professionalism, support and unstinting commitment, combined with their good sense and wisdom, made my task that much easier and I thank them for their support and encouragement throughout the review.

5. At the outset of the review, I invited a number of individuals to form a reference group to act as catalysts for developing new ideas and as a quality mechanism for the

review. This reference group was split into a Core Expert Group and a Key Stakeholder Group. These groups had a wide range of experience and expertise and worked tirelessly to assist me to complete the task.

6. In particular, I was fortunate in persuading a number of leading academics in this field from the United Kingdom and Ireland to join the Core Expert Group.

7. This group scrutinised and challenged emerging ideas to ensure that any recommendations would be robust and practicable. They gave their time freely and generously and made significant and creative suggestions throughout the whole process of the review.

8. I owe them my sincere thanks for their invaluable assistance.

9. Special thanks are also due to the members of the Key Stakeholder Group who provided valuable insights into all areas of the work.

10. I am particularly grateful to the victims of hate crime who willingly shared their experiences. Undoubtedly their 'voice' has helped form an important focus for many of the recommendations made in this review.

## **Public Consultation**

11. At the outset I took seriously the importance of public consultation as an intrinsic and valuable part of the review. This included the assistance of members of the general public, as well as those who have a particular interest in the subject, whether as those engaged in the criminal justice system or other stakeholders. The importance of hearing from victims cannot be underestimated. They provided valuable understanding and lessons to be gained from their experiences that helped inform and shape the review.

12. A consultation paper was published in January 2020.

13. The questions set out in the consultation paper were of both an open and closed nature and invited the opinions, reflections and expressions of views from individuals and organisations interested in this important public debate.

14. In addition to the consultation paper, there was an online questionnaire dealing with the key issues. Responses to the consultation paper proved to be important and the online questionnaire attracted 799 responses.

15. In total, there were 247 responses to the consultation paper. This figure includes responses from 189 individuals and 58 organisations.

16. In the case of the online responses, inevitably many responses replicated the views of other responses. Nevertheless, careful consideration was given to all the responses, notwithstanding any duplication of opinions.

17. Careful consideration has also been given to the views of all respondents in the review and these have been taken account of in making my various recommendations.

18. During the time allowed for the consultation process, the review team organised a series of public outreach events throughout Northern Ireland. This proved successful and allowed members of the public to air their views and provide an input into the review.

19. Since the work of the review began in June 2019, the review team has also met or had discussions with a large number of organisations and individuals.

20. As a result, I have had the benefit of the widest range of informed opinion, expertise and knowledge. It is important to emphasise that meeting with victims of hate crime has been particularly important in understanding how they have been affected and what their aspirations are for reformed legislation.

## **Summary of Key Findings and Recommendations**

### **Definition of Hate Crime – Chapter 3**

21. There is no clear and universally accepted definition in law or related disciplines of the term “hate” or “hate crime”.

22. As well as being a legal concept, ‘hate crime’ is also a criminological concept referring to a group of crimes as defined by national criminal laws. It is not one particular offence.

23. In legal terms, the first element of a hate crime is an act that constitutes a crime under ordinary criminal law. This may be described as the base or basic offence. Such crimes can range from petty crimes to much more serious offences.

24. The second element of a hate crime is that the criminal act is committed with a particular motive or bias. It is this crucial element of bias that differentiates hate crimes from ordinary crimes. The bias motive is the perpetrator’s prejudice towards the victim.

25. The victim is selected because of their real or perceived connection, attachment, affiliation, support or membership of a protected group.

26. It is important to distinguish between criminal expressions of bigotry (hate speech) and the commission of criminal offences with a bias motive (hate crime). Hate speech offences are generally considered separate to and apart from hate crime laws.

27. A hate crime then is defined in the first instance as a base offence which is committed with a hate or bias element; where no non-hate equivalent of the offence exists on the statute book, then no hate crime can exist.

28. The great majority of organisational respondents to the consultation paper and the online survey agree that punishing hate crime more severely is justified. Specifically, 95% of organisational responses to the consultation paper agreed. On the other hand, 90% of individuals disagreed.

29. In the online survey, 58% of respondents agreed whilst 17% disagreed.

30. I recommend the following definition of Hate Crime:

#### **Recommendation 1**

**A hate crime may be defined as a criminal act perpetrated against individuals or communities with protected characteristics based on the perpetrator's hostility, bias, prejudice, bigotry or contempt against the actual or perceived status of the victim or victims.**

#### **Scale of Hate Crime in NI – Chapter 4**

31. The problems of hate crime and discrimination against various minority communities have been observed as a persistent and recurrent problem across Northern Ireland for the past two decades.

32. Beginning in 2016, the number of racist hate motivated incidents has overtaken sectarian motivated incidents so that by 2018/19 there were no fewer than 1124 racist hate motivated incidents as against 865 sectarian hate motivated incidents.

33. In 2018/19, racist hate abuse in Northern Ireland accounted for almost half of all reported occurrences with hate motivation, while sectarian abuse accounted for just over one third.

34. In the same period just over one in ten reports of hateful abuse were of a homophobic nature, whilst other occurrences, (disability, faith/religion and transphobic) combined, accounted for less than 10% of the total.

35. The most recent available figures updated to 30 June 2020 showed a welcome reduction of 6 fewer racist incidents and 78 fewer racist crimes recorded in the 12 months from July 2019 to June 2020.

36. However, transphobic incidents and crimes saw the largest increases across all hate motivation strands, with 29 more incidents and 26 more crimes in the same period. While disability incidents fell by 10, there were 8 more crimes. The number of sectarian incidents decreased by 13 and the number of sectarian crimes fell by 19.

37. Homophobic incidents and crimes rose by 18 and 15 respectively. Faith/religion incidents fell from 45 to 36 and crimes decreased from 23 to 15.

38. The overall figures can be misleading as they appear to indicate that racial and sectarian hate crimes are similar in frequency, but when one considers the statistics in relation to the proportion of the population from a black or multi-ethnic background, the reality becomes much more concerning. In practical terms, there is approximately a one in 31 chance of being the victim of a reported racial hate incident compared to

approximately one in 1777 chance of being a victim of a reported sectarian hate incident.

39. The prevalence of hate crime in Northern Ireland and its rise suggests that Northern Ireland's society as a whole needs to address the problem of hate crime in a holistic way. Improvements in the criminal law need to be supported by educative schemes and preventative strategies.

