Combating Racism and Xenophobia through the Criminal Law
Combating Racism and Xenophobia through the Criminal Law
“If racist crime is allowed to go unchecked – that is, if criminal justice agencies do not appear to tackle the problem effectively – then the message this promotes is that vulnerable communities are not protected by the State and that offenders go unpunished.”

Racism is a complex and multifaceted issue that should neither be glossed over nor ‘talked up’ into something that it is not. The two main forms of racism are discrimination, which is addressed through the civil law and the equality bodies, and ‘racially aggravated offences’ which are addressed through the criminal law. The focus of this research is on the role of the criminal law in combating racism in Ireland.

Most public opinion polls have shown that the majority of migrant and minority communities have a positive experience of living in Ireland, including a Eurobarometer Poll carried across 27 member states in 2007 for EU Year of Intercultural Dialogue, 2008, which reveals that Ireland and Luxembourg are the countries most positively disposed to cultural diversity and dialogue in Europe. However, racism is a reality in Ireland as it is in all EU countries.

However, according to official Garda (Police) Statistics, the number of ‘racially motivated offences’ in Ireland increased from 84 in 2004 to 94 in 2005 to 174 in 2006 to 180 in 2007. The figure for 2008 is presently on track to be similar to 2006 and 2007. In short, there has been a sharp increase followed by a levelling off in reported racist incidents in recent years.

The most common offences occurring are identified as public order offences, minor assault, assault causing harm and criminal damage. These figures would indicate that there is little room for complacency in combating racism in Ireland. Indeed, one of the case studies in chapter 5 of this report (case study 2) gives an evocative sense of the impact that one racist incident can have on an individual victim.

As part of the Irish Government’s National Action Plan Against Racism (NPAR), Jennifer Schweppe and Professor Dermot Walsh of the Centre for Criminal Justice in the University of Limerick were commissioned to undertake a review of the criminal law in Ireland to determine its effectiveness in providing protection and redress against racist crime in Ireland.

There are three main focuses of enquiry in this Report. The first is ‘expression offences’ related to provocative and offensive comment or insults, particularly in public places. The second focus is on crime committed with a racist motivation. The third focus is on the use of the internet to disseminate hatred motivated by racism.

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3 Provisional figure for 2007
The report provides an analysis of international best practice; academic commentary; the examination of two neighbouring jurisdictions (Northern Ireland and Britain); and a review of the current Irish context to determine if changes in the law are needed at this stage.

This report acknowledges that legislation is but one approach to address racially motivated crime, and the issue requires a range of responses and the cooperation of a range of key stakeholders if it is to be effectively redressed. These agencies include the Gardai, the courts, the prosecution services, Government Departments, local authorities, expert and specialised bodies and NGO’s working closely with minority and migrant communities in Ireland.

The Report analyses current Irish law and possible changes in that law in the light of: the benchmarks set by the primary international instruments; the current state of knowledge as reflected in the international literature, legislative developments and experience in England, Wales and Northern Ireland; and the demands of freedom of expression as protected by the European Convention on Human Rights and Bunreacht na hEireann.

The main conclusions from this Report are as follows:

- Judges should be encouraged to consider racism as an aggravating factor deserving a tougher sentence. Judges may decide after full consideration that racism was not an aggravating factor in a particular case and this position is to be fully respected. However, on existing evidence, this Report is concerned that many that judges are at present not considering racism as an aggravating factor and indeed some feel it cannot be considered as an aggravating factor under present law.

- The Prohibition of Incitement to Hatred Act, 1989 should be updated to be specifically inclusive of racism on the internet. However after full consideration of international and Irish experience, sweeping changes in the Act are not advocated in this Report because the Act is limited to dealing with incitement to commit a crime rather than hateful expressions that do not result in a crime being committed.

- There is a range of other pieces of legislation, including Public Order and Offences against the Person Acts which can be used against racism, including hateful expression in public places not involving incitement. These Acts are presently under-used in combating racism. Those involved in the Courts, the police and the administration of justice should be trained on the full extent and potential of all legislation to deal with racism.
In careful review of the experience of other jurisdictions, the Report cautions against the approach of introducing ‘aggravated offences’. Even though the existence of such offences sends out a message that racism is not acceptable, the Report concludes that such offences can actually make convictions more difficult to obtain because the offence and motive have to be proven.

The Report calls for stronger flanking measures to support the role of those combating racism as a crime and to ensure effective implementation of the legislation, including:

- The gardaí should consider producing a detailed annual report on crime where racism has been a factor in Ireland. This would include both publication of data and analysis of data captured as well as an update on Garda responses to the issue. Such reports are compiled by other police forces. At present only data is produced.
- Courts Service should consider systematic monitoring and reporting of cases involving racism on a regular or periodic basis.
- Additional resources to the Garda Racial and Intercultural Unit, including additional resources for training ethnic liaison officers.
- The establishment of consultative forums across all Garda Divisions to allow for more pro-active liaison with minority and migrant communities, building on progress to date.
- Further Initiatives to encourage the reporting of racism as a crime.
- Measures to ensure victim support bodies have adequate training.
- The requirement that all local authorities should include policies to address racism in their strategic planning process including anti social behaviour in social housing estates motivated by racism and effective anti graffiti strategies.

The Report emphasises the need for measures to address racism to be include as part of an overall integration and anti racism strategy in Ireland, which includes education and public awareness programmes and a wide range of measures to ensure migrant and minority communities, including Travellers, are more included in Irish society.
Acknowledgment and thanks

This report was overseen by a research advisory group which includes Philip Watt, National Consultative Committee on Racism and Interculturalism (NCCRI); Garrett Byrne, Janet Lacey and Linda Equality and Law Division, Department of Justice, Equality and Law Reform; Paul Murray, Department of Justice, Equality and Law Reform; Winnie Keenan and Caroline Keane, Pavee Point; Michael Farrell, Irish Human Rights Commission; Mazhar Bari from the Muslim community in Ireland and Superintendent Tom Murphy of An Garda Siochana.

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As part of the process of preparing this report a seminar was held in the Clarence Hotel, Dublin in March 2006 to discuss early emerging research findings. The seminar was chaired by Michael Farrell of the Irish Human Rights Commission and included contributions from the research authors, Dr Robin Oakley, an international expert and Brendan McGuigan, Deputy Chief Inspector of the Criminal Justice Inspectorate, Northern Ireland.

The research steering group would like to express its sincere thanks to Jennifer Schweppe (primary researcher) and Professor Dermot Walsh from the Centre of Criminal Law in the University of Limerick who are the authors of this report.

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## Contents

Preface and Main Conclusions ............................................ 3

Introduction and Structure of Report ................................. 8

1. International Instruments and Policy Statements ............... 10

2. A Comparative Analysis: England and Wales and Northern Ireland ................................................. 29

3. The Current Irish Position in Relation to Expression Offences: The Prohibition of Incitement to Hatred Act 1989 and Related Legislation ...................................................... 53

4. The Current Irish Position in Relation to Racially Motivated Offences and Racially Aggravating Sentencing ................................................................. 74

5. Review and Assessment of Reports, Cases and Trends on Racist Crimes in Ireland ................................................. 84

6. Literature Review ......................................................... 114

7. Combating Racism within the Constraints of the Freedom of Expression ...................................................... 130

8. Cyber-racism ............................................................... 153

9. Conclusions and Recommendations ........................................ 162

10. Flanking Measures ....................................................... 180

EXECUTIVE SUMMARY ................................................... 184
There are three main issues that are addressed in this Report. First, what we refer to as “expression offences” – that is, those offences which are committed by expressing a view which is racist in nature. Secondly, what are referred to as racially aggravated offences, where a crime is committed with a racist motivation, or where the crime is racially aggravated. Thirdly, and finally, those crimes which are committed on the internet – or cybercrimes. In addressing each of these categories, we assess international best practice, we look to academic commentary on the issue, we examine two neighbouring jurisdictions in great detail, and, of course, look at the current Irish position in relation to these three types of offences. In doing so, this Report has been broken down into nine substantive chapters.

Chapter 1 looks at International Instruments and Policy Statements. The UN, Council of Europe and other international bodies have set out what is best international practice in the effort to eliminate racism, and these instruments are useful guides when looking at the direction Ireland should take. The Framework Decision is also assessed.

Chapter 2 looks to our neighbours, England and Wales, and Northern Ireland. Both jurisdictions have recently introduced legislation to address racism through the criminal law, and it is interesting that the approaches taken are quite dissimilar.

Chapter 3 assesses the current Irish position in relation to the Expression Offences. This chapter focuses on the Prohibition of the Incitement to Hatred Act 1989 and examines the offences created in the Act in detail.

Chapter 4 looks at the current legislative position in relation to racially motivated offences and racially aggravated sentencing. The simple answer is that there is no current law in this area, and this reports seeks to address this lacuna.

Chapter 5 assesses the current levels of racist crime in Ireland today by looking at figures from various organisations. A case study on the approach taken by the Courts to racist behaviour is also carried out.

Chapter 6 is the Literature Review. Here, fundamental questions are asked and answered, such as, what is racism, why is racism bad for society, and whether race crimes should be part of the criminal law?

Chapter 7 follows on from this, looking at the literature and case law in relation to expression offences and hate speech.

Chapter 8 examines the growing problem of cyber-racism (internet related racism) and pays particular attention to the UN Convention on Cybercrime and its Additional Protocol.
Chapter 9 sets out conclusions and recommendations

In Chapter 10, we have set out some “flanking measures” which we feel are necessary to introduce. The Criminal law needs to be reinforced by other measures to address racism in Ireland and should to some extent be a last resort.

We would like to thank the Research Advisory Group, particularly Philip Watt; James Hamilton, the Director of Public Prosecutions; Colm Fox of An Garda Siochana, Paul Durant of the Internet Service Providers Association of Ireland; Laraine Hanlon, doctoral student in the Centre for Criminal Justice and Ger Coffey research officer in the Centre for Criminal Justice. The authors bear sole responsibility for all views expressed and all errors or omissions in the Report.

Jennifer Schwepppe and Dermot Walsh
September 2008
Chapter One

International Instruments and Policy Statements
Introduction

That there is no place for racism of any description in civilised nations is abundantly clear from a large and growing body of international instruments on the subject. The Preamble of the International Convention on the Elimination of all Forms of Racial Discrimination, for example, states unequivocally that theories of racial difference are:

“... scientifically false, morally condemnable, socially unjust and dangerous, and ... there is no justification for racial discrimination, in theory or in practice anywhere.”

International instruments provide a useful benchmark of minimum standards for national criminal laws on racist behaviour. As they reflect agreement among a large number of states it can be expected that they will fall below what might be considered to be best international practice. Nevertheless, they constitute a useful starting point for any state concerned to ensure that its own standards do not fall below what is considered to be the minimum acceptable among the community or communities of states to which it belongs.

Status of the instruments

Inevitably there is substantial variation in the scope, content and legal status of these instruments. Some, such as UN instruments, are addressed to all states. Others, such as EU instruments, are addressed only to states which are members of a relatively tight-knit club characterised by common economic, social, political, cultural and legal values. Some, such as the Universal Declaration on Human Rights, promote human rights generally, while others, such as the EU Framework Decision on Combating Racism and Xenophobia, are targeted specifically at racism. Some, such as EC directives, are legally binding on the states to which they are addressed; others, such as Council of Europe Conventions are binding in international law on those who sign and ratify them; while others still, such as the Recommendations of the European Commission against Racism and Intolerance, are policy statements with no legal force.

It might be useful at the outset to give a brief indication of the legal status of the international instruments in question. Broadly speaking they can be classified into:

(a) Instruments which are legally binding on Ireland. These can be further subdivided into:

(i) Those which are binding on Ireland in international law only; i.e. do not give rise to any rights or obligations enforceable in Irish courts unless they have been specifically incorporated into Irish law by the Oireachtas. Most of the legally binding instruments fall into this category. These consist of international treaties, covenants, conventions, declarations etc. (the terminology can differ from instrument to instrument) which Ireland has signed and ratified. By signing and ratifying the instrument, Ireland is agreeing to be bound by its terms in international law. Ireland is also making a statement that its laws and practices conform to the terms of the instrument in question. The terms of any such instrument cannot be enforced in the Irish courts, unless they have been expressly incorporated into Irish law. Examples include: the UN International Covenant on Civil and Political Rights; the UN International Covenant on Economic, Social and Cultural Rights; the UN International Convention on the Elimination
of All Forms of Racial Discrimination; the UN Declaration on Race and Racial Prejudice; the European Convention on the Protection of Fundamental Rights and Freedoms; the European Social Charter; the Framework Convention for the Protection of National Minorities; and, on a general level, the UN Declaration on Human Rights. The only one of these which has been specifically incorporated into Irish law is the European Convention on Human Rights. While these instruments are not generally binding in a domestic sense, they do bind the State externally in its interactions with other states and the various committees, such as the UN Committee on the Elimination of All forms of Racial Discrimination.

(ii) Those which are capable of being enforced in Irish courts as they stand. The only instruments that definitely fall into this category are the EC Treaty and the EC Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Arguably EU Framework Decisions can be included. They are like directives in the sense that they impose legally binding obligations on member states, but leave it to member states to decide how best to implement the obligations within their own domestic systems. Unlike an EC Directive, however, a Framework Decision does not have direct effect within the national legal system. In other words it cannot be enforced in the national courts unless it has been expressly incorporated into national law by the state. It will be seen later that an EU Framework Decision on Combating Racism and Xenophobia is currently in the making. Once it is adopted, Ireland will be under an EU obligation to put it into effect within the state. Until it does so, however, the Framework Decision will not be enforceable in Irish courts. While some parts of the framework decision are mandatory, some elements are discretionary, and members states have an option to derogate from it on these issues.

(b) Instruments which are merely policy statements or objectives
Policy statements incorporate a broad range of instruments from diverse sources. While they do not impose any legal obligations on states which sign up to them, they do reflect standards which the international community feel should be observed. Relevant examples include: the UNESCO Call for a European Coalition of Cities Against Racism; the Vienna Declaration and Programme of Action; the UN Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination; the ECRI General Policy Recommendations; and the EU Joint Action concerning action to combat racism and xenophobia. Again, while not legally binding, these represent an internationally agreed standard which cannot, and should not, be ignored.
Definition of Racism and Racial Discrimination in International Documents

Before considering the substance of the instruments, it is as well to point out that for the most part ‘race’\(^4\) is specified as only one characteristic which should be outlawed as a basis for discrimination, hate or crime. Others which feature are: colour, sex, religion, ethnic or national origin, genetic features, language, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

One of the few instruments to offer an expansive interpretation of racism is the United Nations Declaration on Race and Racial Prejudice. It refers to:

“…racist ideologies, prejudiced attitudes, discriminatory behaviour, structural arrangements and institutionalised practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practise it, divides nations internally, impedes international co-operation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently seriously disturbs international peace and security.”

Several of the instruments include a definition of racism as they are specifically concerned with racial discrimination. The Convention on the Elimination of All Forms of Racial Discrimination, for example\(^5\), notes that one of the purposes of the United Nations is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. “Racial discrimination” in the Convention, according to Article 1, means:

“…any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”\(^6\)

While this is a definition of “racial discrimination” as distinct from “race” it nevertheless offers a useful basis from which a definition of race might be extracted for the purposes of the criminal law. What is particularly useful is the fact that it centres purely on racial discrimination, and does not incorporate issues such as sex or disability into the definition. It is also broad enough to incorporate members of the Traveller community. It may be, however, that “language” would have to be added.

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\(^4\) Available at http://www.unhchr.ch/html/menu3/b/d_icerd.htm (17.07.08)

\(^5\) This also forms the basis for the definition in the Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination produced by the High Commissioner for Human Rights as part of the UN Third Decade to Combat Racism and Racial Discrimination.
Classifying the instruments

Not all of the relevant instruments are specifically concerned with racism and xenophobia. Even those that are, not all take the same approach or address the same issues. It may be useful for the purposes of this study, therefore, to adopt a classification which distinguishes between those provisions which are directly relevant from those which are only indirectly relevant. Accordingly, the following classification is proposed:

- Prohibiting racial discrimination
- Penalising racist or racially motivated criminal behaviour
- Tackling the root causes of racism

While the second heading is the one most directly relevant to the focus of the report, it cannot be understood or treated in isolation from the other two. It is also important to note that no single instrument fits wholly or neatly within any single heading. Where appropriate, therefore, individual instruments will feature under more than one heading.
Prohibiting Racial Discrimination

Prohibiting Racial Discrimination in the Context of Exercising Other Rights

Most international human rights documents include a provision to the effect that the rights protected under the document in question must be capable of being exercised without any form of racial discrimination. So, for example, Article 2 of the Universal Declaration of Human Rights states:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Similarly, the International Covenant on Economic, Social and Cultural Rights states:

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms is in similar vein:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Protocol Number 12 to the Convention notes that this provision is of a limited nature, as it only prohibits discrimination in the enjoyment of the rights guaranteed by the Convention. Also worth noting is the European Social Charter which was established on the basis that the enjoyment of social rights should be secured “without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.” To this end, the Charter declares that states parties should ensure that its social rights are enjoyed by all citizens without discrimination.

Closely associated with the prohibition on racial discrimination in the enjoyment of rights is the requirement to secure equal protection for all before the law. Article 7 of the Universal Declaration on Human Rights, for example, states:

“All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”
Direct Prohibition of Racial Discrimination

Several instruments go a step further by directly prohibiting racial discrimination, as opposed to prohibiting discrimination in the exercise of other rights. Article 21 of the EU Charter of Fundamental Rights, for example, states:

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability age or sexual orientation shall be prohibited.”

Although provisions such as this do not necessarily require signatory states to introduce specific offences or punishments associated with racism, they are important in setting the agenda for tackling racism.

The EC has imposed specific legal obligations on its member states to outlaw racial discrimination within the scope of EC responsibilities. Article 12 (ex Article 6) of the Treaty on the European Communities (TEC) states:

“Within the scope of application of this Treaty, and without any prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.”

Article 13 of the TEC goes on to provide that the Council, acting unanimously on a proposal from the Commission and after consultation with the European Parliament, can take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin was introduced pursuant to Article 13 TEC. It notes that discrimination based on racial or ethnic origin may undermine the objectives of the EC Treaty. Article 2 of the Directive states that there shall be no direct or indirect discrimination based on racial or ethnic origin, and that harassment is to constitute discrimination for the purposes of the Directive. Article 7 obliges member states to ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to all persons. Article 9 goes on to provide that member states should introduce measures to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Before leaving this aspect of the instrumental instruments it is worth drawing attention to the Framework Convention for the Protection of National Minorities. The Preamble to the Convention states that

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7 Harassment is defined as “when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile degrading humiliating or offensive environment.”

8 Signed 1 February 1998. Ireland has signed and ratified the Convention.
“a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.”

Article 3 of the Convention states that a person belonging to a national minority has the right to be treated or not to be treated as such, and that no disadvantage should result from the choice made, nor indeed from the exercise of any of the rights which are connected to that choice. Article 4 provides that States Parties must guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. Article 6.2 goes on to provide that

“The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”

This comes very close to an express obligation to combat racist behaviour through the criminal law.
Penalising Racist or Racially Motivated Criminal Behaviour

In recent years international instruments combating racism have become more specific in the obligations they impose. Increasingly, there is a willingness to demand not just a prohibition on racial discrimination, but also the introduction of specific criminal offences and punishments to target racist behaviour. Initially, these were confined to incitement to discrimination on racial grounds, and did not always expressly require penal action. Article 20.2 of the United Nations International Covenant on Civil and Political Rights, for example, states:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In light of the decision of the Human Rights Council 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, where the Council noted the increasing trend of defamation of religions and incitement to religious hatred, the Council requested the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to report on this phenomenon, and particularly, on the implications for Article 20.2 of the ICCPR.

The Convention on the Elimination of All Forms of Racial Discrimination, which was adopted in 1965, is more direct. Article 2(d) requires States Parties to pursue by all appropriate means a policy of eliminating racial discrimination, and requires states, *inter alia*, to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.”

Article 4 of the Convention states that States Parties undertake to take immediate steps to eradicate all incitement to, or acts of, racial discrimination, and:

(a) declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) declare illegal and prohibit organizations, and also organised and all other propaganda activities which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;

(c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

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10 Article 2 also requires States Parties to:
   (a) undertake to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
   (b) undertake not to sponsor, defend or support racial discrimination by any persons or organisations;
   (c) take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
   (d) undertake to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
As part of the United Nations Third Decade to Combat Racism and Racial Discrimination\(^1\), the Office of the High Commissioner for Human Rights produced Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination.\(^2\) The Secretary-General analysed the provisions against racial discrimination in 42 countries (not including Ireland) and set out the model legislation, the purpose of which was to ensure adequate protection for victims of racial discrimination. Section 4 provides that racial discrimination is an offence under the Act, which, by virtue of section 8, is subject to prosecution. According to section 10, offences are punishable by imprisonment, fines, suspension of the right to be elected to a public office or community service with a view to promoting good relations between different racial groups. Sections 9 and 11 provide that victims shall be entitled to just and adequate reparation by means of restitution or compensation. Part III of the model offences sets out the specific offences in the Act, which are:

1. the offence of racial discrimination committed in exercise of the freedom of opinion and expression;
2. acts of violence and incitement to racial violence;
3. racist organisations and activities;
4. offences committed by public officials or other servants of the State;
5. offences according to the field of activity; and,
6. "other offences" which are defined as acts of racial discrimination defined in section 1 for which no specific penalty has been established in Part III, and said nevertheless to be offences under the Act.

The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in 1993\(^3\), goes a step further by calling for criminal measures against racism and racial discrimination. It was described as "one of the major events in the United Nations history of human rights" and, if adequately implemented, "a milestone in human rights history."\(^4\) The Declaration sets out, *inter alia*, the UN position on combating racism. It states, in Article 15:

"The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community."

The Declaration goes on to state that governments should take effective measures to combat these forms of discrimination.\(^5\)

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\(^2\) Available at http://www.unhchr.ch/html/menu6/2/pub962.htm. This Model Legislation is contained in Appendix A to this Report.


\(^5\) Ibid.
Article 20 of the same Declaration states that the Conference:

“... urges all Governments to take immediate measures and to develop strong policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance, where necessary by enactment of appropriate legislation, including penal measures, and by the establishment of national institutions to combat such phenomena.” [Emphasis added]

While the Declaration does not go into any detail on what form such legislation should take it is nevertheless worth emphasising that it envisages penal measures and also envisages these extending not just to racial discrimination but also any form of racism.

The European Commission against Racism and Intolerance (ECRI) has been to the forefront in promoting the use of the criminal law, inter alia, to combat both racism and racial discrimination. This is evident in its General Policy Recommendations Numbers 1, 3 and 6. ECRI was set up following a decision of the 1st Summit of Heads of State and Government of the member States of the Council of Europe, held in Vienna in October 199316. Its task is to combat racism, xenophobia, anti-Semitism and intolerance at the level of greater Europe and from the perspective of the protection of human rights. In this context, ECRI has published a number of general policy recommendations which are of importance in this context.

**ECRI General Policy Recommendation Number 1: Combating Racism, Xenophobia, Antisemitism and Intolerance**17

The Preamble to the Recommendation states that while racism, xenophobia, anti-Semitism and intolerance cannot be countered by legal measures alone, it must be emphasised that legal measures are nonetheless of “paramount importance” and that non-enforcement of relevant existing legislation discredits action against racism and intolerance in general.

Part A of the Recommendation states that Member States must ensure that national criminal, civil and administrative law must expressly and specifically counter racism, xenophobia, antisemitism and intolerance by providing, inter alia,

“that racist and xenophobic acts are stringently punished through methods such as:

– defining common offences but with a racist or xenophobic nature as specific offences;
– enabling the racist or xenophobic motives of the offender to be specifically taken into account.”

16 http://www.coe.int/T/e/human_rights/ecri/1-ECRI/
17 Available at http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/1-Policy_Reccomendations/Recommendation_%201-1-Recommendation_n%201.asp#TopOfPage
The Recommendation was adopted by the ECRI on 4 October 1996.
It also provides that

“oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question.”

Part A also provides that the general public should be made aware of the legislation, and that the criminal prosecution of the offences be given high priority and is actively and consistently undertaken. It also provides that data and statistics on such matters should be collected and published. Further, it provides that adequate remedies should be made available to victims, that legal assistance is provided to such victims, and that victims are made aware of the legal remedies, and the ways in which to access them. Part B of the Recommendation goes on to highlight areas of policy which need to be addressed, such as education, research, education of police officers, health and housing.

**ECRI General Policy Recommendation Number 3: Combating Racism and Intolerance against Roma/Gypsies**

The Preamble to the Third Recommendation notes that Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of a racism which is deeply rooted in society, are the target of sometimes violent demonstrations of racism and intolerance, and that their fundamental rights are regularly violated or threatened. It also notes that prejudice against Roma/Gypsies which leads to discrimination is also a factor in their social exclusion.

The Recommendation states that Member States should give a high priority to the effective implementation of the provisions in its first policy recommendation. It also obliges Member States to ensure legal aid for victims, and to ensure that no degree of impunity is tolerated as regards crimes committed against Roma/Gypsies, and to inform the public of this fact. It also provides that Member States should pay particular attention to the situation of Roma/Gypsy women, who are often the subject of double discrimination.

**ECRI General Policy Recommendation Number 7: on National Legislation to Combat Racism and Racial Discrimination**

In the Preamble to this recommendation, the point is once again made that while laws alone are not sufficient to eradicate racism and racial discrimination, they are essential in combating
them. It also stresses the vital importance of appropriate legal measures in combating racism and racial discrimination effectively and in a way that both acts as a deterrent and is perceived by the victim as satisfactory. It notes that:

“... the action of the State legislator against racism and racial discrimination ... plays an educative function within society, transmitting the powerful message that no attempts to legitimise racism and racial discrimination will be tolerated in a society ruled by law.”

ECRI recommends that legislation prohibiting racism and racial discrimination is enacted, and that such legislation contains the following key components:

(a) Definition
The Recommendation sets out three definitions – racism, direct racial discrimination and indirect racial discrimination. “Racism” is defined as:

“the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”

(b) Constitutional Law
The Recommendation states that the Constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality, and the right to be free of discrimination. The Constitution should also provide that the exercise of the freedoms of expression, assembly and association may be restricted with a view to combating racism.

(c) Criminal Law
The Recommendation states the law should penalise the following acts when intentionally committed against a person or persons on the grounds of their race, colour, language, religion, nationality or national or ethnic origin:

(i) public incitement to violence, hatred or discrimination
(ii) public insults and defamation;
(iii) threats.

The following should also be penalised:

(iv) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
(v) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
(vi) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs (i) to (v);
(vii) the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with the intention of contributing to the offences covered by paragraphs (i) to (vi);
(viii) racial discrimination in the exercise of one's public office or occupation.

It goes on to provide that genocide should be penalised and, that aiding or abetting any of the above offences should be penalised. It also states that the law should provide that, for all criminal offences not specified above, racist motivation should constitute an aggravating circumstance. It further notes that the law should provide for the criminal liability of legal persons. The law should also provide for effective, proportionate and dissuasive sanctions for the offences set out above, and also provide for ancillary or alternative sanctions.

The explanatory memorandum states that the scope of some of the offences set out in the Recommendation is limited to the extent that they are committed ‘in public’. It notes that as racist conduct can sometimes escape prosecution as it is not of a public nature, “member States should ensure that it should not be too difficult to meet the condition of being committed in ‘public’”. In terms of the “alternative sanctions” available, the explanatory memorandum states that “examples of these could include community work, participation in training courses, deprivation of certain civil or political rights (e.g. the right to exercise certain occupations or functions; voting or eligibility rights) or publication of all or part of a sentence.”

As examples of sanctions for legal persons, it suggests: fines, refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence and the dissolution of the legal person.

Finally the European Union is beginning to have an impact in this area under its third pillar competence in police and judicial cooperation in criminal law matters. The Charter of European Parties for a Non-Racist Society notes that, having regard to the Treaties on the European Communities, and Article 1 of CERD, the political parties of Europe commit to a number of principles of good practice, including:

- To defend basic human rights and democratic principles and to reject all forms of racist violence, incitement to racial hatred and harassment and any form of racial discrimination
- To refuse to display, to publish or to have published, to distribute or to endorse in any way views and positions which stir up or invite, or may reasonably be expected to stir up or to invited prejudices, hostility or division between people of difference ethnic or national origins or religious beliefs, and to deal firmly with any racist sentiments and behaviour within its own ranks.
In 1996 the European Union adopted a Joint Action concerning action to combat racism and xenophobia. The aim of the measure was to achieve a degree of approximation of national criminal laws in order to facilitate judicial cooperation between states in combating certain forms of racist behaviour.

Title IA of the Joint Action provides that each member state should ensure effective judicial cooperation in respect of the following offences:

(a) public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;

(b) public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;

(c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;

(d) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

(e) participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

Member states are obliged either to take steps to ensure that such behaviour is punishable as a criminal offence, or to derogate from the principle of double criminality for such behaviour.

The EU Council of Justice and Home Affairs Ministers are currently considering a Framework Decision on Combating Racism and Xenophobia. This is a follow-up to the Joint Action and provides for the approximation of the laws and regulations of member states regarding offences involving racism and xenophobia. The Preamble notes:

“Racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States.”

It goes on to provide:

“[I]t is necessary to define a common criminal law approach in the European Union to this phenomenon of racism and xenophobia in order to ensure that the
same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences.”

In Article 1 of the framework decision, the offences which each member state must have as part of their criminal law are set out:

(a) publicly inciting to discrimination, violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

Again, these are offences which are particular to racism. The Preamble notes that ‘descent’ may, where appropriate, refer to social status or certain conditions relating to property.

Article 2 states that the aiding and abetting the commission of Article 1 conduct should also be an offence. Article 3 sets out the sanctions for the commission of the Article 1 and 2 offences, and notes that Member States must ensure that the conduct is punishable by effective, proportionate and dissuasive criminal penalties. It further states that Article 1 offences are to be punishable by a maximum of at least between 1 and 3 years of imprisonment. Article 4 provides that Member States are obliged to ensure that racist and xenophobic motivation is considered an aggravating factor, or that such motivation may be taken into consideration by the courts in the determination of penalties. Articles 5 and 6 provide that legal persons should be capable of being held liable for Article 1 offences, and set out the penalties particular to those legal persons in the event of a breach. Ultimately, the Framework Decision proposes to repeal Joint Action 96/443/JHA.
Tackling the Root Causes of Racism

As already observed, several international instruments have recognised that racism cannot be combated purely through the criminal law. Action must be taken simultaneously on several fronts, including measures to tackle the root problems and to change social attitudes. The United Nations Declaration on Race and Racial Prejudice, for example, states that legislation should be adopted to combat racism but also goes on to say (Article 6.3) that “laws proscribing racial discrimination are not in themselves sufficient.” Similarly, the Human Rights Review of 1998, following from the World Council on Human Rights in 1998 explains that the prohibition of discrimination is rooted in the equal dignity of all people. It notes that while progress has been made by the introduction of legislative policies prohibiting the incitement to hatred, and punishing discriminatory behaviour, “[p]enal measures are not sufficient to effectively act against racial and other forms of discrimination and violence.” It goes on:

“Educational programmes to promote racial and religious harmony, community programmes to overcome mutual distrust, youth exchange programmes, technical cooperation to assist in law reforms and establishing appropriate institutions and procedures are examples of activities that should be developed worldwide.”

Recommendations targeted at specific groups have been made in this context, particularly in the context of the media. The Recommendation of the Committee of Ministers to Member States on the Media and the Promotion of a Culture of Tolerance note the important role that the media can play in the fight against intolerance, particularly in the context of fostering a culture of understanding between different ethnic, cultural and religious groups in society. They recommend that the members of the media get specific training in this regard, and for the consideration of certain enterprises to foster multiculturalism in society.

The UNESCO Call for a European Coalition of Cities Against Racism notes that the struggle against racism must be conducted on several fronts – prevention and positive action; monitoring and vigilance; empowerment; mediation and punishment. There is a ten point action plan for Europe, so as to ensure greater vigilance against racism.

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20 http://www.arabhumanrights.org/unconf/wchr/review98-1.html
21 Ibid at paragraphs 35-38.
22 Ibid at paragraph 38.
23 Recommendation Number R (97) 21 adopted by the Committee of Ministers 30 October 1997.
24 Available at http://unesdoc.unesco.org/images/0013/001364/136484e.pdf. No Irish city has joined the coalition, although the City of Galway, in its Anti-Racism Strategy Towards a City of Equals does refer to the document as one which was drawn upon in developing its strategy. Towards a City of Equals available at http://gcp.ie/wordFilesEmails/Toward_a_City_of_Equals.pdf
The ten point plan contains ten commitments, which are:

1. To set up a monitoring, vigilance and solidarity network against racism at city level;

2. To initiate, or develop further the collection of data on racism and discrimination, establish achievable objectives and set common indicators in order to assess the impact of municipal policies;

3. To support victims and contribute to strengthening their capacity to defend themselves against racism and discrimination;

4. To ensure better information for city dwellers on their rights and obligations, on protection and legal options and on the penalties for racist acts or behaviour, by using a participatory approach, notably through consultations with service users and service providers;

5. To facilitate equal opportunities employment practices and support for diversity in the labour market through exercising the existing discretionary powers of the city authority;

6. The city commits itself to be an equal opportunities employer and equitable service provider, and to engage in monitoring, training and development to achieve this objective;

7. To take active steps to strengthen policies against housing discrimination within the city;

8. To strengthen measures against discrimination in access to, and enjoyment of, all forms of education; and to promote the provision of education in mutual tolerance and understanding, and intercultural dialogue;

9. To ensure fair representation and promotion for the diverse range of cultural expression and heritage of city dwellers in the cultural programmes, collective memory and public space of the city authority and promote interculturality in city life;

10. To support or establish mechanisms for dealing with hate crimes and conflict management.

These, again, are broad policy declarations on what cities can do to eradicate racial discrimination. The content of any legislation prohibiting racial discrimination is not included.

One of the most important initiatives of recent years in seeking to combat the root causes of racism was the outcomes from the United Nations World Conference against Racism held in Durban, South Africa in 2001. Through the Declaration and Programme of Action agreed at the conference, the international community recognised the multi-dimensional nature of racism and called on member states to develop national action plans. The UN passed two General Assembly Resolutions to support the implementation and follow up.25 The extent to which global regions and individual countries followed up in these resolutions varies considerably.

25 UN General Assembly Resolutions 56/266 adn 57/195
Conclusion

Best international practice on tackling racism incorporates three main themes. First, that racism is damaging to society, and that all rights of individuals in any society should be capable of being exercised in a non-discriminatory nature. Second, that the criminal law can help in tackling racism by providing specific offences and sentencing racially motivated crimes in a harsher manner than non-racially motivated crimes. Finally, however, it is important to note that best international practice on this issue shows that the criminal law is not and should not be the only way in which racism can be tackled, and that a rounded, multifaceted approach must be taken.

