



Department of  
**Justice**

An Roinn Dlí agus Cirt  
Máinnystrie O tha Laa

**REVIEW OF HATE CRIME LEGISLATION IN  
NORTHERN IRELAND –  
DEPARTMENTAL RESPONSE**

Department of Justice  
Community Safety Division  
July 2021

## Background

Hate Crime is a generic term used to describe offences which are motivated by hostility and/or bias based on a personal characteristic of the victim. For the very reason that people are targeted, just because of who they are, hate crime needs to be challenged, and this policy position should be reflected in criminal law to ensure an appropriately robust response.

2. A commitment to review Hate Crime legislation was included in the draft Programme for Government 2016-21 and, in May 2019, the Department of Justice appointed Judge Desmond Marrinan to carry out an independent Review of Hate Crime Legislation. This Review considered whether the existing legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice, including hate crime and abuse which takes place online. The Review Terms of Reference<sup>1</sup> noted the need for particular consideration on a number of issues, all of which have been covered in Judge Marrinan's Final Report<sup>2</sup> which was published on 1 December 2020.

3. As outlined in the Report, Judge Marrinan, with the support of a Reference Group, had significant engagement with a range of interested organisations and stakeholders as part of his considerations regarding improving the effectiveness of the current hate crime legislation. The Minister of Justice has publically thanked Judge Marrinan for his extensive work on the Review and agrees with his overall assessment that the current system is not working as effectively for victims or offenders as it could, and therefore requires legislative change.

## Departmental Response to Recommendations and Progress to date

4. Judge Marrinan has made 34 recommendations in response to his remit. The full list of recommendations and the Department of Justice's initial response to each is attached at **Annex A**. As indicated in the Annex, all recommendations have been accepted; partially accepted; accepted in principle; or will require further consideration.

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<sup>1</sup> (<https://www.justice-ni.gov.uk/publications/hate-crime-review-terms-reference>)

<sup>2</sup> (<https://www.justice-ni.gov.uk/publications/hate-crime-legislation-independent-review>)

No recommendations have been wholly rejected at this stage. Since publication of Judge Marrinan's Final Report, in addition to consideration of the Department's initial response to the recommendations, work has also commenced on a number of the recommendations in advance of the development of a Hate Crime Bill. The recommendations can be categorised into strategic themes and a summary of each theme, changes recommended, the Department's general views and, where relevant, progress to date, is outlined below:

***i. A New Hate Crime Model for NI (Recommendations 1-8)***

5. The main aim of the independent Hate Crime Legislation Review was to ensure the legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice, and hate motivated offending. In order for this to be deemed successful, the relevant statutory bodies require the necessary powers to ensure action is taken, where necessary, and victims should have confidence in the system that brings offenders to justice. The Department recognises that the current enhanced sentencing model for dealing with hate crime, where a judge is required at sentencing to state in open court that the offence was so aggravated, is not currently working for victims or perpetrators. Judge Marrinan has made a number of recommendations relating to a new statutory aggravation model that is applicable to all current criminal offences and thresholds for proving aggravation.

6. This new model will recognise the hate crime element on conviction; help to ensure that aggravation, as defined, is taken fully into account and allow the judge to consider an appropriately higher sentence; address concerns that the current enhanced sentencing power is under-used by judges; provide the opportunity for the defendant to respond to the hate crime element in early proceedings; protect potential for conviction of the basic offence where aggravation is not proved; maintain the current maximum sentencing; and ensure the conviction of the aggravated offence is recorded on the offender's criminal record, which informs rehabilitative work with such offenders and acts as a deterrent for potential perpetrators/reoffending.

7. To ensure a common understanding of what is meant by hate crime and a consistent approach within (and outside) the criminal justice system, the term 'hate crime' will be defined. Whilst there are similarities across criminal justice organisations in how hate crime is defined (not in law), the motivational factors are interchangeable, for example between hostility, prejudice, hate and bias. The current legal threshold for enhancing a sentence for an aggravated offence is hostility. Further consideration is required in relation to any new motivational factors proposed, such as bigotry and contempt. Consistency of understanding within the criminal justice system will enable a more effective response which, in turn, will assist the prospect of a conviction, and serve to increase confidence and reporting. Increased convictions will also subsequently assist in the delivery of rehabilitation of offenders in changing behaviours, attitudes and prejudices, and reduce the risk of reoffending and further victimisation.