40. As a general expectation arising from the consultation process for this review, I would advocate that all education sectors in Northern Ireland need to address the problem of hate crime, as do private and public sectors of employment.

## **Current Law on Hate Crime in NI and a Proposed New Hate Crime Model – Chapters 5 and 6**

41. At present, no specific offence of 'hate crime' exists in Northern Ireland.

42. The Criminal Justice (No. 2) (Northern Ireland) Order 2004 (the 2004 Order) was introduced to ensure that the perpetrators of offences aggravated by hostility received a higher sentence following conviction. This law enables a sentence to be increased where it is proven that the basic offence of which a person has been convicted was motivated by hostility against one of the currently protected characteristics (race, religion, sexual orientation or disability) or where the offender demonstrated hostility against one of those characteristics either at the time of committing the offence or immediately before or after it.

43. Aside from the stirring up offences referred to in part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order) and Section 37 of the Justice Act (Northern Ireland) 2011 (dealing with indecent or sectarian chanting at regulated



sports matches), provision for hate crime in Northern Ireland centres exclusively on the enhanced sentencing provisions of the 2004 Order.

44. In Scotland, the model allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. This approach does not involve the creation of new specific offences; rather, it involves an existing offence, such as an assault, being motivated by or demonstrating hostility in respect of one or more protected characteristics.

45. The current enhanced sentencing approach in Northern Ireland attracts a good deal of sharp criticism from respondents, with the great majority wishing to see significant changes in the law and the introduction of specific aggravated hate crime offences as in England and Wales or a statutory aggravation model similar to that employed in Scotland.

46. Nothing I have read or reviewed since the launch of the consultation paper in January 2020 has given me any assurance that this enhanced sentencing law is working any better now or is capable of being reformed. It is now some sixteen years since its introduction and it has been the subject of widespread criticism for many years. The review has received feedback from many stakeholders and respondents calling for its reform.

47. Arguably, one of the core issues for this Review is to decide whether or not it is better to tackle hate crime through an aggravated offence model.

48. I have concluded that an aggravated offence model, i.e. where a hate crime aggravation can be added to any offence and tried as such, is more appropriate than the enhanced sentencing model and has a much better chance of providing an effective approach for the justice system to address hate crime. It will encourage the

police to collect evidence of hate in all cases at an early stage – something that does not appear to happen under current arrangements. Among other advantages, it would also mean that the aggravation can appear on the defendant's record, but arguably also gives greater protection to the defendant as it requires the prosecution to prove the aggravation at the offence stage which fits well with the legal doctrine of fair labelling.

49. There is also a question of principle. If the element of 'hate' is left to the sentencing stage, the law seems to be treating the 'hate' element as another type of aggravation on a par with a number of other aggravating factors, such as vulnerability. However, by putting the 'hate' element into the offence stage, the legislature would be making it clear that the 'hate' element means that a different sort of wrong/harm has been caused by the defendant – one that cuts to the heart of our values as a progressive liberal society. I believe that that principle is seriously diluted in a sentencing only system.

50. I am particularly attracted to the Scottish model in terms of its simplicity and efficacy. It can deal with any offence, not just the limited suite of offences currently dealt with as aggravated offences for race and religion alone under the 1998 Act in England and Wales. The statutory aggravation provisions in Scotland do not create new offences.

51. In the current and further proposed Scottish provisions, there is a requirement on the sentencing court to state on conviction that the offence was aggravated in relation to the particular characteristic; to record the conviction in a way that shows that the offence was so aggravated; and to take the aggravation into account in determining the appropriate sentence. In addition, the sentencing court is required to 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 the reason for that difference, or otherwise, the reasons for there being no such difference. It is noted that in Scotland, charges can proceed with more than one statutory

aggravation – for example, in cases where the conduct in question is motivated by malice and ill will relating to both religion and disability.

52. In the light of what has been discussed above, and with very strong support overall from a significant number of respondents to the consultation paper in Northern Ireland, it is possible to make a number of recommendations as follows:

#### **Recommendation 2**

**Statutory aggravations should be added to all existing offences in Northern Ireland following the model adopted in Scotland and become the core method of prosecuting hate crimes in Northern Ireland. This would mean that any criminal offence could be charged in its aggravated form.**

#### **Recommendation 3**

**If the recommendation at 2 is accepted and made into law, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary and should be repealed and replaced by suitably drafted consolidated hate crime provisions.**

**For the avoidance of doubt, those Articles of the 2004 Order providing for higher maximum sentences for certain criminal offences should be retained.**

#### **Recommendation 4**

**If the recommendations at 2 and 3 above are accepted, no increase in maximum sentences for any criminal offence is required.**

#### **Recommendation 5**

**While I am content to retain the notion of “hostility”, I am satisfied that the introduction of a wider range of attitudes such as “bias, prejudice, bigotry and contempt” may well prove beneficial, particularly as there is no standard legal definition of “hostility”.**

#### **Recommendation 6**

**I am persuaded that a variation of the ‘by reason of’ threshold should be added as a third threshold to supplement the current thresholds of (a) demonstration of hostility, and (b) motivation.**

### **Recommendation 7**

**Adopting Section 28 of the Crime and Disorder Act 1998 as a starting point, its equivalent in Northern Ireland could read:**

**. . . Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this section 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, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of one or more of (name the protected characteristic/s); or**
- (b) The offence is motivated (wholly or in significant part) by hostility bias, prejudice, bigotry or contempt towards members of (name the protected characteristic/s) based on their membership (or presumed membership) of that group/s; or**
- (c) The offence is committed (wholly or in significant part) by reason of hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of (one or more of the protected characteristic/s).**
- (d) However, if:**
  - (i) the basic offence is proved but;**
  - (ii) the aggravation is not proved, the offender's conviction is as if there was no reference to the aggravation and the conviction will be solely for the basic offence.**

## **Recommendation 8**

**A consequential section to that described in Recommendation 7 should read:**

### **Consequences of Aggravation**

- (1) When it is proved that the offence is so aggravated, the court must –**
- (i) State on conviction that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated by reference to one or more of the protected characteristics;**
  - (ii) Record the conviction in a way that shows that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated, by reference to one or more of the protected characteristics;**
  - (iii) In determining the appropriate sentence, treat the fact that the offence is so aggravated as an aggravating factor that increases the seriousness of the offence; and**
  - (iv) In imposing sentence, state (a) 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 the difference or (b) otherwise, the reasons for there being no such difference.**

## ***Protected Characteristics – Chapter 7***

### **Discussion**

53. In recommending new hate crime legislation for Northern Ireland, it is also necessary to address the categories of protected characteristics and the question of whether or not there is a need for additional categories of protected characteristics to

be added. The characteristics presently protected under the law in Northern Ireland are race, religion, sexual orientation and disability.