This Report will go on to assess how Irish law currently operates in light of international best practice, and what changes need to occur to bring our law up to this standard. First, however, the Report will examine our closest neighbours to see the approach that was taken in Northern Ireland and England and Wales and establish what can be learned from these jurisdictions.
Chapter Two

A Comparative Analysis: England and Wales and Northern Ireland
England and Wales

Introduction

The first incitement to hatred provisions in England and Wales were introduced by the Race Relations Act 1965. Section 6 of the Act made it an offence to incite racial hatred. However, under the section it was necessary to prove intent to stir up hatred, and due to the high level of proof required, it was accepted that the legislation was not working successfully. It was then replaced by section 70 of the Race Relations Act 1976 which inserted a new section 5A into the Public Order Act 1936. Here, the requirement of intention was replaced by a test of likelihood to stir up racial hatred in all the circumstances. This also proved unsatisfactory.

Ultimately, section 5A of the 1936 Act was replaced by Part III of the Public Order Act 1986. This Act created new offences consisting of certain forms of behaviour which were intended to stir up racial hatred. For the most part they concern the display or publication of racially offensive material.

Twelve years later the incitement offences were supplemented with Part II of Chapter 37 of the Crime and Disorder Act 1998 which introduced the concept of racially aggravated offences. These consist of a number of offences already known to the law, with the additional aggravating element of being motivated by racial hostility. The presence of this additional aggravating factor means that higher penalties are available to punish offenders on conviction. The availability of aggravated sentences for racially motivated crime was taken a step further in the Criminal Justice Act 2003. Chapter 1 of Part 12 of this Act makes provision for an increase in the severity of sentences for racially aggravated offences not already covered by the Crime and Disorder Act 1998. The Act is also distinctive in that if the court finds that the offence was racially or indeed religiously aggravated, it must treat that fact as an aggravating factor, make a positive statement to that effect and impose a more severe penalty than it would otherwise have imposed in the absence of the aggravating factor. Finally, the Racial and Religious Hatred Act 2006 includes religious hatred within the offences covered by Part 3 of the Public Order Act 1986.

The relevant provisions of each of the three Acts will now be considered in greater detail. The legislation will be broken down into that which deals with “expression offences” and that which deals with racially motivated offences and racially aggravated sentencing.

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26 However, as noted by the NCCRI Prohibition of Incitement to Hatred Act 1989: A Review Available at http://www.nccri.ie/submissions/01AugLegislation.pdf one of the earliest recorded cases concerning incitement to hatred took place in 1732 in the case of R v Osborne (1732) 2 Swnast 503 where newspaper material was ruled to be seditious for allegations against Portuguese Jews that led to violence and disorder.
Expression Offences – the Public Order Act 1986

Racial hatred

Part III of the Public Order Act 1986 introduced specific race crimes into the criminal law of England and Wales. They all have ‘racial hatred’ as a core component. Racial hatred is defined in section 17 as “hatred against a group of persons... defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.” Unfortunately the term hatred is not further defined. At the very least this introduces a degree of uncertainty into the nature and scope of the offences. Indeed, it may well be that the relatively small number of convictions under the 1986 Act can be attributed to judges and juries taking the view that only the most extreme forms of racial abuse would be sufficient to satisfy ‘hatred’. On the other hand, however, it would be very difficult to define hatred without diluting its meaning – the use of the term may well have been deliberate, to express a very strong emotion. Indeed, ECRI observe that while the term is not defined, they are of the opinion that it means something much stronger than ridicule or contempt: “it is not enough to cause offence or to mock a racial group. ‘Hatred’ connotes an element of hostility.”

At the outset, it can be noted that cases of incitement to racial hatred have a high legal threshold, which means that few cases result in a successful conviction. Rogers notes that this high threshold is then coupled with the problem that “many of those people who would seek to incite racial hatred, know the legislation well and are able to spin their vile message within the parameters of the law.”

Further problems emerge from the specific requirements for each of the offences.

Offence Number 1:
Use of offensive words or display of offensive material

CONDUCT

The most general offence is found in section 18 which states:

“A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –

(a) he intends thereby to stir up racial hatred; or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.”

The conduct (as distinct from the mental) element of the offence can take one of two forms. The first is where a person uses threatening, abusive or insulting words or behaviour. This relates directly to the spoken words or physical gestures of the person concerned. As noted by ECRI,

27 http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/3-legal_research/1-national_legal_measures/united_Kingdom/united_kingdom%20sr.asp#P320_39689
29 Ibid at page 5. This point is elaborated on comprehensively by Goodall Incitement to Religious Hatred: All Talk and No Substance? (2007) 70(1) MLR 89.
30 Similar observations are made in relation to the Prohibition of Incitement to Hatred Act 1989 at chapter XXX.
31 http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/3-legal_research/1-national_legal_measures/united_Kingdom/united_kingdom%20sr.asp#P320_39689
the Courts have held that the term “insulting” in the context of Part I of the Act is to be given its ordinary meaning and the issue as to whether the words were insulting is to be decided on a case by case basis. They also note that the insulting character must be established on the basis of the conduct itself, it being irrelevant if nobody was actually insulted or that the defendant did not intend any particular person to be insulted. They are of the opinion that the question seems to be “whether an ordinary and reasonable person who witnessed the conduct would be insulted”. Whether this interpretation can be applied in the criminal context is unclear.

It would appear that the bare words of section 18 as currently framed are sufficient to cover audio and/or visual recordings of the words or gestures. However, there are specific offences dealing with the broadcasting or distribution of such material through sound or visual images. These are dealt with later. The second form of conduct covered is the display of any written material which is threatening, abusive or insulting. This clearly relates to the display of posters, flags, emblems etc containing the offensive words. Less certain is whether ‘written material’ is confined to words or whether it will extend to drawings or images which have been sketched. Presumably it does not cover the display of photographs. It is also unlikely to cover books or pamphlets containing the offensive material unless the page or pages in question are openly displayed.

Interestingly, the offence makes some concession to the rights of privacy and freedom of expression by excluding words, behaviour or displays which occur inside a dwelling and are not heard or seen except by other persons in that or another dwelling. It is worth noting, however, that there is no blanket exemption for conduct on private property. The limited exemption only applies to dwellings and, as such, clearly does not extend to any other private property which is not used as a dwelling. Moreover, the communication of words to, or the display of material which can be seen by, persons outside the dwelling is not covered; except for the very limited situation in which the only other persons who can hear or see the offensive material are themselves in another dwelling. Nevertheless, this still leaves open the possibility of individuals being subjected to racial abuse by their neighbours in circumstances which would not be covered by section 18. Telephones can also be used to communicate racial abuse from one dwelling to another without falling foul of section 18.

STATE OF MIND
To be guilty of an offence under section 18 a person must use the words or behaviour or display the written material with the necessary intention or state of mind (the mental element). Once again there are two possibilities. The first requires an actual intention on the part of the accused, namely an intention to stir up racial hatred by his or her actions. This can have the effect of excluding some highly objectionable forms of racist behaviour from the scope of the offence. The uncertainty surrounding the meaning of ‘hatred’ in this context has been noted above. A further complication arises when the accused addresses racist abuse at persons from a racial minority in circumstances where it is not heard by others. If his or her actions are intended solely to abuse these individuals, can it really be said that he or she intends to stir up racial hatred? An intention to stir up racial hatred would seem to connote a situation in which the accused is seeking to provoke the emotion of hate against the racial minority. In other words an actual or potential audience

35 Ibid.
36 Though ECRI are of the opinion that the phrase “can be expected to include banners carried at demonstrations, cartoons drawn without words and graffiti drawn onto movable or immovable objects.” http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/3-legal_research/1-national_legal_measures/united_kingdom/united_kingdom%20sr.asp#P320_39689
outside of the racial minority itself would seem to be a pre-requisite for the state of mind required by the offence. ECRI\(^{37}\) note that an important context of the formulation is that the effect, likely or intended, “is not to offend the audience but to incite them to hatred or a racial group other than that of the audience.”\(^{38}\)

A more fundamental weakness in this mental element is that it may well not cover situations such as the accused who campaigns against what he or she considers to be unfair discrimination in favour of certain racial minorities in matters of social welfare benefits, public sector housing allocation, access to employment etc. His or her intention may not be to stir up racial hatred, but that may well be the result of his or actions. It is possible, of course, that such situations will be covered by the alternative mental element in section 18 which does not refer specifically to the accused’s intention. Indeed, it focuses on the likely consequences of the accused’s actions as distinct from his or her state of mind. As such it is more in the nature of a strict liability offence.

This alternative state of mind will be satisfied where, having regard to all the circumstances, racial hatred is likely to be stirred up by the accused’s conduct. However, this is qualified to the effect that a person is not guilty in these circumstances if they did not intend, or was not aware that, their words or behaviour might be threatening, abusive or insulting. It is worth emphasising that this defence relates to the state of the accused’s mind with respect to whether the words were threatening, abusive or insulting. It will be a defence for the accused to show either that they did not know that the words were of that nature or that they could not have been aware that the words were of that nature. If, however, the accused did know (or ought to have known) that the words etc were threatening, abusive or insulting, it will be no defence for them to show that they did not know (or had no reason to know) that the words were likely to stir up racial hatred. In that sense the offence is one of strict liability. If the accused chooses to use words which they know (or ought to know) are threatening, abusive or insulting, then they take the risk that the words may also be likely to stir up racial hatred. This might be considered necessary to deal with the situation where a person seeks to peddle race hate dressed up as political, social or economic debate. On the other hand it does represent a departure from the normal requirement for mens rea (a guilty mind) in the criminal law and a significant restriction on freedom of expression.

It is also worth noting that if the accused wishes to rely on the defence specifically provided by section 18 they will have to present some credible evidence to the effect that they did not know that his words were threatening, abusive or insulting. They do not have to prove beyond a reasonable doubt, nor even on a balance of probabilities, that they were not so aware. It will be sufficient that they present some credible evidence to that effect, in which case it will be a matter for the prosecution to prove the contrary beyond a reasonable doubt. Nevertheless, this is a departure from the standard in the criminal law where the prosecution must carry the full legal and evidential burden of proving guilt beyond a reasonable doubt.

**THE PERFORMING ARTS**

There is no express provision in the section 18 offence for an exemption for the performing arts. It would seem to follow, therefore, that if an actor etc uses threatening, abusive or insulting words or behaviour in the course of a performance (whether public or private) in circumstances where racial hatred is likely to be stirred up by their words or behaviour they will be guilty of an
offence unless they can bring themselves within the scope of the defence outlined above. This, of course, will be difficult in any case where the words or behaviour used are clearly threatening, abusive or insulting. As will be seen later, there are specific provisions dealing with the director and presenter of public performances.

**Offence Number 2:**
**Publication or distribution of offensive material in written form**

Although the section 18 offence covers the display of written material, it is unlikely that it will cover the publication and/or distribution of books etc in circumstances where the offending contents are not openly on display. This loophole is addressed by section 19 which makes it an offence to publish or distribute written material which is threatening, abusive or insulting where, either the accused intends to stir up racial hatred or, having regard to all the circumstances, racial hatred is likely to be stirred up by the actions of the accused. Since there is no definition of ‘publish’ or ‘distribute’ in respect of this section it is at least arguable that it would capture the person who passes offending material to a family member, close friend, business associate, academic colleague etc. This might be considered a severe intrusion on privacy and freedom of thought and expression.

More reasonably, there is a defence for the person who participates in the publication or distribution of relevant material but in circumstances where they did not intend to stir up racial hatred and who was not aware of the contents of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. This will protect distributors and vendors of books, newspapers etc who cannot be expected to have read the contents of what they are distributing or selling. However, it would not cover distributors etc simply because they had not read the material or were not actually aware that it contained offending material. If, for example, the material emanated from a body or source that had a reputation for producing threatening, abusive or insulting material (irrespective or whether there was a racist dimension) then the distributor may find it difficult to come within the scope of the defence.

**Offence Number 3:**
**Use of offensive material in live or recorded performances**

Written material is not the only medium through which racist words and behaviour can be disseminated to a larger audience. Live performances and the audio and/or visual broadcasts of live and recorded performance are further examples. Persons who utter racist words or who engage in racist behaviour in the course of a live or recorded performance are covered by section 18. Persons who write scripts etc for such performances are covered by section 19. As noted above, there are no exemptions for the arts. Indeed, there are separate distinct offences for persons who direct, present or broadcast such performances. These are found in sections 20 to 22.

Section 20 makes it an offence for a director or presenter of a public performance of a play which involves the use of threatening, abusive or insulting words or behaviour if they intend to stir up racial hatred or, having regard to all the circumstances, racial hatred is likely to be stirred by the
performance. This is very similar to the offence in section 18 and, as such, the comments made above with respect to that offence are applicable here. In respect of the section 20 offence, however, it is not necessary for the director or presenter to be the author of or to use the offending words or behaviour himself or herself. It is only necessary that they are presenting or directing the performance in which such words or behaviour are used.

Where the director does not intend to stir up racial behaviour by the play they may benefit from a defence which is broadly similar to that applicable to the section 18 offence. It is a defence to show that the director:

(a) did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour; or

(b) did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting; or

(c) did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up.

Clearly, this will protect the accused where, without their advance knowledge, the actor departs from the script to use the offensive words or behaviour. If the script does contain the offensive material it will still be a defence if the accused had no reason to suspect that they were threatening, abusive or insulting. Even if the accused does appreciate, or should have appreciated, that the words or behaviour were threatening, abusive or insulting it will be a defence if he or she can show that they did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up. This is as close as the Act comes to recognising an exemption for the arts. It is worth noting, however, that it is a defence confined to the presenter or director. Section 18 does not recognise a similar defence for the performers. Once again it is not necessary for the accused to prove their ignorance beyond a reasonable doubt or on a balance of probabilities. It will be sufficient if the accused raises some credible evidence to that effect and the prosecution fails to prove the contrary beyond a reasonable doubt.

The section 20 offence is targeted at public performances of theatrical plays. It does not therefore apply to private viewings. Nor does it apply to a performance for the purpose of a rehearsal, for the making or recording of the performance, or for enabling the performance to be included in a programme service. However, if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance, it shall not be taken to have been given for those purposes.

Section 20 does not offer a comprehensive definition of a presenter or director. It does stipulate that a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance. It also stipulates that a person is not to be treated as presenting a performance only by reason of taking part in it as a performer. Moreover, a person is not to be treated as aiding or abetting the commission of an offence under
this section by reason only of their taking part in a performance as a performer. However, a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that direction.

**Offence Number 4:**
**The presentation or distribution of offensive material through audio or visual recordings**

Section 21 of the Act provides that a person is guilty of an offence where he or she distributes, or shows or plays a recording of visual images or sounds which are threatening, abusive or insulting where he intends to stir up racial hatred, or having regard to all the circumstances, racial hatred is likely to be stirred up. Under the section, it is a defence for an accused who did not intend to stir up racial hatred to show that they were not aware of the content of the recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. This is almost identical to the offence in section 19, with the substitution of visual images or sounds for written material. As such the comments above in respect of section 19 apply here.

Section 21 does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service. This is dealt with in section 22.

Section 22 of the Act refers to the broadcasting of a programme or the inclusion of a programme in a cable programme service. It provides:

“If a programme involving threatening, abusive or insulting visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if –

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.”

The persons mentioned in subsection 1 are defined in sub-section 2 as:

(a) the person providing the... programme service,

(b) any person by whom the programme is produced or directed, and

(c) any person by whom offending words or behaviour are used.

There are specific defences for a person who provided the service, or who produced or directed the programme, and who did not intend to stir up racial hatred. It is a defence for any such person to show that:
he did not know and had no reason to suspect that the programme would involve the offending material, and

(having regard to the circumstances in which the programme was included in a programme service, it was not reasonably practicable for him to secure the removal of the material.

It is also a defence for the programme producer or director to show that they did not know and had no reason to suspect –

(a) that the programme would be included in a programme service, or

(b) that the circumstances in which the programme would be so included would be such that racial hatred would be likely to be stirred up.

Similarly, there is a specific defence for a person who used the offending words or behaviour and who did not intend to stir up racial hatred. It is a defence for them to show that they did not know and had no reason to suspect –

(a) that a programme involving the use of the offending material would be included in a programme service, or

(b) that the circumstances in which a programme involving the use of the offending material would be so included, or in which a programme so included would involve the use of the offending material, would be such that racial hatred would be likely to be stirred up.

A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under the section if they did not know, and had no reason to suspect, that the offending material was threatening, abusive or insulting.

The offence, and associated defences, under section 22 are effectively a combination of those in sections 18 to 21. As such all of the points made above in respect of the other offences and defences are applicable here, subject to the necessary modifications. Nevertheless, it is worth emphasising that the offence is not confined solely to persons who intend to stir up racial hatred by the use or inclusion of threatening, abusive or insulting visual, images or sounds in a programme. It extends to persons who know, or who should realise, that the programme contains such images or sounds and, whether known to them or not, those sounds or images are likely in all the circumstances to stir up racial hatred. To mount a successful defence in the second instance the accused will have to show that they did not know, and could not reasonably be expected to know, that the programme contained the offensive sounds or images. It will avail them nothing to show that they did not realise that the sounds or images were likely to stir up racial hatred.
Offence Number 5:
Possession of offensive material for distribution or display

All of the offences outlined above relate to the active communication, distribution or display of threatening, insulting or abusive behaviour. Section 23 addresses the situation where a person has such material in his possession with a view to distribution or display. The passive possession in such circumstances will constitute an offence where his or her intention is to stir up racial hatred or where, in all the circumstances, racial hatred is likely to be stirred up. The relevant part reads:

“A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—

(a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or

(b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another,

is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.”

Where the accused did not intend to stir up racial hatred it is a defence for them to show that they were not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. Once again it is worth emphasising that it is no defence to show that they did not realise or had no reason to suspect that the material was likely to stir up racial hatred.

Penalties
All these offences under the 1986 Act are punishable on conviction on indictment for a term of imprisonment not exceeding seven years or a fine or both, and on summary conviction, to a term not exceeding six months or a fine not exceeding the statutory maximum under section 27. Section 28 of the Act provides that a body corporate can also be punished for these offences. (section 28)

Operation of the Act
Goodall\(^39\) notes that between 1987 and 2005, there were only 76 prosecutions for racial hatred. The reasons for the low number of prosecutions under the 1986 Act are the same as those put forward for the low number of prosecutions under the 1989 Act: that the legislation is so complex that it is difficult to establish proof of all the elements to secure a conviction.

Racial and Religious Hatred Act 2006

One of the main reasons cited for the introduction of the 2006 Act was that Muslims were unprotected as a group by race hate laws, as unlike Jews and Sikhs, for example, their community does not have any racial foundations. Goodall explains that while politicians were quick to contend that there were many gaps in the legislation, in fact, there was only one:

“[T]he sole area in which law was lacking is where a person incites another, not to crime, but to religious hatred. It is not unlawful to feel hatred, so incitement to hatred is not in itself an offence. Incitement to racial hatred is unlawful ... People were free to incite other forms of hatred. This is the crux.”

An earlier inception of the Bill attempted to simply insert the words “or religious” into section 18 of the 1986 Act. However, as Watkins notes, the House of Lords rejected this due to the possible width of the offence and the possible resulting implications for freedom of expression. For this reason, a new Bill was published which provides for a separate offence of incitement to religious hatred. Religious hatred is defined in section 29A as “hatred against a group of persons defined by reference to religious belief or lack of religious belief.”

The Act as published is in fact a different animal to that which is provided for in the 1986 provisions. Similar offences are provided for in the 2006 Act, such as ‘use of words or behaviour or display or written material’; ‘publishing or distributing written material’; ‘public performance of a play’; ‘distributing, showing or playing a recording’ and ‘broadcasting or including a programme in programme service’. The offence can be committed in private, where the person committing the offence has any reason to believe that it might be seen or heard by people outside. Nonetheless, the substance of the offences has changed dramatically in two ways.

First, the types of words or behaviour criminalised in the new Part 3A are limited to threatening words or behaviour – abusive or insulting words or behaviour are eliminated where they are directed towards religious hatred.

Secondly, a person will only be guilty of an offence under the new Part 3A if he or she intends to stir up religious hatred – the second limb to the mens rea included in the rest of Part 3, (that is where, having regard to all the circumstances, racial hatred is likely to be stirred up), is also eliminated from the new offence. An attempt was made in the House of Commons to include a new test of subjective recklessness to replace the ‘likely to’ test, but this was defeated.

An element of protection was also included to satisfy those who were of the opinion that the Bill intruded too far into the realms of freedom of expression is provided for in section 29J of the

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44 Section 29B.

45 Section 29C.

46 Section 29D.

47 Section 29E.

48 Section 29F.

Part, which provides:

“Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

As it already accepted that prosecutions are difficult to secure under the 1986 Act, with these three elements working together, it is difficult to imagine how a prosecution could be secured under the new Part. Indeed, Watkins is of the opinion that the cartoons of the Prophet Mohammed would be outside the remit of the 2006 Act.

Goodall concludes in her article that the new Part 3A will be almost unenforceable, as without a confession, it will be very difficult to prove the purposive intention\(^{50}\). She notes that without a confession, racist activists will simply adapt their rhetoric to comply with the statute.\(^{51}\)

Background
The Public Order Act 1986 tackles behaviour which is aimed at stirring up hatred against racial or ethnic minorities based on their race or ethnicity. As such it is primarily concerned with words or behaviour calculated to spread race hate, as distinct from physical attacks on the person and property of individuals on account of their racial or ethnic backgrounds. The 1986 Act is aimed at preventing the development of an environment in which such attacks can happen rather than tackling the attacks themselves. Racially motivated attacks on individuals were dealt with under the ordinary criminal law governing offences against the person and property, with no distinction being drawn on the grounds of whether racism was a motive or not. As racially motivated attacks increased in volume and severity throughout the 1980s and 1990s it was recognised that more robust remedial action was needed. This included the introduction of more severe punishments for crimes which were motivated by race hatred. The legislative vehicle was Part 2 of the Crime and Disorder Act 1998. It introduced the concept of the racially aggravated offence which carried a higher penalty than its non-racially motivated counterpart.

As Malik\(^\text{52}\) notes, the Act does more than simply bolt on the aggravating factor to the existing offences: rather, “the new racially aggravated offences are aimed at conduct which causes harm of a qualitatively different type to that caused by the basic offences.”\(^\text{53}\)

Racially aggravated offences
The Act defines a number of offences as racially aggravated offences. All of them are offences already known to the law in their non-racially aggravated condition. They become racially aggravated for the purposes of the Act if:

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

For the purpose of this definition ‘racial group’ is defined as “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”. Membership of a group is defined as including association with members of the group. It follows that a racially aggravated offence can be triggered where the victim is in the company of members of a racial or ethnic minority and is presumed by the accused to be an associate of that minority even though the victim clearly does not have a racial or ethnic minority background. The focus of the offence is more on the racist motivation of the attacker and less on the racial or ethnic identity of the victim.

It is important to point out that the offence does not lose its racially aggravated character simply because religious or other prejudice is a contributory factor. The Act states that it is immaterial

\(^{53}\) Ibid at page 419.
whether the hostility of the offender is also based on the fact or presumption that any person or persons belong to any religious group, or any other factor not mentioned. Nevertheless, it is doubtful whether this is sufficient to cover an attack on a Muslim where the accused maintains that it was motivated by his hostility towards Islam. Does a Muslim qualify as a member of an ethnic group? If not, then it is not clear how the attack could qualify as a racially aggravated offence. If he is, then it is possible that the offence would qualify, but only if the offender was motivated by a combination of hostility towards Muslims and Islam.

Hostility

It is significant that the 1998 Act targets ‘hostility’ as distinct from ‘hatred’ which is the focus of the 1986 Act. Although the Act does not define ‘hostility’ it is clear that it represents a lower standard of animosity than ‘hatred’. This should make it easier for the prosecution to establish that an offence was racially aggravated. It should be sufficient, for example, if the accused used words or actions either before, during or after having committed the offence which conveys his animosity towards the victim on account of the victim’s racial or ethnic background or association (whether actual or presumed) and that this animosity was a motivating factor in the commission of the offence.

The offences and associated penalties are set out in sections 29 to 32. The maximum penalties are higher than those applicable to the same offences committed without the racially aggravated component.

Racially aggravated assault

Section 29 provides for the offence of racially aggravated assault. It stipulates that a person is guilty under the section if he or she commits the offence of 1. malicious wounding or grievous bodily harm, 2. the offence of actual bodily harm or 3. the offence of common assault which is racially aggravated. A person convicted of one of the first two of these offences is liable, on summary conviction to a sentence of imprisonment of not more than six months, and/or a fine “not exceeding the statutory maximum”; or on conviction on indictment, to a term of imprisonment not exceeding seven years, or to a fine, or both. For common assault, the maximum sentence is the same on summary conviction, and on conviction on indictment a term of imprisonment not exceeding two years.

Racially aggravated criminal damage

Section 30 provides for the offence of racially aggravated criminal damage. It provides that a person is guilty under the section if he or she destroys or damages property belonging to another when the offence is racially aggravated. On summary conviction, the maximum penalty is a term of imprisonment of not more than six months, or a fine not exceeding the statutory maximum, or both; and on conviction on indictment, the penalty is a term of imprisonment not exceeding fourteen years, or a fine, or both.
Racially aggravated public order
Section 31 of the Act provides for the offence of racially aggravated public order offences. This consists of any one of the following offences which is racially aggravated:

- fear or provocation of violence which consists of: using threatening, abusive or insulting words or behaviour towards another person; or distributing or displaying any writing, sign or other visible representation which is threatening, abusive or insulting;
- intentionally causing another person harassment, alarm or distress; and
- using threatening, abusive or insulting words or behaviour or engaging in disorderly behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress by the words or behaviour.

This section covers racially aggravated abuse which is threatening, abusive or insulting as well as that which would cause harassment, alarm and distress. It is not confined to abuse directed at specific individuals. The third offence clearly targets racially aggravated public disorder within the hearing or sight of persons who are likely to be caused harassment, alarm or distress, even though it may not be specifically directed at them. The price to be paid for seeking to embrace all forms of unacceptable racial abuse in this manner is that the offence or offences must be formulated in such general terms that there is always a risk that they impinge too severely on freedom of expression. There is an issue, for example, over whether the criminal law should be involved in seeking to eradicate insulting behaviour or behaviour which causes alarm or distress. Undoubtedly, there are certain forms of insult, alarm or distress which are so severe that few reasonable people would object to their being criminalised. The section, however, does not seek to limit the reach of the offence to the more extreme examples.

A person convicted of one of the first two of these offences is liable on summary conviction to a sentence of imprisonment of not more than six months and/or to a fine not exceeding the statutory maximum; and on conviction on indictment, to a term of imprisonment not exceeding two years, or to a fine, or both. For harassment, alarm or distress, the person can be liable to a fine not exceeding level 4 on the standard scale. Where an individual is found not guilty by a jury of one of the first two offences, the jury can find that person guilty of the third offence.

Racially aggravated harassment
Section 32 provides for the offence of racially aggravated harassment. It provides that a person is guilty under the section if he or she commits the offence of harassment or of putting people in fear of violence when it is racially aggravated. The offence of harassment is punishable on summary conviction to a sentence of imprisonment of not more than six months, and/or to a fine not exceeding the statutory maximum; and on conviction on indictment, to a term of imprisonment not exceeding two years, or to a fine, or both. For harassment, alarm or distress, the person can be liable to a fine not exceeding level 4 on the standard scale. Where an individual is found not guilty by a jury of one of the first two offences, the jury can find that person guilty of the third offence.

Racially aggravated harassment
Section 32 provides for the offence of racially aggravated harassment. It provides that a person is guilty under the section if he or she commits the offence of harassment or of putting people in fear of violence when it is racially aggravated. The offence of harassment is punishable on summary conviction to a sentence of imprisonment of not more than six months, and/or to a fine not exceeding the statutory maximum; and on conviction on indictment, to a term of imprisonment not exceeding two years, or to a fine, or both. The offence of putting in fear of violence is punishable on summary conviction with a sentence of imprisonment of not more than six months, and/or to a fine “not exceeding the statutory maximum”; and on conviction on indictment, to a term of imprisonment not exceeding seven years, or to a fine, or both. The section also provides that section 5 of the Protection from Harassment Act 1997, which concerns restraining orders, applies to the section.
Operation of the Aggravated Offences Provisions of the 1998 Act

Burney and Rose in their comprehensive analysis of the 1998 Act highlight that there are two major problems with the operation of the 1998 Act which has led to a very low number of successful prosecutions under the Act - there were nearly 48,000 incidents reported between 1999-2000, with only 1,150 racially aggravated offences sentenced by the courts.\textsuperscript{54}

The political nature of the legislation, including the stigma attached to a conviction for a racially motivated offence has, the Report notes, proven that the legislation is having an effect in voicing the view of society that racism is unacceptable:

“It is already apparent, from the vehemence with which racist intent is denied by defendants, that a racist conviction is felt as a shaming label and this in itself suggests that public opinion is broadly in tune with the legislation.”\textsuperscript{55}

However, a key problem is this very high rate of not guilty pleas.\textsuperscript{56} The Report highlights two further key problems with the Act in the context of racially aggravated offences: the first is policing difficulties; the second, prosecution difficulties. Coupled with the perceived difficulty in proving racial hostility, leading to high levels of not guilty pleas, these problems have led to a low number of convictions under the Act which may indicate to potential racists that it is okay to commit this sort of crime, as one will not be convicted under the legislation.
Sentencing

Section 82 of the Crime and Disorder 1998 Act provides that where a court is considering the seriousness of an offence other than one provided for in sections 29 to 32, and the offence is racially aggravated, the court must treat that as an aggravating factor, and state in open court that the offence was so aggravated. However, as Malik notes, even before the introduction of the 1998 Act, case law showed that courts could take a racial motivation into account at sentencing, referring to the case of R v Ribbens, R v Duggan, R v Ridley where it was stated:

“We take the view that it is perfectly possible for the court to deal with any offence of violence which has a proved racial element in it, in a way which makes clear that that aspect invests the offence with added gravity and therefore must be regarded as an aggravating feature.”

On foot of section 82, the Sentencing Advisory Panel produced a document Racially Aggravated Offences: Advice to the Court of Appeal where it advised on when a court is considering aggravating a sentence under section 82 and under sections 29-32 of the Act. It stated:

“In summary, the Panel proposes that a sentencer dealing with any case where racial aggravation is treated as an aggravating factor under section 82 of the Act should:

(a) decide what would have been the appropriate sentence for the offence, if the racial element had not been present; then

(b) (i) (if the appropriate sentence would have been a fine or a community sentence) consider whether the racial element is sufficiently serious to raise it from a fine to a community or custodial sentence, or from a community sentence to custody; or

(b) (ii) (if the offence was already serious enough to merit a custodial sentence) add an enhancement within the range of 40%-70%, according to the seriousness of the racial aggravation; or

(b) (iii) (if the sentence selected for the aggravated offence is still a fine) add an enhancement within the range of 40-70% to the notional fine for the non-aggravated offence, bearing in mind the need for the total to remain within the offender’s means to pay; or

(b) (iv) (if the sentence selected for the aggravated offence is a community sentence) either add a similar enhancement to, say, the number of hours community service the offender is asked to perform, or tailor the specific sentence to the circumstances of the offence, for example by combining a Probation Order including a requirement to attend a Racially Motivated Offenders Programme with a Curfew Order.

A sentencer dealing with one of the specific racially aggravated offences created by the 1998 Act should follow a similar process, deciding first what would have been the appropriate sentence...
sentence for the corresponding basic offence. In all cases, the sentencer should say publicly what the appropriate sentence would have been for the basic offence, without racial aggravation.62

The Court of Appeal considered this advice in the case of Kelly and Donnelly.63 The Court accepted that the sentencing decision should be given in two stages: first, without the racial aggravation and then with the aggravating factor included. However, while the Panel were quite prescriptive on the amount by which each sentence should be increased, the Court of Appeal declined to accept this particular recommendation, preferring to leave it to the discretion of each individual sentencing court to determine the amount by which the sentence should be increased due to the aggravating factor. As Ashworth notes, however, the Court of Appeal agreed with the Panel’s proposed factors which would make the offence more serious, factors which include a pattern of racist conduct, membership of the racist group, deliberate humiliation of the victim and repeated or prolonged expressions of racial hostility64. Factors which would make the offence less serious, Ashworth notes, include the relative brevity of the racist conduct, and cases where there was no evidence of racial motivation and the racial abuse was minor or incidental.65

62 Ibid at page 2.
63 [2001] 2 Cr App R (S) 341. As cited Ibid.
65 Ibid.
Criminal Justice Act 2003

Background

Racial hostility as an aggravating factor
Part 12 of the Criminal Justice Act 2003 sets out the general provisions on sentencing that apply in England and Wales. Section 142 sets out a legislative statement as to what the purpose of sentencing is, and section 143 sets out how a court must consider the seriousness of an offence. Section 144 provides for a reduction in sentences for guilty pleas. Of more direct relevance for this Report are the contents of section 145 which specifically requires a trial judge to treat as an aggravating factor for the purpose of sentencing the fact that the offence was racially aggravated. It stipulates:

“If the offence was racially or religiously aggravated, the court –
(a) must treat that fact as an aggravating factor, and
(b) must state in open court that the offence was so aggravated.”

Interaction with the 1998 Act
The definition of racially or religiously aggravated in section 28 of the Crime and Disorder Act 1998 applies to the section. It is important to note that the section as a whole does not apply to the racially aggravated offences provided for in the 1998 Act outlined above. These continue to attract the higher maximum penalties provided for in the 1998 Act, but it remains a matter for the trial judge in any individual case as to whether he will actually apply a more severe sentence than he would otherwise have done had the offence been racially aggravated. For any other offence, however, the normal maximum sentence will continue to apply, but if it was racially aggravated the judge must treat that as an aggravating factor for the purpose of sentence. It is worth noting that this racially aggravated sentencing provision also extends to offences which were religiously aggravated.

Conclusion

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Section 142(1) states: “Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing: (a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; and (e) the making of reparation by offenders to persons affected by their offences.”

This is provided for under section 146 where the offence was motivated by hostility on the grounds of sexual orientation or disability. Section 146 of the Act applies where the Court is considering the seriousness of an offence where:
(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on –
   a. the sexual orientation (or presumed sexual orientation) of the victim, or
   b. a disability (or presumed disability) of the victim, or
(b) that the offence is motivated (wholly or partly) –
   a. by hostility towards persons who are of a particular sexual orientation, or
   b. by hostility towards persons who have a disability or a particular disability.

In these circumstances, according to the section, the court must treat it as an aggravating factor and must state in open court that the offence was committed in those circumstances.
Northern Ireland

Introduction

English legislation on crime and criminal justice matters is not normally extended to Northern Ireland, as a matter of course. In practice, however, the substance of legislative developments in this area in England and Wales is followed in Northern Ireland a few years later by domestic legislation which takes account of any local differences applicable in Northern Ireland.68 So the substance of Part III of the Public Order Act 1986 was replicated in Northern Ireland by the Public Order (Northern Ireland) Order 1987.69 By 2004, however, the developments introduced by the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 had still to be introduced in Northern Ireland.