8. Clarity on the thresholds for proving aggravation, to ensure effectiveness in law, is also required. Section 2 of the current Criminal Justice (No.2) (Northern Ireland) Order 2004 provides for two thresholds – where the offender 'demonstrates' hostility towards the victim or where the offence is 'motivated (wholly or partly) by' hostility. Consideration will be given to a potential third threshold of 'by reason of', aimed at lowering the current hostility threshold to open hate crime legislation up to protecting additional vulnerability and equality groups, but with potential consequences of making the threshold too broad and recognising the potential for alternative provisions for sentencing in these cases.

9. The Department agrees that the recommended statutory aggravation model for all offences should be developed and the current enhanced sentencing provisions in the Criminal Justice (No.2) (Northern Ireland) Order 2004 should be repealed in due course.

#### ***ii. Protected Characteristics (Recommendations 9-11)***

10. There are four protected characteristics in the current enhanced sentencing provisions in the Criminal Justice (No.2) (Northern Ireland) Order 2004 – race, religion,

disability and sexual orientation. PSNI also collect data on the number of hate incidents and hate crimes in relation to transgender persons and hate incidents and hate crimes aggravated by sectarian hostility. The remit for the Review included consideration on whether new categories of hate crime should be created for characteristics such as gender and any other characteristics (which are not currently covered).

11. The Report notes equality principles provide an important influence in deciding whether or not to recommend any further protected characteristics within hate crime law, and that the justification for inclusion of a group should be based on a 'need for protection' criterion. The Report also notes that, outside the core group of protected characteristics such as race, national origin, ethnicity and religion, there is a general lack of consensus internationally as to which characteristics should be protected. England and Wales, Scotland and Ireland are all currently considering these issues.

12. Judge Marrinan has recommended that the current four protected characteristics should continue to receive protection under the proposed new model, with the addition of age (for all age groups), sex/gender (gender neutral and including gender identity) and variations in sex characteristics (including transgender identity and intersex) as new protected groups. He also notes that provision should be made for further protected groups to be added if required. Recognising that hate crime can also be experienced on more than one characteristic, he recommends that legislation should include recognition of intersectionality.

13. The Department agrees current protected groups should continue to be included in legislation, that all protected groups should be treated equally and intersectionality between these groups should be recognised in legislation. In relation to new protected groups, and noting that PSNI currently record hate incidents and hate crimes against transgender persons, the Department agrees transgender identity should also be included as a protected group in legislation.

14. The addition of age and sex/gender as protected characteristics was the subject of varying views in Judge Marrinan's consultation. Respectively, the evidence appears to indicate particular concerns with hostility-based offences against the elderly, due to

vulnerability, and criminal harassment/abuse of women frequently motivated by hostility based on gender – both of which create wider society damage. The need to ensure protection from an equality perspective, as well as the need to communicate an important message that neither elder nor gender-based hate will be tolerated, featured in the subsequent decision to recommend the inclusion of all ages and all genders as protected groups.

15. The Department agrees that both elder abuse and violence against females are important issues. In order to explore the varying views raised in the Final Report and recommendations to include age and gender as protected groups, further consideration will be required as part of wider considerations, including the definition of hate crime and threshold for proving aggravation. It will be important to consider the concerns of some that the addition of any new protected group may dilute the function of the hate crime legislation and that it would cease to be about protecting disadvantaged minorities. For example, evidence shows that crimes against older people are often based on their perceived vulnerability, not their age. It is also possible these issues may be best addressed via mechanisms already ongoing, for example the Sentencing Review (sentencing already takes into consideration the vulnerability of older victims) and The Executive Office work on the development of a Violence Against Women and Girls Strategy. Further work will be required on the inclusion of age and sex/gender as protected groups and will be subject to further consultation.

### ***iii. Sectarianism (Recommendations 12-13)***

16. Very few people would disagree that sectarianism is an objectionable aspect of society in Northern Ireland but, despite various attempts to define it, sectarianism does not have a legal definition. At present, hate incidents and hate crimes aggravated by sectarian hostility are recorded by PSNI. Judge Marrinan has recommended that the findings of the Working Group on defining sectarianism in Scots law<sup>3</sup> should be applied in Northern Ireland. The Department agrees in principle that there should be a

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<sup>3</sup> (<https://www.gov.scot/publications/final-report-working-group-defining-sectarianism-scots-law/>)

definition in legislation and that, whilst wide-ranging, there is merit in considering this one carefully in relation to its implementation in Northern Ireland.