54. These protected characteristics are the most commonly protected in comparable jurisdictions and I have concluded that these current categories of protected characteristics should remain in the law of Northern Ireland.

### ***Gender***

55. The Terms of Reference for the Review ask it to consider, in particular, whether new categories of hate crime should be created for characteristics such as gender and any other characteristics, which are not currently covered.

56. Any informed analysis of gender and gender identity involves examining the wider spectrum of gender identities which include cis gender, transgender and non-binary gender identities.

57. None of the UK jurisdictions currently include gender per se under hate crime legislation

58. The inclusion of gender in any hate crime protected category is not straightforward. Gender continues to divide advocates of hate crime laws with some recognising the misogynistic nature of much sexual and domestic violence against women, but others express concern that gender will swamp other hate crime offences and argue that it is better addressed under criminal laws already developed for this purpose.

59. As also highlighted in the commentary on chapter 13, there is also evidence that women in particular – including politicians and others in high profile positions – are at significant risk of being targeted online. This has led to calls for legislators to

give serious consideration to the inclusion of gender as a protected characteristic for any online offences.

60. There was no clear consensus from the consultation responses on the question of whether gender and gender identity should be included as protected characteristics in Northern Ireland hate crime legislation. This is an important finding and underlines the challenges of legislating in this area.

61. Organisations were split in their views, with 55% 'for' and 45% 'against' the inclusion of gender and gender identity. In contrast, 92% of individuals were opposed to the inclusion of gender and gender identity.

62. In the online survey, 77% of respondents agreed that gender should be a protected characteristic, whilst 74% felt that transgender identity should be similarly protected.

63. A further complicating factor is that, particularly in the case of organisational respondents, some held differing views on the inclusion of gender and gender identity, while others focused heavily on misogyny in their comments. Even among those supportive of gender there were differing views on whether this should cover both men and women.

64. A recurring argument was that the inclusion of gender and gender identity as protected characteristics would pose a serious threat to freedom of speech and religious expression. This view was particularly prevalent among faith sector organisations and individual respondents. These respondents argued that the inclusion of the proposed characteristics would further undermine meaningful discussion and debate, and related to this, they expressed concerns about the potential criminalisation of the expression of religious beliefs and opinions.



65. I am satisfied that gender should be covered as a protected characteristic (rather than misogyny) and that it should be neutral in the sense that using the term sex/gender would also provide protection to men.

66. There were very significant differences between organisational responses and individual responses on the issue of whether or not transgender identity should be included as a protected characteristic.

67. 73% of organisations felt that it should, whereas 97% of individual responses argued that it should not.

68. I am satisfied that transgender identity requires protection. I note that it is already protected in Scotland and in England and Wales. I think it is important, where possible, to offer similar levels of protection to groups throughout the United Kingdom. I am also satisfied that variations in sex characteristics requires protection.

## **Age**

69. Age is not a protected characteristic under the existing hate crime laws. Including it would protect all age groups, although one would imagine that the majority of such cases are likely to involve crimes against older people. Recommending older age as a characteristic would probably mean including an agreed age.

70. The majority of respondents to the review were opposed to the inclusion of age as a protected characteristic. On the other hand, 63% of respondents to the online survey agreed that age should be included as a protected characteristic.

71. The inclusion of age as a protected characteristic is likely to be controversial. However, having weighed up all the submissions received including the expert evidence submitted to the review, I consider that there is sufficient evidence of

hostility-based offences against the elderly to include age as a protected characteristic.

72. Although I have seen very little evidence to suggest that offences are being committed against young people because they are young people, it is of course possible that such behaviour does occur.

73. It is therefore preferable to adopt an approach where a protected characteristic of age generally is introduced rather than an elder specific protection.

### ***Intersectionality***

74. Intersectionality describes a situation where hate crime is experienced on more than one characteristic, for example, someone who is disabled and gay.

75. The consultation paper asked respondents whether or not they considered that intersectionality is an important factor to be taken into consideration in any new hate crime legislation. If the answer to that question was in the affirmative, it then asked for views on the best way to achieve this.

76. Not for the first time, there was a significant difference in opinion between individuals and organisations. 83% of organisations answered positively, as opposed to only 12% of individuals.

77. Among those respondents who indicated that intersectionality should be considered, it was felt that this was crucial to gaining a comprehensive understanding of the victim's experiences of hostility, prejudice and violence, and of the nuances of harm suffered.

78. Additionally, it was suggested that taking intersectionality into account in legal responses to hate crime would:

- Allow for greater visibility and understanding of the multiple factors motivating hostility;
- Reassure victims that their nuanced experience would be taken seriously by the judicial system, which, in turn, will encourage reporting; and
- Allow for specific harm on the grounds of two or more particular characteristics to be considered and addressed.

79. There is strong evidence to suggest that seeking to incorporate the notion of intersectionality into a new statutory aggravation model would create challenges in attempting to reflect more than one protected characteristic in prosecuting aggravated offences. For example, in England and Wales, if the prosecution has to deal with a case involving racial and religious hostility, this can create real difficulties.

80. The *Law Commission* provisionally suggests a novel approach to this by the inclusion of a provision allowing for the recognition of hostility based on “one or more characteristics”. Thus, the characteristics could be specified in the charge or count on the indictment, but conviction would only require the jury to be satisfied that at least one had been met on the evidence given by the prosecution.

81. I agree with the approach of the *Law Commission* in England and Wales on this important issue.

82. My recommendations on characteristics are therefore as follows:

### **Recommendation 9**

**All current protected characteristics in Northern Ireland – race, religion, disability and sexual orientation should continue to receive protection under the proposed model set out in Recommendation 2, together with the new recommended protected characteristics of age, sex/gender and variations in sex characteristics.**

**For the avoidance of doubt, the protected characteristic of sex/gender includes transgender identity.**

**The protected characteristics will be protected for all purposes including any amended public order provisions.**

### **Recommendation 10**

**Provision should be made for any future legislation to be framed in such a way as to allow any other protected characteristic to be added to the list of protected characteristics referred to in Recommendation 9 above by statutory instrument if sufficient evidence emerges to show such a group or groups are victims of hate crime or hate speech. The reasoning behind this recommendation is to allow suitable protection to be provided in the changing circumstances of the time.**

### **Recommendation 11**

**Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences referred to in Recommendation 2.**

## ***Sectarianism – Chapter 8***

83. Although the remit for this review does not explicitly reference sectarianism as requiring special attention, it does ask the review to consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.