Inquiry Into Hate Crime

On 12 February 2004 the Northern Ireland Affairs Committee announced an inquiry into Hate Crime in Northern Ireland.70 The terms of reference for the inquiry were to:

“Explore the reasons for the reported increase in crimes and incidents motivated by hatred within and between the communities of Northern Ireland;

To examine the effectiveness of measures taken by Government and relevant agencies to tackle prejudice, and to support the victims of such prejudice; and

To assess the effectiveness of the existing law and proposed changes to that law.”71

The subsequent Report noted that crime motivated by race, religion and sexual orientation is a substantial and growing problem in Northern Ireland.72 Government statistics recorded a rate of racial incidents in Northern Ireland in 2001/2002 of 12.9 per 1000 of the population, compared to a rate of 6.7 per 1000 in England and Wales.73 Statistics from the Police Service of Northern Ireland (PSNI) showed that the number of racist and homophobic attacks recorded more than doubled between 2002/2003 to 2003/2004.74

Clearly, the existing legislation to combat racism and racist attacks (the Public Order (Northern Ireland) Order 1987 and the general criminal law) was not having the desired effect. The Committee noted in particular that of the 226 racial incidents recorded by the PSNI in the 2002/2003 period,
only 7 prosecutions were taken. While it is noted that not all the incidents necessarily involved criminal offences, the number of prosecutions was still “worryingly small”.

Draft Northern Ireland Order

Overview

Following on from the Report a Draft Criminal Justice (Northern Ireland) Order 2004 was produced. It combined some of the primary features of the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. It took a purely sentence-based approach whereby hostility based on race, religion or sexual orientation would be an aggravating factor in sentencing. As was stated in the explanatory memorandum to the Draft Order:

“The proposals will provide Courts with powers to impose heavier sentences when an offence is aggravated by hostility based on the victim’s actual or presumed religion, race or sexual orientation. When there has been such aggravation, the proposals will require sentencers to state this in court and to treat this as an aggravating factor in sentencing.”

Racial hostility as an aggravating factor

It also made provision for an increase in the maximum penalties available for crimes of violence generally. Thus, the maximum sentences for the following offences were increased: grievous bodily harm; actual bodily harm; common assault; criminal damage; putting in fear of violence; and harassment. For the purpose of combating racism the net effect would be that trial judges would be required to treat racial hostility in the commission of an offence as an aggravating factor for the purpose of sentence. For crimes of violence and certain public order offences this was combined with an increase in the maximum penalties.

Protected Groups

The Criminal Justice Inspection for Northern Ireland in their 2007 Report noted that while traditionally, Northern Ireland had a tradition of discriminating on grounds of religion, “new divisions and lines of possible discrimination have opened up in recent years.” Migrant groups, members of the Lesbian, Gay, Bisexual and Transgender community and those with disabilities have, they note, “inherited the ‘scapegoat’ role and are being targeted by people who previously have acted out their hatred on the other religious community.”

RELIGION AND SEXUAL ORIENTATION

The draft Order embraced hostility based on religion and sexual orientation as well as race. It defined racial, religious and sexual orientation groups. “Racial group” is defined as “a group of

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75 House of Commons Northern Ireland Affairs Committee ‘Hate Crime’: the Draft Criminal Justice (Northern Ireland) Order 2004 (HC 615) at page 4.
76 Ibid.
77 These maximum penalties were increased generally, not just where the crime was aggravated by hostility.
78 Criminal Justice Inspection Northern Ireland Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland (CJINI 2007).
79 Ibid at page 3.
80 Ibid. Of course, another explanation for the rise in figures might be higher levels of reporting and recording racist crime, as suggested by Committee on the Administration of Justice Response to the Race Crime and Sectarian Crime Legislation in Northern Ireland (Committee on the Administration of Justice 2003) at page 4.
persons defined by reference to colour, race nationality or ethnic or national origins and references to a person’s racial background refer to any racial group into which he falls.” It is noted in the explanatory memorandum that this definition includes the Irish Traveller community. “Religious group” is defined as “a group of persons defined by reference to religious belief or lack of religious belief”, while “sexual orientation group” is defined as “a group of persons defined by reference to sexual orientation and will cover heterosexual, homosexual and bisexual orientations.”

The draft Order also amended the Public Order legislation so as to include sexual orientation to the list of groups protected. Thus, inciting hatred or fear based on sexual orientation would be penalised by a maximum of six months imprisonment.

DISABILITY
The Committee also referred to the fact that people with disabilities were omitted from the legislation. It referred to evidence from Mencap, which showed that “almost a quarter of those surveyed had been physically assaulted.” It was argued by the Director of Mencap that attacks upon the disabled were directly comparable with attacks on other groups which were the object of hate crime. While the Government argued that attacks on the disabled were “motivated more by opportunity than hostility”, the Committee were “unimpressed” with this line of reasoning. The argument was also somewhat weakened in light of the fact that section 146 of the Criminal Justice Act 2003 applies ‘hate crime’ provisions to offences against the disabled in England and Wales. The Committee were of the opinion that “by not including hostility against disabled people within the Draft Order [the Government] is unintentionally encouraging the perception that disabled people in Northern Ireland are less deserving of specific legal protection than disabled people in England and Wales.” It recommended that the Draft Order be amended to include appropriate protection from ‘hate crime’ to people with disabilities.

Committee’s assessment
In its assessment of the draft order the Northern Ireland Affairs Committee noted that its success would “depend in practice on the priority given to enforcing the proposed law by the police.” It stated:

“We are convinced that strong laws and effective police enforcement measures against ‘hate crimes’ are required to sent the strongest possible signal that such activity is completely unacceptable and will not be tolerated. We expect to see the problem tackled more vigorously in the future by the Police Service of Northern Ireland than appears to have been the case in the past.”
The 2004 order

Hostility as an aggravating factor

The draft order was subsequently adopted as the Criminal Justice (No 2) (Northern Ireland) Order 2004 and came into operation on the 28th of September 2004. It generally follows the terms of the draft order, as amended to include hostility on the grounds of disability.

Section 2 of the Order provides that where an offence was aggravated by hostility, the court must treat that as an aggravating factor which increases the seriousness of the offence, and must state in open court that that is the case. Unlike the English and Welsh legislation this applies to any offence (including those offences for which the maximum available penalties were increased).

An offence is aggravated by hostility if, at the time of committing the offence, or immediately before or after committing the offence, the offender demonstrates to the victim hostility based on:

(a) the victim’s membership of a racial group;
(b) the victim’s membership of a religious group;
(c) the victim’s membership of a sexual orientation group;
(d) a disability of the victim.

Also included is the situation where the hostility is based on the offender’s presumption that the victim was a member of one of the stated groups.

Section 2 further provides that an offence is also aggravated by hostility where the offence is motivated, either wholly or partly, by hostility towards:

(a) members of a racial group based on their membership of that group;
(b) members of a religious group based on their membership of that group;
(c) members of a sexual orientation group based on their membership of that group;
(d) persons who have a disability or a particular disability.

Increase in maximum penalties

The Order also makes provision for an increase in the maximum penalties available for certain offences.81 Those most directly relevant to racist attacks are as follows:

- up to seven years imprisonment on conviction on indictment for malicious wounding or causing grievous bodily harm;
- up to seven years imprisonment on conviction on indictment for assault occasioning actual bodily harm and common assault;
- up to 14 years imprisonment on conviction on indictment for criminal damage;
- up to 2 years imprisonment and a fine on conviction on indictment and up to 6 months imprisonment and a fine not exceeding the statutory maximum on summary conviction for harassment;
- up to 7 years imprisonment on conviction on indictment for putting a person in fear of violence.

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81 These offences are, *inter alia*: malicious wounding or grievous bodily harm, increased from 5 years to 7 years; assault occasioning actual bodily harm, increased from 5 years to 7 years; common assault increased from 12 months and/or £5,000 fine on summary conviction to maximum of 2 years and/or unlimited fine on conviction on indictment; criminal damage increased from 10 years maximum to 14 years maximum; putting in fear of violence increased from 5 years to 7 years.
Amendment of Public Order legislation
Section 3 of the Order provides for the extension of the Public Order (Northern Ireland) Order 1987 whereby sexual orientation and disability are included within the ambit of the Act.

Operation of the Legislation
The Criminal Justice Inspection for Northern Ireland in their 2007 Report\textsuperscript{82} note that there were 2,997 hate crime incidents recorded by the PSNI in 2005/2006. For monitoring purposes, the PSNI also include an additional “sectarian” category to those categories in the 2004 order.\textsuperscript{83} Thus, there are five categories of hate incidents within the PSNI: sectarian incidents, racist incidents, homophobic incidents, faith related incidents and disability related incidents.\textsuperscript{84}

The PSNI use an adapted Lawrence definition of hate crime, which is “any hate incident which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by prejudice or hate.”\textsuperscript{85} Thus, while there were 2997 hate crime incidents reported, 880 of these did not have a crime, meaning that 2117 were progressed for investigation.\textsuperscript{86} Of these, the Report notes that there is a low clearance rate for these crimes in comparison to other crimes.\textsuperscript{87}

The Report notes that during 2005/2006, the PSNI forwarded 232 files to the PPS in Belfast, Fermanagh and Tyrone with a hate crime motivation.\textsuperscript{88} Of these, 95 were accepted, and 136 were rejected.\textsuperscript{89} An additional 27 cases were recommended for prosecution by the PPS.\textsuperscript{90} However, of these numbers, the Report notes that there is little evidence of cases being prosecuted or dealt with by use of the Criminal Justice (Number 2) (Northern Ireland) Order 2004 – the offender was presumably prosecuted for a general offence.\textsuperscript{91} Indeed, inspectors found that with the exception of one court venue, experienced court clerks were unaware of the provisions of Articles 2 and 5 of the 2004 Order ever being raised in a Court.\textsuperscript{92} The Report suggests that a reason for this might be that the term “aggravated by hostility” is difficult to prove, but accepts that there may be other reasons for this.\textsuperscript{93}

\begin{footnotes}
\item[82] Criminal Justice Inspection Northern Ireland Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland (CJINI 2007).
\item[83] Ibid at page 9.
\item[84] Ibid at page 10.
\item[85] Ibid at page 9.
\item[86] Ibid.
\item[87] Ibid at page 33.
\item[88] Ibid at page 13.
\item[89] Ibid.
\item[90] Ibid.
\item[91] Ibid at page 31.
\item[92] Ibid at page 34.
\item[93] Ibid at page 34.
\end{footnotes}
Chapter Three

The Current Irish Position in Relation to “Expression Offences”: The *Prohibition of Incitment to Hatred Act 1989* and Related Legislation
Introduction

With the exception of incitement to hatred, racist behaviour is not expressly criminalised in Irish law. Offences against the person, property offences and public order offences committed with racist intent are not treated any differently from the basic offences where a racist intent is absent. Where criminal assaults are motivated by race hate they are simply prosecuted as generic assaults or assaults causing harm, etc. Similarly, there are no statutory provisions prescribing aggravated sentences for offences committed as an expression of race hate. While a judge can treat a racist motive as an aggravating factor when determining sentence in any individual case, there is no statutory authority or binding precedent compelling him or her to do so.

The first, and to date the only, Act to combat racist behaviour in Ireland through the criminal law is the Prohibition of Incitement to Hatred Act 1989. It introduces a number of offences concerning incitement to hatred. Similar measures have been in existence in England and Wales since at least 1965 and in Northern Ireland since 1970. The law in England and Wales was taken a step further with the Crime and Disorder Act 1998 which introduced a number of racially aggravated offences of assault, criminal damage, public order and harassment. In the Criminal Justice Act 2003 the law was expanded further to provide for harsher penalties for offences which were racially motivated. These developments have not yet been adopted in Ireland.
Background to the 1989 Act

In July 1983 an interdepartmental committee chaired by the Attorney General was set up to examine what measures were necessary to enable Ireland adopt certain international human rights instruments including, in particular, the International Covenant on Civil and Political Rights (ICCPR) and the UN Covenant on the Elimination of all Forms of Racial Discrimination (CERD). In the event it was decided to postpone consideration of CERD until the requirements of the ICCPR and the related International Covenant on Economic, Social and Cultural Rights had been completed. Consequent on the Committee’s recommendations the Prohibition of Racial, Religious or National Hatred Bill was introduced in the Seanad in November 1988. It was subsequently enacted as the Prohibition of Incitement to Hatred Act, 1989.

The Act was conceived as a minimalist measure designed to meet the requirements of Art.20.2 ICCPR which states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” While it was not initially intended to deal with the much broader anti-discrimination measures of CERD the opportunity was taken ultimately to include the incitement provisions of CERD. Accordingly, the definition of hatred in the Bill, as originally formulated, was extended to include hatred against a group on account of their race, colour, nationality, religion, ethnic or national origins. In the course of its passage through the Oireachtas it was further extended specially to include the travelling community and sexual orientation.

As regards CERD Ireland made a reservation with regards Article 4 of the Convention which states:

“Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. Ireland therefore considers that through such measures, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. These rights are laid down in Articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted Articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in Article 5 (d)(viii) and (ix) of the present Convention.”

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94 It is worth noting that the Act does not specifically include “descent” in this definition although “descent” is included in the definition of racial hatred in CERD.
95 The preferred term by most academics and NGO’s is now ‘Traveller Community’.
96 It was accepted that the Irish travelling community were a sufficiently distinct minority to warrant specific mention in the definition, rather than being included in the broader term ‘ethnic community’. See UK House of Lords debates HL Debates (1975), col.2188 for a consideration of the extent to which Irish travellers in Britain satisfy the definition of an ethnic community.
97 Article 4 of the Convention states:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
The minimalist nature of the Act can also be explained by the official perception that there was no general problem of racial hatred in Ireland at the time. While occasional incidents had been reported it was considered that the problem was not sufficiently pressing to warrant more sweeping measures which might pose problems for freedom of expression. Indeed, in the Dail Debates, Minister Collins stated:

“When [the occasional problem of racial incitement arises here] it is often due to localised ignorance and fear rather than to any general sense of intolerance or hatred towards people of other races or religions.”

As yet there is no evidence to suggest that the definition of personal features that can be the subject of hatred has proved too constricting. Nevertheless, it is worth noting that it is not as comprehensive as the definition in some of the international instruments. The Convention on the Elimination of All Forms of Racial Discrimination, for example, includes ‘descent’. Other characteristics which can have a bearing on racial hatred and which feature in some of the international instruments are: genetic features, language, membership of a national minority, property and birth.

While the Act was certainly in conformity with best international practice at the time of its enactment in 1989, and was perhaps ahead of its time in certain aspects, there has been concern regarding the perceived lack of implementation of the provisions of the legislation. In announcing the Review of the Act in 2000, the then Minister for Justice John O’Donoghue stated:

“Ireland has legislation in place for the past ten years prohibiting incitement to hatred. The [1989 Act] makes it an offence to incite hatred against any group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the Traveller community. I am aware that there has been some criticism of the effectiveness of this Act and I understand that since it was enacted only one case involving an alleged breach of the Act was referred to the Director of Public Prosecutions. That case was subsequently dismissed in the District Court.”

The question has thus been asked whether the provisions of the Act are too complex to provide for a workable offence. While admittedly few, it would appear that there have been successful prosecutions under the Act which might indicate that it is in fact workable, and there may be other reasons why it is used on such an irregular basis. Such reasons might be that the Act is considered a serious offence, requiring the consent of the DPP to prosecute, and so Gardai are slow to begin proceedings. It should also be noted that similar legislation in Northern Ireland and England and Wales also have low prosecution and conviction rates.

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

98 Dail Debates Vol.387, Col.2177.
99 The Irish definition of hatred is distinctive in that it include religion and sexual orientation from the outset. Religion was only added to the legislation in England and Wales, in the face of considerable opposition, in 2006. It has been in the Northern Irish legislation since 1987, 17 years after an offence of incitement to racial hatred was first introduced in Northern Ireland.
100 In Northern Ireland, it would appear that since 1987, there have been only a handful of successful prosecutions, and in England and Wales since the legislation was enacted in the 1960s, there have been fewer than 80 successful prosecutions.
Incitement

The Act criminalises certain forms of behaviour and expression to the extent that they are likely to provoke hatred or are intended to provoke hatred against a group of person on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation. The individual offences are dealt with in more detail below. It is important to emphasise at the outset, however, that they all aimed directly or indirectly at punishing incitement to hatred. This statement must be qualified immediately by the acknowledgement that not one of the offences in the Act actually uses the term incitement in its definition. Nor does the Act offer a definition of incitement. Nevertheless, given the long and short titles of the Act and the substantive contents of the individual offences created by the Act, it would seem reasonable to suppose that they can be classified generally as incitement to hatred offences.

At common law incitement is classified generally as an inchoate offence. At common law incitement is classified generally as an inchoate offence.\(^{101}\) It is a preparatory or preliminary offence aimed at persuading another or others to commit a substantive offence already known to the criminal law, such as murder or arson. Critically, the commission of the incitement offence is not dependant on success in persuading others to commit the substantive offence in question. It is essentially an offence of expression. It does not have to result in the application of injury or harm to another person. Indeed, it does not have to involve the communication of violent or harmful intent to the intended victims. They do not even have to be present when the incitement offence is committed or to be aware of it. The incitement is addressed not to the ultimate victims, but to other persons for the purpose of persuading them to commit the substantive offence against these victims.

At common law the offence of incitement cannot have an existence independent of an established substantive offence. The peculiar feature of the individual offences in the 1989 Act, however, is that they do not encompass a substantive offence separate and distinct from the incitement offence itself. They criminalise different modes of incitement to hatred, or certain acts preparatory thereto. The novel aspect of this is that hatred itself does not exist as a substantive criminal offence. The Act does not create an offence of hatred per se, and it is virtually inconceivable that there could be an offence of hatred which consisted only of one’s feelings or state of mind. In effect the Act is criminalising the expression of words or behaviour aimed at persuading others to have feelings or opinions which are lawful in themselves. To that extent they constitute a significant departure from the common law concept of incitement and a more substantial intrusion by the criminal law into freedom of expression and, in particular, the free communication of ideas, views and opinions. There is no absolute need for the persuasion to be successful for any of the offences to be established. It will be sufficient that the intent was there or that the views or opinions expressed were likely, having regard to all the circumstances, to stir up hatred. Equally, however, none of the offences will necessarily be established by subjecting a person to direct physical or verbal abuse on account of his race etc.

It is important, of course, to acknowledge the harm that is sought to be addressed by this novel use of the incitement concept. It is universally recognised that hatred is an acutely destructive emotion. Where it infects relations between social communities it can generate gross acts of violence and public disorder which can escalate into prolonged conflict and war. There is a strong public interest, therefore, in controlling the dissemination of views and opinions which have no purpose other than to foment hatred of a collective group. Where the hatred relates to essentially

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human characteristics such as race or colour, the case of restraint is even stronger as it is the fundamental principle of equality as human beings that is being called into question. This is particularly important where, as is often the case, the hate material is displayed or disseminated in a manner or in circumstances that it is likely to come to the attention of the targeted group. Such expressions of hate attack the fundamental right of these individuals to live in a society where they are not put in fear of violence or made to feel that they are second class citizens on account of their race etc.

It is generally accepted that there is a role for the criminal law in combating the spread of race hate. The difficult question is whether and to what extent this should include offences consisting purely of expression. Where should the balance be struck, between freedom of expression and the need to protect vulnerable groups from being the target of hate speech on account of their race etc.? This chapter analyses where that balance has been struck in Ireland in the offences created by the Prohibition of Incitement to Hatred Act 1989. Once again, it is important to remember that they are offences of incitement. They do not necessarily penalise the direct application of racist abuse to a person from a racial group.
The Offences

Although the origins of the Act are different its substance broadly follows that of the legislative provisions on incitement to hatred in force at the time in England and Wales and in Northern Ireland. The offences created by the Act are defined by reference to three broad situations. The basic crime definition in each is quite complex as it attempts to cover several different modes of having communicating or displaying offensive words, material or behaviour, together with several defences.

The common core in each of the three offences is words, material or behaviour which are: 1. threatening, abusive or insulting; and 2. intended or likely in the circumstances to stir up hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation. The inclusion of sexual orientation means that the offences are not confined to racist crime. However, they do not encompass other distinct categories of persons such as the disabled or women. 102 For the purposes of this analysis the words, material or behaviour at the core of each of the three offences will be referred to collectively as offensive material.

Threatening, abusive or insulting

As is the case in England, Wales and Northern Ireland the offensive material must be ‘threatening, abusive or insulting’ per se. If this essential precondition is not satisfied the offence cannot be established. Threatening words or actions should not give rise to much difficulty of interpretation as they have been around for centuries in the guise of the common law offence of assault. Their close association with the use of violence or conduct which puts another person in fear for his or her safety helps to overcome concerns about freedom expression which are inevitably generated by incitement to hatred offences. The inclusion of abusive or insulting words material or behaviour on the other hand is problematic. It is possible, for example, that they could be satisfied by extreme criticism of the religious practices and beliefs of a religious sect or the alleged social characteristics of an ethnic group in the context of popular, political or even academic debate. This raises the freedom of expression issue in an acute form. Even if in practice prosecutions are not taken against the expression of extreme views in such contexts, the very existence of such broadly defined offences can have a chilling effect on the freedom of debate and the freedom to express one’s views.

Words or behaviour which fall short of abuse or insults but which nevertheless expose a group of persons to ridicule or contempt on account of their race, religion etc will not be sufficient. In the course of the Bill’s passage through the Oireachtas, the Minister was pressed to extend its reach to include ridicule and contempt. He resisted, however, on the grounds that that would be too severe an encroachment on freedom of expression. While this is a helpful acknowledgement of the need to strike a balance between freedom of expression and the protection of individuals and groups from gratuitously offensive racial abuse, it does not solve the underlying problem. Where do ridicule and contempt stop and insults begin? The Act does not offer a reliable guide.

While the broad and ill-defined scope of ‘threatening, abusive or insulting’ words, material or behaviour clearly poses problems for freedom of expression, it must also be acknowledged that

102 In the course of the Bill’s passage through the Oireachtas Monica Barnes TD made a strong but unsuccessful case for the inclusion of women on the basis that pornography had the capacity to spread hatred against women.
in some contexts they may not be wide enough to catch the expression of racist views. One could envisage, for example, a situation in which an individual gives an address or publishes a paper in which he intends to stir up hatred against a particular religious sect or ethnic minority. His or her address or paper might even have the effect of stirring up hatred against the sect or group concerned. Arguably, however, no offence would be made out if the individual was careful enough to present his or her views in language which avoided the use of threatening, abusive or insulting words or material. A related example would be the presentation of the results of ‘scientific research’ which could stir up hatred of a group. It, too, would hardly qualify if the results were presented in accordance with the appropriate scientific language and norms, avoiding the use of threatening, abusive or insulting terms or material.

Although the primary purpose of the Act is to punish ‘hatred’ on the grounds of race etc, the Act takes a rather unusual approach to the definition of hatred. It states that:

“‘hatred’ means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.”

Clearly, the definition focuses on the target of the hatred and on the characteristics of the target which attracts the hatred. It does not actually define ‘hatred’ itself in terms of the nature and intensity of feelings or emotions that must be generated in order to qualify as ‘hatred’ rather than some lesser feeling or emotion. This lack of firm guidance on the central ingredient of the offence is not helpful for gardai, prosecutors, judges and juries who are required to make decisions in the enforcement of the Act within their respective spheres. Ultimately, it can fuel under-enforcement, over-enforcement or arbitrary enforcement over time and place.

**A group of persons**

A key feature of the definition of ‘hatred’ is its reference to a group of persons in the State or elsewhere on account of their race etc. This plays a role in limiting the scope of the offences in the Act. Under the definition of hatred an offence can only be established if the accused intended to stir up hatred or his words or behaviour were likely in the circumstances to stir up hatred against a group of persons on account of their race etc. A typical example would be a public speaker who addressed a crowd in terms that invited them to drive members of a distinct racial group out of the country because they posed a serious public health risk to the indigenous population. Here, the offensive material clearly refers to a group defined by the characteristics of race etc, and the intention of the speaker is to stir up hatred in others for members of that group. It is not necessary that members of the group actually hear or see the offensive material. The real question is whether it is addressed to others who are intended to feel, or who are likely to feel, hatred for the group as a result.

This emphasis on the group conceals a weakness in the capacity of the Act to deal with another
very common form of racist behaviour, namely abuse which is expressed directly at another person or group of persons on account of his, her or their perceived racial characteristics. Where the abuse takes this form it will be difficult to satisfy the requirement that it is intended to stir up hatred against a group of persons on account of their race, or that it is likely in the circumstances to have that effect. Almost invariably the intention of the aggressor is to cause fear or embarrassment in the victim or victims, rather than to stir up hatred against his, her or their race. Equally it is difficult to see how his or her actions are likely to stir up hatred against a group of persons on account of their race etc unless others (not members of the group) see or hear the offensive material. Even where others are present, and not participating in the abuse, it is quite possible that they would feel sympathy for the victim or victim(s) being abused, rather than hatred for his, her or their racial group. An example of this or provided by DPP v O’Grady, one of the few cases under the Act in which there was a conviction at first instance.

In the O’Grady case the defendant driver of a coach refused to allow a Gambian man to board at the public bus stop while the man was eating a sandwich. In doing so the driver subjected the individual to extremely derogatory remarks to the effect that he as a black man lacked the civilised standards of behaviour of the Irish white man. His conviction the District Court was overturned on appeal by the Circuit Court when it emerged that only two witnesses (apart from the Gambian man himself) had heard the offensive words and they were entirely supportive and sympathetic to the Gambian man. They were not incited to hate Gambians or non-whites as a result of the bus driver’s conduct. Accordingly, an essential component of the offence had not been established and so the Circuit Court judge felt that it would be unsafe to uphold the conviction.

It follows that the focus on spreading hatred for a ‘group’ confirms what has already been suggested above in the discussion of incitement. The offences created by the Act do not, and were never meant to, apply to the situation where one or more individuals are the target of direct racist abuse by another. Where the abuse takes that form the most that the gardai and the DPP can do under the current law is proceed against the aggressor on the basis of general assault or public offences or breach of the peace.

The General Offence
– Publication or Distribution of Offensive Material

The three individual offences differ from each other by reference to the manner in which the offensive words, material or behaviour are communicated or processed. This follows the pattern in England, Wales and Northern Ireland. The general offence consists of the use, distribution or publication of the offensive material. There is a separate, narrower offence to deal with the situation where the mode of expression takes the form of broadcasting through, for example, radio, television or the internet. The third offence targets the preparation and possession of offensive material. Inevitably, there is a degree of overlap between all three offences. Nevertheless, the approach here will follow that of the Act. It will simply outline the parameters of each offence in accordance with its own definition, starting with the generic offence.

The general offence concerns the use, publication or distribution of offensive material which is intended to or which is likely to stir up hatred.\textsuperscript{105} It can take one of three different forms, namely: 1. the publication or distribution of written material; 2. the use of words or behaviour or the display of written material; and 3. the distribution, showing or playing of a recording of visual images or sounds. Collectively, these would seem to cover all possible means of expressing the offensive material targeted by the Act. They include: words (spoken or written), gestures, pictures and sketches communicated or displayed through any medium. For the most part it does not matter whether the expression occurs in public or in a private setting, or even whether the audience consists solely of persons who identify with the sentiments being expressed. The only qualification concerns the second form of expression (the use of words or behaviour or display of written material) which will not constitute an offence where it occurs in a private residence in circumstances where it cannot be seen or heard by persons outside.\textsuperscript{106} While this is clearly a concession to the right to privacy within the home and the freedom of private communication, it should be noted that a ‘private residence’ is defined narrowly to help protect against it being used as a device to circumvent the offence.\textsuperscript{107} While it includes any structure (including a tent, caravan, vehicle, vessel or any other temporary moveable structure) or part of such structure which is used as a dwelling, it does not cover any part which is not used as a dwelling. More significantly, it does not include any private dwelling in which a public meeting is being held. In this context a public meeting means a meeting at which the public are entitled to be present, on payment or otherwise as of right or by virtue of an express or implied permission. It follows that it is only purely private engagements in a private residence (or part thereof) which is actually used as a private residence which is beyond the reach of the offence, and even then only if the words or behaviour cannot be seen or heard by persons outside the private residence or part thereof. It is also important to note that if the words or behaviour occur inside a private residence in circumstances where they are heard or seen by persons outside, it will be a defence for the defendant to prove that he had no reason to believe that the words or behaviour would be heard or seen by a person outside.\textsuperscript{108}

Irrespective of what form the words or actions take or where they took place, the offence can only be committed if they were ‘threatening, abusive or insulting’. This is a core and essential part of the behaviour or conduct (\textit{actus reus}) constituting the offence. There is no absolute requirement that the threatening, abusive or insulting words or actions should be of a nature as to provoke hatred. As will be seen below it will be sufficient if the accused uses such words or behaviour with the intent to stir up hatred, irrespective of whether the words would have had that effect in themselves. There is, however, another variation of the offence. This arises where the accused uses words or behaviour which are threatening, abusive or insulting and which are likely, having regard to all the circumstances, to stir up hatred. In this event he can be guilty of the offence even if he did not intend to stir up hatred. As will be seen below, there is provision for a defence in this situation.

As a general principle, criminal liability arises only where the accused has engaged in the prohibited conduct (\textit{actus reus}) with the appropriate state of mind (\textit{mens rea}). To satisfy the \textit{mens rea} it must normally be shown at least that the accused intended or was reckless with respect to his or her commission of the components of the \textit{actus reus}. Where one or more components of the \textit{actus reus} consist of a circumstance or state of affairs then it must be shown that the accused was aware of or was reckless as to the existence of that circumstance or state of affairs. Applying these principles to the components of the general offence in the 1989 Act, the prosecution must prove at least

\textsuperscript{105} Prohibition of Incitement to Hatred Act, 1989, s.2(1).
\textsuperscript{106} Ibid. s.2(1)(b).
\textsuperscript{107} Ibid. s.2(3).
\textsuperscript{108} Ibid. s.2(2)(b).
that the accused knew or was reckless to the fact that he or she was engaged in an act of publishing, distributing, communicating etc. The prosecution must also prove that the accused was aware or was reckless as to the fact that the material was threatening, abusive or insulting. It is on the central issue of ‘hatred’, however, that the *mens rea* gets complicated. In effect the offence can be proved in one of two ways which differ in respect of what the prosecution must prove about the state of mind of the accused.

In one of the two variations the prosecution can succeed by proving that the accused used published or distributed the offensive material with the intention to stir up hatred. In this variant the prosecution do not have to show that the material itself was likely to stir up hatred. It will be sufficient for them to prove that it was threatening, abusive or insulting and that the accused intended to stir up hatred. The problem is that it is difficult to prove this intent. Recklessness or negligence on the part of the accused will not suffice. The prosecution will have to prove that the accused used the offensive material specifically with the intent to stir up racial hatred. If there is even a reasonable doubt that the accused had some other intent or did not think that this might be the consequences of his actions the offence will not be established.

Experience in England and Wales with the Race Relations Act 1965 confirmed that it was exceedingly difficult to prove beyond a reasonable doubt that the intention of the accused was to stir up hatred by his words or behaviour, especially when he offered an alternative explanation or denied that that was his intention. Accordingly many prosecutions were lost in England and Wales leading ultimately to the amendment of their legislation. The Irish 1989 Act has followed the amended approach in England and Wales by providing for an alternative to the requirement to prove an intention to stir up hatred.

Under this alternative version it will be sufficient for the prosecution to prove that the offensive material, having regard to all the circumstances, was likely to stir up hatred, irrespective of whether the accused intended to stir up hatred or not. This, of course, is an amendment to the *actus reus*. The prosecution will have to prove not only that the accused’s words or conduct was threatening, abusive or insulting, but also that it was likely, having regard to all the circumstances, to stir up hatred. If the prosecution can prove that the words or conduct were of that nature then it is not necessary to go further and prove that the accused intended to stir up hatred.

The problem with this approach is that it may criminalise an individual who had no intention to stir up hatred and who did not realise that his or her words or behaviour would be likely to stir up hatred or even that his words or behaviour were threatening, abusive or insulting. To reduce this risk the Act states that where it is not shown that a person intended to stir up hatred it will be a defence for him to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that the material was threatening, abusive or insulting.\(^\text{109}\) It is important to note that the defendant must prove that he did not suspect and had no reason to suspect that the material was threatening, abusive or insulting. He does not have to prove that he did not suspect had no reason to suspect that it contained material likely to stir up hatred, nor would it benefit him any if he did prove that. If the material was likely to stir up hatred he will only escape liability if he can prove that he did not suspect (and had no reason to suspect) that it was threatening, abusive or insulting.

\(^\text{109}\) Ibid. s.2(2)(a).
The burden of proof in criminal matters normally rests on the prosecution which must prove all elements of the offence beyond a reasonable doubt. Where the accused wants to rely on the defence provided by the Act he clearly assumes an onus of proof with respect to his state of mind. Although it is by no means certain, it is likely that this is an evidential burden as distinct from the full burden of proof. In other words the accused will discharge the burden if he shows on a balance of probabilities that he was not aware of the content of the material and that he had no reason to suspect its nature. If he manages to discharge this burden then it will be a matter for the prosecution to prove his guilt beyond a reasonable doubt.

Two further defences are available in respect of the second form of the offence outlined above; the use of words, behaviour or the display of written material. As noted above, the accused will have a defence if he proves that he was inside a private residence at the time and had no reason to believe that his action was visible or audible to persons outside. An additional defence is available where he is not shown to have intended to stir up hatred. In this event he will have a defence if he proves that he did not intend his actions to be, and was not aware that they might be, threatening, abusive or insulting.\textsuperscript{110} This defence has nothing to do with whether the action occurred within a private residence. Indeed, it would appear to be a repetition of the general defence that applies to all three methods of committing the offence; the only difference being that it is tailored more specifically to the actions concerned in the second method of commission, compared to the actions concerned in the first and third methods. Once again, it is likely but by no means certain that this entails a transfer of an evidential burden as distinct from the full burden from the prosecution to the defence.

### The Broadcasting Offence

The Irish legislation follows the example of England, Wales and Northern Ireland by making provision for a separate broadcasting offence, even though it is likely that broadcasting the offensive material would probably be covered by the general offence anyway. The inclusion of a distinct broadcasting offence reflects the general awareness that broadcasting is a most powerful and potentially dangerous medium for the dissemination of offensive material. There is also the risk that broadcasting technology can be used to disseminate offensive material in a manner which could not be dealt with adequately by the basic offence. While the latter might be sufficient to catch those who are at the front end of the broadcasting process it may not be so effective in reaching those in the background who may be the guiding force behind the operation.

Where offensive material is broadcast the following three categories of person are guilty of an offence: 1. the person providing the broadcasting service; 2. any person by whom the item is produced or directed; and 3. any person whose words or behaviour in the item are threatening, abusive or insulting.\textsuperscript{111}

A person will only be guilty of the broadcasting offence if the offensive material is broadcast and he intended to stir up hatred or, having regard to all the circumstances, hatred is likely to be stirred up by the broadcast.\textsuperscript{112} The latter possibility raises the same mens rea issues discussed.