17. Judge Marrinan has also recommended that there should be a new statutory aggravation for sectarian prejudice for the purpose of hate crime legislation i.e. that hate crimes could be aggravated by sectarian prejudice or hostility. The Department agrees in principle that there should be a new statutory aggravation for sectarian prejudice (which will be subject to the agreed definition of sectarianism) which could be monitored by the proposed Victims of Crime Commissioner (point vii. Victims of Hate Crime below refers).

18. These Recommendations will need to be considered in conjunction with any recommendations in the Flags, Identity, Culture, Tradition (FICT Report) once published.

#### ***iv. Stirring Up Offences / Freedom of Expression (Recommendation 14)***

19. The remit for the Review included consideration on the implementation and operation of the current legislative framework for incitement offences, in particular Part III of the Public Order (Northern Ireland) Order 1987 relating to stirring up hatred or arousing fear, and sought recommendations for improvements.

20. Stirring up hatred or arousing fear is a separate concept to hate crime. As Judge Marrinan succinctly explains *“In a hate crime, the baseline conduct (or basic offence) is already criminal; it is the motive or demonstration of hostility that currently marks it out 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 speech and should be clearly distinguished from hate crime generally”*.

21. Judge Marrinan has noted the current legislation has not been used frequently and that there is limited awareness of this law. His recommendation 14 makes a number of sub-recommendations including that all current and any new protected groups should be included in Stirring Up Hatred offences; that intentional harassment,

alarm or distress should be included in legislation (similar to Sections 4, 4A and 5 of the Public Order Act 1986); that the current dwelling defence (allowing conversations that take place within private dwellings to be defended) be repealed and replaced with a private conversations defence; that decisions on prosecutions be taken personally by the Director of Public Prosecutions; that there should be no express defence for freedom of expression in relation to religion, sexual orientation or other protected characteristics, as there should be formal statutory recognition of the importance of freedom of expression Article 10 ECHR rights; that current legislation should be updated in relation to the term publication to include posting or uploading material online; and that intentionally stirring up hatred should be treated differently to the use of words or behaviour likely to stir up hatred.

22. This recommendation covers a number of complex and interrelated policy areas in relation to stirring up hatred which garnered considerable contrasting views in Judge Marrinan's consultation. The Department will require further consideration with stakeholders on some of these issues in order to balance the need for protecting hate crime victims from harm against the need to ensure freedom of expression. In the meantime, there are parts of this recommendation that the Department can indicate agreement/agreement in principle, as noted in Annex A.

#### **v. Duty to Remove Hate Expression (*Recommendation 15*)**

23. Judge Marrinan has considered the extent to which the law should regulate hate expressions in public places, including the powers and duties of public authorities to remove sectarian and other hateful graffiti or items displayed on roadsides or other public property. He notes that public hate expressions tend to diminish the respect for law, normalising hate slogans and enhancing the fear factor within an individual or community.

24. Public authorities currently have a 'good relations' duty under Section 75(2) of the Northern Ireland Act 1998 and Councils and the Department of Infrastructure have existing powers in relation to the removal of hate expressions. Judge Marrinan has recommended that there should be a clear and unambiguous statutory **duty** on relevant public authorities to take all reasonable steps to remove hate expression from their own property and, where it engages their function, broader public space.



25. The Department agrees in principle with this recommendation, noting the need for further discussion on the meaning of hate expression, however some of the practical outworkings require further consideration. Whilst some expressions of hate will be obvious, such as racist graffiti, others may be more subjective and difficult to establish as hate as opposed to offensive and therefore hard to enforce removal. The proposed statutory duty will be subject to consultation with the relevant organisations on the impact of the Recommendation and will need to be considered in conjunction with any recommendations in the FICT Report once published.

**vi. Restorative Justice (Recommendations 16-22)**

26. The remit for the Review included consideration on whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending. Members will be aware of the current provisions for restorative justice which supports constructive dialogue between the victim and offender, for under 18's in Northern Ireland, through the use of Youth Conferencing. Judge Marrinan is supportive of the current model and concludes that there is a very strong case for providing that restorative justice should be part of the criminal justice process in dealing with hate crimes in Northern Ireland, and that adults should be included. He suggests that the significant proportion of repeat victims of hate crimes means that restorative practice would be particularly beneficial.

27. Judge Marrinan has made a number of recommendations in relation to the use of restorative justice for adults in relation to hate crime. These include the development of a new statutory scheme for adult restorative justice, fully funded, independent of the Department and run by a statutory agency. He has also recommended that the Department should consider the benefits of establishing a Centre of Restorative Excellence; that current accredited groups should continue to provide community support; and that the current diversionary practice in Scotland provides an efficient and practical template.