84. The term ‘sectarianism’ does not have a precise legal meaning but is used frequently in everyday speech.

85. Sectarianism elicits differing responses from different groups in Northern Ireland, but there is a growing consensus in the community about attempting to address its causes and prevent it from continuing to act to undermine good relations in our society, bringing with it severe damage, loss of life and suffering.

86. Whilst most people claim to recognise it when they see it, defining and dealing with it in the criminal law has proved to be a much more difficult task.

87. Various definitions of sectarianism have been attempted, although none are enshrined in law. None of the possible definitions appear to be sufficiently clear to be easily adapted into a legislative formulation, capable of legal enforcement and appropriate prosecution. A common thread running through the literature on sectarianism is the presence of some form of ‘hostility’, which provides a building block towards consensus.

88. 75% of the organisations who responded to the consultation paper were in favour of there being a specific reference to the term ‘sectarian’ within any new hate crime legislation. Individual responses were different, with 65% of individuals disagreeing.

89. The current 'religious group' indicator does not adequately capture the meaning and impact of sectarianism, which extends beyond religion to include aspects of nationality and political identity.

90. Among those who were generally supportive of the expansion of the indicators, many agreed that the inclusion of 'political opinion' as an indicator was not appropriate. In particular, it was argued that this would risk capturing legitimate political speech and conflict with human rights obligations and freedom of speech, such as Article 10 of the European Convention on Human Rights.

91. It is useful to look at the experience of other relevant jurisdictions. The Working Group on defining sectarianism in Scots law in its final report of November 2018 noted that this is a complex issue. It argued that a single, intersectional, sectarian aggravator could have two key advantages for police and prosecutors. Firstly, it would streamline decision making where the accused's conduct immediately before, during or after the offence might arguably fall within racial or religious aggravations, where the hostility evinced is of a sectarian character. In addition, a single compound aggravator avoids the need for duplication where, for example, the accused's behaviour could arguably ground both the religious and a racial aggravator, observing that there is no reason in principle why a sectarian prejudice aggravator should be any more difficult to apply in practice than the existing aggravators based on religious and racial prejudice.

92. I agree with the Scottish Working Group that, although this is a complex issue, that is not a sufficient reason not to establish a workable legal definition. I am persuaded that the principle of fair labelling should apply so that criminal acts of prejudice can be named for what they are, whether that be anti-Catholicism; anti Protestantism; sectarianism or any other descriptor. Whilst I acknowledge concerns expressed by other communities, I believe that sectarianism in Northern Ireland should be specifically defined as an issue that exists between Christian communities in Northern Ireland at this time. I do not believe that enough is understood about sectarianism in relation to other communities in Northern Ireland to make the

application of 'sectarianism' to these communities meaningful in a legal or social sense.

93. I am clear that the crimes of this nature committed against such individuals, whether Catholic, Protestant or no religion, should be covered by new hate crime legislation and that the gaps in protection should be rectified.

94. I am satisfied, therefore, that the current legislative and policy construction in relation to sectarianism is not only complex, but also inconsistent and must be addressed.

95. After careful consideration, I therefore recommend as follows:

**Recommendation 12**

**The findings of the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in Northern Ireland – subject to any necessary adjustments.**

**Recommendation 13**

**There should be a new statutory aggravation for sectarian prejudice. It is recommended that the introduction of the new offence of statutory aggravation for sectarian prejudice should be carefully monitored by the proposed Hate Crime Commissioner on an annual basis and provide an annual report to the Northern Ireland Assembly.**

## ***Stirring up offences – Chapter 9***

96. The review's Terms of Reference includes the consideration of the implementation and operation of the current legislative framework for incitement offences, in particular, Part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order), and make recommendations for improvements.

97. Part III of the 1987 Order relates to 'stirring up hatred or arousing fear'.

98. Stirring up hatred is conduct which encourages others to hate a particular group. It is important to distinguish this concept from the definition of 'hate crime' discussed in the early part of this review. In a hate crime, the baseline conduct (or basic offence) is already criminal; it is the motive or demonstration of hostility that marks it out currently as a hate crime. However, a stirring up hatred offence may criminalise conduct which would not otherwise be criminal. These so-called 'stirring up' offences criminalise certain forms of hate speech and should be clearly distinguished from hate crime generally.

99. Hate speech has been defined as speech that "expresses, encourages, stirs up or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality and sexual orientation".

100. Historically, while Part III of the 1987 Order may be a key element in legislation pertaining to hate speech, it has been little used and there continues to be limited awareness of the law.



## **Freedom of expression**

101. The law in Northern Ireland does not draw any distinction whatsoever between offences relating to racial hatred and other protected groups. All are treated equally under the current law.

102. In Northern Ireland, there are no express provisions protecting freedom of expression in relation to criticism of religious beliefs. Until recently, the same could be said in relation to there being no express provision protecting freedom of expression in relation to sexual orientation

103. The consultation paper asked respondents whether the term 'hatred' is the appropriate test use in the stirring up offences under the 1987 Order. Although the great majority of respondents did not consider the term 'hatred' as the appropriate test, there was little support for lowering the bar.

104. Although the term 'hatred' sets a very high bar for prosecution, I am satisfied that this is appropriate given the seriousness of such offences and the potential impact on freedom of speech if a lower threshold was employed.

105. Another key issue in considering the operation of the 1987 Order and making recommendations for improvements is whether Northern Ireland should amend legislation to add the equivalent to Sections 4, 4A and 5 of the Public Order Act 1986. Such provisions are not currently part of the law in Northern Ireland. The relevant parts of the Public Order Act 1986 are set out in more detail in chapter 9 of this report.

106. Section 4 creates an offence of using, distributing or displaying threatening or abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence would be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence would be used or it is likely that such violence would be provoked.