\textsuperscript{110} Ibid. s.2(2)(b)(ii).
\textsuperscript{111} Ibid. Ibid. s.3(2).
\textsuperscript{112} Ibid. Ibid. s.3(1).
above with respect to the generic offence. As with the general offence it is a defence for any of 
these persons (where they did not intend to stir up racial hatred) to prove that they did not know 
and had no reason to suspect that the material broadcast was threatening, abusive or insulting.113

Persons in categories 1 and 2 have an additional defence option where they did not intend to stir 
up hatred. They have a defence if they can prove that they did not know and had no reason to 
suspect that the items broadcast would involve the offensive material.114 In other words, they were 
taken unawares. Even if they were aware in advance they will have a defence if they can prove 
that having regard to the circumstances in which the item was broadcast it was not reasonably 
practicable for them to secure the removal of the material.115

Persons in category 2. have a further defence if they can prove that they did not know and had 
no reason to suspect that the item would be broadcast or that the circumstances in which the 
item would be broadcast would be such that hatred would be likely to be stirred up.116 A very 
similar defence extends to persons in category 3. They have a defence if they can prove that they 
did not know and had no reason to suspect that an item involving the use of the material would 
be broadcast or that the circumstances in which such an item would be broadcast would be such 
that hatred would be likely to be stirred up.117

Inevitably the proliferation of these relatively abstract defences makes it difficult to get a firm grip 
on what does and what does not constitute an offence under the broadcasting provisions. This can 
work to the detriment of freedom of expression in that it can result in broadcasters being overly 
cautious about what they will broadcast or even what programmes or items they will commissions.118 
Equally, it can work to the detriment of vulnerable groups as it can result in prosecutors being 
reluctant to act against broadcasters in any but the most extreme and clear cut cases.

The broadcasting offences are supported by the provision of police powers and evidential provisions. 
Where a member of the Garda Siochana not below the rank of superintendent has reasonable 
grounds for suspecting that a broadcasting offence has been or will be committed under the Act 
in respect of an item, he may make an order authorising any member of the Garda Siochana, on 
production of the order if so requested, to require any person named in the order to produce a 
copy of the script on which the item was or will be based (if it exists) or a recording of any matter 
which was or will be included in the item (if it exists).119 The request pursuant to such an order 
may be made at any time or times within one month from the date the order was made. Where 
the script or recording is produced the person in question may be required to afford the member 
an opportunity of causing a copy to be made. An order pursuant to these provisions must be 
signed by the person making it, and it shall name the person to whom it is directed.120 It shall 
also describe the item to which it relates in a manner sufficient to enable the item to be identified. 
Any person who without reasonable excuse fails or refuses to comply with a requirement made 
under an order shall be guilty of an offence.121 Nothing lawfully done under these provisions in 
respect of a script or a recording shall constitute an infringement of copyright or an offence 
under the Performers’ Protection ct, 1968.122

113 Ibid. s.3(6).
114 Ibid. s.3(3)(a)
115 Ibid. s.3(3)(b).
116 Ibid. s.3(4).
117 Ibid. s.3(5).
118 See T Daly op.cit.
119 Prohibition of Incitement to Hatred Act, 1989, s.3(8)(a).
120 Ibid. s.3(8)(b).
121 Ibid. s.3(8)(c).
122 Ibid. s.3(8)(e).
In proceedings for a broadcasting offence in respect of an item under these provisions, a script on which the item was based shall be evidence of what was included in the item and of the manner in which the item or any part of it was performed.\textsuperscript{123} If such a script is given in evidence on behalf of any party to the proceedings, the item shall be taken to have been performed in accordance with the script except in so far as the contrary is shown.\textsuperscript{124} This also applies to a copy of any script or recording which has been made by a member of the Garda Siochana pursuant to these provisions.\textsuperscript{125} A document purporting to be such a copy and to be signed by the member shall be deemed for the purposes of these provisions to be such a copy and to be so signed unless the contrary is shown. These provisions are aimed at averting the need to call first hand testimony of what was actually said or done in the course of a broadcast item.

Preparation and Possession of Material Likely to Stir up Hatred

Separate provision is made for an offence of preparing or possessing offensive material. It is aimed primarily at the situation where someone has created hate material with a view to its wider dissemination. It also extends to a situation where the material has come into existence but has not yet been distributed. As such the offence is likely to arise earlier in time than the first or second offences outlined above. A similar offence is also present in the law of England, Wales and Northern Ireland.

The offence can be committed in three different ways.\textsuperscript{126} The first is based on the preparation of written material, which is defined broadly to include signs or visual representations.\textsuperscript{127} So the offence would cover writing, sketches or pictures produced by the accused. Presumably it would also cover the preparation of such material originating from a source other than the accused. The second method of commission is based on the making of a recording of sounds or visual images. These could be sounds or images originating from the accused or another source. The third method of commission is the mere possession of the written material, sounds or visual images, irrespective of their source. In all three modes the material in question must be threatening, abusive or insulting.

Although it is by no means certain, it would appear that the first two modes of commission can be satisfied even though the accused has not completed his production of the prohibited material. Indeed, the offence could commence at the point where he starts to prepare or make such materials (presupposing that the other elements of the offence are also satisfied at that point). The counter argument is that some threatening, abusive or insulting materials must actually have been made or prepared before the offence can arise. While this does not necessarily require that the accused should have completed the making or preparation, it does mean that the offence will only arise at some indeterminate point in the process where the threatening, abusive or insulting nature of the material becomes apparent. These problems do not arise with respect to the third mode of commission, namely possession. This mode of commission can be satisfied only at the point where the accused comes into possession of the prohibited material. It does not matter whether he has made or prepared it or whether he has received it from a third party or downloaded it from the web.

The remaining elements of the offence are common to all three modes of commission. The first

\textsuperscript{123} Ibid. s.3(7)(a).
\textsuperscript{124} Ibid. s.3(7)(b).
\textsuperscript{125} Ibid. s.3(8)(d).
\textsuperscript{126} Ibid. s.4(1).
\textsuperscript{127} Ibid. s.1(1).
of these is that the material must be prepared/made or possessed with a view to being distributed, displayed/shown, played, broadcast, or otherwise published (as the case may be) in the State or elsewhere. In other words it will not be an offence to make, prepare or possess hate material for one's own private use or gratification. On the other hand if it is made, prepared or possessed with a view to wider distribution then the offence can be made out even if no actual distribution occurs.

The second common element can be satisfied in one of two ways which, due to awkward drafting, are difficult to interpret with certainty. The first would appear to be an intention on the part of the accused to stir up hatred. In other words the offence can be made out if the accused's intention in possessing the material with a view to wider dissemination was to stir up hatred. Even if he lacks that specific intention, the offence may still be made out if the other option is present. This will arise where the material is likely to stir up hatred having regard to all the circumstances including, in particular, the distribution etc that the accused seems to have in mind. However, if the prosecution relies on this option as distinct from the accused's specific intention, the accused will have a defence if he can prove that he was not aware of the content of the material or recording and did not suspect, and had no reason to suspect, that the material was threatening, abusive or insulting.\textsuperscript{128} It is worth noting that this defence does not require the accused to prove that he had no reason to suspect that the material was likely to stir up hatred. By the same token, however, proving that he had no reason to suspect that the material was likely to stir up hatred will not assist him any if he does not show that he had no reason to suspect that the material was threatening, abusive or insulting. Presumably the onus of proof in this context is the evidential burden which is satisfied by proof on a balance of probabilities. If he discharges that burden the prosecution will have to prove beyond a reasonable doubt that the accused did know that the material was threatening, abusive or insulting and that it was likely to stir up racial hatred.

Clearly this defence will be applicable to an innocent distributor who could not be expected to know the contents of the material. The standard example is the postman delivering a sealed package containing the prohibited material. It would also cover a publisher who had possession of, but had not yet read, an offending manuscript. However, it would not benefit the individual who was aware of the contents of the material but due to his own naivety or lack of awareness did not realise that it contained threatening, abusive or insulting material even though all reasonable persons would have had such awareness.

There is an additional evidential provision which makes it easier for the prosecution to prove its case under the possession offence. If it is reasonable to assume that the material or recording in question was not intended for the personal use of the accused, he shall be presumed until the contrary is proved to have been in possession of it within the meaning of the offence.\textsuperscript{129} In other words if the accused is found in possession of a large quantity of copies of the material it can be assumed that he had it with a view to distributing, displaying, broadcasting or otherwise publishing it. For this presumption to operate the material must actually be threatening, abusive or insulting. It can be made only if it is reasonable to assume that the material was not intended for the personal use of the accused. It is also worth noting that the presumption applies only to the possession of material. It does not apply to the situation where the accused is still in the process of making or preparing the material and has not yet reached the point where he has produced material which is threatening, abusive or insulting.

\textsuperscript{128}\textit{Ibid.} s.4(2).
\textsuperscript{129}\textit{Ibid.} s.4(3).
Where the presumption applies the accused will have to prove that he was not in possession of the material within the scope of the offence. This can be done by proving that the material was not for distribution etc. Equally, it can be done by proving that the material was not intended, and was not likely, to stir up hatred. Presumably this presumption can be displaced on a balance of probabilities. In the event that the accused does manage to displace it the prosecution will have to prove beyond a reasonable doubt that all of the elements are satisfied.

It is worth noting that prohibiting the possession of anything in the criminal law can give rise to further problems concerning what must be proved in order to establish that the offence has been committed. Is it enough for the prosecution to prove that the material is on property or chattels owned by the accused? Does it have to go further and prove that the accused was aware of the presence of the material? Does it have to go further still and prove that the accused considered himself to be in possession of the property; in other words that he had an intention to exercise possession or control over it which coincided with his physical or legal control of it? It is submitted that all of these requirements would have to be satisfied in the absence of specific provision to the contrary in the legislation. This can render it difficult for the prosecution to establish a case for possession in circumstances where material is found on the accused’s property in circumstances where the accused maintains that he was not aware of its presence or that it belonged to someone else or parties unknown. The possession offence in the 1989 Act does not make any attempt to qualify the meaning of possession or how it can be proved. It must follow that the prosecution may be faced with these difficulties in individual cases.

The comparable provisions in England, Wales and Northern Ireland do not include specific provisions for preparation (as distinct from possession) of the material. They also lack the presumption provisions that appears problematic in the Irish legislation.

Live Performances

The 1989 Act does not make specific provision for live performances (plays etc) in which offensive material is used. It follows that script writers and performers are subject to the general provisions in the Act governing the preparation, possession and use of the prohibited material and conduct. Directors and others associated with such performances may be guilty as secondary parties. There are no exemptions for the arts. The legislation in England, Wales and Northern Ireland contains specific offences pertaining to the use of prohibited words or conduct in the course of a live or recorded performance. In addition it is a specific offence for a director and/or presenter of a public performance involving the use of threatening, abusive or insulting words or behaviour if he or she intends to stir up racial hatred or, having regard to all the circumstances, racial hatred is likely to be stirred up by the performance. Where the material is likely to stir up racial hatred and the director or presenter did not intend to stir up hatred he will have a defence if he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour or that he did not know and had no reason to suspect that the words were threatening, abusive or insulting.

130 See F McAuley and J P McCutcheon Criminal Liability (Dublin: Round Hall Sweet & Maxwell, 2000) at ch.4.
Other Matters

There are a number of disparate provisions in the Act on matters such as: its application to a body corporate, exemptions for reports of parliamentary and court proceedings, limitations on prosecutorial competence, maximum penalties and police powers of arrest, entry, search and seizure. These and related matters are dealt with here.

Application to a body corporate

The offences can be committed by a body corporate. In that event any officer or member of the body (as well as the body itself) shall be guilty of the offence if it is proved to have been committed with the consent or connivance of that officer or member or to have been attributable to any neglect on his or her part. Neglect does not normally connote a sufficient degree of blameworthiness for criminal liability. The usual standard is knowledge, intention or recklessness. By extending liability to neglect in the context of corporate crime the Act is imposing a relatively high standard of care on all officers and members of a corporate body to guard against the commission of hate offences by the body.

The application of the offences to a body corporate and its officers cannot be avoided through the device of the members managing the affairs of the body corporate directly. In this event the provisions outlined in the immediately preceding paragraph apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

There is no provision in the Act extending the offences to an unincorporated association

Race hate organisations

The Act does not deal specifically with the proscription of organisations engaged in the distribution of hate material. It emerged during the course of its passage as a Bill through the Oireachtas that the interdepartmental committee chaired by the Attorney General was looking at this matter in the context of the requirements of CERD. The official view at the time was that the provisions dealing with an unlawful organisation in the Offences against the State Act, 1939 were probably sufficient to deal with this aspect. Section 18 of the 1939 Act defines as unlawful any organisation which, inter alia, “engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law” or “engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means”. Presumably, in the light of the 1989 Act, an organisation would satisfy this definition where it engages in or encourages hatred of groups of persons on account of their race etc. The 1939 Act makes it a criminal offence for any person to be a member of an unlawful organisation. It is a defence for any such person to show that he did not know that the organisation was an unlawful organisation or that, as soon as reasonably possible after he became aware of its nature, he disassociated himself from it. The Act also enables the Government to issue a suppression order against an unlawful organisation. This, in turn, paves the way for the forfeiture of the property and assets of such an organisation. So, while it might be an unorthodox use of the 1939 Act, it would appear that it can be used to combat racist organisations and their members.

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131 Prohibition of Incitement to Hatred Act, 1989, s.7(1). An officer in this context means a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in such capacity.
132 Ibid. s.7(2).
Exemptions for legislative and judicial processes

The offences created by the 1989 Act do not extend to anything contained in a fair and accurate report of proceedings in either House of the Oireachtas (including committees and official reports). This exclusion is considered necessary to protect the public interest in the transparency of proceedings in the legislature and the freedom of debate leading to public policy-making. The Act does not expressly exclude anything said in the Oireachtas or in committees of the Oireachtas, by members, presumably because they are already protected by Article 15.10 of the Constitution and the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976. It would also appear that persons appearing before a Committee are generally protected for things said before or submitted to the Committee, by virtue of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997. Nevertheless, there is a case for including express provision in the Prohibition of Incitement to Hatred Act exempting from the offences things said by persons appearing before Committees or evidence submitted by such persons to Committees. There should be no doubt about citizens being able to express their views and opinions freely and without the fear of sanction in the public policy-making process of a liberal democracy.

Also excluded from the offences is a fair and accurate report of public proceedings before a court or a tribunal exercising functions of a judicial nature. The report, however, must be published contemporaneously with the proceedings or as soon as reasonably practicable and lawful. This exclusion is considered necessary to serve the public interest in having justice administered in public. Once again, however, exclusion applies only to the report it does not expressly extend to anything said in the court or the tribunal.

Prosecution

Significantly, where a person is charged with an offence under the Act no further proceedings can be taken (apart from remand) except by or with the consent of the DPP. It was anticipated that the requirement for the prior consent of the DPP would help protect against private individuals using the Act to pursue trivial disputes or grievances. Equally, it would help ensure that prosecutions are only brought on the basis of sufficient evidence and pursuant to a consistent policy.

This restriction on prosecutorial competency can also function as a useful protection for rights of privacy and freedom of expression. The generic offence, in particular, has the potential to encroach severely on privacy and property rights in one’s own home, on the right to engage in private communications on the street and generally on the freedom to express one’s opinions and views. The argument in favour of these intrusions is that they are necessary to prevent determined individuals from organising their activities in the dissemination of race hate in a manner which would technically avoid offences that were defined too tightly. By subjecting prosecutions to the prior consent of the DPP, the State is helping to ensure that the more broadly defined offences are not used inappropriately to encroach on privacy and expression rights. Nevertheless, it must be acknowledged that this safeguard may not be sufficient to avert the chilling effect that the broadly defined offences may have on, for example, the freedom of expression in the course of public debate on race issues. A more satisfactory balance between freedom of expression and the punishment of race hate might be achieved through the publication of guidance on the principles that will govern the DPP’s decision to prosecute and, by extension, his consent to prosecution by a third party.

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133 Ibid. s.5(a).
134 Ibid. s.5(b).
135 Ibid. s.8.
Punishment

The offences can be tried and punished summarily and on indictment. On summary conviction an offender is liable to be fined up to a maximum of 1,270 euro and/or imprisonment for a term not exceeding 6 months. An offender convicted on indictment is liable to a fine up to a maximum of 12,700 euro and/or imprisonment for a term not exceeding two years. The penalties on conviction on indictment are stiffer in England and Wales. There the offence carries a maximum prison sentence of 7 years and/or an unlimited fine.

The court before which a person is convicted of a 'hate' offence may order the forfeiture of any written material or recording shown to its satisfaction to relate to the offence. The material will then be destroyed or otherwise disposed of in such manner as the court may order. It is worth noting that it is not just the offending words etc which can be destroyed. It is any material or recording relating to it. This could involve the destruction of large quantities of material, such as a print run of books, where the offending material cannot easily be isolated and destroyed. The owner of the material, or any person claiming an interest in it can apply to the court to be heard in the matter. In this event the court shall not make the order unless the person has been given an opportunity to show cause why it should not be made. The wording of this provision is unfortunate because on one interpretation the simple action of the purported owner etc in applying to be heard could prevent the court from ever being able to make the order if the person in question had not been given the opportunity to be heard before making his or her application. A forfeiture order will not take effect until the ordinary time for instituting an appeal against conviction or the order itself has expired. Where an appeal is instituted the order shall not take effect until it is finally decided or abandoned or until the ordinary time for instituting any further appeal has expired.

Police Powers

The 1989 Act confers certain powers on members of the Garda Siochana to facilitate the investigation, detection and prevention of offences under the Act. A member can summarily arrest anyone whom he reasonably suspects of having used words, behaving or displaying written material in public where the words, behaviour or material are threatening, abusive or insulting and are likely having regard to all the circumstances to stir up racial hatred, or if the person intended thereby to stir up racial hatred. Where a member reasonably suspects a person of having committed any of the other hate offences under the Act he or she may require that person to reveal his or her identity. A failure to do so, or the supply of a name or address which the member reasonably suspects to be false or misleading, will trigger a summary power of arrest.

A District Court judge or a peace commissioner may issue a search warrant where he or she is satisfied on the sworn information of a member of the Garda Siochana not below the rank of sergeant that there are reasonable grounds for suspecting that relevant material is in or at any premises or other place. For this purpose, relevant material includes material the preparation or possession of which is unlawful under the Act, and scripts or recordings the production of which has been lawfully requested by gardai pursuant to the Act. However, a warrant cannot issue for such scripts or recordings unless the judge or peace commissioner is satisfied by information on

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136 Ibid. s.6(a).
137 Ibid. s.6(b).
138 Ibid. s.11(1).
139 Ibid. s.11(2).
140 Ibid. s.11(3).
141 Ibid. s.10(1). “In public” in this context means in any place other than a private residence, and inside a private residence when the words, behaviour or material are heard or seen by persons outside the residence.
142 Ibid. s.10(2).
143 Ibid. s.9(1)(a).
oath that a formal request for its production or the making of a copy was made and not complied with, or that it is necessary in all the circumstances to issue the warrant notwithstanding that such a request was not made.\textsuperscript{144}

Where a warrant issues, it will authorise any member of the Garda Siochana (who may be accompanied by any other members), on production of the warrant if requested, (using force if necessary) to enter the premises or place specified in the warrant at any time or times within one month from the date the warrant was issued. The warrant also authorises them to seize any such material found there and to require any person found there to give his or her name and address. It is an offence for any person to obstruct or interfere with a member of the Garda acting under the authority of a warrant.\textsuperscript{145} Equally, it is an offence for any person found at or in premises or a place specified in the warrant to refuse or fail to give his name or address when required by the member to do so.\textsuperscript{146} Giving a false or misleading name or address is also an offence.

\textsuperscript{144} \textit{i}bid. s.9(1)(b).
\textsuperscript{145} \textit{i}bid. s.9(2)(a).
\textsuperscript{146} \textit{i}bid. s.9(2)(b).
Other Relevant Legislation

Asides from the provisions of the 1989 Act, section 11 of the Wireless Telegraphy Act 1926 provides for the offence of sending any message of an indecent, obscene or offensive character by wireless telegraphy.

Section 3 of the Video Recordings Act 1989 provides that where the viewing of a video work would be likely to stir up hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation, the Official Censor shall declare the work unfit for viewing and refuse the person making the application a supply certificate.

Finally, section 12 of the Broadcasting Act 2001 applies the provisions of the 1989 Act, and sets out that in a digital content contract, a condition must be present which provides that where any of the programme material provided in the pursuance of the contract contravenes the 1989 Act, the Broadcasting Commission may terminate the contract.
Chapter Four

The Current Irish Position in Relation to Racially Motivated Offences and Racially Aggravated Sentencing
Racially Aggravated Criminal Offences

Current Position in Ireland

With the exception of incitement to hatred, racist behaviour does not attract any special attention from the criminal law in Ireland. Offences against the person, property offences and public order offences motivated by race hate are not treated any differently from such offences where a racist motive is absent. So, for example, there are no aggravated assault offences where the aggravating factor is racial hatred. Where criminal assaults are committed from a racist motive they are simply prosecuted as generic assaults or assaults causing harm, etc. It is at the discretion of the individual sentencing judge as to whether to attach significance to the fact that the offence was racially motivated: this is done post-conviction, and the racial motivation may form no part of the original trial. Where an individual pleads guilty to the offence, the fact that the crime was racially motivated may never be revealed.

Equality Legislation

The Employment Equality Act and the Equal Status Act provide for the criminalisation of certain offences. Section 14 of the Employment Equality Act 1998 provides that a person who procures or attempts to procure another person to do anything which either constitutes discrimination or victimisation is guilty of an offence under the Act.

Section 13 of the Equal Status Act 2000 further provides that a person shall not procure or attempt to procure another person to engage in conduct which consists of discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of, a person in contravention of the Act.

Asides from these particular offences, there is no provision in Irish law for the criminalising the commission of racially motivated or racially aggravated offences.
Range of Offences Committed with Racial Motivation

These fall into three main areas and might include:

**Offences against the person**
These offences would broadly follow the framework of the existing *Offences Against the Person Act 1997*, the *Criminal Justice (Public Order) Act 1994*, the *Offences Against the Person Act 1861* and *Criminal Law (Rape) Acts* and might include:

- Assault
- Sexual assault
- Harrassment
- Poisoning
- Endangerment
- Threatening, abusive or insulting behaviour in a public place
- Robbery from the person
- Theft from a person
- Blackmail
- Conspiring or soliciting to commit murder
- Coercion
- Menacing phonecalls

**Criminal damage**
Some of these offences would broadly follow the framework of the existing *Criminal Damage Act 1991*, *Malicious Damage Act 1861* and might include:

- Damaging property
- Arson
- Threatening to damage property
- Killing or maiming animals

**Public Order Offences**
Some of these offences would broadly follow the framework of the existing *Criminal Justice (Public Order) Act 1994* while others are more general, and and might include:

- Disorderly conduct in a public place
- Distribution or display in public place of material which is threatening, abusive, insulting or obscene
- Public mischief
- Trespass on a building
- Violent disorder
- Riot
- Affray
- Discharging firearm
- Possession of an offensive weapon
- Unauthorised taking of a vehicle
While this may seem like a very wide range of offences to include, and that it is hard to imagine some being committed with a racist motivation, statistics set out in the Report will show that offences such as discharging a firearm, sexual assault and drunkenness can be committed with a racist motivation. Thus, to be comprehensive, it could be argued that the whole range of criminal offences should have a racially motivated equivalent.

However, traditionally, the criminal law does not regard the motivation for committing an offence as an element in the offence. In any criminal trial, the only elements that need to be proved by the prosecution are the *actus reus* (guilty act) and *mens rea* (guilty mind) of the offence. So, for example, if an individual assaults another, the prosecution will have to prove that the assault actually occurred (*actus reus*) and that the defendant intended to commit the assault, or was reckless as to whether or not the assault would occur. So, just as the fact that the assault occurred because the victim provoked it, or because the accused was suffering from a mental disability will not be considered at the prosecution stage, neither will the fact that the accused hated old people, nor took advantage because the victim was in a wheelchair and couldn’t retaliate be considered at the prosecution stage. These factors are traditionally considered at the sentencing stage in any case, where the court will consider the circumstances of the offender and the offence in determining the appropriate penalty for the individual.

It has recently been suggested that to provide for increased penalties for racially aggravated offences might fall foul of the constitutional guarantee of equality. In the case of *Mitchell v Ireland*\(^{147}\) the court considered section 62 of the *Offences Against the Person Act 1861* which provided for a maximum sentence of ten years imprisonment for indecent assault on a male, while the sentence for a similar offence on a female was two years. It was argued that this difference in sentencing amounted to a breach of Article 40.1 of the Constitution, as well as Article 14 of the European Convention on Human Rights. Ultimately, it was found that the legislation was unconstitutional, but the relevance for this discussion is an argument put forward by counsel described as “apt and compelling” by Laffoy J. The court was asked to consider the following hypothetical analogies:

“a statutory provision which provides for a maximum sentence of life imprisonment for the murder of a man in contrast to two years for the murder of a woman; a statutory provision which provides for a maximum penalty of ten years of an assault on a member of one religion, say, the Roman Catholic Church, in contrast to a maximum penalty of two years for an assault on a member of another church, say, the Presbyterian Church; and a statutory provision which creates different maximum penalties for an assault or an indecent assault depending on the racial or ethnic origin of the victim.”\(^{148}\)

The reasoning here is that to differentiate between two groups of people on the grounds of race or religion would violate the equality guarantee of the Constitution. However, it could also be argued that this differentiation could be justified under the second paragraph Article 40.1. Nonetheless, for a variety of reasons, it is suggested that introducing racially aggravated offences in this jurisdiction is not appropriate. Rather, the issue should be dealt with through sentencing.

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\(^{147}\) *Unreported High Court 12 July 2007.*

\(^{148}\) *Ibid* at page 22.
Racially Aggravated Sentencing

Current Position in Ireland

As is the case with racially motivated offences, similarly, there are no statutory provisions prescribing aggravated sentences for offences committed with a racist motive. While it may be open to a judge to treat a racist motive as an aggravating factor when determining sentence in any individual case, there is no statutory authority or binding precedent compelling him or her to do so. Indeed, with the current sentencing system in this jurisdiction, there is little statutory guidance on how judges should sentence any given offender.

O’Malley notes: 149

“[T]he primary consideration must be to ensure that sentences can be tailored to meet the individual circumstances of each case. The objective therefore must be to develop consistency of approach rather than a crude uniformity which would require sentences to be fashioned on the basis of mathematical formulae. The general principles that are now being articulated and fine-tuned by the superior courts ... go some way towards achieving that goal.” 150

Despite the fact that there is no statutory scheme in place in this jurisdiction which sets out principles that should guide sentencing courts when coming to their decision, there are a number of specific instances where legislation specifies individual sentences. The appeal courts have also given guidelines as to how a sentencing court should approach sentencing for particular offences.

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150 Ibid at pages 66-67.
151 As amended by section 10 of the Bail Act 1997.
Statutory Guidelines

As has been already mentioned, certain offences carry mandatory sentences. The classic example of this is set out in section 2 of the Criminal Justice Act 1990 which provides for a mandatory sentence of life imprisonment for any individual convicted of murder or treason. Other statutory provisions provide that certain offences carry a mandatory minimum sentence, such as section 3 of the Misuse of Drugs Act 1977.

Section 11 of the Criminal Justice Act 1984 however, is different. It stipulates that where an offence is carried out in certain circumstances (that is, while on bail), the sentencing court must consider that an aggravating factor in sentencing:

“Where a court—
(a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail, and
(b) is required by subsection (1) to impose two or more consecutive sentences, then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor.”

Thus, where a court is determining the sentence to be imposed on a person for an offence committed while he or she was on bail, the fact that the offence was committed while the person was on bail is to be treated as an aggravating factor in sentencing. In these circumstances, the court is obliged to impose a sentence that is greater than that which would have been imposed in the absence of this factor, save where there are exceptional circumstances.

It is clear, then that while there is no coherent legislative sentencing structure in place, there are a number of statutory provisions which interfere with judicial discretion in sentencing. Indeed, O’Malley notes that while the notion of statutory sentencing guidance is often resisted as an unwarranted intrusion into the judicial role in the sentencing process, through the process of setting the maximum sentence for each offence, “statutory guidance is the longest established, the most widely used and ... the most widely accepted method of structuring sentencing discretion.”

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Guidelines Emanating from Case Law

Through exercising the appellate jurisdiction by way of appeal from the offender on the grounds of severity of sentence, and appeals by the Director of Public Prosecutions on the grounds of undue leniency, the courts have begun to articulate general sentencing principles. The Courts have been willing to treat certain issues as aggravating factors, but have yet to find that where the attack appears to have been racially motivated, that fact should be treated as an aggravating factor. Indeed, they have explicitly stated that a racist motivation is not one which should be treated as an aggravating factor in sentencing.

In the case *DPP v Jones and Derwin* the Director appealed the sentencing court’s decision on the basis that it was unduly lenient, under section 2 of the *Criminal Justice Act 1993*. The Court noted that for such an application to succeed, it needs to be shown that the sentences “exhibit a departure from the established principles of sentencing.” The Court was asked to consider that the sentences were unduly lenient on the basis of the need to condemn racially motivated attacks or attacks in which race plays any part. While the Court admitted that it did condemn such attacks, it went on to say:

“[I]t has not been submitted, and I do not think it could be submitted, that the ordinary principles in relation to sentencing do not apply to these cases as to others … [T]he Director eventually came to making the case plainly that the sentence could not be criticised in any way but for the context in which it occurred, but that the context in which it occurred required a custodial sentence as a matter of principle … No such submission was made to the trial judge. The principle is one for which no authority was or could be cited … But in no sense are we declining to review the case on the grounds of undue leniency on any sort of technical ground … [T]he sentence was one fully in accordance with the principles of sentencing.”

This part of the decision is unfortunate. It was open to the court to state clearly that whereas an established racist motivation does not automatically mean that the sentence imposed should be custodial, nonetheless, that a racist motivation should be considered an aggravating factor to be considered at sentencing. As the law currently stands, Irish courts are under no obligation, and arguably cannot, treat a racist motivation as an aggravating factor in sentencing.

Possibility of Introducing Sentencing Guidelines

The Law Reform Commission in its *Report on Sentencing* considered the Irish sentencing system and noted that while a statutory scheme of sentencing should not be introduced, that non-statutory guidelines should be introduced whereby the severity of a sentence to be imposed should be measured in proportion to the seriousness of the offending behaviour. This, the Commission

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153 For example, the courts have found the use of a knife or other weapon in the commission of an offence to be an aggravating factor – *People (DPP) v Murphy* Court of Criminal Appeal 1 February 1999.
154 Unreported Court of Criminal Appeal 1 November 2004 Hardiman J (ex tempore).
155 *Ibid* at page 2. [Emphasis in original]
argued, should be measured by reference to two issues: first, the harm caused or risked by the
offender in committing the offence; and second, the culpability of the offender in committing
the offence.

The Commission also suggested that sentencing guidelines should outline factors which both
aggravate and mitigate a sentence. Such factors for aggravating the sentence, the Commisison
argued, should include:

1. Whether the offence was planned or premeditated;
2. Whether the offender committed the offence as a member of a group organised for crime;
3. Whether the offence formed part of a campaign of offences;
4. Whether the offender exploited the position of a weak or defenceless victim or exploited
   the knowledge that the victim’s access to justice might have been impeded;
5. Whether the offender exploited a position of confidence or trust, including offences
   committed by law enforcement officers;
6. Whether the offender threatened to use or actually used violence, or used, threatened
   to use, or carried, a weapon;
7. Whether the offender caused, threatened to cause, or risked the death or serious injury
   of another person, or used or threatened to use excessive cruelty;
8. Whether the offender caused or risked substantial economic loss to the victim of the offence;
9. Whether the offence was committed for pleasure or excitement;
10. Whether the offender played a leading role in the commission of the offence, or induced
    others to participate in the commission of the offence;
11. Whether the offence was committed on a law enforcement officer;
12. Any other circumstances which:
   a) increase the harm caused or risked by the offender, or
   b) increase the culpability of the offender for the offence

While these factors have not been adopted, it is clear that a crime committed with a racist
motivation might fall into a number of these categories. For example, factors 2, 3 and 4 might
well apply in the context of crimes which are committed with a racist motivation.

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557 *Ibid* at page 65.
558 Factors which should mitigate sentence, the Commission opined, should include:
- Whether the offence was committed under circumstances of duress not amounting to a defence to
  criminal liability;
- Whether the offender was provoked;
- Whether the offence was committed on impulse, or the offender showed no sustained motivation to
  break the law;
- Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when
  committing the offence;
- Whether the offence was occasioned as a result of strong temptation;
- Whether the offender was motivated by strong compassion or human sympathy;
- Whether the offender played only a minor role in the commission of the offence;
- Whether no serious injury resulted nor was intended;
- Whether the offender made voluntary attempts to prevent the effects of the offence;
- Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability,
  tend to extenuate the offender’s culpability, such as ignorance of the law, mistake of fact, or necessity.
- Any other circumstances which:
  - reduce the harm caused or risked by the offender, or
  - reduce the culpability of the offender for the offence.
International Obligations

The United Nations Committee on Elimination of Racial Discrimination in its Concluding Observations on Reports on the conclusion of its 66th session\textsuperscript{159} noted that while the adoption of the National Action Plan Against Racism, the Human Rights Commission, the NCCRI and the Equality Authority were all to be commended, that there were still issues that needed to be addressed in an Irish legislative context. In particular, the Committee stressed that Ireland should incorporate the Convention in a domestic setting. It also recommended that:

“... the State party introduce in its criminal law a provision that makes committing an offence with a racist motivation or aim an aggravating circumstance allowing for a more severe punishment.”

\textsuperscript{159} Available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.IRL.CO.2.En?OpenDocument
Conclusion

From an examination of the operation of our neighbouring jurisdictions, it is clear that while racially aggravated offences have the benefit of sending a clear message to society that this type of behaviour is not acceptable, the lack of convictions under the legislation is problematic. One might go so far as to say that the legislation sets at naught its objectives: as there are no convictions under the Act, the message is not that this kind of behaviour is unacceptable, but rather that one can behave in this manner with impunity, safe in the knowledge that it is unlikely that one will be convicted under the Act. An analysis of these jurisdictions makes it clear that the most effective route to combating racism through the criminal law most effectively is through sentencing.

Before addressing what approach the Irish legislature should take, however, the first question must be, what is the extent of the problem of racist violence in Ireland. The next chapter will address this question.
Chapter Five

Review and Assessment of Reports, Cases and Trends on Racist Crimes in Ireland
Introduction

“I would like to say to this Irish community, people, that they must be concerned of the racist crime that I endured. As if one feels dirty, a part of the self is gone. It’s not because one has frizzy hair, it’s not because one has dark brown eyes, it’s not because one has brown skin, that one is different of the Irish people. I am victim of this ignorance, I am victim of this archaism. I am victim of this alcoholism. I simply ask that this Irish community, people, be conscious that racism is part of this country.”160

Despite racist offences being a relatively new phenomenon in this jurisdiction, there is a substantial, and growing, body of discrete data sources and reports on racism and crime in Ireland. These come from Garda Reports, NGOs, and the NCCRI, an independent expert body focusing on racism and interculturalism. Despite what appears to be a substantial incidence of racist offences here, there have been relatively few court cases, none which have been officially reported. While the Prohibition of Incitement to Hatred Act 1989 has been on the statute books for nearly 20 years, there have been so few successful prosecutions under the Act that one might think there was no problem with racism in this country. Indeed, the words of Bonello J of the ECHR in the case of Angeuelova v Bulgaria161 are as applicable in an Irish context as a European one:

“Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court’s case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination... Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.”