28. The Department will consider these recommendations in the context of the development of the Department's Adult Restorative Justice Strategy. In particular, the

Working Group established to develop the Strategy will consider the restorative justice issues raised in the Hate Crime Legislation Review summary of responses and use the views expressed to inform the development of the Strategy and associated Action Plan.

**vii. Victims of Hate Crime (*Recommendations 23-24, 33-34*)**

29. Supporting victims of crime is a priority for the Department. It is recognised that hate crime is under-reported and improving confidence in the criminal justice system, so that victims will report hate crimes, is essential. Improving the legislation for prosecuting hate crimes will lead to better outcomes for victims of hate crime and, in turn, encourage reporting which ensures the provision of support where needed.

30. Whilst the remit of the Review is limited to legislative issues, Judge Marrinan notes that the importance of victims lies at the centre of his Review and has made recommendations to strengthen current support measures. These include that the joint PSNI and DoJ funded Hate Crime Advocacy Service should be placed on a statutory footing with a dedicated religious hate crime advocate who can deal with sectarian hatred; that victims of hate crime should automatically receive special measures in Court; and that a Hate Crime Commissioner should be established, or alternatively a Hate Crime and Domestic Abuse Commissioner should be established.

31. The Hate Crime Advocacy Service, which supports victims of hate incidents and hate crimes through the criminal justice process and signposts them to relevant support services, is currently in place and will be expanded to include any new protected groups included in the new legislation. There are no plans to place the Service in statute as the delivery of services is not effectively dealt with through legislation. However, the Department agrees that the Hate Crime Advocacy Service should be placed on a more sustainable financial footing. The PSNI and DoJ are currently in the process of moving to a publicly tendered commercial arrangement for provision of the advocacy service from April 2022 for up to five years. The tender documentation recognises the Hate Crime Review recommendations, including the need to adapt to any future legislative changes for new protected categories.

32. In relation to Special Measures, the Department intends to include provisions for victims of hate crime in the Hate Crime Bill, similar to the inclusion of provisions in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021. This will ensure those subject to hate crime offences are automatically eligible for consideration of special measures when giving evidence, which could include the use of live links or screens. Final decisions on the granting of special measures would continue to be a matter for the judiciary. The accused will also be prohibited from cross examining their victim in a criminal court, where this relates to the hate crime offence or an offence aggravated by hate. These provisions will help hate crime victims to give the best evidence in court and reduce the number of victims disengaging from the criminal justice system.

33. Justice Committee members will be aware of the ongoing consultation<sup>4</sup> on a Victims and Witness Strategy and establishment of a Victims of Crime Commissioner for Northern Ireland. This consultation is seeking feedback on the role a Victims of Crime Commissioner should have in focusing on victims of hate crime as a particularly vulnerable group. The Department is of the view that the creation of a Victims of Crime Commissioner with a particular focus on hate crime (and domestic and sexual abuse) will realise the aim of Judge Marrinan's recommendations. The outcome of this consultation and subsequent scrutiny will determine the way forward.

***viii. Online Hate Speech (Recommendations 25-30)***

34. Telecommunications legislation is a reserved matter. The original Terms of Reference for the Review, which excluded this issue on that basis, were updated in August 2019, and the Review extended by three months, to include consideration of hate crime and abuse which takes place online. This was in response to feedback from stakeholders to Judge Marrinan during his initial consultations.

35. As a result, and recognising the legislation in this area is a reserved matter, Judge Marrinan has made a number of recommendations to help inform Northern Ireland's input into ongoing work by the UK Government in relation to plans for a

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<sup>4</sup> [consultation on a Victims and Witness Strategy and establishment of a Victims of Crime Commissioner for Northern Ireland](#)

package of online safety measures to keep users safe online. Following a joint Home Office and Department for Digital, Culture, Media and Sport (DCSM) consultation from April to July 2019, the UK Government published its full consultation response<sup>5</sup> in December 2020. A subsequent draft Online Safety Bill<sup>6</sup>, which will give effect to the regulatory framework outlined in the full Government response to the Online Harms White Paper, was published in May 2021 for pre-legislative scrutiny.

36. The remit of the Online Safety Bill will govern removal of illegal content for a range of issues (not specific to hate crime) as well as content that is legal but harmful, whilst safeguarding freedom of expression, through a regulatory framework for social media companies which will be regulated by Ofcom. Judge Marrinan is supportive of the UK Government's original proposals and has made several recommendations on Online Hate Speech including: the full implementation of the UK Online Harms White Paper; clarifying that online material downloadable in NI is within the jurisdiction of the NI Courts; legal requirement for social media users to verify identities; removal of offending behaviour from the internet by the offender or by court order; publishing PPS guidance on cases involving electronic communication; and amending the Malicious Communications (NI) Order 1988 to include uploading material online.