107. Section 4A differs from Section 4 in that, rather than a requirement for immediate violence, an offence under Section 4A is committed if there is an intention to cause harassment, alarm or distress and that harassment, alarm or distress is caused.

108. An offence under Section 5 is committed if threatening or abusive words or behaviour or disorderly conduct are used within the hearing or sight of a person likely to be caused harassment, alarm or distress.

109. There are no direct equivalents to these provisions within the current law of Northern Ireland.

110. The consultation paper asked respondents whether 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.

111. This question provoked remarkable disagreement between the responses from organisations and the responses from individuals. A strong majority of organisations (89%) supported the proposition whereas the ten individuals who responded all disagreed. Most of those who disagreed expressed concerns about freedom of speech being curtailed and legitimate criticism or opinion being interpreted as stirring up hatred.

112. The consultation paper noted that in relation to the use of words or behaviour or display of written material under Article 9(3) of the 1987 Order no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. I observed that it was unclear why stirring up hatred inside a building is considered acceptable and the same expression outside the building would be considered an offence.

113. At the time this defence was introduced, the Internet had not been developed. It is now available very widely and in most homes. If the dwelling defence is read literally, much that is posted online could fall into this category. Even if one was to enter into a legalistic discussion about how, in this time of smart phones, a defendant could realistically argue that he had no reason to believe that his words will be seen by a person outside a dwelling, it is clear that this offence is not ideally suited to the online era.

114. The consultation paper asked whether the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should be retained. Organisations were evenly split in their views whilst the great majority of individuals supported retaining the defence.

115. It is interesting to compare these answers (to question 32) with a virtually identical question (question 42) about the dwelling defence was asked in the context of online harm.

116. In answer to question 42, 76% of organisations agreed that the dwelling defence should be amended/removed, while 63% of individuals disagreed.

117. There was general consensus among respondents that the dwelling defence was outdated, redundant and particularly problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media. The dominant view among most respondents was that the dwelling defence should be removed.

118. The consultation paper then asked respondents whether or not there should be an explicit defence of 'private conversations' in stirring up legislation to uphold privacy protection. 100% of organisations who responded supported this proposition together with 83% of individuals.

119. The consultation paper sought the views of respondents on whether the requirement that the Director of Public Prosecutions (DPP) gives consent to any prosecutions taken under Part III of the 1987 Order is necessary and appropriate. There was widespread agreement that such a provision is necessary and appropriate. Some 78% of organisations and 69% of individuals agreed.

120. There was strong consensus among respondents that this was necessary to safeguard against potential misuse of the legislation. Specific concerns focused on freedom of speech and the need to ensure that individuals were sufficiently protected from prosecution of trivial or unfounded allegations.

121. The consultation paper also sought the views of respondents as to whether or not any new proposed additional characteristics or groups should also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987. 74% of organisations agreed with this proposition as compared to only 2% of individuals who agreed.

122. With a few exceptions, individual responses were similar (in a few cases identical) and they comprised a limited range of key points.

123. The consultation paper asked: 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? A strong majority (97%) of individuals were in favour, while organisations were relatively balanced in their views, with 48% and 52% answering 'yes' and 'no' respectively.

124. Further, it asked: should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the 1987 Order be retained in law or repealed?

125. Respondents' comments indicated that they strongly endorsed retention of the express defence of freedom of expression for same-sex marriage. This view was taken by the majority of individual respondents and some organisational respondents.

126. Finally, it asked: if there are to be offences dealing with the stirring up of hatred against protected groups, does there need to be any specific provision protecting freedom of expression? 56% of organisations agreed with this proposition as did all of the individual respondents.

127. No evidence has been brought to my attention of any miscarriages of justice in Northern Ireland in the 33 years since the passing of the 1987 Order, which would justify the assertion that the protection for freedom of expression in Northern Ireland is significantly more limited than in England and Wales, or that the risks of injustice are greater in Northern Ireland.

128. When the 1987 Order was passed into law, the Internet did not exist as we know it today. As things stand, there is no explicit legislative provision for online publication. The Internet now provides unprecedented means for people to communicate and connect, providing a platform for social and political discussion, analysis and comment. It has become a major platform for online hate speech.

129. Although the provisions of the 1987 Order were not designed or enacted with the Internet in mind, the courts have shown flexibility to accommodate material posted online. In terms of jurisdiction, it makes sense to clarify this issue by stating that any material downloadable in the United Kingdom is within the jurisdiction of the UK courts – including the courts of Northern Ireland.

#### **Recommendation 14**

**The Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order Bill, should be amended to:**

- (a) include all the current and proposed protected characteristics referred to in Recommendation 9;**
- (b) introduce articles equivalent to Sections 4, 4(a) and 5 (as amended) of the Public Order Act 1986 with the proviso that the dwelling defences in those sections be removed.**
- (c) repeal Article 8 (2);**
- (d) repeal the dwelling defence in Article 9 (3);**
- (e) include a specific defence for private conversations.**
- (f) the test of hatred for the stirring up offences should remain unchanged.**
- (g) all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions**
- (h) there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics. However,**
- (i) there should be formal statutory recognition of the importance of freedom of expression Article 10 rights and all other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, in particular, rights guaranteed under Articles 6, 8, 9 and 14**
- (j) the term ‘publication’ in article 10 should be amended to include ‘posting’ or ‘uploading material online’.**
- (k) intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear:**
  - (1) where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.**
  - (2) where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:**
    - (i) the defendant’s words or behaviour were threatening or abusive;**
    - (ii) the defendant’s words or behaviour were likely to stir up hatred or arouse fear;**
    - (iii) the defendant knew or ought to have known that his words or behaviour were threatening or abusive; and**
    - (iv) the defendant knew or ought to have known that his words or behaviour were likely to stir up hatred or arouse fear.**

## ***Removing Hate Expression from Public Space – Chapter 10***

130. In this chapter, I address the question of the extent to which the law should regulate hate expression displayed in public places. This includes the question of the powers and duties of public authorities to remove sectarian and other hateful graffiti or items displayed on roadsides or other public property.

131. Section 75(2) of the Northern Ireland Act 1998 places a good relations duty on public authorities, which means that a public authority must have regard to the desirability of promoting good relations between persons of different religious beliefs, political opinion or racial groups when carrying out its functions.

132. Clearly, any public authority which tolerates incitement of hatred in its functions is not promoting good relations. This question of hate expression displayed in public places clearly intersects with any review of hate crime legislation in Northern Ireland.