By way of an introduction, however, the comments in the RAXEN Report162 are noteworthy:

“Any analysis of racist violence in Ireland must be prefaced by a ‘health warning’ on the paucity of official data on this issue both in the form of crime statistics and regular national crime surveys.”163

The EUMC164 reiterate the need for high quality and detailed data to establish the levels of racist crime. It states in its 2006 Report:

160 Testimony of victim in the case of DPP v O’Driscoll and Moore witness hearings 6 December 2001 obtained from transcripts of proceedings received from the Courts Service.
162 Equality Authority & National Consultative Committee on Racism and Interculturalism National Analytical Study on Racist Violence and crime RAXEN Focal Point for Ireland. RAXEN is the European Racism and Xenophobia Information Network which was set up by the EUMC (the EUMC is now known as the European Fundamental Rights Agency FRA).
163 Ibid at page 24.
164 The European Monitoring Centre on Racism and Xenophobia, now called the European Fundamental Rights Agency.
“What we know about the extent and nature of racist violence and crime from official sources is dependent on the quality of existing data collection mechanisms: Do they encourage members of the public to report incidents; are they able to record a wide or narrow range of incidents; are the police and other criminal justice agents trained and encouraged to accurately record incidents as ‘racist’ or as contravening the law with respect to, for example, ‘hate crimes’ and extremism.”

The importance of accurate data collection and high levels of reporting are highlighted in the Report Challenges and Responses to Hate-Motivated Incidents in the OSCE Region where the European Network Against Racism (ENAR) statement that underreporting and lack of data remain “two of the most critical impediments to the effectiveness of the law (hate crime legislation).”

Nonetheless, from a variety of sources, we can establish whether racist violence is a problem in Irish society, and what the perceptions are of the problem amongst the general population.
National Consultative Committee on Racism and Interculturalism

The National Consultative Committee on Racism and Interculturalism (NCCRI) was established in 1998 as an independent expert body focusing on racism and interculturalism. It is a partnership body which brings together government and non-government organisations to:

- Develop an inclusive and strategic approach to combat racism by focusing on its prevention and promoting an intercultural society;
- Contribute to policy and legislative developments and seek to encourage dialogue and progress in all areas relating to racism and interculturalism;
- Encourage integrated actions towards acknowledging, celebrating and accommodating cultural diversity;
- Establish and maintain links with organisations or individuals involved in addressing racism and promoting interculturalism at national, European and international level;
- Provide a national framework for responding to and consulting with key European and international bodies on issues related to racism and interculturalism.168

Since May 2001, the NCCRI established a system for recording incidents relating to racism in Ireland. These incidents are reported to the NCCRI primarily through the medium of NGOs, but can also be reported by victims. The NCCRI is to be commended for gathering these statistics, as it has no statutory responsibility for doing so, and publishes and compiles these statistics for the purposes of monitoring racist activity in the State. Oftentimes, due to the manner in which the NCCRI collects its statistics, it will observe trends which are not picked up by Garda statistics, so the work of the NCCRI in this regard is invaluable in assessing the levels and types of racist crime in this jurisdiction.

A number of important points regarding the reporting system should be noted at this juncture. As the NCCRI itself states, the data generated by the reporting system is qualitative, and is primarily an indicator of the issues that need to be addressed. The reports do not aim to provide a comprehensive list of every racist incident in Ireland, nor are those who report the incident obliged to take further action on the issue. It also keeps account of racist material, whether written in the traditional medium, broadcasted or posted on the internet.

For the purposes of this report, two important aspects are relevant. First, the NCCRI Racist Incidents Reporting Procedure does not only record racist crime, but also any other form of racial discrimination or statement.169 Consequently, the NCCRI statistics will not necessarily correlate with those of An Garda Siochana. This is due first, to the more comprehensive nature of the NCCRI statistics, but also, and perhaps more importantly because of the under-reporting of racist crimes to the police, a phenomenon which is prevalent worldwide. It is quite clear, therefore, that the NCCRI provides an invaluable resource of an account of the occurrence of racist incidents in this jurisdiction.

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168 http://www.nccri.ie/nccri-about.htm
169 The Form contains the following options as characterising the incident: Access to public places/shops; Accommodation; Attacks/Physical abuse; Education; Entertainment sector/pubs; Government agencies; Health sector; Hostility at place of residence; Job market; Legal; Media portrayal; People wearing offensive badges, insignia or tattoos; Policing issues; Racist comments or other cultural disrespect; Racist graffiti; Racist jokes; Social and personal contact; Transport; Verbal abuse/Name-calling; Workplace; Other.
As noted on the website of the NCCRI\textsuperscript{170} incidents can be forwarded by non-governmental organisations on behalf of the victims, including key organisations working with Travellers, refugees, asylum seekers and migrants. Other incidents have been reported directly to the NCCRI by victims. It is important to emphasise that this procedure is confidential and an individual does not need to give their personal details.

In compiling the statistics and reports, the NCCRI sees the aim of its work in this regard to be:

- Providing an overview of racist incidents reported to the NCCRI in the preceding six month period;
- Drawing out the key issues arising from the incidents logged;
- Outlining how the NCCRI has responded to these key issues;
- Making recommendations to a range of relevant actors.

<table>
<thead>
<tr>
<th>TABLE 1</th>
<th>NCCRI Published Statistics of Racist Incidents in Ireland (2001–2005)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of Nationalities</td>
</tr>
<tr>
<td>January ’01 – October ’01</td>
<td>15</td>
</tr>
<tr>
<td>November ’01 – April ’02</td>
<td>-</td>
</tr>
<tr>
<td>May ’02 – October ’02</td>
<td>23</td>
</tr>
<tr>
<td>November ’02 – April ’03</td>
<td>20</td>
</tr>
<tr>
<td>May ’03 – October ’03</td>
<td>14</td>
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<tr>
<td>November ’03 – April ’04</td>
<td>15</td>
</tr>
<tr>
<td>May ’04 – October ’04</td>
<td>-</td>
</tr>
<tr>
<td>November ’04 – December ’04</td>
<td>-</td>
</tr>
<tr>
<td>January ’05 – June ’05</td>
<td>-</td>
</tr>
<tr>
<td>July ’05 – December ’05</td>
<td>38</td>
</tr>
<tr>
<td>TOTAL</td>
<td>495</td>
</tr>
<tr>
<td>Average No. of Incidents</td>
<td>53</td>
</tr>
</tbody>
</table>

Source: NCCRI Reported Incidents Relating to Racism

\textsuperscript{170}http://www.nccri.ie/incidents-about.html
TABLE 1A

<table>
<thead>
<tr>
<th>Period Covered</th>
<th>Number of Incidents Reported to the NCCRI</th>
</tr>
</thead>
<tbody>
<tr>
<td>January – December 2006</td>
<td>65</td>
</tr>
<tr>
<td>January – December 2007</td>
<td>99</td>
</tr>
<tr>
<td>January – July 2008</td>
<td>50</td>
</tr>
</tbody>
</table>

Source: NCCRI Reported Incidents Relating to Racism

Commentary on Table 1
The 60 per cent increase in the number of reports in the period covering May-October 2002 over the previous figures is explained by the NCCRI as reflecting the general increase in reported violent crime at the time. Other factors said to result in the increase are the run-up to the General Election in May 2002, which led to an increase in the circulation of offensive material by extremist groups and individuals; Operation Hyphen (the apprehension of immigrants) which was implemented in July 2002 and was the focus of media attention; and the second Nice Referendum which took place in July 2002.

The NCCRI data reveals further significant fluctuations in the periods May-October 2004 May–December 2005 but is is not clear what the contributory factors for these might have been.

It is not possible to establish whether racist incidents are generally increasing, with May–December 2005 being seen as an exception to the general trend, or whether 2004 and the first part of 2005 were exceptional peaks for racist incidents. What can be established is that the average number of incidents per 6 month period is 53.\(^2\)

Table 2
Reasons for complaint submitted to NCCRI, and breakdown of Garda Reports
NCCRI permitted researchers to have access to their files with a view to identifying further analyses useful to the project. The information in NCCRI Table 2 is derived from these files. The table indicates the type of complaint which was received by NCCRI, and the relationship between the reporting levels to the NCCRI and An Garda Síochána.

Commentary on Table 2
While at first glance, it would appear that there is significant underreporting of incidents to the Gardaí, it is important to note that not all the complaints received by the NCCRI are worthy of Garda investigation — discriminatory job interviews, or delivery or non-delivery of services being clear examples. What can be established is that the most reported incident to the NCCRI is in relation to the delivery or non-delivery of services. Since this has not raised a criminal issue, it is not of direct relevance for this Report. Graffiti accounts for 23 complaints, 18 of which were ignored.

\(^2\) For the purposes of establishing the average, the 2 month period between November and December 2004 were ignored.
Chapter Five
Review and Assessment of Reports, Cases and Trends on Racist Crimes in Ireland

reported to the Gardaí. Racist e-mails have also featured significantly at 20, but only 11 of these were reported to the Gardaí. What are termed “Policing Issues” were the subject of 11 complaints and reported to the Gardaí 8 times. Physical assaults were reported to the NCCRI 10 times, and to the Gardaí 7 times.

### TABLE 2
NCCRI Complaints Received

<table>
<thead>
<tr>
<th></th>
<th>Jan–June 2005</th>
<th>Nov–Dec 2004</th>
<th>May–Nov 2004</th>
<th>Nov 03–April 04</th>
<th>Total Reports Received</th>
<th>Total Reports Reported to Gardaí</th>
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<tbody>
<tr>
<td>Policing Issue</td>
<td>8</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>11</td>
<td>8</td>
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<tr>
<td>Graffiti</td>
<td>13</td>
<td>13</td>
<td>4</td>
<td>4</td>
<td>23</td>
<td>18</td>
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<tr>
<td>Racist e-mail</td>
<td>11</td>
<td>9</td>
<td>1</td>
<td>1</td>
<td>20</td>
<td>11</td>
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<tr>
<td>Name-calling in School</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
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<td>Teacher’s Probing</td>
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<td>0</td>
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<td>Neighbour’s Harassment</td>
<td>7</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>17</td>
<td>4</td>
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<td>Racist Abuse at Work</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>10</td>
<td>1</td>
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<td>Bus Driver Verbal Abuse</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
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<td>Racist Mail Received</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>6</td>
<td>2</td>
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<tr>
<td>Media Broadcasts</td>
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<td>0</td>
<td>0</td>
<td>3</td>
<td>6</td>
<td>0</td>
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<tr>
<td>Delivery/non-delivery of</td>
<td>11</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>34</td>
<td>3</td>
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<td>Discriminatory job conditions/ interview</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>7</td>
<td>0</td>
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<td>Electioneering/Politics</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>10</td>
<td>2</td>
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<td>Racist Websites</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>8</td>
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<tr>
<td>Newspaper Articles</td>
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<td>0</td>
<td>8</td>
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<td>Judge’s Comments</td>
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<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
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<tr>
<td>Physical Assaults</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>10</td>
<td>7</td>
</tr>
<tr>
<td>Verbal Abuse in Street</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>12</td>
<td>18</td>
<td>6</td>
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<td>Abusive Phonecall</td>
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<td>0</td>
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<td>1</td>
<td>4</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td><strong>81</strong></td>
<td><strong>38</strong></td>
<td><strong>19</strong></td>
<td><strong>9</strong></td>
<td><strong>213</strong></td>
<td><strong>67</strong></td>
</tr>
</tbody>
</table>

*Source: NCCRI Files – Not Published*
Commentary on Table 2A
Table 2A outlines racist incidents reported to the NCCRI since 2005. For the period January to June 2008. There were 50 racist incidents reported and compiled by the NCCRI between January–July 2008. Over half of all the incidents reported to the NCCRI occurred in the greater Dublin area and 10% of all incidents reported related to Taxi services. The majority of incidents were targeted at adults, mostly male 60% and female 32%, however 8% of the racist incidents were targeted at families. Racism on the internet remains a significant issue with 20% of all cases reported relating to this form of racism. The breakdown shows that the most significant victims of racist incidents were Black Africans, constituting 41% of all incidents reported. Eastern Europeans accounted for 11% of all incidents recorded and people of Asian origin as well as Jewish, Muslim, Roma, British and Traveller communities also reported experiences of racism to the NCCRI.

Conclusion on NCCRI Statistics and Reports
NCCRI’s published bi-annual Reports offer a statistical account of the number of incidents reported to the organisation, the range of ethnicities of the victims (but not a break-down of those ethnicities), and the general environment in which the incident occurred, as evidenced by the Racist Incidents Report Form.172

The incidents reported to the NCCRI are examined in great detail in the second part of the NCCRI Reports including an anecdotal account of some of the incidents reported, observation of issues which need to be addressed, and recommendations made based on the analysis of the incidents reported in that period relating to the main areas of reporting. For example, the second part of the Report173 is broken down as follows:

1. Assaults, abuse and harassment
2. Discrimination in the workplace and delivery of public and private services
3. Misinformation and the Circulation of Offensive Material
4. Recommendations and further Action

The Reports are therefore much more than a mere recitation of facts and figures regarding the level of reported racist incidents. They also offer an evaluation of the type of incident that occurs, and recommendations as to the measures that need to be taken into hand by public and private sector to eliminate and reduce racist incidents.

Further useful information could be drawn from the other raw data provided on the NCCRI’s Racist Incidents Report Forms. These include details of gender, age, occupation and legal status of the victim, details and character of incident, whether it was reported to Gardai or any other authority for action and what further action is anticipated. While the NCCRI tabulates this detailed data in summary form it does not publish it. Part of the reason for this is that the report forms are often incomplete. Indeed, the report form is not used in all incidents of reporting: – some reports comprise of a brief e-mail referring to a rumoured incident with no follow-up of details, while other incidents were reported in outline in a lengthy list supplied by an NGO.

172 See www.nccri.ie for a copy of the Incident Report Form.
An Garda Síochána

Garda Reports and statistics break down crimes into two types of offences – headline offences and non-headline offences. These are broadly similar to indictable offences and summary offences, although the distinction is not absolute. Prior to the year 2000 the offences were divided into indictable and non-indictable offences. The indictable offence were then broken down into four categories which the Annual Reports used to present crime statistics, and incitement to hatred was included under “Group 4 Other Indictable Crime”. Statistics for “Group 21 Non-Indictable Offence of Incitement” for these years show one recorded offence in 1998, which was dismissed by the court. Offences reported to the Garda are determined to be racist offences in accordance with the guidelines set out in the Stephen Lawrence Report, that is, if the victim or any other person perceives the crime to be one motivated by racism. However, while initially it may appear that the crime was in fact racially motivated, post-investigation it may transpire that it was not.

**TABLE 3**

<table>
<thead>
<tr>
<th>Year</th>
<th>Offences Reported</th>
<th>Offences Known</th>
<th>Proceedings Committed</th>
<th>% Convictions</th>
<th>Dismissals</th>
<th>Adjourned/Other</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>2001</td>
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<td>2</td>
<td>25</td>
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<td>0</td>
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</tr>
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<td>3</td>
<td>43</td>
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<td>0</td>
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<tr>
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<td>10</td>
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<td>5</td>
<td>50</td>
<td>0</td>
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<td>1</td>
</tr>
<tr>
<td>2004</td>
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<td>9</td>
<td>6</td>
<td>55</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2005</td>
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<td>5</td>
<td>45</td>
<td>8</td>
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<td>4</td>
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<tr>
<td>Total</td>
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<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

*Source: Annual Reports of An Garda Síochána*

These statistics include offences which were dealt with on indictment, and those that were dealt with summarily. Indeed, according to the data, there were no prosecutions on indictment under the Prohibition of Incitement to Hatred Act 1989.

**TABLE 4**

<table>
<thead>
<tr>
<th>Year</th>
<th>Offences Reported</th>
<th>Offences Known</th>
<th>Proceedings Committed</th>
<th>% Convictions</th>
<th>% Proc Dismissals</th>
<th>Adjourned/Other</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
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<td>0</td>
<td>6</td>
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<td>67</td>
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<td>0</td>
<td>12</td>
<td>0</td>
<td>3</td>
<td>5</td>
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<td>2002</td>
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<td>2003</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2004</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
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<tr>
<td>2005</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
<td>37</td>
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*Source: Annual Reports of An Garda Síochána*
### TABLE 5
Outcome of Prosecutions under 1989 Act

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Incidents</th>
<th>No. of Court Proceedings</th>
<th>Convictions</th>
<th>Sentence</th>
<th>Fine</th>
<th>Bound Over</th>
<th>Community Service Order</th>
<th>Probation</th>
<th>Taken into Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>71</td>
<td>21</td>
<td>16</td>
<td>76</td>
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<td>0</td>
</tr>
<tr>
<td>2001</td>
<td>43</td>
<td>22</td>
<td>16</td>
<td>73</td>
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<td>0</td>
<td>2</td>
<td>5</td>
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<tr>
<td>2002</td>
<td>102</td>
<td>107</td>
<td>62</td>
<td>58</td>
<td>21</td>
<td>14</td>
<td>8</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>2003</td>
<td>68</td>
<td>25</td>
<td>2</td>
<td>8</td>
<td>0</td>
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</tr>
<tr>
<td>Subtotal</td>
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<td>129</td>
<td>59</td>
<td>38</td>
<td>30</td>
<td>17</td>
<td>2</td>
<td>24</td>
</tr>
<tr>
<td>2004</td>
<td>66</td>
<td>14</td>
<td>17</td>
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<td>29</td>
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<td>55</td>
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<td>5</td>
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<td>77</td>
<td>6</td>
<td>10</td>
<td>6</td>
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<tr>
<td>Total</td>
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<td>261</td>
<td>162</td>
<td>62</td>
<td>44</td>
<td>40</td>
<td>23</td>
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</table>


### TABLE 5A
Details of Convictions recorded for racially motivated offences in 2006

<table>
<thead>
<tr>
<th>Year</th>
<th>Sentence</th>
<th>Fine</th>
<th>Bound to the Peace</th>
<th>Community Service</th>
<th>Probation Act</th>
<th>Taken into Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>11</td>
<td>17</td>
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<td>1</td>
<td>5</td>
</tr>
</tbody>
</table>

These figures are not consistent with Table 1, which indicates that the total number of prosecutions for headline and non-headline offences of incitement to racial hatred during this period is only 36. The number of incidents for 2003 (68) is not consistent with Garda figures given provisionally to NCCRI and reported previously as a total of 81 prosecutions. However, the number of convictions includes the number of offences taken into consideration but for which no order was made by the court. This would explain the discrepancy for the year 2004 between the number of proceedings and the number of convictions.
TABLE 5B

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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<tr>
<td>Male</td>
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<td>11</td>
<td>23</td>
<td>21</td>
<td>16</td>
<td>9</td>
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<td>2</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>9</td>
<td>14</td>
<td>27</td>
<td>27</td>
<td>23</td>
<td>12</td>
<td>4</td>
<td>5</td>
<td>4</td>
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</tbody>
</table>

<table>
<thead>
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<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>23</td>
<td>25</td>
<td>17</td>
<td>13</td>
<td>11</td>
<td>5</td>
<td>7</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Female</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>TOTAL</td>
<td>28</td>
<td>26</td>
<td>18</td>
<td>15</td>
<td>11</td>
<td>5</td>
<td>8</td>
<td>1</td>
<td>6</td>
</tr>
</tbody>
</table>


TABLE 6

<table>
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<tr>
<th>Offences Recorded as having Racist Motivation</th>
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<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>Total</th>
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<tbody>
<tr>
<td>Affray/riot/violent disorder</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Arson</td>
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<td>1</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Assault causing harm</td>
<td>12</td>
<td>7</td>
<td>13</td>
<td>8</td>
<td>7</td>
<td>7</td>
<td>54</td>
</tr>
<tr>
<td>Assault minor</td>
<td>5</td>
<td>5</td>
<td>18</td>
<td>15</td>
<td>13</td>
<td>9</td>
<td>65</td>
</tr>
<tr>
<td>Attention and complaints</td>
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<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Coercion</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Criminal damage (excl arson)***</td>
<td>31</td>
<td>14</td>
<td>47</td>
<td>27</td>
<td>19</td>
<td>28</td>
<td>166</td>
</tr>
<tr>
<td>Discharging firearm</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Drunkenness</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Harassment</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
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<td>1</td>
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<td>3</td>
<td>10</td>
</tr>
<tr>
<td>Incitement to Hatred other</td>
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<td>1</td>
<td>5</td>
<td>0</td>
<td>8</td>
</tr>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Menacing telephone calls</td>
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<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
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<td>0</td>
<td>0</td>
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<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Possession of offensive weapon</td>
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<td>1</td>
<td>3</td>
<td>1</td>
<td>3</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>Public Mischief</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
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<td>2</td>
<td>7</td>
<td>6</td>
<td>10</td>
<td>20</td>
<td>46</td>
</tr>
<tr>
<td>Robbery from the person</td>
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<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Sexual Assault</td>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Theft from the person</td>
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<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Theft other</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Unauthorised taking of vehicle</td>
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<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>71</td>
<td>43</td>
<td>102</td>
<td>68</td>
<td>66</td>
<td>84</td>
<td>434</td>
</tr>
</tbody>
</table>

TABLE 6A
Racially Motivated Offences Recorded and Detected, the number which had proceedings commenced and a conviction in 2006

<table>
<thead>
<tr>
<th>Offence Type</th>
<th>Recorded</th>
<th>Detected</th>
<th>Proceedings Commenced</th>
<th>Convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arson</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Harassment</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Assault Minor</td>
<td>39</td>
<td>18</td>
<td>13</td>
<td>2</td>
</tr>
<tr>
<td>False Imprisonment</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Assault Causing Harm</td>
<td>20</td>
<td>9</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>Drunkenness Offences</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
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<tr>
<td>Menacing Phone Calls</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Discharging a Firearm</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>General Road Offences</td>
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<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Public Order Offences</td>
<td>50</td>
<td>44</td>
<td>34</td>
<td>10</td>
</tr>
<tr>
<td>Robbery from the Person</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Affray/Riot/Violent Disorder</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Criminal Damages (Not Arson)</td>
<td>39</td>
<td>7</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Public Mischief &amp; Sim. Offences</td>
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<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Prohibition/Incitement to Hatred</td>
<td>9</td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>173</strong></td>
<td><strong>91</strong></td>
<td><strong>70</strong></td>
<td><strong>16</strong></td>
</tr>
</tbody>
</table>


These figures clarify in detail the type of offence, the number of offences recorded, the number detected, the number of proceedings commenced and the number of convictions. The Gardai Racial Intercultural Office confirmed that the term ‘detected’ refers to the number of cases that were investigated and for which somebody was arrested. The low convictions figure of 16 as opposed to the higher figure of 70 for ‘proceedings commenced’ is as a result of ongoing cases, which are not listed. Of 173 recorded incidents, only 91 were detected. Of the 173 recorded incidents there were 39 minor assaults, 20 assaults causing harm, 50 public order offences, 39 incidents of criminal damage (not arson) and 9 accounts of prohibition or incitement to hatred. Criminal damage incidents led to a low number of detections (7), as opposed to public order offences which resulted in a high number of detection rates.
Chapter Five
Review and Assessment of Reports, Cases and Trends on Racist Crimes in Ireland

TABLE 7

<table>
<thead>
<tr>
<th>Number of Incidents</th>
<th>Number of Perpetrators</th>
<th>Perpetrators 10–29 yrs</th>
<th>Number of Victims</th>
<th>Victims 20–39 yrs</th>
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<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
<td>Total</td>
<td>Male</td>
</tr>
<tr>
<td>2000</td>
<td>71</td>
<td>81</td>
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<td>98</td>
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<tr>
<td>2001</td>
<td>43</td>
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</tr>
<tr>
<td>2002</td>
<td>102</td>
<td>63</td>
<td>5</td>
<td>68</td>
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<tr>
<td>2003</td>
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<td>27</td>
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<tr>
<td>Subtotal</td>
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<td>198</td>
<td>32</td>
<td>230</td>
</tr>
<tr>
<td>2004</td>
<td>66</td>
<td>32</td>
<td>7</td>
<td>39</td>
</tr>
<tr>
<td>2005</td>
<td>84</td>
<td>52</td>
<td>8</td>
<td>60</td>
</tr>
<tr>
<td>Subtotal</td>
<td>150</td>
<td>84</td>
<td>15</td>
<td>99</td>
</tr>
<tr>
<td>Total</td>
<td>434</td>
<td>282</td>
<td>47</td>
<td>329</td>
</tr>
</tbody>
</table>


The following conclusions can be drawn on the basis of this information from the earlier period:
- 86% total perpetrators were male
- 76% total perpetrators were under the age of 30 years
- 74% of the victims were male
- 67% victims were aged 20-39 years.

There was very little change in the results:
- 85% total perpetrators were male
- 72% total perpetrators were under the age of 30 years
- 80% of the victims were male
- 63% victims were aged 20-39 years

TABLE 8

<table>
<thead>
<tr>
<th>Europeanafrican</th>
<th>Asian/Far Eastern</th>
<th>American/Canadian</th>
<th>Caribbean</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>Female</td>
<td>Male</td>
<td>Female</td>
<td>Male</td>
</tr>
<tr>
<td>2000</td>
<td>14</td>
<td>3</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>2001</td>
<td>4</td>
<td>0</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
<td>2</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>2003</td>
<td>4</td>
<td>1</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Subtotal</td>
<td>24</td>
<td>6</td>
<td>28</td>
<td>6</td>
</tr>
<tr>
<td>2004</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>2005</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Subtotal</td>
<td>5</td>
<td>1</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>29</td>
<td>7</td>
<td>35</td>
<td>7</td>
</tr>
</tbody>
</table>

174 suspected offenders are recorded as being Irish.

### TABLE 8A

<table>
<thead>
<tr>
<th>Continent of Injured Party</th>
<th>Africa</th>
<th>Antartica</th>
<th>Asia</th>
<th>Australia</th>
<th>Europe</th>
<th>North &amp; South America</th>
<th>Unknown</th>
<th>Not Recorded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>15</td>
<td>0</td>
<td>13</td>
<td>1</td>
<td>20</td>
<td>0</td>
<td>5</td>
<td>38</td>
</tr>
<tr>
<td>Female</td>
<td>8</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>8</td>
<td>0</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>TOTAL</td>
<td>23</td>
<td>0</td>
<td>16</td>
<td>1</td>
<td>28</td>
<td>0</td>
<td>7</td>
<td>50</td>
</tr>
</tbody>
</table>

### TABLE 9

**Statistics for 2006**

<table>
<thead>
<tr>
<th>Offence Type</th>
<th>Detected</th>
<th>Not Detected</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Order</td>
<td>55</td>
<td>8</td>
<td>63</td>
</tr>
<tr>
<td>Criminal Damage</td>
<td>8</td>
<td>25</td>
<td>33</td>
</tr>
<tr>
<td>Assault Minor</td>
<td>19</td>
<td>19</td>
<td>38</td>
</tr>
<tr>
<td>Assault Causing Harm</td>
<td>11</td>
<td>6</td>
<td>17</td>
</tr>
<tr>
<td>Harassment</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>False Imprisonment</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Robbery from Person</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Road Traffic Offence</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Firearms Offences</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>99</strong></td>
<td><strong>60</strong></td>
<td><strong>159</strong></td>
</tr>
</tbody>
</table>


---

77 suspected offenders are recorded as being Irish.
Between 2005 and 2006, it would appear that the way in which figures are collated was changed. For the year 2006, the only information available is set out in the table below. Here, the offences are grouped, which is unfortunate, as it does not give such a rounded view of the types of offences committed as, for example, Table 6, above, does. What is important to note, however, is the marked increase in the number of racist offences between 2005 and 2006: the number of offences doubled in this period. Asides from an actual increase in racist violence, there could be a number of reasons for this: increased confidence in the Garda by minority groups; a better reporting system put in place by the Garda; or Garda training. Nonetheless, this marked increase is disturbing as it shows Ireland is becoming an increasingly racist society.
Conclusions

The Annual Report of An Garda Síochána is of little assistance in indicating the extent of racially motivated crime. Gardaí Table 1 indicates a total of 36 offences where proceedings were commenced under the Prohibition of Incitement to Hatred Act, mainly section 2. Other PULSE statistics show that the majority of racially motivated offences are dealt with through prosecutions for mainstream criminal offences, such as assault, public order etc.

Table 6 shows the consistent dominance of the offences of criminal damage (excluding arson) and assault. These account for over 65% of racially motivated crime (approximately 40% and 30% respectively). The figures show a small percentage increase in public order offences and a marked increase in the number of incidents over the figures for the preceding year. This could reflect post September 11th 2001 attitudes and the introduction in that year of a formal definition of a racially motivated incident. Since 2002 there has been a doubling of public order offences from 2003 to 2004 and 2004 to 2005.

Table 8 shows that either Gardaí are not recording the nationality of persons making a criminal report or this information is simply not being fed into the PULSE data recording system. In either case this must be rectified, otherwise the official analysis of trends in racially motivated crime will be hindered. NCCRI has already drawn attention to the need for the Traveller community to be treated as an ethnic minority in Ireland, fearing that its treatment otherwise would distort the figures significantly.

What is vital is that Garda statistics are compiled and published in a coherent and comprehensive manner. What is more, the published figures should be categorised in the same way from year to year to ensure that it is possible to make meaningful comparison and analysis.
Statistics from the Office of the Director of Public Prosecutions

From statistics obtained from the Office of the Director of Public Prosecutions, it was determined that between 2000 and 2005, 56 references were made to the DPP under the 1989 Act. These references ranged from complaints made about media coverage of issues, to verbal attacks on individuals to physical assaults which were committed with a racist motivation. Of these 56 complaints, the Director recommended that a prosecution be taken under the 1989 Act in seven cases.

Summary prosecutions were directed in four of these seven cases. Of these cases, three resulted in prosecutions. One was bound to the peace, one was fined €150 and one was sentenced to 6 months imprisonment on a section 2 assault charge with the section 2 incitement charge being taken into account. In the fourth case, the proceedings were struck out due to the long-term sick-leave of the garda witness.

Prosecutions on indictment were taken in the other three cases. Of these, results were available in two of the cases. In the first, the individuals were prosecuted for incitement, assault causing harm and violent disorder. They were convicted on guilty pleas of incitement to hatred and sentenced to 7-9 months imprisonment. In the second, there were guilty pleas on assault charges and the section 2 incitement charge. Compensation of €2,000 was paid by each assailant, and sentence of 3 years imprisonment was imposed. In the third case, judicial review proceedings were taken by the alleged assailants which were unsuccessful, and it is now possible for the trials to proceed.

Regarding the remaining 49 complaints, reasons for not prosecuting or refusing leave to prosecute under the Act can be grouped into four general categories: 1. Insufficient evidence; 2. Problems with the terms of the 1989 Act; 3. Prosecutorial discretion exercised by the Director; 4. Procedural problems.

1. No evidence that there had been any breach of the Act/insufficient evidence

Reasons given include:
- Language used didn’t come within the definition of hatred, abusive or insulting language
- If the language was abusive, it didn’t in fact incite hatred, or was not likely to incite hatred
- Individual did not intend to incite but rather abuse, hurt or intimidate – for example, in one case the Director notes that use of the phrase “black bastard” was general abuse and there was no evidence that the words were used in a manner with the intent of stirring up racial hatred. Other reasons for the use of the term were to incite a public order offence rather than to incite hatred.
- Comments were made in a private conversation
- Although the remarks were racially motivated, they were not sufficiently serious to come under the legislation
- One reference had the general statement “Words contained in the section made any prosecution difficult, as no evidence the words used were intended to stir up hatred”
2. Problems with definitions in Act:

The complexity in the Act is seen clearly in a cursory examination of the reasons given by the Director not to prosecute in individual cases. Reasons given for not prosecuting under the provisions of the 1989 Act include:

- Definition of hatred in the Act refers to hatred of the ethnic background of the complainant – abuse was directed for other reasons rather than ones directly relating to race
- People present when remarks were made could not be considered “general public” for purposes of Act – comments made towards doctor when suspect being processed for drunk driving
- Using the phrase “black bastard” was general abuse and there was no evidence that the words were used in a manner with the intent of stirring up racial hatred
- While the suspect did verbally abuse the victim, and it was racially motivated, the words used were connected with a robbery rather than with the intention to stir up hatred
- Fact that victim was abused in relation to his country of origin is not sufficient to satisfy s 2
- Words were directed at one person and could not be considered to stir up hatred

3. Prosecutorial discretion exercised by the Director

- Not necessary to use 1989 Act as other provisions used to prosecute offender
- Decision made in the public interest for the benefit of the victims
- While 1989 Act could have been used, decision made to charge under alternative legislation so as not to delay the case further – proofs required easier under alternate legislation
- Words were intended to insult but in light of the level of alcohol consumed and public interest issues it was decided not to prosecute either suspect

4. Procedural Issues

- While it came within 1989 Act, time limit for summary proceedings had expired
- Date of hearing had been set without the consent of DPP – section 2 charge withdrawn

From a conversation with the Director and some of his staff members the Director explained what he perceived to be the problems with the 1989 Act. He noted that there are two primary reasons why there are so few prosecutions under the 1989 Act which are that first, there are difficulties with proving intent to stir up hatred, particularly in a situation where there is an altercation where one party shouts abuse – a third party needs to be stirred up in order for the situation to come within parameters of the 1989 Act; and secondly, because of this, other offences are generally charged for ease of prosecution. In the opinion of the Director, the 1989 Act is more suited to pure expression offences. Regarding holocaust denial, the Director is of the view that “the formula provided for by the 1989 Act does not per se include expression such as holocaust denial, however offensive it may be, in providing very clearly that there has to be an intention or likelihood to incite hatred on the basis of race, colour, religion, ethnic or national origin, membership of the Travelling community or sexual orientation.”
European Racism and Xenophobia Information Network (RAXEN) Report

The National Analytical Study on Racist Violence and Crime RAXEN Focal Point for Ireland notes that due to the absence of a Garda definition of what constitutes a racist incident until 2002, and the absence of a systematic mechanism in place to gather statistics, any information gleaned from Garda statistics is likely to be unrepresentative. It also notes that there is no alternative source of quantitative information available on racist crime.

It also observes that there remain “significant hurdles to be addressed including the generation of adequate data and analysis of racist violence, both as a component of overall crime and as a specific research issue.” It is of the opinion that the National Crime Council should have a role to play in the provision of data through a national crime survey, both as a means of providing a comparative set of statistics, and establishing the incidents of crime against people of ethnic minority.

The Report highlights the point that the level of racist violence in this jurisdiction is shaped by both internal and external factors – the increase of attacks in 2001, for example, being attributed to the attacks on the United States on the 11th of September 2001. In terms of internal factors, the increase in verbal attacks on pregnant black women has been attributed to the public debate at the time on citizenship rights of Irish born children.

The Report notes that while the figures would indicate an increase in racist violence, this is in no small part due to the increase in reporting and recording of such incidents. However, it goes on to say that “despite emerging knowledge it remains impossible to draw substantive conclusions about the changing nature of racist violence in Ireland.” The Report highlights the opinions of the representatives of some of the ethnic minority groups in this jurisdiction:

- **Jewish Representative Council**: “While there does not appear to be any concerted campaign of anti-Semitic activity against the Irish Jewish Community, there are numerous events that demonstrate a certain degree of overt and/or latent anti-Semitism in Ireland.”