37. As the majority of these recommendations relate to legislation that are reserved matters, the Minister has written to DCMS, as lead for the Online Safety Bill, and the Home Office to seek assurance that Northern Ireland's views will be included in the forthcoming Bill. The Minister has also written to the Executive and the Speaker on this issue given the interest of Northern Ireland departments on wider online safety issues. It should be noted that hate crime is only one element of the Online Safety Bill. As a result of this engagement, DCMS and the Home Office have confirmed they intend to work closely with the Department and Executive to protect users and tackle these crimes across the UK. The Department will consider specific hate crime issues in Judge Marrinan's recommendations as part of the development of this wider on-line safety work. Recommendations in relation to publishing PPS guidance on cases

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<sup>5</sup> (<https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response>)

<sup>6</sup> [draft Online Safety Bill](#)

involving electronic communication (Rec 29) and amending the Malicious Communications (NI) Order 1988, to include uploading material online (Rec 30), do not relate to reserved matters and have been accepted and will be progressed.

#### ***ix. Legislation and Scrutiny (Recommendations 31-32)***

38. The current piecemeal approach to hate crime has led to legislation that is, according to the Review, 'outdated, under-utilised and subject to significant gaps'. The modernisation and consolidation of hate crime legislation will lead to legislation that is more easily understood by more people and used more effectively. Judge Marrinan has recommended that all hate crime and hate speech legislation (except reserved matters) should be consolidated into one Bill and that there should be regular post-legislative scrutiny by the Assembly to monitor its effectiveness.

39. The Department intends to develop and bring forward a consolidated stand-alone Bill within the next Assembly mandate. This will allow for proper consideration of the policy areas and public consultation, as well as securing legal clearance for drafting the Bill provisions and ensuring any interlinking of provisions and potential consequential impacts on other related issues. The Department recognises the role of the Justice Committee and Assembly in scrutinising this proposed legislation which will be factored into the Department's legislative programme.

#### **Resources / Financial Assessment**

40. In relation to implementation of the Hate Crime Review Report, the Department has put in place a dedicated Hate Crime Branch, with effect from 01 June 2021, to take this work forward. A budget of £165k for 2021-22 has been allocated to cover the salaries of this Branch from the existing 2021-22 departmental budget. A financial assessment of the costs of the Hate Crime Bill, in delivering the recommendations from the Review, will be completed in due course. It is anticipated resources may be required following implementation of some of the recommendations and subsequent legislation, however it is not yet possible to quantify these. Future budgets are not yet known and any additional costs will potentially increase unfunded pressures within the department in current and future years.

## **Approach to Delivery and Next Steps**

41. The Department will continue to work with partners to progress each of the 34 recommendations as indicated in this paper and at Annex A, and work with partners to progress recommendations which fall outside its remit. The Department also recognises the need to work with Criminal Justice partners who have their own competing priorities and capacity issues. Delivery of the cross-cutting nature of some of the recommendations (e.g. duty to remove hate expressions from public places) will only be possible through collaboration and partnership working across a wide range of organisations. Consideration will also need to be given to the potential read across to the FICT report when published.

42. A dedicated Hate Crime Branch has been set up to progress this work. Consideration will now commence on a multi-agency Hate Crime Review Steering/Reference Group to oversee implementation and ensure work is conducted in a co-ordinated and efficient way and is compliant with Human Rights legislation. Officials will also commence more targeted engagement with Criminal Justice partners to look at the practical out-workings and assess their views on the operability of the recommendations.

43. Given the read across to developments in related policy in other business areas, such as Restorative Justice, and the development of hate crime legislation in other UK jurisdictions and Ireland, the Department will continue to monitor these with a view to developing a consultation paper. Following further policy development, the Department will then be in a position to publish a public consultation on its proposals for hate crime legislation for Northern Ireland. Once complete, the consultation analysis will form the policy that will be developed into a consolidated Hate Crime Bill to be scheduled into the Legislative Programme for the next Assembly mandate.

44. The Department will keep the Committee informed of any key developments arising from this work, including the development of the legislative timetable.

**Claire McCormick**

**DALO**

**Enc.**

**Annex A – Review of Hate Crime Legislation: Department of Justice Response to Recommendations**