133. There are a number of human rights treaty obligations entered into by the United Kingdom, which place positive duties on relevant public authorities to tackle hate expression, including the European Convention on Human Rights and Fundamental Freedoms (ECHR).

134. Under Section 32 of the Police (Northern Ireland) Act 2000 and common law, the *PSNI* have fundamental duties such as their duty to take steps to bring offenders to justice. They are also under a duty to prevent the commission of criminal offences.

135. There are also a number of specific powers vested in other public authorities. For example, *district councils* in Northern Ireland have powers to remove or obliterate graffiti detrimental to the amenity of any land in its district, or any placard or poster in its district that does not have planning permission.

136. Powers are also vested in the *Department for Infrastructure* under planning legislation to remove items and recover the cost of doing so for any unauthorised materials on lampposts or other street furniture.

137. The consultation paper sought responses as to whether any recommendation should be considered to clarify and strengthen the law to regulate duties to tackle hate expression in public space.

138. There was strong support for this idea among organisations – 88% percent of organisations agreed. This included a measure of agreement across the political spectrum.

139. Although support was considerably less prevalent among individuals – with 47% answering ‘yes’ – the overall approval for this idea was 67%.

140. A number of organisations expressed concern at what they saw as the relative lack of action to tackle this issue from public authorities.

141. It is only fair to observe that this area of the law sets many challenges for public bodies, including the *PSNI*. However, the overwhelming response to the consultation question on this issue should be respected. It is also obvious that there are political sensitivities in play on issues such as this.

#### **Recommendation 15**

**There should be a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.**



## ***Restorative Justice - Chapter 11***

142. As part of its remit, the review is asked to consider whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

143. Restorative justice has been defined as a process of independent, facilitated contact, which supports constructive dialogue between the victim and the person who has harmed arising from an offence or alleged offence.

144. The present position in Northern Ireland is that there is statutory provision for restorative justice for defendants who are under 18 years of age, primarily through the use of youth conferencing which is delivered at both a diversionary level (when recommended by the *PPS*), and as a court ordered disposal.

145. Numerous reviews and reports have all held this model of conferencing in high esteem. However, in terms of those defendants over 18, none of the existing legislative provisions apply.

146. If a model along the lines presently employed for youth justice is envisaged, legislation would be required as any emerging restorative justice approaches for adults would require a statutory disposal involving pre-court and court ordered sanctions. In this event, I noted in the consultation paper that a likely provider would be the *PBNI*, a statutory body which enjoys acceptance by, and the confidence of, all parts of the community in Northern Ireland. I envisaged that in such a scenario, the existing accredited community-based restorative justice bodies would act to complement the work of such an agency.

147. With regard to the consultation, in respect of asking whether restorative justice should be part of the criminal justice process in dealing with hate crime in Northern

Ireland, there was overwhelming support for this proposition – 90% – from organisations. There was also very strong support from individuals – 73% – for this proposition.

148. In respect of asking whether restorative justice schemes should be placed on a statutory footing, there was even stronger support from organisations and individuals. 94% of organisations and 79% of individuals agreed with this proposal.

149. One consultation question asked whether there should be a formal justice agency responsible for the delivery of adult restorative justice for hate crime. 95% of organisations and 62% of individuals agreed with this proposition.

150. Another question asked respondents to envisage what role could be played in the delivery of adult restorative justice for hate crime by the accredited community-based restorative justice organisations. A number of respondents noted the wealth of experience and expertise of accredited community-based restorative justice organisations, placing them in a strong position to contribute to the effective delivery of adult restorative justice for hate crime. One respondent argued that the involvement of such organisations was particularly important in the context of Northern Ireland, where levels of trust and confidence in the police and criminal justice system to tackle hate crime are generally low.

151. Respondents were also asked whether they considered diversion from prosecution as an appropriate method of dealing with low-level hate crimes, as per the practice in Scotland. There was considerable support for this proposition; 94% of organisations agreed, together with 71% of individuals. However, a degree of caution was urged. Some respondents suggested that victims should have the option to choose, while others thought that the decision to use diversion should be taken on a case-by-case basis.

152. Having examined the arguments carefully, I conclude that there is a very strong case for providing that restorative justice should be made an integral part of the criminal justice process in dealing with hate crime in Northern Ireland.

153. The acknowledged success of the provision for those who are under 18 encourages confidence that, with appropriate adjustments, the model operated by the *Youth Justice Agency* can be replicated for those who are over 18.

154. Placing such provision on a statutory basis will help to ensure consistency in the application of restorative justice processes and enable the system to be completely victim led and victim focused.

#### **Recommendation 16**

**There should be a new statutory scheme for restorative justice for over 18s, organised and delivered on lines similar to the Youth Justice Agency in Northern Ireland.**

#### **Recommendation 17**

**It is desirable that such a statutory restorative justice framework be established with the necessary financial funding.**

#### **Recommendation 18**

**The new statutory scheme for restorative justice should be independent of the Department of Justice.**

#### **Recommendation 19**

**As such a scheme will involve referrals from the Public Prosecution Service and the Courts, it is recommended that it should be run by a statutory agency such as the Probation Service for Northern Ireland.**

#### **Recommendation 20**

**The presently accredited restorative justice groups should continue to provide community support and support to the statutory agency, which would take the lead in any such collaboration.**

#### **Recommendation 21**

**There should be further consideration of the benefits of establishing a Centre of Excellence for Restorative Justice.**

#### **Recommendation 22**

**Diversion from prosecution is an appropriate method of dealing with low-level hate crimes. The model as per the practice in Scotland appears to offer an efficient and practical template.**

### ***Victims – Chapter 12***

155. As mentioned in the introduction, the importance of victims lies at the centre of this review.

156. Hate crime in Northern Ireland is significantly under-reported. Although reporting figures have improved, this was from a low in 2010/2011 of just over 18% of those in Great Britain who experienced hate crime being prepared to report the matter to the police. There is no reason to suspect that patterns of reporting in Northern Ireland are now any better, meaning that a significant proportion of hate crime continues to remain unrecorded by the police.

157. The consultation paper sought the views of the public as to how high levels of underreporting might be improved.

158. Although I do not make any specific recommendation for legislative change to deal with this issue directly, I am satisfied that the introduction of better and more effective hate crime laws as a result of this review will instil new levels of confidence among victims and marginalised communities, and will encourage them to come forward and better trust the police and other actors in the criminal justice system with more confidence than up to now.