- **Islamic Cultural Centre of Ireland**: “... have recently indicated that there continues to be sporadic incidents related to racism experienced by the Islamic community, possibly as a result of 11 September but that is not the same level as in the immediate aftermath. The Centre also said that women seem to be a particular target.”

The Report concludes: “From the limited amount of evidence to date, there is little evidence that there is any systematic or organised racist violence in Ireland. While it is difficult to be definitive on this issue, the indications to date are that the most serious incidents have tended to be once off, isolated events. This conclusion has to be hedged in the absence of definitive data and the broad acceptence that racist violence is underreported.”

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274 Equality Authority & National Consultative Committee on Racism and Interculturalism National Analytical Study on Racist Violence and Crime RAXEN Focal Point for Ireland.
275 Ibid at page 23.
276 Despite this recommendation, there has been no such published information, and the Report on Public Order Offences published by the National Crime Council contains no reference to offences committed with a racial motivation.
277 Equality Authority & National Consultative Committee on Racism and Interculturalism National Analytical Study on Racist Violence and Crime RAXEN Focal Point for Ireland.
278 Ibid at page 25. Emphasis added.
279 Ibid.
280 Ibid at page 26.
In its 2006 Annual Report, the EUMC notes that there are two primary data collectors on racist crime in Ireland – the police and the NCCRI. The following is the breakdown of figures in its report:

**Police:**
- **2004**
  - 84 racially motivated crimes reported, 28 crimes detected
- **2005**
  - 94 racially motivated crimes reported; 45 crimes detected

**NCCRI:**
- **Nov 2003–April 2004**
  - 42 incidents reported – mostly related to general discrimination
- **May – Oct 2004**
  - 70 incidents
- **Nov-Dec 2004**
  - 22 incidents
- **Jan-June 2005**
  - 81 incidents

As the EUMC notes, were data to be collected purely on the basis of crimes prosecuted under specific race-hate legislation, then the statistics would be quite different. In Ireland, they would be limited to the handful of cases prosecuted under the 1989 Act. The Irish approach to data gathering follows the UK approach, which, as the EUMC notes, “records a broad range of ‘racist’ incidents as they are reported by the public to the police and, importantly, before they are classified by the police themselves as crimes under particular sections of the criminal law.” However, on the basis of the figures, the EUMC concludes that between 2000 and 2005, there has been a 21.2% mean average increase in the levels of racist crime in Ireland. It does, however, note, that “data reveals as much about the mechanisms that are in place to collect information, and the impact of significant events on reporting practices, as it does about the actual extent of the crime.”

The EUMC is of the opinion that high figures of racist incidents are due to effective data collection, and that by analogy, low figures represent ineffective data collection. This is a rather pessimistic attitude in that it infers the inevitability of high levels of racist incidents are inevitable.

Ireland is categorised as having a “good” system of data collection. Only Finland and the UK are classified as “comprehensive”, having detailed data collection. The Finnish system includes

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181 European Monitoring Centre on Racism and Xenophobia
182 Now known as the European Fundamental Rights Agency.
183 “Detected” means that the perpetrator was identified and penalised.
184 European Monitoring Centre on Racism and Xenophobia Annual Report on the Situation regarding Racism and Xenophobia in the Member States of the EU (EUMC 2006).
185 Ibid at page 101.
186 Ibid at page 95.
187 As opposed to comprehensive, limited or non-existent system.
188 European Monitoring Centre on Racism and Xenophobia Annual Report on the Situation regarding Racism and Xenophobia in the Member States of the EU (EUMC 2006) at page 97.
detailed information about the characteristics of the crimes, including the type of offence, where it occurred, when it occurred, the victim’s immigrant or non-immigrant status, their nationality, ethnicity, gender and age, and whether they have been victimised on more than one occasion. This information is also then collected with respect to offenders.189

The Report also notes the need for unofficial data collection mechanisms, through, for example, NGOs. While acknowledging the fact that NGOs cannot be expected to fill the gap left by ineffective official data collection, it does highlight the fact that non official data can give a “wealth of insight” that allows us to form a picture of ‘who’ victims are. For example, the Report notes:

“NGOs widely report that ‘visibly different’ minorities and foreigners, such as North Africans, are more likely to be victimised than groups that are visibly similar to the majority population in each member state. NGOs also report that the following ‘groups’ are particularly vulnerable to racist violence and crime; namely …: asylum seekers and refugees, Jews, Muslims and ‘Roma’.” 190

The Report also notes that specific communities have organisations which collect data particular to their group, such as the Community Security Trust in the UK which collects data on antisemetic incidents, and the Islamic Human Rights Commission, the Muslim Line and FAIR which collect data on anti-Muslim, or “Islamophobic” incidents. None of these groups currently operate in Ireland. While Pavee Point represents the travelling community and some Roma gypsies, and collects data on incidents relating to inequality, it does not collect data on race crimes directed against the travelling community.

The Report concludes that the EUMC is of the opinion that there should be a coordinating mechanism for data on racism, which would act as a “one stop shop” for all available national data related to racism which has been collected by state authorities and NGOs.

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189 Ibid.
190 European Monitoring Centre on Racism and Xenophobia Annual Report on the Situation regarding Racism and Xenophobia in the Member States of the EU (EUMC 2006) at page 103.
ESRI Report on Migrants’ Experience of Racism and Discrimination in Ireland

As part of the EUMC study, the ESRI carried out a survey in 2005 which analysed the experience of racism and discrimination in Ireland by non-EU immigrants. The survey grouped the individuals involved into 5 regional groups: Black South/Central Africans; White South/Central Africans; North Africans; Asians and non-EU East Europeans.

The survey, as with Garda statistics, measured “perceived” racism. The following is a broad indication of the responses relevant to this report:

Victim of violence or crime 10%
Harassed by neighbours 15%
Harassment at work 32%
Harassed in street/public transport 35%

Interestingly, the group most likely to experience harassment, Black Africans, was the group which was least likely to report such an incident to the police. The Report found that generally, levels of reporting of insults and harassment and of violence or serious crime to the police was “rather low”. Importantly, the Report notes:

“[This] implies that Garda reports of racially motivated crime are a serious underestimation of the incidence of racially motivated crime.”

In terms of the people most likely to be the victims of what the Report terms discrimination in “private and public arenas”, the Report notes:

“[W]e see that individuals with higher levels of education are more likely to experience discrimination in private life and public arenas. Women are less likely to experience this form of discrimination. Younger people are more likely to experience ‘public discrimination’, as are those who have been in Ireland longer. Single migrants are also somewhat more likely to experience ‘public discrimination’. Black South/Central Africans are much more likely to experience discrimination in this domain than East Europeans; Asians are somewhat more likely to experience this form of discrimination. If one were to single out a ‘modal’ category experiencing a combination of harassment on the street, in public places, from neighbours or violence and crime it would be a single, young, Black African male who had been living in Ireland for a number of years.”

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192 Economic and Social Research Institute Migrants’ Experience of Racism and Discrimination in Ireland: Results of a survey conducted by the Economic and Social Research Institute for the European Union Monitoring Centre (ESRI 2006).
193 Ibid at page 33. The survey was carried out by post, and was an anonymous random sample of immigrants. For details on the methodology of the survey, see Economic and Social Research Institute Migrants’ Experience of Racism and Discrimination in Ireland: Results of a survey conducted by the Economic and Social Research Institute for the European Union Monitoring Centre at pages 11-20.
194 The survey also dealt with general discrimination, such as being refused entry to an establishment; being badly treated by immigration services, health services, social services and police; being discriminated against in employment and being denied housing or credit.
195 Economic and Social Research Institute Migrants’ Experience of Racism and Discrimination in Ireland: Results of a survey conducted by the Economic and Social Research Institute for the European Union Monitoring Centre (ESRI 2006) at page 40.
196 Ibid at page 41.
197 The Report defines this as “overt or public racial harassment and racially motivated crime experienced by all respondents. Specifically, the items combined are: insults or harassment by neighbours in the last year; threats, insults or harassment on the street, in public transport during the last year; violence, robbery or theft or any other serious crime in the last year.” Ibid at page 57.
198 Ibid at page 57.
Garda Public Attitudes Survey 2006

The Garda Public Attitudes Survey is compiled annually by an independent company to provide information regarding the public perception of the service provided by An Garda Síochána.

In the Report, a racist incident was defined as “any incident which is perceived to be racist by the victim, a witness to the incident or the investigating Garda”. While initially, figures seem quite low, when those with Irish nationality were excluded from the figures, the picture is quite a different one. Indeed, the Report admits that “the survey is likely to under-represent certain minority groups and therefore understate racist incidents.” In the Report, it notes that the rates of experience of racist incidents by non-Irish nationals are as follows: UK (6%), EU (18%), and non-EU (28%).

The Report states that the main reasons for not reporting the incident to the Gardaí were:
- The incident was not serious enough (51%);
- The Gardaí could not have done anything (23%);
- The Gardaí would not have been interested (17%).

When respondents were asked if they had ever been subjected to a racist incident by a Garda, 22 respondents said they had, compared with 31 and 21 in 2005 and 2002, respectively.

Unfortunately, there is no breakdown for Irish nationals and non-nationals for the remainder of the survey. When asked to agree or disagree with the statement “The Gardaí discriminate against immigrants”, 16% agreed, 54% disagreed and 30% expressed no opinion. Unfortunately, these figures are increasing: in 2002, 11% agreed and in 2005, 14% agreed. While these figures seem inconsequential, it is important to note that the small numbers of non Irish nationals in the figures may hide the true experience of those who do not have Irish nationality.

When asked how worried respondents were about being subject to physical attack because of the religion, race or skin colour of the respondent, 14% replied “very worried” and 17% replied “fairly worried”.

When asked whether respondents thought race/hate crime was a major problem, a minor problem or not a problem, where they lived, 10% replied that they thought it was a major problem, 29% replied that they thought it was a minor problem, 45% thought it was not a problem, with 6% expressing no opinion. However, when asked whether it was a problem in the country as a whole, the results are shocking: 51% replied that they thought it was a major problem, 36% replied that they thought it was a minor problem, only 8% thought it was not a problem, with 5% expressing no opinion.

Respondents were also asked their view on the statement “People who are different are likely to experience ridicule or personal attack on our streets”. Again, the results are high: 63% agreed, 18% disagreed and 19% expressed no opinion.

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198 Kennedy and Browne Garda Public Attitudes Survey 2006 (Garda Research Unit, 2006).
199 Overall, 2.6 per cent of respondents said that they had ever been subjected to a racist incident (n=265). Seventeen per cent of these had reported the most recent incident to the Gardaí (n=46). Of these, just over half were satisfied (53%) with the way the incident was handled. In the 2005 survey, 2.5 per cent reported having experienced a racist incident (n=252); 16 per cent reported it to the Gardaí (n=40) and 50 per cent were satisfied with the way it was handled (n=20). Ibid at page 26.
200 92% of respondents were of Irish nationality. Ibid at page 27.
201 Ibid at page 27. The reasons for non-reporting in 2005 were similar. Ibid.
202 Ibid at page 27. Ibid at page 39. Ibid at page 41.
203 Ibid at page 48. Ibid at page 49. Ibid, Ibid at page 52.
“Know Racism” – The National Anti-Racism Awareness Programme

In 2004, Millward Brown IMS produced research findings on opinions on racism and attitudes to minority groups in Ireland. A number of interesting points emerged from the research. First, 18% of individuals personally witnessed racist behaviour, of which by far the most prevalent was verbal abuse, which accounted for 80%. However, physical abuse accounted for 15% of all racist behaviour, which is a relatively high percentage.

People in Dublin and in urban areas were more likely to perceive Irish society to be “very racist” while those over 65 years of age and living in rural areas were more likely to be of the opinion that Irish society was “not at all racist.”

54% of respondents agreed that the number of racist incidents against asylum seekers was increasing all the time. 68% of people were of the opinion that travellers were discriminated against, and 72% agreed that the settled community is not willing to accept the travelling community living among them.

The research notes that while most people are reluctant to be seen as racist, there is a sense of threat from what is perceived as an uncontrolled influx of “foreigners”.

The research also points out that “appearance plays a key role, with those who look the most ‘different’ being the most likely to experience problems.”

It also appears that Irish society is becoming more, rather than less racist – from the research, it is reported that “foreigners” who are long-term residents report that formerly positive attitudes towards them have become more negative – again, bolstering the idea that Ireland, while becoming more multi-cultural, is simultaneously becoming more racist.

The research also indicates that the position of travellers seems to be worse. They stated:

“The general public tend to be more conscious of the more visible immigrants, but face-to-face with travellers their attitudes are often more negative – more instinctive, more deeply ingrained and less subject to correction by liberal sensitivity – there is more public acceptance of negative attitudes to travellers than to immigrants. There were seen to be grounds for pessimism in the fact that our efforts to provide adequately for the relatively small traveller population have had such limited success after forty years of trying.”

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210 Available at http://diversityireland.ie/Publications/upload/File/Millward-Brown-IMS-Presentation_26th_Feb_04.pdf.
Recent Irish Cases containing an Element of Racial Motivation – *Three Case Studies*

These three case studies attempt to examine how the Circuit Criminal Court addresses racially motivated, or racially aggravated offences at sentencing. One would expect the Court to treat a racist motivation explicitly as an aggravating factor, but as we will see, given the absence of clear sentencing guidelines, it is impossible to establish if this is the case.

**Case Study 1: Manslaughter – DPP v Derwin, Jones and Other**

In the case *DPP v Derwin, X, Y and Jones*, the first defendant was charged with the manslaughter of a 30 year old Chinese national. Prior to the incident which resulted in the victim receiving his injuries, a number of racial insults were exchanged between Derwin and two Chinese men, one of whom, Zhao Liu Tao, was the victim. The Court accepted that there were mitigating factors to be taken into account in relation to Derwin, who was 18 years of age at the time of the hearing but 16 at the time of the attack. These were:

- The Defendant pleaded guilty at the earliest opportunity.
- He displayed remorse for what happened.
- He attended at his local Garda station with his family shortly after the incident to report what happened. Indeed, at this time, Derwin admitted to using racist remarks.

Aggravating factors were also noted. These were:

- The Defendant and his companions were the instigators and aggressors to the incident.
- In particular, the Court noted “They started out by abusing these Chinese people. They followed them and on being confronted by these Chinese people ... phoned for reinforcements and it would appear to me, to put it in simple language, were spoiling for a fight which in my view was racially orientated.”
- A weapon was used.
- The blow was struck with the weapon to the head of the victim.

In sentencing Derwin, Hogan J stated:

“Balancing the mitigating factors which have been outlined to me, which I will have regard to, and the aggravating factor in this case, I ask myself is this a case where it is appropriate that a custodial sentence be imposed and the answer to that is yes ... However, having regard to the age of the defendant at the time of the commission of this offence and having regard to the fact that he has no previous convictions and his other mitigating factors such as immediately presenting himself with his parents to Coolock Garda Station and to the fact that he has expressed remorse which I accept, those matters will be reflected in the sentence to be served.”

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211 Transcripts of hearings in the Circuit Criminal Court received from the Courts Service. The second and third defendants can not be named due to their age. The third defendant is not considered as he was not involved in the initial racist element to the attack. The second defendant, X was not charged with manslaughter, but rather violent disorder. He was part of the initial group who made racist remarks to the victim and his companion, and instigated the attack, but after that he took a lesser role, which encompassed violent behaviour. Unfortunately, the sentencing remarks for the third defendant are not available.

212 Transcripts of hearings in the Circuit Criminal Court received from the Courts Service.

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215 Transcripts of hearings in the Circuit Criminal Court received from the Courts Service.
The Court ultimately imposed a sentence of 4 years on the defendant, and, having regard to the mitigating factors, suspended the last two years of this sentence on the condition that he entered into a bond. However, he then went on to say “Having regard to the seriousness of the offence, that portion of his sentence is to be suspended for a period of 3 years.”

Jones, the fourth defendant, was charged with violent disorder in relation to the offence involving the Chinese nationals. He was 18 at the time of the attack. Regarding the sentence to be imposed on Jones, the Court noted that he was not in attendance at the incident when it first occurred, but arrived in response to the phone call for reinforcements. However, the Court did note that his presence aggravated the situation, and bore particular attention to the fact that Jones was older than the other defendants. He received a two year sentence which the Court suspended in its entirety.

In the case DPP v Jones and Derwin the Director appealed the sentencing court’s decision for these two defendants on the basis that it was unduly lenient, in accordance with section 2 of the Criminal Justice Act 1993. The Court noted that for such an application to succeed, it needs to be shown that the sentences “exhibit a departure from the established principles of sentencing.”

The Court was asked to consider that the sentences were unduly lenient on the basis of the need to condemn racially motivated attacks or attacks in which race plays any part. While the Court admitted that it did condemn such attacks, it went on to say:

“[I]t has not been submitted, and I do not think it could be submitted, that the ordinary principles in relation to sentencing do not apply to these cases as to others ... [T]he Director eventually came to making the case plainly that the sentence could not be criticised in any way but for the context in which it occurred, but that the context in which it occurred required a custodial sentence as a matter of principle ... No such submission was made to the trial judge. The principle is one for which no authority was or could be cited ... But in no sense are we declining to review the case on the grounds of undue leniency on any sort of technical ground ... [T]he sentence was one fully in accordance with the principles of sentencing.”

In fact, Mr Gageby SC, speaking for Derwin, stated to the sentencing court:

“Now I know your Lordship has a very strong public duty and Your Lordship was very right, I am sure to denounce that any incident should ever begin or end with a form of racial abuse against hard-working young people who come to our country.”

While admittedly, this does not go so far as to make a submission to the trial court that a custodial sentence should be imposed in principle, it does however indicate that defence counsel was aware that the Court should treat such offences with the utmost of seriousness. Indeed, from the transcripts received, it would appear that counsel for the Director made no representations whatsoever to the Court regarding the type of sentence which should be imposed.

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216 Transcripts of hearings in the Circuit Criminal Court received from the Courts Service.
217 Unreported Court of Criminal Appeal 1 November 2004 Hardiman J (ex tempore).
218 Ibid at page 2. [Emphasis in original]
219 Ibid.
220 Transcripts of hearings in the Circuit Criminal Court received from the Courts Service.
Given the absence of sentencing guidelines in this jurisdiction, one hesitates to criticise this sentence on the grounds that it is unduly lenient. It is unfortunate, however, that the Court of Criminal Appeal did not take an opportunity to denounce racially motivated attacks by way of holding that where it is established at sentencing stage that the attack was racially motivated, this should be taken into account as an aggravating factor at sentencing.

Case Study 2: Assault Causing Harm – DPP v O’Driscoll and Moore

In the case of *DPP v O’Driscoll and Moore* the two defendants were charged with assault causing harm under section 3 of the Offences Against the Person Act 1997 and for using threatening and abusive and insulting words to the victim. The victim in the case was a French national of Moroccan origin, and was dark skinned.

The victim and her partner came home the evening of the incident to find the second defendant urinating in their doorway. Words were then exchanged between the victim and the two defendants. The victim was then thrown to the ground, at which stage the first defendant sat on her head and banged her head off the ground while the second defendant kicked her. Evidence also showed that “racial slurs were cast”. When the Gardai arrived, things quietened down, but in the present of the Gardai, they attacked the victim again. When arrested, further racist and xenophobic remarks were made.

The victim suffered physical injuries, but the primary effect was that her existing condition of epilepsy was exacerbated, and she suffered psychological damage. The victim gave evidence on her medical injuries, and in the course of this evidence, stated:

“I would like to say to this Irish community, people, that they must be concerned of the racist crime that I endured. As if one feels dirty, a part of the self is gone. It’s not because one has frizzy hair, it’s not because one has dark brown eyes, it’s not because one has brown skin, that one is different of the Irish people. I am victim of this ignorance, I am victim of this archaism. I am victim of this alcoholism. I simply ask that this Irish community, people, be conscious that racism is part of this country.”

In sentencing the two defendants, Moran J noted at the outset that the attack was a serious one and that the two defendants were fortunate that they were not being prosecuted on more serious charges.

The relevant element of the sentencing remarks are:

“I accept that you have pleaded guilty. I accept that you, Ms O’Driscoll have two young children and that anything that I may do here today may result in them

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221 Testimony of victim in the case of *DPP v O’Driscoll and Moore* obtained from transcripts of proceedings received from the Courts Service.
being taken into care. I accept that neither of you has been in prison before and I accept that you have paid compensation to the degree of Two Thousand Euros each... I propose imposing a prison sentence of three years on each of you ...”222

The important element of the case is how the judge determined which count the two defendants were to be sentenced on. This part of the decision is worthy of quotation:

“JUDGE: I propose imposing a prison sentence of three years on each of you. In respect of which count Mr Sreenan?
...
MR SREENAN: Your Lordship could of course impose concurrent sentences.

JUDGE: It is two years on each one. Very well, I impose a sentence of two years on Count No...

MR SREENAN: In relation to the incitement to hatred charge my lord the maximum sentence is...

JUDGE: What about the assault contrary to section 3?

MR SREENAN: Five years is the maximum sentence my lord.

JUDGE: Very well. On Count No 3 on the indictment I am imposing a prison sentence of three years on each of you, and as far as the other counts are concerned they are taken into account.”223

The Judge did not explicitly take any aggravating factors into account, though one might consider his statement that the two defendants were lucky they were not being brought forward on more serious charges as indicative of the fact that he considered the assault to be a serious one. However, the fact that the offence was a racially motivated one, and that it appears that the two defendants were prosecuted under section 2 of the Prohibition of Incitement to Hatred Act 1989 did not feature explicitly in the ruling of the Court as an aggravating factor. This is to be regretted, as it would be useful to know whether it was an aggravating factor, and if so, whether this aggravation was measurable.224

Case Study 3: Incitement to Hatred: DPP v O’Grady225

This third case concerns what is referred to in this paper as an “expression offence”. Here, a Gambian man attempted to board a bus with some food. The bus driver, O’Grady, told him “we don’t eat on buses in this country”, told him to go back to his own country and referred to him as a “nignog”.226 He was convicted under section 2 of the Act, and fined £450.227
He successfully appealed this conviction to the Circuit Criminal Court. When researchers communicated with Judge Buckley, who heard the case, he revealed that the only two witnesses who heard the offensive words were entirely supportive of the Gambian man, and “certainly had not been incited to hate Gambians as a result of the Bus driver’s conduct.” Judge Buckley was of the view that it would not be safe to uphold the conviction, having regard to the narrow definition of “hatred” in the Act.

**Case Study 4: Incitement to Hatred: Bus Driver (2)**

From the Report compiled by the Director of Public Prosecutions, it was established that a second bus driver was prosecuted under section 2 of the 1989 Act. Here, there were allegations of racial insults made by a bus driver towards a young schoolboy. There was an initial decision not to prosecute, but this decision was reviewed, and the prosecution went ahead. The reason given is that “the words were said to the schoolboy by an adult in the presence of other schoolchildren and that could be seen to constitute stirring up hatred under the Act.” The accused was convicted under section 2 of the 1989 Act, and fined €150. He was also convicted under section 6 of the Public Order Act and fined €150. He was also bound to the peace for 2 years.

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228 Written communication with Judge Buckley, dated 8 June 2006.
Conclusion

From the above analysis, a number of conclusions can be drawn. There is a problem with race crime in Ireland, and it is on the increase. The number of crimes reported from 2005 to 2006 doubled: while there may be reasons for this increase which are unrelated to an actual rise in the incidents of racially motivated crimes, these figures are worrying. Not only do the figures show that there is a problem with racism in Ireland, there is also a perception in the wider community that racism is a growing issue in Irish society.

While the NCCRI gathers data, it would be beneficial to have more detailed statistical information from the Gardai. Moreover, it is important that this data is collected in a consistent manner so it is possible to analyse data in a meaningful way.

In terms of tackling the crimes, it is clear from the Office of the DPP that many of the 1989-type offences that come to his office do not come within the parameters of the Act itself. Further, when racially motivated crimes appear in court, there is no obligation on the court to take that motivation into account.
Chapter Six

Literature Review
What is Racism and what is Racial Discrimination

Racism has been described as:

“… any attitude, action or institutional structure which subordinates a person or group because of their colour … Racism is not just a matter of attitudes: actions and institutional structures can also be a form of racism.”

The UN Convention on the Elimination of All Forms of Racial Discrimination defines “racial discrimination” as

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

It also imposes on States Parties in Article 4(a) the obligation to declare an offence punishable by law “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”

Solomas takes a broader approach, and states:

“… in many societies people continue to act as if race exists as a fixed and objective category, and this belief is reflected in political discourses and at the level of popular ideas. Commonplace classifications of race have relied on a variety of variables – such as skin colour, country of origin, religion, nationality and language – to define groups of people.”

Fredman argues that “race is itself a social construct, reflecting ideological attempts to legitimate domination, and heavily based on social and historical context.” Racism, then, she argues is “not about objective characteristics, but about relationships of domination and subordination, about hatred of the ‘Other’ in defence of ‘Self’, perpetrated and apparently legitimated through images of the ‘Other’ as inferior, abhorrent, even sub-human.” She states:

“Nor is there a single racism, but multiple racisms: colour racism must be examined together with cultural racism, which includes ethnicity, religion, and language. Racism, it is argued, operates along at least three axes: first, that of denigratory stereotyping, hatred and violence; secondly, that of a cycle of disadvantage; and the third the negation and even obliteration of culture, religion, or language.”

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229 Article 1, Convention on the Elimination of All Forms of Racial Discrimination.
232 Ibid at page 2.
233 Ibid at page 10. 234 Ibid at page 2.
In recent years, there has been a move away from the concept of “race” to one of “ethnicity”. It is noted that ethnicity is

“intended to describe differences in groups (defined by such features as: a common geographic origin; migratory status, phenotypic features; language; religious faith; shared traditions, values and symbols; cultural features, such as literature, music and foods) without resort to the racist notions of superiority and inferiority.”235

The Additional Protocol to the Convention on Cybercrime defines racist and xenophobic material as material which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin as well as religion if used as a pretext for any of these factors.

Indeed, as Perry notes, the term “Hate Crime” itself is being replaced by the term “ethnoviolence”.236 However, it is also argued that the term “ethnicity” will simply become a euphemism for race – it “sustains ‘racial meanings’ while rejecting the cruder terminology of race.”237

Pattel-Gray agrees that “racism appears in may different forms in our human societies, including individual, institutional, scientific ... and so on.”238 She highlights a number of forms of racism:

1. Individual Racism
   Individual racism is what a person encounters from another person. She cites McConnochie et al239, who state:
   “Individual racism refers to the expression of racist attitudes in the behaviour of individual people in face-to-face situations. It is based on the attitudes of individual people...”240

2. Institutional Racism
   Institutional racism is what a person encounters from another person in an organisation. Again, citing McConnochie et al:
   “Institutional racism ... is rather more complex, and refers to the ways in which racist beliefs or values have been built into the operations of social institutions in such a way as to discriminate against, control and oppress various minority groups.”241

3. Scientific Racism
   Darwin’s theories of evolution were “taken up improperly by social scientists and mistakenly applied to human sciences”242 which led to Social Darwinism, based on “racist notions of the superiority of the white race.”

The NCCRI note that there are 5 different forms of racism in Ireland, each of which can range from "small, everyday acts of discrimination, through the barriers and omissions that may be

236 Perry In the Name of Hate: Understanding Hate Crime (Routledge, New York, 2001) at page 1.
237 Ibid at page 24.
238 Ibid at page 9.
239 McConnochie, Keith, Hollinsworth, David and Pettman Race and Racism in Australia (Social Science Press, New South Wales, 1989).
241 Ibid at page 10.
inadvertently established at an institutional level, to acts of threatening behaviour and violence”. According to them, the different forms of racism include:

- Racism experienced by Travellers on the basis of their distinct identity, nomadic tradition and culture;
- Racism experienced by recent migrants, which includes migrant workers, refugees and asylum seekers;
- Racism experienced by ‘people of colour’ and visible minority ethnic groups, including black people on the basis of their skin colour and ethnic and/or national identity, irrespective of their legal status;
- Racism experienced by Jewish and Muslim people in the form of anti-Semitism and Islamaphobia;
- The intersection between racism and other forms of inequality, including the inequality that can be experienced by women, people with disabilities, gay and lesbians, older and younger people or on the basis of family status.

Indeed, it is the Irish definition of racism in the National Action Plan Against Racism (NPAR) that was lauded as the “most authoritative statement on the matter within the domestic legal order” by the EU Network of Independent Experts on Fundamental Rights in their Report *Combating Racism and Xenophobia through Criminal Legislation: The Situation in the EU Member States*. The NPAR defines it as:

“Racism is a specific form of discrimination and exclusion faced by cultural and ethnic minorities. It is based on the false belief that some ‘races’ are inherently superior to others because of their cultural or ethnic background, different skin colour and nationality. Racism denies people their basic human rights, dignity and respect.”

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243 NCCRI Submission to the Legal Aid Board Corporate Plan Review (NCCRI 2005) at page 3.
244 Ibid.
246 Ibid at page 9.
Racism and Racist Violence: Why is Racism Dangerous for Society\textsuperscript{247}

Regardless of the form of racism, Pattel-Gray is of the belief that racism moves towards exploitation and violence. She refers to the Human Rights and Equal Opportunity Commission which defined “racist violence” as:\textsuperscript{248}

“a specific act of violence, intimidation or harassment carried out against an individual, group or organisation (or their property) on the basis of:
• race, colour, descent, or national or ethnic origin ; and/or
• support for non-racist policies.\textsuperscript{249}

Racist violence, she states “moves beyond what we think and feel to what we do”\textsuperscript{250}. Conversely, the FRA note in their recent \textit{Report on Racism and Xenophobia in the Member States of the EU}\textsuperscript{251}:

“Evidence of racist violence and crime is perhaps the most direct indicator there is that vulnerable groups in society experience discrimination.”\textsuperscript{252}

Bowling and Phillips\textsuperscript{253} set out concisely what the effect of racism and racist violence is on society:

“Racist violence provides an example of the impact of direct, individual racism... Racist violence cannot be seen only as the madness of individual hooligans... [but] is a much broader phenomenon that includes violence perpetrated by individuals and groups of youths in contexts where the implicit ‘goals’ are shared among a much broader section of the English population. Research on prejudice and racism among ‘ordinary’ non-violent white people suggests that some share the goals of the perpetrators of racial harassment ... even if they do not agree with the means (that is, violence) which is used to achieve this...”\textsuperscript{254}

Thus, while combating racist violence in society is important, what is equally important is to eliminate all forms of racism, or biases towards ethnic minorities in society. Criminalising racist violence must be but a small part of a bigger picture.\textsuperscript{255}

It is the movement, from the internal thoughts to the external actions, which the criminal law concerns itself with. While most accept that racist violence is abhorrent, the question is whether it should specifically be prohibited by our criminal code, whether a racist motivation should attract a higher penalty, or whether crimes with a racial motivation should be treated any differently than any other remains to be asked. This question will be analysed in greater detail later in this chapter.

\textsuperscript{247} The extent of racist violence in Ireland is examined in Chapter 5 of the Report.
\textsuperscript{249} As quoted in Pattel-Gray \textit{The Great White Flood: Racism in Australia} (Scholars Press, Georgia, 1998) at page 12.
\textsuperscript{250} \textit{Ibid}.
\textsuperscript{251} EU Agency for Fundamental Rights (FRA) \textit{Report on Racism and Xenophobia in the Member States of the EU} (2007).
\textsuperscript{252} \textit{Ibid} at page 114.
\textsuperscript{253} Bowling and Phillips \textit{Race, Crime and Justice} (Pearson Education, Harlow, 2002).
\textsuperscript{254} \textit{Ibid} at page 125.
\textsuperscript{255} Though the point is also made that racist violence has no more an impact on society than other forms of criminal behaviour. This point is elaborated on later in this chapter.
What is the extent of Racist Violence?

Asides from the theoretical questions as to whether hate crimes or race crimes should form part of the criminal law, the very real question arises as to whether there is a practical need for such offences – is racist violence a problem in society?

Bowling and Phillips256 observe that, from a British context, ethnic communities have been the targets of verbal abuse, harassment and physical attacks throughout their history in Britain. This violence, however, they state, has been overshadowed until recently by a preoccupation with “black criminality” and “black-on-black crime”. In the late 1970s, they observe, community groups collected evidence of racist violence, which led to a recognition that this type of crime was a problem in British society. This, of course, culminated with the murder of Stephen Lawrence and the subsequent police investigation, which the authors state:

“has come to represent the experience of many victims of racist violence in Britain. Rather than being an isolated case it is entirely consistent with extensive empirical and documentary evidence gathered over the last four decades.”257

Regarding statistics, the authors note that statistically only 2% of racially motivated incidents were recorded as serious crimes. However, an important point to be made in this regard is that where a serious crime has a racist motivation, “their categorisation as a specific type of serious crime overrides and negates their definition by the police as ‘racial’.”258 Thus, for example, if an individual kills another for race-related reasons, that crime will be recorded as a murder or manslaughter, rather than a racist murder or racist manslaughter. Another factor which effects the accuracy of statistics is the well-established low reporting rates for this type of offence.259

The effect of racist violence is that it creates a fear in ethnic minority communities – Bowling and Phillips note that on the street, and at home, people from ethnic minorities feel less safe than white people, and that these feelings of being unsafe affect their individual freedom of movement.260 They state:

“Although the relationship between fear, crime and victimisation is a complex one, fear of ‘ordinary crime’ among people from ethnic minority communities is fundamentally shaped by their fear of racist victimisation.”261

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257 Ibid at page 109.
258 Ibid at page 111.
259 Ibid at page 112.
260 Ibid at page 113.
261 Ibid. [Emphasis in original]
The primary question to be answered in this context is, what is a hate crime? How can the law distinguish between a crime perpetrated against a member of a minority group, and a crime perpetrated against that person which is committed due to their membership of that group.

The MacPherson Report of the Stephen Lawrence Enquiry\textsuperscript{262} suggested the following definition of a racist incident for the purposes of recording the levels of race crimes:

“racist incident is any incident which is perceived to be racist by the victim or any other person.”\textsuperscript{263}

While this definition is invaluable for recording the levels of racist activities in the State, it is not workable for the purposes of the criminal law: one cannot define the scope of an offence on the basis of the subjective viewpoint of the victim.

Sloan, King and Sheppard state that

“Hate crimes are crimes perpetrated upon individuals because of the appearance of particular characteristics or because of their apparent membership in a particular group.”\textsuperscript{264}

Indeed, a more simplistic definition has been provided by Jacobs and Potter: \textsuperscript{265} “[E]ssentially hate crime refers to criminal conduct motivated by prejudice.”\textsuperscript{266}

The question that thus needs to be addressed is what the range of such a crime should be – should issues such as skin colour, descent, religion be determinative?

Jacobs and Potter\textsuperscript{267} note that while criminals probably have conscious or unconscious prejudices against people who are, for example, rich, poor, successful or drug addicts, these prejudices would not turn an ordinary crime into a hate crime. “By contrast”, they note, “racial, religious, and gender prejudices are widely and vigorously condemned.”\textsuperscript{268}

In the Report Challenges and Responses to Hate-Motivated Incidents in the OSCE Region\textsuperscript{269} a working definition of “Hate Crime” is provided, which is separated into two Parts:

“Part A) Any criminal offence, including offences against person or property, where the victim, premises or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support or membership with a group as defined in part B”

\textsuperscript{262} Available at http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm
\textsuperscript{263} Ibid at Chapter 46, paragraph 12. Available at http://www.archive.official-documents.co.uk/document/cm42/4262/sli-47.htm
\textsuperscript{265} Jacobs and Potter Hate Crimes (Oxford University Press 1998).
\textsuperscript{266} Ibid at page 11. The authors do note, however, that the concept of prejudice is a complicated, broad and cloudy one.
\textsuperscript{267} Jacobs and Potter Hate Crimes (Oxford University Press 1998).
\textsuperscript{268} Ibid at page 16.
\textsuperscript{269} http://www.osce.org/documents/odihr/2006/10/21496_en.pdf
Part B) A group may be based upon their real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or other similar factor.”