159. On a practical level, one theme became clear in the responses – the necessity to provide appropriate and effective support for victims and inform the training of those working with victims.

160. The *Hate Crime Advocacy Service (HCAS)*, which began its work in July 2013, is comprised of a hate crime advocacy co-ordinator based in *Victim Support NI*, and hate crime advocates based in host organisations – *Leonard Cheshire Disability*, the *Migrant Centre NI*, with two advocates based in Belfast and Foyle, and the *Rainbow Project* for LGBT victims.

161. The service was developed to provide victims of hate crime with access to specialist support tailored to their needs. Information and guidance is made available

through the service to help victims make decisions and choices to increase their safety and well-being.

162. It is clear to me that the work of *Victim Support NI* and the *HCAS* plays a vital role in increasing the engagement of victims of hate crime with the criminal justice system at all levels, and in helping victims to cope and deal with the effects of hate crime and support them through a very difficult process.

163. In the consultation a majority of organisations (89%) acknowledged that the service was valuable in supporting victims of hate crime through the criminal justice process, whilst 63% of individuals agreed, giving an overall percentage in support of 81%.

164. A majority (94%) of organisational respondents and 60% of individuals considered that the funding model for the service should be placed on a permanent basis, as opposed to the present annual rolling contract model, giving an overall approval percentage of 81%.

165. There was general agreement that the service requires further improvement, in order to improve levels of service and ensure more victims are supported through the criminal justice process.

166. A common suggestion was that improvement would only be obtained through the provision of a more sustainable model of funding. At the time of writing, my understanding is that a new funding model is under consideration by the *DoJ* and the *PSNI*.

167. This is a service which is vital for victims and it must be sustained on a permanent reliable basis. The precarious funding model and the uncertainty it creates is unacceptable and concerning.

168. Additional resources will be required, particularly if this work is expanded and the number of advocates increased to allow for a better geographical spread of services and the inclusion of new protected characteristics as recommended in this report.

169. The consultation paper asked two questions in relation to anonymity and restrictions on reporting:

- (i) Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?
- (ii) In what circumstances should a restriction on press reporting of the identity of the complainant in hate crime be permissible?

170. A substantial majority of the organisations which responded to this question considered that, in certain circumstances, the identity of a complainant in a hate crime case should not be published. The views of individuals who responded were evenly split.

171. Overall, a large majority of respondents (83%), considered that, in certain circumstances, press reporting of the identity of the complainant in a hate crime case should not be permitted.

172. I have serious concerns that many victims will be discouraged from giving evidence in cases where perpetrators (alleged or otherwise) choose to exercise a right to cross examine their victims in person. It is widely accepted that such cross

examination can cause the victim significant distress and can sometimes amount, on occasion quite deliberately, to a continuation of the abuse.

173. I believe there is a strong argument to put victims of hate crime on the same footing as domestic violence and sexual violence witnesses.

### **Recommendation 23**

**The work of the *Hate Crime Advocacy Service* should be expanded and placed on a permanent statutory footing to ensure a more sustainable funding model with specialised advocates appointed to support victims for all protected characteristics thus ensuring that the right to advocacy acknowledged in the Victims Charter is guaranteed.**

**For the avoidance of doubt, such specialised advocates should include a dedicated religious hate crime advocate who can also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variation of sex characteristics.**



#### Recommendation 24

**Complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens.**

**Protection for complainants in hate crime/hate speech criminal proceedings should be provided as follows:**

- (i) no person charged with any aggravated or stirring up offence may in any criminal proceedings cross-examine a witness who is the complainant either –**
  - (a) in connection with that offence or**
  - (b) in connection with any other offence with which that person is charged in the proceedings**

#### ***Online hate speech – Chapter 13***

174. Online harm may take many forms. Much of it is committed on social media and brings with it a **‘public’** element which is quite distinct from off-line hate speech. This ‘public’ element needs to be distinguished from ‘public order’ which lies at the heart of some of the offences to be discussed below. The public element of online hate is about the potential for reputational damage or for public humiliation and embarrassment when comments appear on social media.

175. This is compounded by the fact that an attack carried out on the Internet is potentially **permanent** in nature, and can have an almost limitless **reach**. Whilst there is no doubt that off-line attacks can leave permanent scars and can cause immeasurable pain, the attacks themselves will usually be of a finite nature; and, once a perpetrator is caught, can be stopped.

176. However, the **permanency** and **reach** of the Internet can mean the online attacks never go away, even if a perpetrator is caught. This results in the victims of online hate being at risk of being exposed to the attack time and time again, thus rendering them re-victimised.

177. This demonstrates that the harm caused by online hate goes far beyond the impact of the words themselves. In some cases, damage can occur simply because the hateful material appears online.

178. Furthermore, there is increasing evidence that online attacks of this kind can have an impact on victims' ability to maintain a public presence on the Internet. There is evidence that victims of cyber hate change their online behaviour in order to avoid attacks. In an era when having a presence online is crucial – both for social and professional reasons – this is something that cannot be ignored; particularly, when we know that it is often minority groups that are most affected. There is also evidence that women in particular – including politicians – are at significant risk of being targeted online. This has led to calls for legislators to give serious consideration to the inclusion of sex/gender as a protected characteristic for any online offences.

179. There are strong and compelling arguments made by many respondents that online hate speech is a serious and growing problem which needs to be addressed.

180. The UK Government's 'Online Harms' White Paper, published in 2019, aims to go far beyond legislating for the notice and take-down process, and puts forward a proposed extensive regulatory regime that would put it at the forefront of online regulation worldwide.

181. It proposes:

- a new duty of care to be imposed on Internet companies which will require them to take reasonable steps to keep users safe, and prevent other persons being harmed as a direct consequence of activity on their services;
- Internet companies to be required to comply with this duty of care and compliance will be overseen by an independent regulator;
- The regulator to have a suite of powers to ensure compliance with the duty of care and will have punitive powers such as the imposition of fines;
- The regulator to set out codes of conduct which will outline to companies how they can satisfy the duty of care and will also set out the expectation of how complaints procedures will work and operate;
- There will also be various other aspects to the regulator's powers such as the power to request information about how a company's algorithm works; and
- broadly speaking, Internet companies to be required to remove material that is considered harmful.