As stated in *What is a Hate Crime?*

“Americans originally used the term ‘hate crime’ to describe a violent act committed against a person, property or organization because of actual or perceived differences in race, color, national origin or religion.”

However, the definition has broadened today – it is noted that in the United States today, the term is used to describe violent incidents in which the perpetrators are not only motivated by differences in race, colour or religion, “but by characteristics such as sexual orientation, gender or disability”. This has been broadened considerably in the state of Oregon, where the author notes that the law prohibits discrimination stemming “from a myriad of characteristics, from political affiliation to marital status.”

Others prefer to determine the ambit of hate crime laws to include only those who, historically, have been the victims of oppression – thus, it is argued “Violence against gays and the disabled, for example, is not a badge or incident of slavery.”

Perry notes that while the legal definition of a hate crime – the commission of a criminal offence – does not pose any problems, from a sociological standpoint, the definition is inadequate as it fails to encompass grievous violations which may be legal in some jurisdictions – such as denying the Holocaust or discriminating against an individual on the basis of their sexual identity. She proposes a working definition of a hate crime which is:

“… a mechanism of power intended to sustain somewhat precarious hierarchies, through violence and threats of violence (verbal or physical). It is generally directed toward those whom our society has traditionally stigmatised and marginalised.”

This of course, is a definition which also explains why we *should* treat hate crimes as a distinct sub-set of criminal offences. However, while sociologically speaking, this definition may indeed be preferable, encompassing as it does both civil and criminal acts of discrimination and violence, for the purposes of the criminal law, it is a rather vague and unworkable definition for the purposes of this paper. Indeed, the definition used in the United States *Hate Crime Statistics Act 1990* – “crimes that manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity” – is probably more suited to the question posed in Ireland.

The issue as to the scope of a hate crime has also been questioned – it is argued that to broaden the definition to include sexual orientation, women and disability would “create a special class

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270 Ibid at page 7.
271 *What is a Hate Crime?* Espejo, editor (Greehnaven Press Inc, California 2002)
272 Ibid at page 7.
273 Ibid.
274 Ibid.
275 Perry in the *Name of Hate: Understanding Hate Crime* (Routledge, New York, 2001).
276 Ibid at page 3.
Indeed, former Los Angeles County DA Ira Reiner, a former lobbyist for the introduction of hate crimes legislation has stated:

“The hijacking of hate crime legislation occurred when every victims group decided to validate their status by having their group added to the list. I guess if you’re not on the list, you’re a second class citizen.”

This argument can also then be extrapolated to the more general question of having any form of race or hate crimes at all. However, Perry argues that “just as racialised violence is a practice of oppression vis-à-vis people of color, so too is gender-motivated violence a mechanism that perpetuates the marginalisation of women, and gay men and lesbians.”

The European Network Against Racism in its Report *European Strategies to Combat Racism and Xenophobia as a Crime* notes that there are “at least three basic concepts of legislation dealing with racism and xenophobia possible”. These are:

1. **A Maximum Concept:**
   This tries to cover all possible forms of expression of racism and xenophobia, Thus, public expressions of racism would be penalised, as would direct and indirect discrimination.

2. **A Minimum Concept:**
   The Report notes that this would avoid detailed provisions. It states that “The criminalisation of racist attitudes is viewed as a criminalisation of motifs, thus violating the fundamental principle of criminal law, which demands the punishment of harmful social actions only, and not unwanted motifs.” Thus, the “marketplace of opinions” is the right place to defeat racism and xenophobia, rather than the criminal law.

3. **The Medium Concept**
   The Report notes that this concept accepts the need for detailed legislation, but only in relation to certain actions. It states:
   “The concept views criminal law as an inadequate instrument for comprehensive social engineering. On the contrary, criminal law would be a flexible means to react on dangerous trends within society and also a means to prevent violent crimes and protect the freedoms and the dignity of persons affected by racism and xenophobia.”

Thus, in relation to existing criminal offences, the question as to the relation between what are referred to as “common offences” and occasions where such offences are committed with a racist motivation needs to be addressed. There are two ways of addressing this: first, having explicit crimes which are common offences committed with a racist motivation (such as “racially aggravated assault”); or secondly, having a specific legislative measure which states that where crimes are

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277 Ibid.
278 What is a Hate Crime? Espejo, editor (Greehnaven Press Inc, California 2002) at page 44.
279 Perry *In the Name of Hate: Understanding Hate Crime* (Routledge, New York, 2001) at page 5.
281 Ibid at page 6.
282 Ibid.
283 Ibid.
284 Ibid.
committed with a racist motivation, the penalty should be increased (that is, dealing with the issue at sentencing rather than offence stage).

However, the ENAR are quick to point out that discrimination should not be defined as a specific criminal offence – primarily because if legislation is perceived to be ineffective, and thus symbolic, the entire scheme of anti-racism legislation is delegitimised.\textsuperscript{285}

**Conclusion**

There are various working definitions of what a hate crime should constitute. Indeed, leaving aside issues such as sexuality and disability, the very notion of a race crime is also open to discussion. The question as to what the determining factor should be is not clearly answered: country of origin, skin colour, language use, religion and ethnicity can all be usefully adopted as factors to be considered when drafting legislation. What is clear, is that a race crime is a crime against an individual which is committed because of their actual or perceived membership of a particular group.

The bigger question, of course is whether race crimes or hate crimes should be introduced at all – should the criminal law be used to combat racism? This question is addressed in the next section of this chapter.

\textsuperscript{285} *Ibid* at page 14.
Should Hate Crimes form part of the Criminal Law?

While it is clearly important that hate crimes or race crimes may form part of the criminal law, it is vital to stress at the outset that the criminal law is only one piece of the jigsaw that is needed to combat racism in society. Fredman286 refers to Boyle and Baldaccini, who state that “[t]he central question for the future ... is how to sustain support and commitment from all countries, not just through changes in the law, but through significant social change.”287

Arguments For Introducing Hate Crimes into the Criminal Law

The main arguments for introducing hate crimes can be broken down into three categories.288 First, the offender, second, the victim, and third, the broader community:

- **Offender**
  - Greater culpability of hate crime offenders
  - Deterrence

- **Victim**
  - More severe emotional harm to hate crime victims

- **Community**
  - Protection for members of victims groups and victim communities
  - Greater potential to trigger retaliation and intergroup conflict
  - Compassion for traditional targets of hate
  - The making of a political statement that hate crimes will not be tolerated.

The American Psychological Association note that, as hate crimes are not committed by members of extremist groups, but rather by young people acting impulsively, upon their own personal prejudices, many of the crimes can be prevented.289 As Levin and McDevitt state, “A strong prison sentence sends a signal to would-be hatemongers everywhere that should they illegally express their bigotry, they can expect to receive more than a mere slap on the wrist.”290 This argument, can be countered by the fact that any conduct which hate crime legislation seeks to criminalise is already subject to criminal sanction — thus, Jacobs and Potter ask, “how many additional crimes will be deterred by threatening potential hate crime offenders with higher maximum or minimum penalties.”291 They also question the belief that hate crimes are more amenable to deterrence than nonhate crimes.

Crocker states:

“One who commits a racist assault with some awareness of the history of racism is not merely of worse character than the ordinary assailant. The worse character is crystallized into an act that is itself morally worse.”292

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287 Ibid at page 2.
290 As quoted in Jacobs and Potter Hate Crimes (Oxford University Press 1998) at page 89.
291 Ibid.
Whether the history of racism should be determinative, however, is questionable. As Jacobs and Potter argue, first, on this basis, anti-white prejudice would not be treated as a hate crime, and secondly, they ask why history of a condemnable motivation should be the basis for more punishment, and other criminal motivations, such as greed, lust or politics not be regarded as being politically based.\footnote{Jacobs and Potter Hate Crimes (Oxford University Press 1998) at page 80.}

They then note that defenders of hate crime legislation argue that more severe penalties for criminals motivated by prejudice “are justified because such offenders are morally worse – more culpable – than criminals who engage in the same conduct, but for reasons other than prejudice.”\footnote{Ibid at page 80.}

It is argued by Jacobs and Potter that, rather than being more responsible, a prejudiced offender might be less culpable than his or her counterpart who is motivated by greed or lust: he could argue that his prejudice against homosexuals, for example, was the result of religious training.

They state:

“According to this account, his prejudice was imposed, not chosen, and should make him a candidate for a lesser punishment, not a greater one.”\footnote{Ibid at page 81.}

Weisburd and Levin state that hate crime victims suffer greater emotional and psychological injury than other crime victims: “Because the violence is so brutal, the degradation so complete and the vulnerability so omnipresent, bias crime victims exhibit greater psychological trauma than nonbias victims.”\footnote{Weisburd and Levin “On the Basis of Sex: Recognising Gender-Based Bias Crimes” (1994) 5 Stanford Law and Policy Review 21 at page 25, cited in Jacobs and Potter Hate Crimes (Oxford University Press 1998) at page 82. Jacobs and Potter question the validity of this statement, based as it is on a survey of hate crime victims which did not compare their injuries with non-hate crime victims.}

The European Network Against Racism note in their Report \textit{European Strategies to Combat Racism and Xenophobia as a Crime}\footnote{European Network Against Racism \textit{European Strategies to Combat Racism and Xenophobia as a Crime} (ENAR 2003) available at http://www.enar-eu.org/en/publication/reports/racism\_crime\_EN.pdf} that while the European Commission Against Racism and Intolerance have not presented sound reasoning why racist or xenophobic offences should be privileged against any other form of bias attack, ENAR are of the opinion that there are aspects which back ECRI’s position. They state:

“\begin{quote}
[H]igher sentences in cases of killing or bodily assault because of a racist or xenophobic intent of the perpetrator certainly send a clear message to the public and to possible perpetrators. For this reason, Member State legislation should at least provide for counting racist or xenophobic motifs as aggravating factors in some areas of criminal law to ensure that the racist background of these criminal acts does not get lost.\end{quote}”\footnote{Ibid at page 14.}

Bowling and Phillips\footnote{Bowling and Phillips Race, Crime and Justice (Pearson Education, Harlow, 2002).} remark that the harm that racially motivated offences cause is higher than that of a ‘normal crime’ to both the victim and their community. They note that being targeted for an attack, rather than being picked at random, creates feelings of hostility and tension, which make both the victim and the community feel vulnerable to future attacks.\footnote{Ibid at page 121.}

The Supreme Court of Oregon note this point:

\begin{quote}
\end{quote}
“[Hate crime] creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes – because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member – invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.”

Taslitz argues that any criticism of hate crimes legislation can be countered by three claims:

1. The psychological and moral need for individualised justice is undermined when victims are harmed because they are treated as members of a category rather than as unique beings;
2. In an especially dangerous way, hate crimes contribute to a racist culture that creates subordinate status for marginalised groups and raises the risk of physical harms, such as further assault; and
3. Racist assaults rely on a despised theory of human worth that has been rejected by our modern constitutional culture.

Watt similarly notes that racist incidents can have a “significant” impact on the victim, the family of the victim and the community to which he or she belongs. He cites the following as being among the direct consequences of a racist incident:

- Loss of life and serious personal injury;
- Criminal damage to property, including homes;
- Long-term health, including mental health problems;
- Relocation of homes by victims, sometimes to another country.

Jacobs and Potter doubt the validity of this statement, citing rape or child abductions as examples of crimes which also impact greatly on the wider community. More importantly, however, they go on to ask, even if it is accepted that hate crimes effect the wider community more than an average crime, “is third-party anguish a permissible basis for increasing an offender’s sentence?”

Bowling and Phillips also note that there is a strong element of premeditation in racist attacks, and, “as the criminal law is intended to punish those who can be held morally culpable it may be that a higher moral culpability deserves a higher sentence.”

Arguably, the main argument for introducing this type of legislation is, simply, that it works. By criminalising racist behaviour, the legislature is sending a clear message that it will not be tolerated in any form in society, thus reducing racism generally. Munro notes that since the introduction of race crime legislation in Britain, certainly the “cruder manifestations of discrimination such as colour bars in pubs or openly discriminatory advertisements” have been eliminated. He refers to Professor Bhikhu, an experienced observer of the race laws, who is of the opinion that there...

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301 State v Plowman 838 P.2d 558 (1992) at page 564, as quoted in Jacobs and Potter Hate Crimes (Oxford University Press 1998) at page 86.
302 Taslitz “Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong” (1999) 40 Boston College Law Review 739.
303 Ibid at page 742.
has been "significant progress in racial integration and harmony" since the 1960s, and that “the lead given by the law” has been an important factor in producing it.307

Perry308 agrees that hate crime legislation is useful. She notes that “… there may be some symbolic value to opting for legislation as a means of responding to ethnoviolence. Just as hate crime is an expressive act, so too is hate crime legislation. It sends a message to its intended audience(s) about what is not to be tolerated.” 309 However, she also notes that hate crime legislation is not without its limitations, and that in order to be effective, it must be consistent in providing protection for all classes of individuals – particularly those groups that have been traditionally oppressed: woman and gay men and lesbians. Without this broad approach, she argues, the implication is that they are not worthy of the same protections afforded to racial minorities.

Arguments Against Introducing Hate Crimes into the Criminal Law

The primary reason for not introducing hate, or race crimes into the criminal law is that the law is currently fully equipped to deal with the issue – there are no gaps that such an offence, or range of offences, needs to fill. Dickey argues:

“[People who commit ‘hate crimes’] can be punished by laws that were adequate long before hate crimes statutes sprang up, and by judges who have always had the powers to consider motive when fixing punishment. The idea that a separate set of hate crime laws would somehow dissuade them from doing what they do is as weak as the no-quaint idea that capital punishment lowers the murder rate.”310

While some argue that hate crimes are generally more brutal and cause more serious injury than other crimes, it is argued that the current range of offences, from simple assault to aggravated assault, or the range of sentencing options open to a sentencing court on a particular offence, such as arson, is sufficient to adequately punish the offender.

Sullivan questions the very idea of putting an emotion, 'hate', into the criminal law. He writes,

“For all our zeal to attack hate, we still have a remarkably vague idea of what it actually is … For all its emotional punch, ‘hate’ is far less nuanced an idea than prejudice, or bigotry, or bias, or anger, or even mere aversion to others … sentiment is a poor basis for law, and a dangerous tool in politics.”311

While acknowledging the argument that hate crimes should be disproportionately punished because they victimise more than the victim, by spreading fear, hatred and panic among whole populations, Sullivan states frankly that all crimes victimise more than the victim, and spread alarm in the society at large. He states:

307 Ibid at page 181.
308 Perry In the Name of Hate: Understanding Hate Crime (Routledge, New York, 2001).
309 Ibid at page 229.
311 What is a Hate Crime? Espejo, editor (Greenhaven Press Inc, California 2002 at page 21.
“[T]he distinction between a crime filled with personal hate and a crime filled with group hate is essentially an arbitrary one ... It is a function primarily of politics, of special interest groups carving out particular protections for themselves, rather than a serious response to a serious criminal concern.”312

Jacobs and Potter313 also ask whether “prejudice is more morally reprehensible than other criminal motivations like greed, power, lust, spite, desire to dominate [or] pure sadism?”314 This question is particularly relevant to the Irish situation. Is it more blameworthy for an individual to attack an individual because of their race, or for example, attack an elderly person because of their infirmity or vulnerability? And can, or should, the criminal law create such a hierarchy of victims?

Brick makes the point that:

“Americans are not equal under the law if crimes against a particular ‘victim’ group are punished more harshly than identical crimes against someone who is not a member of a government-protected group.”315

The politicisation of the issue is also cause for concern. For example, if race crimes are introduced, it would be a rare politician who would stand up and state that while being strong on race crimes, they don’t feel the need to be as hard on crimes against those with disabilities, those of a particular sexual orientation or those of a particular gender. The question as to where the legislature would stop is a difficult one – would the introduction of race crimes lead to a broad-sweeping piece of legislation which does not protect minorities, but instead punishes this elusive concept, hate?316

Bowling and Phillips317 also address this point, and highlight the fact that due to notions of racist motivation or aggravation in legislation being defined broadly, they are “flexible enough to cast a wide spectrum of incidents involving people from ethnic minority communities (as both victims and suspected offenders) as ‘racially aggravated’.”318

Bowling and Phillips319 also note that more severe punishment for racist crimes could lead to further victimisation within minority communities. They note that some critics argue that protecting minority ethnic communities by penalising racist violence could provoke a ‘white racist backlash’, particularly amongst those who either hold racist views.

It is also recognised that if a punishment is perceived to be unfair – such as an increased penalty for a racist motivation – this can have the effect of defiance and the confirmation of deviant identities which lead in turn to increased rather than decreased levels of offending.320
Conclusion

Bowling and Phillips\(^321\) ask whether aggravated offences should exist, and note that while racist violence is an area that deserves, and indeed demands attention, it remains to be seen whether tackling this issue through the criminal law is effective. They ask whether such laws improve or exacerbate the question, or have no effect at all. This question is not an easy one to answer.

While it is clear that some measure has to be introduced whereby a sentencing court can increase the penalty imposed where the offence is racially motivated, it is suggested that the introduction of a new range of offences is not the most appropriate way to do this. This is for a number of reasons, some practical, and some theoretical.

Due to the social stigma attached to being convicted of a “hate crime” or a “race crime”, defendants are unlikely to plead guilty to such an offence, thus leading to lengthy and expensive court proceedings. Proving that an offence was committed with a racist motivation or on the grounds of hostility to a standard satisfactory to the criminal law can also prove problematic. While it is important for the legislature to make it clear through the law that racism will not be tolerated, that message will lose much of its impact if there are very few convictions under the Act.

Given the current scope of the equality legislation and, indeed, the protection afforded by the Prohibition of Incitement to Hatred Act 1998, from a practical point, any legislation introduced to combat racism would have to have a wider ambit than racist offences. Thus, while the aim of the legislation might be to combat race crimes, ultimately, it might end up also aimed at crimes against people due to their sexual orientation, gender, disability, marital status, family status or age.\(^322\) While it is agreed that crimes committed for such reasons should be punished, and that perhaps they should be punished more harshly than those committed opportunistically, the purpose for introducing race crimes is then lost. The reason for introducing race crimes is to send a clear message that society will not tolerate racism of any form. If, however, the legislation covers crimes committed for a range of reasons, that message is lost. This argument might seem circuitous, but the underlying reasons for introducing this legislation should not be lost.

From a theoretical perspective, the arguments against introducing a new range of criminal offences into the code are persuasive. In particular, the argument against elevating racism to a level higher than, for example, crimes against the elderly or children, is a cogent one. If what is required is harsher sentences to be meted out to those who commit crimes which are racially motivated than those who commit crimes for other motivations (even though they may be as reprehensible) then one approach might be to increase the maximum sentence available for specific offences.

This is not to say, however, that the criminal law should ignore the issue of race crimes entirely. On the contrary, it is suggested that rather than introduce a raft of unworkable legislation, the approach should be one that is in keeping with the current criminal code.

A separate but related issue in the context of a literature review concerns the freedom of expression. The entire debate cannot be considered in isolation from this principle, and the issue will be considered in the following chapter.


\(^{322}\) These are the nine grounds of discrimination set out in the Equality Acts.
The freedom of expression is one of the most vigorously protected rights of western democracies. Barendt notes that political philosophers have argued that free speech is entitled to a greater degree of immunity from regulation than other forms of conduct that cause similar harm or offence. He notes that there are four main arguments put forward for protecting the free speech principle:

1. The importance of discovering truth
2. As an aspect of self development and self-fulfilment
3. Citizen participation in a democracy
4. Suspicion of government.

However, as with any human rights guarantee, the freedom of expression is not absolute. Thus, we have laws prohibiting defamation of the person, and in the context of this Report, laws which prohibit speech with incites hatred or violence.

That said, the question needs to be asked as to how far these limitations on free speech should go: for example, in the United States, the freedom of expression is almost absolute, with few exceptions. In China, the position is at the opposite end of the spectrum, with free speech being severely curtailed. In Europe, and indeed, in Ireland, what might be referred to as a middle ground is taken. Exactly how elastic this middle ground is, is the subject of this chapter.

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324 Ibid at page 1.
325 Ibid at pages 6-22.
326 See Barendt Freedom of Speech 2nd Edition (Oxford 2007) at pages 183 to 186 for a discussion on the criminalisation of hate speech within the terms of the First Amendment to the US Constitution.
International Agreements

Article 19 of the International Convention on Civil and Political Rights states:

“1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   a. For respect of the rights or reputations of others;
   b. For the protection of national security or of public order (ordre public), or of public health or morals.”

Article 20(2) of the International Covenant on Civil and Political Rights explicitly restricts this provision, however:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination demands that all states, in an effort to eradicate incitement to hatred and discrimination, “shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination...” This is expressly subject to the UN Declaration of Human Rights, and Article 5 of CERD which, amongst other things, protects the freedom of expression.

While violent racist attacks pose no problem for the criminal law, as criminal damage, arson, assault and indeed homicide currently proscribe most physical attacks, the question of racist speech poses more controversial difficulties. Where should the line be drawn between protection of minorities, on the one hand, and protection of the constitutional right to free speech, on the other?

Lawrence\textsuperscript{327} states:

“The words ‘women need not apply’ in a job announcement, the racially exclusionary clause in a restrictive covenant and the racial epithet scrawled on the locker of the new black employee at a previously all-white job site convey a political message. But we treat these messages as ‘discriminatory practices’ and outlaw them under federal and state civil rights legislation because they are more than speech. In the context of social inequality, these verbal and symbolic acts form integral links in historically ingrained systems of social discrimination. They work to keep traditionally victimized groups in socially isolated, stigmatised and disadvantaged positions through the promotion of fear, intolerance, degradation and violence.”\textsuperscript{328}

\textsuperscript{327} Lawrence “Hate Crimes Violate the Free Speech Rights of Victims” in Winters (editor) \textit{Hate Crimes (Current Controversies)} (Greenhaven Press 1996).

\textsuperscript{328} Ibid at page 63.
The essential argument for a broad freedom of speech is that, in order to protect that speech and those freedoms which we cherish, we must allow those with opposing views to voice that type of speech which we hate. Others argue that allowing such speech promotes society’s commitment to tolerance, or that there is no principled basis upon which to regulate speech based on opinion or viewpoint. The arguments are summed up by Delgado and Stefancic:

“The argument in each of its guises is essentially the same: to protect the most central, important forms of speech – political and artistic speech, and so on – we must protect the most repugnant, valueless forms including hate speech directed against minorities and degrading pornographic stereotypes of women.”

However, the authors recognise that many Western democracies have substantially curtailed the freedom of speech, with no reported erosion of the atmosphere of free speech or debate. They also note that the idea of a constitutional principle, such as free speech, would be incoherent without the existence of other values which limits the way in which one can exercise the right.

In the United Kingdom, in *R v Griffin; R v Collett* Judge Norman Jones QC stated:

“We live in a democratic society which jealously protects the rights of its citizens to freedom of expression, to free speech. That does not mean it is limited to speaking only the acceptable, popular or politically correct things. It extends to the unpopular, to those which many people may find unacceptable, unpalatable and sensitive. Along with those rights come rights and duties not to abuse them.”

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329 *What is a Hate Crime?* Espejo, editor (Greehnaven Press Inc, California 2002) at page 52.
330 *Ibid* at page 53.
331 *Ibid*.
Why treat Hate Speech any differently to other Racially Motivated Incidents?

The reason speech, or the expression of opinions, is considered separately to other types of racially motivated incidents is that it is a long-standing tradition of democratic societies that people should be able to express their opinions openly and freely – commonly known as the doctrine of the freedom of expression. Indeed, as Daly notes,

“In democracies worldwide today, laws enacted to proscribe ‘abusive, denigrating, harassing’ language directed at vulnerable minorities engender fierce debate given their inevitable interferences with the right to free speech, one of the ‘most precious rights of man’.”

It is well recognised that the freedom of expression is a concept held dear to the heart of any democratic state. It was stated:

“In the United States legal tradition, the proper response to racist books was not to ban or burn them; rather, it was to leave open avenues of expression for a diverse array of views, with the knowledge that racist dogma will be soundly rebutted. In that tradition, it is through a clash of views in vigorous debate, and not through government censorship, that equality was well served.”

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Freedom of Expression and the European Convention on Human Rights and Fundamental Freedoms

Article 10 of the European Convention on Human Rights and Fundamental Freedoms similarly provides for the freedom of expression. However, while this freedom is broadly stated, it is once again limited by the operation of the second paragraph of the Article.

“Everyone has the right to freedom of expression ... The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

It is through the operation of this second paragraph that the European Court of Human Rights has upheld restrictions on hate speech in member states. Article 17 of the Convention has also been held to be a justification for restricting freedom of expression in the context of hate speech. It states:

“Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

In the case of Handyside v United Kingdom335 the Court considered the position freedom of expression has in a democratic society:

“Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”

Article 17 and the Freedom of Expression

In the case of Glimmerveen and Hagenbeek v The Netherlands336 the Court considered whether the distribution of leaflets which were found to be inciting racial discrimination, was protected by Article 10 of the Convention. The Court explained the purpose of Article 17:

“The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention.”

335 (1976) 1 EHRR 737.
336 Application Numbers 8348/78 and 8406/78.
The Court found that were the Netherlands to allow the applicants to continue to distribute the racially discriminatory material, the State would be in violation of Articles 3 and 14 and Protocol 4 of the Convention, as well as its obligations under CERD. Thus, due to the provisions of Article 17 of the Convention, the Commission found that the applicants could not rely on the second paragraph of Article 10.

In the case of *H, W, P and K v Austria* the applicants were found guilty of various acts associated with being connected with National Socialist ideas, contrary to the *National Socialism Prohibition Act*. The applicants claimed, *inter alia*, that the relevant section:

“unjustifiably interfered with their freedom of expression guaranteed by Article 10 of the Convention in that it provided a disproportionate sanction for the expression of certain opinion, in particular on historical facts which should be discussed freely in a democratic society.”

The Commission found, however, that there was no violation of Article 10, as the prohibition against expressing National Socialist ideas was justified as being “necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime” – thus, it came within the exception contained in the second paragraph of Article 10. The Commission also based their findings on Article 17 of the Convention, and noted that National Socialism is “a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17.”

In the case of *Kühnen v Federal Republic of Germany* the applicant was in a leading position in an organisation attempting to reinstitute the National Socialist Party which was prohibited in Germany, and in that context, prepared and disseminated various publications. He argued that he was punished for his beliefs and the free expression of his opinion. He also argued that the conditions of Article 17 did not apply to his case, as he was merely advocating the reinstitution of the National Socialist Party as a legal organisation.

The Commission noted that there had been a *prima facia* violation of Article 10, as he had been convicted of publishing his ideas. The Commission then went on to examine whether this interference could be justified by reference to the second paragraph of Article 10. While acknowledging that the freedom of expression constitutes one of the essential foundations of a democratic society, the Court held that the German penal code in question was aimed at protecting the basic order of freedom and democracy and the notion of the understanding among people. By operation of Article 17, the Court also found that the applicant’s publications “ran counter to one of basic values underlying the Convention”, that is that the terms of the Convention are “best maintained ... by an effective political democracy.” They also found that the publications contained elements of racial and religious discrimination, and thus found:

“the applicant [was] essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are, as shown above, contrary to the text and spirit of the Convention and which,

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337 Application Number 12774/87.
338 Application Number 12194/86.
if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.”

Thus, the Commission found that while there had been an interference with the Article 10 rights of the applicant, that interference was justified as being necessary in a democratic society, in accordance with Article 10.2.

In the case of Garaudy v France the Court examined material which it found to deny the Holocaust. It stated:

“The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention”

The case of Norwood v United Kingdom, concerned an individual who had been convicted for putting a poster in his window with the words “Islam out of Britain – Protect the British People” on it, along with a picture of the Twin Towers in flames. The Court held that:

“Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.”

340 16 November 2004. Application number 23131/03.
ECHR, the Media and Freedom of Expression – application of Article 10.2

In the case of *Jersild v Denmark*341 the applicant was a journalist who conducted an interview with a group of young people called the “Greenjackets” who, during the interview, made racist remarks about immigrants and ethnic groups in Denmark. The interview was broadcast on the radio station at which the applicant worked. He was ultimately found guilty of disseminating racist material, and the aiding and abetting of such dissemination.

The Court examined whether the measures were “necessary in a democratic society”. The applicant argued that the overall result of the broadcast was to ridicule, rather than extol the views of the Greenjackets. Further, he argued that the aim of the programme was to draw public attention to the issue of racism and xenophobia in society.

The Court noted that the applicant did not make the statements himself, but rather assisted in them being disseminated. The Court, referring to *Observer and Guardian v The United Kingdom*342 noted:

“While the press must not overstep the bounds set, *inter alia*, in the interest of the protection of the reputation or rights of others, it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”343

The Court observed that in examining the material, it had to look at the contents of the feature and the context of the feature. The Court looked at the context of the piece, which was to examine the problem of racism in society. It also noted the content, and paid particular attention to the fact that the journalist was only reporting the facts, and that he did not subscribe to the views of the Greenjackets. It stated:

“[A]s to the contents of the Greenjackets item, it should be noted that the TV presenter’s introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought – by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.”

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In the case of Lehideux and Isorni v France\textsuperscript{344} the first applicant was President of the Association for the Defence of the Memory of Marshal Pétan, and the second was an author of an article published in \textit{La Monde} on that topic. It was argued and ultimately held that the text was public defence of the crimes of Marshal Pétan, who had been found guilty of collusion with Germany with a view to furthering the designs of the enemy in 1945.

The Court noted that what was in question in the article was not Holocaust denial, the negation of which, it said “would be removed from the protection of Article 10 by Article 17.” Instead, what was in question was an issue which was the subject of ongoing debate amongst historians. The Court stated:

“The adjective ‘necessary’ within the meaning of Article 10.2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court...

In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicants and the context in which they made them. In particular, it must determine whether the interference in issue was ‘proportionate to the legitimate aims pursued’ and whether the reasons adduced by the national authorities to justify it were ‘relevant and sufficient’. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.”\textsuperscript{345}

The Court questioned the use of criminal sanctions for the offence in question, stating:

“[T]he Court notes the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies.”

The Court ultimately held that there had been a breach of Article 10 as the criminal conviction was disproportionate, and thus not necessary in a democratic society.

In contrast to this decision, the case of Garaudy v France\textsuperscript{346} concerned the publication of Holocaust revisionist material. The Court stated:

“Denying crimes against humanity is ... one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting

\textsuperscript{345} \textit{Ibid} at paragraph 51.
\textsuperscript{346} 24 June 2003. Application number 65831/01.
of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.”

In the case of Sürek and Özdemir v Turkey, the first applicant, Sürek, was the major shareholder in a company which published a weekly review, of which the second applicant, Özdemir was the editor-in-chief. They published a copy of the review, which the Turkish court found to have disseminated separatist propaganda, and contained a declaration by terrorist organisations.

The applicants argued, inter alia, that the Turkish authorities had unjustifiably interfered with their right to freedom of expression under Article 10 of the Convention. Essentially, the applicants argued that they published the views of a third party in a manner which accorded with the principles of objective journalism, and that the aims sought to be achieved were not “necessary in a democratic society”.

The Commission looked at the contents of the publication, and found that the interferences with the applicant’s Article 10 rights could not be justified in accordance with Article 10.2. The Court then assessed the case.

The Court reiterated the fundamental principles that could be established in relation to Article 10 cases:

(1) Freedom of expression constitutes one of the essential foundations of a democratic society, and is not only applicable to that sort of information which society finds favourable, but also to those ideas that offend, shock or disturb. However, the freedom of expression is subject to exceptions as contained in Article 10.2.

(2) The adjective ‘necessary’ in Article 10.2 implies the existence of a ‘pressing social need’. While the Contracting States have a certain margin of appreciation in assessing whether such a need exists, it goes hand in hand with European supervision.

(3) When exercising this supervisory role, the Court must look at the interference in the light of the case as a whole, particularly in relation to the content of the impugned statements and the context in which they were made. In particular, the court must ask whether the interference was proportionate to the legitimate aims pursued.

The Court noted that in this case, the essential role of the press in ensuring the “proper functioning of a political democracy” had to be taken into account when examining the alleged interferences. The Court stated:

“While the press must not overstep the bounds set, inter alia, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political

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348 Ibid at paragraph 57.
349 Ibid at paragraph 58.
issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has the right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.”

The Court noted that in the realms of political speech or debate on questions of public interest there is little scope for Article 10.2 restrictions. It also stated that the limits of criticism are wider with regard to the government than in relation to a private citizen or even a politician. However, the Court stated:

“[I]t certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to such remarks … [W]here such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.”

Having examined the material in question, the Court found that the conviction and sentencing of the applicants was in fact disproportionate, and thus not necessary in a democratic society.

The rationale in this case has been applied in a number of later cases, for example, Gündüz v Turkey where the comments were made during the course of a live televised debate. The Court initially noted that when exercising the freedom of expression, one undertakes duties and responsibilities,

“amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.”

In terms of the context in which the applicant made his statements the court noted that they were made orally during a live television broadcast. This meant that he had no possibility of

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350 Ibid.
351 In the case of İncal v Turkey 9 June 1998 application number 41/1997/825/1031 the Court also addressed the very particular case of politicians and their freedom of expression, and stated at paragraph 46:
“While precious to all, freedom of expression is particularly important for political parties and their active members ... They represent their electorate, dram attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closet scrutiny on the Court’s part.”

It further noted at paragraph 54:
“The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal nature, intended to react appropriately and without excess to such remarks.”

353 Ibid at paragraph 37.
reformulating, refining or retracting his ideas before they were aired. The Court also noted that the programme itself was one which was designed to encourage an “exchange of views or even an argument”. As the domestic court had not attached much importance to, in particular, the first issue, the Court found that the conviction of the applicant infringed Article 10 of the Convention. The Court also noted that the mere defending of Sharia, without calling for violence to establish it, cannot be regarded as ‘hate speech’.

In the case of *Gümüş and Others v Turkey* the court similarly stated:

“[The Court considers] that, although certain particularly acerbic passages of the article paint an extremely negative picture of the Turkish State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and to not constitute hate speech. In the Court’s view, this is the essential factor.”

In *Koç and Tambas v Turkey* the Court summed up the issues to be addressed in an Article 10.2 hearing. It stated:

“The Court must look at the impugned interference in the light of the case as a whole, including the content of the articles and the context in which they were diffused. In particular, it must determine whether the interference in question was ‘proportionate to the legitimate aims pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’.”

In *Düzgören v Turkey* the Court added to this, stating that “the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.”

As stated in the European Network Against Racism’s Report *European Strategies to Combat Racism and Xenophobia as a Crime*.