182. The consultation paper asked '**... Should social media companies be compelled under legislation to remove offensive material posted online?**'

There was strong support for this proposal from both organisations (86%) and individuals (71%).

183. It also asked respondents whether or not the term 'publication' in the 1987 Order should be amended to include 'posting or uploading material online'.

184. 100% of organisational respondents agreed that it should together with 79% of individual respondents giving an average response of 91% in favour.

185. Question 46 in the consultation paper posed the question of whether or not the Malicious Communications (Northern Ireland) Order 1988 should be adapted to deal with online behaviour?

186. There was widespread agreement with this proposal. All of the organisations which responded agreed together with 88% of individual respondents.

187. The approach that commanded most support was to update the legislation and make it applicable to contemporary society, particularly given the growth of the use of the Internet and social media.

188. The final question in the area of online harm raised in the consultation paper asked respondents:

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

189. There was strong support for the inclusion of online harm in the general law on hate crime both among organisations and individual respondents. 81% of organisations and 75% of individuals who responded agreed.

**Recommendation 25**

**The proposals contained in the United Kingdom Government's 'Online Harms' White Paper (2019) should be implemented in full.**

**Given that legislation in this area is a reserved matter, the Assembly in Northern Ireland should consider whether or not to encourage implementation of these proposals by the Government of the United Kingdom, or, in the alternative, seek the agreement of the Secretary of State for Northern Ireland to allow the Assembly to enact appropriate legislation on this issue in Northern Ireland.**

#### **Recommendation 26**

**In terms of jurisdiction for dealing with online hate speech, the law should be clarified to confirm that any online material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the courts of Northern Ireland.**

#### **Recommendation 27**

**There should be a legal requirement on social media companies to ensure that potential users who wish to avail of their services must provide verifiable personal information before they are permitted to use those services.**

**As this recommendation involves legislating in respect of a reserved matter, see Recommendation 25 above.**

#### **Recommendation 28**

**There should be a mechanism by which the offending behaviour must be removed from the Internet by the offender, or through a court order imposed on the relevant social media company.**

#### **Recommendation 29**

**The PPS should make their prosecution guidelines for cases involving electronic communications public and disseminate them in an appropriate way.**

#### **Recommendation 30**

**Article 3 of the Malicious Communications (Northern Ireland) Order 1988 should be amended to explicitly bring within its ambit electronic communications. The word ‘publication’ should be amended to refer to ‘posting’ or ‘uploading material online’.**

### ***Hate Crime Legislation Consolidation – Chapter 14***

190. At present, hate crime legislation, such as it is, has developed in a piecemeal and uncoordinated way over many years.

191. The consultation paper asked respondents whether or not they believed that there would be benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation.

192. The responses to the consultation paper in Northern Ireland revealed very strong support for producing one consolidated piece of legislation in the area of hate crime/hate speech. 91% of organisations agreed with this proposal, together with 63% of individuals, giving an overall approval of 79%.

193. It was a generally held view that the current laws were considered to be outdated, under-utilised, and subject to significant gaps.

194. The opportunity to consider hate crime/hate speech offences in the round should include consideration of all relevant current statutes, including the Malicious Communications (Northern Ireland) Order 1988, Section 37(3) of the Justice Act 2011 and The Protection from Harassment (Northern Ireland) Order 1997.

195. I acknowledge that some legislation, such as the Communications Act 2003, deals with reserved matters and may not necessarily fall under the jurisdiction of the Assembly – at least without the consent of the Secretary of State for Northern Ireland.

### **Recommendation 31**

**All hate crime and hate speech law – including public order legislation, apart from law dealing with reserved matters – should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.**

### ***Legislative Scrutiny and Oversight – Chapter 15***

196. There was unanimous support from respondents to the consultation paper that any new legislation on hate crime should be subject to post-legislative scrutiny.

197. I think a period of three years should give time to allow the legislation to bed in and be fully understood and put into practice by those involved in the criminal justice system.

198. One particular advantage of such scrutiny is that this may well facilitate the addition of certain new characteristics as protected groups if the evidence base is sufficient to demonstrate that targeted criminality has developed into serious social problems that serve to justify criminal proscription.

199. The establishment of a Hate Crime Commissioner for Northern Ireland might well complement the legislative reform options I have outlined in this Review and underscore the importance of hate crime and hate speech.

200. This would be to encourage good practice in the prevention, detection, investigation and prosecution of offences associated with hate crime, as well as the identification of victims and perpetrators of those offences.

201. Such a Commissioner might well also have an important role in keeping hate crime legislation under review.

202. Consideration could also be given to whether or not such a role would be full-time or part-time. A solution to the question of financial commitment might well be to provide for a Domestic Abuse/Hate Crime Commissioner whose responsibilities would straddle both areas of criminality.

#### **Recommendation 32**

**There should be post-legislative scrutiny by the *Assembly* to monitor the effectiveness of any new legislation on hate crime and hate speech. It is recommended that such scrutiny should occur regularly at three-year intervals and, if possible, include an element of public consultation.**

#### **Recommendation 33**

**An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.**



#### **Recommendation 34**

**In the alternative, I recommend that the role of such a Commissioner could properly be shared and that, therefore, there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner. I believe this would work well because the remit for this post relates to specific criminal contexts which are not dissimilar.**

203. Chapter 16 is the final chapter. It explores the role of sentencing guidance in dealing with hate crime/hate speech. It then examines the wider societal issue of challenging hatred and prejudice in Northern Ireland, focusing on the key role to be played by education and encouraging the next generation to respect difference and diversity in helping to build a shared and integrated society. Going forward, it is essential that society in Northern Ireland should recognize both collective and individual responsibility to prevent hatred and advance mutual understanding.

Desmond Marrinan

30 November 2020

*Judge Desmond Marrinan was called to the Bar of Northern Ireland in 1972 and later to the Irish Bar. He specialised in criminal law, EC law and professional negligence until his appointment as a County Court judge in 2003. He served as such until 2018 dealing mostly with criminal trials in the Crown Court and continues to sit as a deputy County Court judge. From 2008 – 2011 he served as the Recorder of Londonderry. He was formerly the vice- chair of the Law reform Advisory Committee. From 1971 – 1978 he lectured in public law at the Queen's University of Belfast and latterly was an external examiner for the Institute of Professional Legal Studies at Queen's University Belfast. He presently serves as one of the Parole Commissioners for Northern Ireland.*