“The Court will not in general protect ‘racist’ speech against restrictions imposed by States. However it will do so on the basis of an examination whether such restrictions are ‘necessary in a democratic society for the protection of others’, not based on their exclusion from the realm of protected speech.”

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355 This same reasoning was employed in *Marasli v Turkey* 9 February 2005 application number 40077/98.
357 *Ibid* at paragraph 36.
358 9 November 2006. Application Number 56827/00.
359 *Ibid* at paragraph 29.
Weber in her analysis of case law of the ECHR notes that the Court exercises strict supervision when there is a risk of incitement to hatred, but grants a wide margin of appreciation when dealing with attacks on religious beliefs. She explains, “The Court’s line of reasoning thus differs according to whether the statements in question are directed against human beings or only against their views and beliefs.” She concludes:

“Tolerance works both ways here: it is important to reject violent, hate-filled attacks on persons, but to accept the expression of criticism of opinions and beliefs.”

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363 Ibid at page 17.
364 Ibid.
365 Ibid.
Unlike the United States, as Heinze states, “[a]ll Western European states currently prohibit various forms of racist, sexist, anti-religious, homophobic, or other intolerant speech.” Indeed, he notes that in this area, the United States “can be seen as aberrant – parochially, even wilfully, defying an international consensus founded on a powerful humanitarian concern.” He goes so far as to say that Article 20(2) of the ICCPR, as quoted at the beginning of this section, may well represent a norm of customary law.

The European Commission Against Racism and Intolerance (ECRI) held an expert seminar on combating racism while respecting freedom of expression on the 16-17 of November 2006. It was noted that, while there is a consensus on the fact that racist expression in all its forms has to be combated, there is less agreement on the national and European levels on how this should be achieved. Again, the point was made that while racist speech should be eliminated, freedom of expression, which is a cornerstone of all democratic states, should always be respected.

As the Rapporteur, Mr Michael Head notes, discussions at the seminar were at a philosophical, as well as a practical level. As regards the first, it was asked “whether the consequences to society of unrestricted manifestations of racism are greater than any perceived dangers to freedom of expression.” More practical considerations addressed included:

- different kinds of legal restrictions – for example, those relating to acts of racism and discrimination, ‘hate speech’ and expressions of views and opinions deemed to have racism overtones;
- inconsistencies in national laws, reflecting differing national circumstances;
- inconsistencies as between relevant international instruments and huge complexities in their case law;
- the variety of communications media, including the role of the internet;
- the impact of external events, particularly since 9/11 and their effect on the climate of discussion and political debate;
- differences in national approaches – for example, as between those which have traditionally favoured restrictions, reflecting a priority in favour of freedom of expression and those with particular backgrounds justifying a more restrictive approach.

While all these considerations are not necessarily relevant to the discussion in question, they are noteworthy if only to show the vastness of the area under discussion.

367 Ibid at page 543.
368 Ibid at page 544.
369 See at http://www.coe.int/t/e/human_rights/ecri/ The following discussion of the seminar comes from the Main Findings and Conclusions of Mr Michael Herd, Rapporteur of the Seminar.
A major point which was made repeatedly at the seminar was that freedom of expression and freedom from racial discrimination are not conflicting, but complementary rights. It was noted:

“We should keep in mind that human rights are interdependent and interconnected. This means that (i) there can be no such thing as two conflicting human rights and that (ii) human rights need to be interpreted in light of each other.”

It was argued that it is possible to protect one right through the other, by ensuring a balanced application of the provision against incitement to racial hatred. It was, however, noted that there was a need to be realistic – that there is an inherent tension between the two freedoms, and that this had to be managed sensitively and creatively.

As regards the legal standards, it was observed that the case law of the ECHR provides invaluable guidance as to what is covered by freedom of expression and what is not:

“The elements that must be examined include: (i) the aim pursued by the author of the expression or statement; (ii) its content; and (iii) the context within which the expression or statement took place. In assessing whether a specific expression or statement is covered by freedom of expression, the setting (public or political debate) and the function (journalist, politician, civil servant) bear considerable relevance.”

It was noted, however, that the contextualisation of the crime might lead to legal uncertainty, and this element of the test was questioned.
Another question frequently raised in this context is, what form of expression should be criminalised as hate speech, and which should remain in the ambit of the ordinary criminal law. McGonagle argues that “virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term [hate speech].”

The European Network Against Racism observes in its Report *European Strategies to Combat Racism and Xenophobia as a Crime* notes that from examining the criminal codes of the Member States, four major fields of criminalised racist expression can be identified:

- Racist or xenophobic insults and defamation
- Public incitement to violence, hatred or discrimination
- Discriminatory actions
- Public denial, trivialisation, justification or condoning of crimes of genocide (especially concerning the Holocaust), or of crimes against humanity or war crimes.

The Council of Europe Recommendation of Ministers to Member States on “Hate Speech” in 1997 called on member states to combat hate speech, and the root causes of hate speech. It defines “hate speech” in a broad fashion:

“The term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism, or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”

Thus, the definition here relates not only to race, but goes so far as to protect against what are commonly described in the Irish context as “non-nationals.” This clearly goes beyond the scope of current Irish legislation. The Recommendation urges member states to establish a clear legal framework on hate speech whereby both administrators and the judiciary are given guidance on how to reconcile the freedom of expression with the respect for human dignity. It notes:

“National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of rights and freedoms laid down in the Convention or at their limitation to a greater extend than provided therein.”
Thus, while hate speech is generally considered abhorrent, it is only that type of speech which is aimed at the destruction of the rights and freedoms of others which is to be punished by the criminal law. This is in keeping with the jurisprudence of the European Court of Human Rights, from which it is clear that any interference with the freedom of expression must be:

- foreseen in the complete and exhaustive list of restrictions set out in Article 10.2;
- laid down by law and formulated in clear and precise terms;
- necessary in a democratic society and respond to a pressing social need; and
- proportional to the aim pursued.

In light of the decision of the Human Rights Council 1/107 where the Council noted the increasing trend of defamation of religions and incitement to religious hatred, the Council requested the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to report into this phenomenon, and particularly, into the implications of this for Article 20.2 of the ICCPR. The Special Rapporteur was of the opinion that

“expressions should only be prohibited under Article 20 if they constituted incitement to imminent acts of violence or discrimination against a specific individual or group.”

Importantly, the Special Rapporteur was of the opinion that, from a legal perspective, a clear distinction should be made between racist statements and acts of religious defamation, as the elements constituting each act are quite different.

The European Court of Human Rights has defined “hate speech” as “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”.374

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374 Gündüz v Turkey Application Number 35071/97.
Racist Speech and Elected Representatives

A particular issue arises in relation to elected representatives. The Prohibition of Incitement to Hatred Act 1989 Act provides that statements made inside the Houses of the Oireachtas are privileged. The question then arises as to whether this is appropriate, or whether, even outside the confines of Leinster House, politicians and public representatives should be held to a higher level of accountability for racist statements.

The Council of Europe noted in 1997\(^{375}\) that governments of member states, public authorities and public institutions at the national, regional and local level have a special responsibility to refrain from statements, especially to the media “which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.”\(^{376}\)

At a high-level panel meeting of ECRI\(^{377}\) entitled “The Use of Racist, Anti-Semitic and Xenophobic Elements in Political Discourse”, Camus presented a study on the issue and used Ireland as one of three case studies. He chose Ireland because of the elections on 11 June 2004 which included the referendum on Article 9 of the Constitution, designed to remove automatic citizenship rights to a class of children born in Ireland. While critical of some of the political statements made around the referendum, he notes that Ireland has no far right political parties, and when racist views are heard in the political arena, “it is due to verbal excesses by elected representatives of the traditional parties.”\(^{378}\)

While it is laudable that there is no vociferous far right-wing party, and certainly no cohesive political group which has racism and xenophobia at its core, it is lamentable that politicians do make occasional comments that can be regarded as racist or xenophobic. While anything which comes within the boundaries of the 1989 Act will be prosecuted, perhaps politicians should explicitly be held to a higher standard of accountability when it comes to ‘verbal excesses’. Indeed, ECRI in its Declaration on the Use of Racist, Antisemetic and Xenophobic Elements in Political Discourse\(^{379}\) note that the following practical measures should be adopted:

- Self-regulatory measures which can be taken by political parties or national parliaments
- The signature and implementation by political parties of the Charter of European Political Parties for a Non-Racist Society
- Effective implementation of criminal law provisions dealing with racist offences
- Adoption and implementation of provisions penalising the leadership of any group that promotes racism, as well as support for such groups and participation in their activities
- Establishment of an obligation to suppress public financing of organisations which promote racism, including public financing of political parties.

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\(^{375}\) Council Of Europe Recommendation Number R (97) 20 of the Committee of Ministers to Member States on ‘Hate Speech’ Adopted 30 October 1997.

\(^{376}\) Principle 1 of the Recommendation.

\(^{377}\) ECRI The Use of Racist, Antisemetic and Xenophobic Elements in Political Discourse 21 March 2005 (ECRI 2005).

\(^{378}\) Ibid at page 41.

\(^{379}\) Adopted 17 March 2005.
Article 40.6.1.i of the Irish Constitution states that the State guarantees liberty for the exercise of the right of citizens to freely express their convictions and opinions, subject to public order and morality. This is clearly a much more restricted guarantee than is provided for by Article 10 of the ECHR.

It is noted by Daly that, quite unlike other Western democracies, there is a general apathy to freedom of expression in this jurisdiction. He states:

"Unlike the red-blooded guarantee central to other democratic orders, in Ireland the right simply sits wanly on the sidelines of our culture, like a feeble substitute waiting to be called into play."³⁸⁰

Thus, any “reasonable” state interference with the right to freedom of expression will be accepted by an Irish court as being required for purposes of public order and morality.

Ireland has also placed a reservation on Article 4 of CERD:

“Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. Ireland therefore considers that through such measures, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. These rights are laid down in Articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted Articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in Article 5 (d)(viii) and (ix) of the present Convention.”³⁸¹

Ireland has been criticised for having this reservation, though given the broad provisions of the Framework Decision on Racism and Xenophobia, this reservation may need to be considered.

³⁸¹ Article 4 of the Convention states:
"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organizations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."
How can Hate Speech be regulated?

Jacobs and Potter\textsuperscript{382} argue that

“[c]reating a blacklist of dirty ("hate-ist") words, expressions, and symbols that warrant enhanced punishment would be a very subjective, politically loaded and nonviewpoint-neutral task. Ultimately, it would amount to picking and choosing words, expressions, and symbols that the lawmaker finds offensive.”\textsuperscript{383}

In terms of the interface between the criminal law and internal regulation of the media, McGonagle notes:

“Offences under criminal law constitute a \textit{de minimis} threshold. As such, the putative role to be played by co-regulation as regards hate speech could perhaps be to raise the threshold above that of ordinary criminal law in order to insist on higher standards in the audiovisual or journalistic sectors.”\textsuperscript{384}

However, at the ECRI Expert Seminar on combating racism while respecting freedom of expression on the 16-17 of November 2006\textsuperscript{385} it was thought that there are certain criminal restrictions which could be made on the freedom of speech, where the restrictions would be a price worth paying. These would include, it was thought:

“words and expressions used with an intent to stir up racial or religious hatred, racial violence or incitement to racial violence, incitement to racist conduct such as discrimination and racial harassment.”

It was argued that these actions involve direct threats and damage to individuals or groups defined in terms of race, religion or ethnic or national origin. There is however, a fine line between “words and expressions used with an intent to stir up racial or religious hatred” and those situations where an individual expresses his or her opinion, which is racist in nature. The seminar cited the UK Racial and Religious Hatred Act 2006 as an example of where steps have been taken to minimise the chance of conflict; however, interestingly, they felt that it went too far, protecting as it does expressions of insult and ridicule. It was thought that the Act:

“does indicate that it is possible to draft laws in this area which also contain safeguards for free speech and which place the burden of defining what is or is not acceptable on the courts of the country concerned – which, it may be argued, is where such issues belong.” [Emphasis added]

\textsuperscript{382} Jacobs and Potter \textit{Hate Crimes} (Oxford University Press 1998).
\textsuperscript{383} Ibid at page 85.
\textsuperscript{384} McGonagle Protection of Human Dignity, Distribution of Racist Content (Hate Speech) IRIS Special: Co-Regulation of the Media in Europe (Strasbourg, The European Audiovisual Observatory 2003) at pages 43-46. Available at http://www.ivir.nl/publications/mcgonagle/humandignity.html
\textsuperscript{385} See at http://www.coe.int/t/e/human_rights/ecri/ The following discussion of the seminar comes from the Main Findings and Conclusions of Mr Michael Herd, Rapporteur of the Seminar.
Kevan suggests that, no matter what the criminal act, caution must be exercised when prosecuting the crime. He notes:

“a successful prosecution potentially allows a bigot to claim to be a martyr of the civil liberties movement; however, a finding of innocence results in the accused claiming that the court had in some way given respectability and legitimacy to their views.”

He also cautions that, while the Race Relations Act 1965 was designed to protect those from ethnic minorities, the first person to be prosecuted under the Act was Michael Abdul Malik, the leader of the Black Power Movement. This, he notes, presented a stark contrast to the acquittal the following year of four members of the Racial Preservation Society.

387 Ibid.
Conclusion

It is accepted that in a modern democratic society, certain forms of “hate speech” must be regulated. In the context of the Irish constitutional position, it is suggested that the reservation on Article 4 of CERD be removed. This should be carried out in the general context of amendments to the Prohibition of Incitement to Hatred Act 1989 as recommended in this Report.
Chapter Eight

Cyber-Racism
Introduction

The Internet has provided those with racist and xenophobic beliefs a perceived unlimited platform in which they can air their views. Many of the same issues that arise in relation to hate speech and written material also apply to race crimes and the internet. However, a number of further issues arise in this context. First, the perceived borderless nature of the internet raises jurisdictional questions. Secondly, a range of issues arises in relation to the liability of service providers and website hosts. Unlike written or spoken material, as ECRI point out, “the diffused structure of the internet, its pervasiveness and the possibility it affords for anonymity, may render difficult the enforcement of provisions.”388 In short, as Rorive states, “[t]he problem to regulate content on the Internet is at least twofold: the criminalisation of the content and the effective enforcement of the criminal law.”389

Information can be communicated on the internet in many forms. It can be done on a private basis, in the form of electronic mail, or “instant chat”; on a semi-private basis, such as where access to a webpage or website is password protected390; or in a public forum, where access is unlimited and the information can be freely accessed by anyone. When it comes to the question of how to regulate this type of speech, the issues that arise in the context of the freedom of expression are directly applicable in terms of what forms of speech or communication should be regulated, as well as the content of that speech or communication.

388 European Commission against Racism and Intolerance Legal Instruments to Combat Racism on the Internet – Report prepared by the Swiss Institute of Comparative law (Council of Europe, 2000) at page 5.
390 This can further be subdivided into those categories in which permission to access the page is granted as a matter of course, or where only specific individuals known to the site owner can access the material.
The Convention on Cybercrime was signed on the 23rd of November 2001. The aim of the Convention is to adopt a common criminal policy on cybercrime, while recognising the need to maintain a balance between the interests of law enforcement and the need to protect and respect the fundamental human rights of individuals. The Convention provides for the computer-related offences of fraud and forgery, the content-related offence of child pornography and offences related to infringements of copyright and related rights.

In 2000, ECRI noted regretfully the absence of provisions on racist, xenophobic and antisemetic crimes committed on the internet. The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, was introduced in 2003, and it is this Protocol which is of interest to this Report.

The Introduction to the Protocol states that the internet provides individuals with a means to disseminate and express racist and xenophobic ideas easily. Due to the borderless nature of the internet, international co-operation is seen to be vital in this area. The purpose of the Protocol is stated to be two-fold: first, to harmonise substantive criminal law in the area, and secondly, to improve international cooperation.

### Types of material covered

Article 2 of the Convention defines racist and xenophobic material as

> “any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.”

The definition of material covered by the protocol set out in Article 2, as stated in the Explanatory Memorandum to the Protocol, is that it requires that “such material advocates, promotes, incites hatred, discrimination or violence.” The Protocol thus distinguishes clearly between the expression of racist material on the one hand, and the conduct to which the material may lead, on the other. The former is not covered by the Protocol, while the latter is. This is, of course, in keeping with international best practice in the area. These terms are then described individually in the Memorandum: ‘advocates’ refers to a plea in favour of hatred, discrimination or violence, ‘promotes’ refers to an encouragement to or advancing hatred, discrimination or violence and ‘incites’ refers to urging others to the same. ‘Violence’ is defined as the unlawful use of force, while ‘hatred’ is referred to as “intense dislike or enmity”. The term ‘discrimination’ is to be interpreted according to ECHR jurisprudence, as well as the definitions set out in CERD.

This “hatred, discrimination or violence” has to be directed at an individual or against a group of individuals for the reason that they belong to a group distinguished by “race, colour, descent or national or ethnic origin, as well as religion”.

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391 Ireland signed the Convention on the 28th February 2002, but have not yet ratified it.
393 Ireland has not yet signed or ratified the Protocol.
Measures to be taken at national level

Chapter II of the Protocol sets out the measures which are to be taken at national level. Legislation is to be enacted establishing the criminal offences set out below at a domestic level, when the act is “committed intentionally and without right”. The latter element of this phrase is clarified in the explanatory memorandum, that is, that in certain circumstances, the conduct described is not necessarily punishable. Clearly, the general defences to any criminal prosecution will operate, but also, other principles or interests can intervene here which will lead to the exclusion of criminal liability. Examples of this would be, for example, where the conduct is done for law enforcement, academic or research purposes.

As regards the intent requirement, or the \textit{mens rea} element to the offence, because of the very different nature of internet law, it is made clear in the explanatory memorandum that it would not be sufficient, for example, for a service provider to be held criminally liable under the provisions where the service provider operated as a conduit or hosted a website without the required intent under national law. It is also clearly stated that a service provider would not be required to monitor conduct in order to avoid criminal liability.

The Protocol provides that States Parties must at least consider the possibility of introducing five separate offences into their criminal codes. States Parties are \textit{obliged} to introduce one of these measures, but the others are discretionary, and states can derogate from the provisions of the Protocol in relation to these other four offences.

Compulsory Measure
Racist and xenophobic motivated threat

Article 4 of the Protocol provides that each state party must establish the offence of making a racist and xenophobic motivated threat. The offence is:

“threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law,

(i) persons for the reasons that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or

(ii) a group of persons which is distinguished by any of these characteristics.”

It is open to State Parties to determine what is a “serious criminal offence” for the purpose of the Protocol – for example, those that affect the life, personal security or integrity of the victims, or threaten serious damage to property of the victims. Importantly, there is no requirement that the threat be made publicly – quite unlike the requirements in Article 3. Thus, a threat made through private communications, such as email, is covered by Article 4.
Discretionary Measures

1. Dissemination of racist and xenophobic material through computer systems

The Protocol states that each state party should establish the offence of “distributing, or otherwise making available, racist and xenophobic material to the public through a computer system”.

The offence is only complete where the intent is present, not only for the distributing of the material, but also in relation to the racist or xenophobic nature of the material itself. The Explanatory Memorandum indicates that the offence is intended also to cover the creation or compilation of hyperlinks in order to facilitate access to such material. It also makes clear that private communications expressed through a computer system fall outside the ambit of the Protocol.

However, given the myriad of ways in which individuals communicate using computers, there are clear differences between the distribution of printed material and the distribution of material on the internet. Having stated that each case should be decided on its facts, the Explanatory Memorandum goes into considerable detail as to what constitutes “distributing, or otherwise making available” for the purposes of the Protocol:

- **Email messages**: What counts is the intent of the sender that the message will only be received by the pre-determined receiver. Where a message is sent to more than one individual, the number of the receivers and the relationship between sender and receiver should be taken into consideration when determining if the message can be considered as private.

- **Chat rooms, news groups or discussion fora**: These all count as making the material public. The presence or access of a password is immaterial where such authorisation would be given as a matter of course, or given to any individual who meets certain criteria. Perhaps, however, where a discussion group was set up by and for a set number of individuals, and was limited to those individuals, the publication of racist or xenophobic material among them might not be considered to be made public here. Again, the relationship between the parties should be considered when determining whether the material was made public or not.

The offence as stated is subject to two caveats, set out in Article 3.2 and 3.3. These are, according to the Explanatory Memorandum, to be read in conjunction and in sequence. According to Article 3.2, where there is no hatred or violence associated with the discrimination, a State Party has the option of not attaching criminal liability to the act, but only where there is another effective remedy available – perhaps in the realm of civil or administrative law. Similarly, where the State Party is limited by laws on the freedom of expression from providing for such remedies, it can reserve the right not to implement paragraph 1 in the same circumstances as applied in paragraph 2 – thus, if the laws of the State Party are such that the freedom of expression has a very high value accorded to it, that State Party can make a reservation in respect of the Article.
2. Racist and xenophobic motivated insult
The third crime provided for under the Protocol is in Article 5, which provides for a racially or xenobphically motivated insult. The offence is framed as:

“insulting publicly, through a computer system,
(i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or
(ii) a group of persons which is distinguished by any of these characteristics.”

Again, provision is made in Article 5.2(b) for the option not to apply either part of the whole of the Article. Article 5.2(a) provides that the party may in the alternative, require that the offence has the effect that the person or group of persons is actually exposed to hatred, contempt or ridicule. The Explanatory Memorandum explains that “insult” refers to “any offensive, contemptuous or invective expression which prejudices the honour or dignity of a person.” It is made clear that any insult expressed in private communication is not covered by the threat. It might be asked where the offence is a suitable one for the Irish legal system – one might ask whether the offence satisfies the requirements of the constitutional principle of legality, and whether the common law offence of defamation is not more suitable for this situation.

3. Denial, gross minimisation, approval or justification of genocide or crimes against humanity
Article 6 provides for the offence of:

“distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions or the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that party.”

Again, there are reservations which State Parties can apply here. Article 6.2(a) provides that State Parties can require that the offence is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used for a pretext for any of these factors. In the alternative, under Article 6.2(b), State Parties can simply reserve the right not to apply Article 6.1.
The example given in the Explanatory Memorandum is the Holocaust, and the justification for including this Article in the Protocol as being four-fold:

- The statements are presented as scientific research, while in fact their aim is to support and promote the political motivation which gave rise to the Holocaust;
- These statements have inspired, stimulated and encouraged racist and xenophobic groups in their action;
- The expression of such ideas insults the memory of those persons who have been victims of such evil, as well as their relatives;
- The behaviour threatens the dignity of the human community.

The clear issue that might be raised with this Article is its possible interference with the guarantee for freedom of expression of thoughts and beliefs. Clearly, implementing the first reservation would assuage such a difficulty – where the statement calls for the incitement to hatred, discrimination or violence against an individual or group of individuals. However, the European Court of Human Rights has made it clear that the denial or revision of “clear established historical facts – such as the Holocaust … would be removed from the protection of Article 10 by Article 17 [of the ECHR].”\(^394\)

From an Irish perspective, the same issues arise here as in the general context of an incitement offence of Holocaust denial.

4. Aiding and Abetting

The final offence provided for in the Protocol is that of aiding or abetting any of the other criminal offences provided for in the above Articles. Notably, while the Convention itself includes the offence of attempting to commit offences, the Protocol does not. This is because, as stated in the Explanatory Memorandum, many of the criminalised conducts set out are preparatory in nature. It also importantly explains that where the offence is aided or abetted, the intention to aid or abet the offence must be present. Thus, while the transmission of racist and xenophobic material through the Internet requires the assistance of service providers as a conduit, which might be considered airing the transmission of such material, where the service provider does not have the intent to aid the transmission of such material, no liability can be apportioned under the section.

\(^394\) *Lehideus and Isorni v France* 23 September 1998 as quoted in the explanatory Memorandum to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.
Cyberhate in an Irish Context

There is not a huge problem in Ireland regarding the dissemination of race-hate speech on the Internet. This is in no small part due to the self-regulation of Internet Service Providers in this jurisdiction. This is not to say, however that it is not a problem. Indeed, in January 2007, the NCCRI called for the forum section of www.taxi.ie to be closed down and for it to remove all racist and inflammatory material. The Fourth Report of the ISPAI shows that 1% of all Reports made to the Hotline were in relation to “racism and violence”.

However, from conversation with Paul Durant, ISPAI General Manager it was established that while the organisation do get Reports of racist material on the internet, a lot of these websites are traced back to the United States where freedom of expression laws allow material to be published that would not be publishable in Ireland. An Irish racist can publish material on these websites without fear of prosecution. Also, he noted that organisations such as Stormfront, which the ISPAI has had 3 or 4 complaints about in the last few years, have lawyers who vet material before it is published to ensure that it doesn’t breach the first amendment. He recognised the problem with respecting freedom of speech and combating racist material, and suggested that the problem with the 1989 Act is the requirement that someone is incited – which is no easy task to prove in the context of the World Wide Web. He suggested that the offence be simplified to one whereby an individual could be prosecuted for presenting 1989 Act material on the screen – there being no requirement for a third party to be incited by the material. Asides from the issue of criminalising conduct, the ISPAI is doing invaluable work through its reporting mechanism, and this is to be commended.

396 Goodall also makes this comment – see Goodall “Incitement to Religious Hatred: All Talk and No Substance?” (2007) 70(1) MLR where she examines forum rules for particular websites which ensure that no material will be published that is contrary to law.
Conclusion

While it could be argued that the 1989 Act can be used to combat racist material on the internet, in order to comply with best international practice and standards, it is recommended that Ireland sign and ratify the Protocol, and introduce the compulsory measure to eliminate the dissemination of threats which are of a racist or xenophobic nature. Care, however would have to be taken to protect privacy rights in this context. The discretionary measures would have to be examined carefully before their incorporation, and particular attention would have to be drawn to the requirements under the Framework Decision in this regard.
Chapter Nine

Conclusions and Recommendations
Introduction

The criminal law has a role to play in combating racism by proscribing distinct forms of racist behaviour and by treating a racist motive in the commission of any offences as an aggravating factor for the purpose of sentencing. The race motivated crimes break down into two distinct categories. The first and purest of these consists of offences that were created specifically to prohibit the public expression or dissemination of racist views or opinions. These are generally referred to as ‘expression offences’. The second category consists of offences which are derived from existing offences. They add a common element to existing offences, such as assault causing harm or criminal damage, to create new offences of assault causing harm with racist intent or criminal damage with racist intent. Typically offences with this extra ‘racist intent’ element will carry higher maximum penalties than the offences on which they are based (i.e. with the racist intent absent). Our conclusions on what reforms, if any, might be appropriate are set out separately for these two categories. They are followed by our conclusions on aggravated sentencing.
The Expression Offences

Introduction

The Prohibition of Incitement to Hatred Act 1989 is the current source for the race hate ‘expression
offences. However, the offences suffer from complexity, limited scope and under-enforcement.

The complex nature of the offences arises primarily from the overriding need to balance funda-
mental rights such as freedom of expression, privacy and basic principles of criminal liability with
the need to protect individuals and groups against vicious racist abuse. All of the offences have
a significant public order component in that they are based on words, material or behaviour that
is threatening, abusive or insulting. What distinguishes them from other general public order
offences is the requirement that the words, material or behaviour were intended to stir up racial
hatred or were likely in the circumstances to have that effect. This seemingly straightforward
element has had to be qualified repeatedly in the Act in order to accommodate basic principles of
criminal liability. It is not acceptable to hold someone criminally liable for a serious offence unless
they have a ‘guilty mind’ with respect to the prohibited conduct. So, for example, just because
someone publishes material which is likely in the circumstances to stir up racial hatred it is not
acceptable to burden them with criminal liability unless they appreciated that the material might
have that effect and proceeded to take the risk regardless. Accordingly, it is necessary to make
provision in the Act for ‘lack of awareness’ defences for persons who have published such material.

Further complexity has resulted from the need to include defences for the innocent distributors
and broadcasters of racist materials, and for things said or done in a private residence.

It can be expected that successful prosecutions for criminal offences will be impeded by the complexity
of the legislation creating these offences. The more complex the definition of a criminal offence
(and associated statutory defences) the more scope there will be to raise doubts about the viability
of a successful prosecution on all but the most straightforward cases. Inevitably, the prosecutor will
be reluctant to embark on prosecutions where it is difficult to be sure that the actions of the alleged
offender satisfy the requirements of the offence. Even where prosecutions are launched the complexities
of the offence and associated defences enhance the prospects of the alleged offender escaping on the
basis of a legal technical flaw in the prosecution case. They also enhance the likelihood of an acquittal
on the grounds that the judge (or jury) is not satisfied beyond a reasonable doubt that all of the elements
of the offence have been established and the statutory defences proved to be inapplicable. Indeed,
the statistics on prosecutions for offences under the 1989 Act would seem to lend some support
to the argument that the complexity of the offences may be proving an obstacle to the proper
enforcement of the law in this area.

The limited scope of the offences is a consequence of the fact that the Act is aimed only at the
behaviour of those who would incite others to hate distinct groups of people on account of their
race etc. It is not concerned with what is arguably a much more prevalent form of obnoxious racist
behaviour in Ireland, namely verbal abuse directed at another person on account of his or her
race etc. Equally, it does not specifically address other forms of race hate expression such as:
icitement to racial discrimination, participation in an organisation promoting racial discrimination,
‘Holocaust’ or genocide denial, and the dissemination of race hate through the internet. These
offences are included in the laws of many other European states and are provided for in some of
the leading international instruments on the subject.
Should the Act be retained?

The first issue that must be considered in the context of reform of the expression offences is whether the Act should be retained at all. The fact that it is proving difficult to secure convictions for the possession and publication of racist views and opinions can be used as an argument for dispensing with these offences altogether. What is the point of criminalising certain forms of expression if convictions for the criminal offences in question will rarely if ever be enforced? The counter-argument is that the need to have these offences on the statute book cannot be measured solely by reference to the number of convictions for them. Their primary value lies in their role as a declaration of the minimum standards that must be respected in the public expression of race-based views and opinions on others. They provide an essential affirmation of the importance of racial harmony in civilised societies. It is also important to remember that the lack of convictions does not necessarily signify a lack of effect. It may equally be consistent with the offence having a significant preventative effect.

Ultimately, of course, it is inconceivable that Ireland would not have these offences on its statute book given best international practice in the area. Indeed, it is legally bound to introduce specific race hate offences by the terms of certain international instruments, such as the UN Convention on the Elimination of Racial Discrimination, to which it is a party. If the proposed EU Framework Decision on combating racism and xenophobia is adopted in its current form Ireland will be further obliged to penalise a range of race hate crimes, some of which go well beyond the offences currently provided for in the 1989 Act. The real question, therefore, is whether the Act can be improved and strengthened by simplifying the offences, expanding the scope of the existing offences and adding new offences.

Simplification

Unfortunately, there is little scope to simplify the wording of the existing offences in the 1989 Act. The complexity stems largely from an attempt to strike a balance between the need to protect vulnerable groups from racist abuse and the need to respect fundamental legal and political values such as the freedom of expression and confining the application of the criminal law to those who engage in prohibited conduct with a ‘guilty mind’. As indicated above, much of the complexity stems from the need to include statutory defences to sift out those who did not realise that they were peddling race hate or that their actions would have that effect. It is difficult to see how this complexity can be avoided without exposing to criminal liability persons who did not know and had no reason to suspect that their words or actions were peddling race hate. Criminalising persons in such circumstances would create constitutional difficulties in this jurisdiction and would offend against the common law principle that the criminal act should not be punished unless it was done with a criminal mind (mens rea). It would also run the risk of bringing the criminalisation of race hate into disrepute.

As indicated above, further complexity is injected by the need to respect the right to privacy. A balance must be struck between the need to restrict the expression of race hate and the need to
afford the individual a private space in which he or she can express himself or herself freely. Much of the complexity could be avoided by simply exempting private property from the prohibitions in the Act. That, however, would severely undermine the efficacy of the Act. Those who were intent on purveying race hate would disseminate their views and opinions through ‘public’ meetings on private property and through the ‘public’ display of posters etc on private property. It is necessary, therefore, for the offences to extend to private property, but not to the extent that it deprives the individual of the right to a private space on private property. Striking this balance entails a degree of unavoidable complexity in the legislation.

The complexity of the offences is further enhanced by the attempt to strike a balance between a prohibition on the more extreme forms of race hate expression and protection for the freedom to express controversial and even divisive views and opinions. The vehicle chosen to achieve this balance is a prohibition on threatening, abusive or insulting words or behaviour which is intended or likely to stir up hatred against a group of persons on the grounds of race. Hatred is inevitably an uncertain concept. It clearly refers to a more intense emotion than dislike, distaste or contempt, but it is very difficult to say when these latter feelings end and hatred begins. Indeed, it can be argued that there is a significant subjective element to ‘hatred’ in the sense that the hatred threshold in an individual can differ from person to person depending on the subject at issue.

By opting for ‘hatred’ as the baseline for the offences the 1989 Act has introduced a significant element of uncertainty. It is difficult for individuals to know when their words or actions are likely to cross the threshold. Equally, it is difficult for prosecutors to predict how a judge or jury is likely to interpret words or actions in some situations where undoubtedly threatening, abusive or insulting words or behaviour have been used by reference to groups of persons on account of their race. It can also be difficult for judges and juries to make this determination. It is likely that such uncertainty will contribute to under-enforcement of the offences in question.

Greater certainty and simplification can be achieved by lowering the threshold to concepts which have a more objective core and a much greater consensus in interpretation. Examples are ridicule or contempt. The problem with this approach is that it impinges much more severely on freedom of expression. It could even prove counter-productive in that racial groups could be seen as being protected by the criminal law against criticisms which other groups must accept as part of the price for living in a modern liberal democracy. Hatred, by contrast, is an emotion which is generally recognised as harmful and socially destructive. It would be difficult to argue that punishing the dissemination of hatred against persons on account of the racial characteristics they were born with or into demonstrates inappropriate favouritism towards the persons or groups protected. Despite its subjective vagueness, therefore, it may be difficult to improve on ‘hatred’ as the appropriate trigger for the application of the criminal law to the public expression of racist views and opinions.
Expanding existing offences

There are some limitations on the scope of the offences in the 1989 Act which are not necessitated by the need to respect basic criminal law principles, the freedom of expression and the right to privacy. It would appear, for example, that the offences are linked to the public expression of hatred for a group of people on account of their race etc. As illustrated by the case of the bus driver and the Gambian man outlined earlier in this Report, this can present difficulties when the abuse is directed at an individual. In such cases, for example, it can be argued that the accused did not intend to stir up hatred against a group of people on account of their race. His intention was to express contempt or hate for the individual victim and he did not realise that his words would have the broader effect of stirring up racial hatred generally against persons from the victim’s racial background. Equally, as happened in the case in question, when the abuse is targeted against an individual in the presence of others it may have the effect of engendering sympathy for the individual rather than hatred of his race. In this event it will be difficult to convict on the grounds that the abuse was likely to stir up racial hatred.

To plug this apparent gap in the offence it would be necessary to expand it considerably. One possibility is something along the lines of, intentionally or recklessly subjecting another person to threatening, abusive or insulting words or behaviour on account of his or her race. The attraction of this approach is that it clearly brings racist abuse targeted at an individual within its scope and keeps the focus on the actions and frame of mind of the accused, as distinct from the impact that his words or behaviour might have on others. It represents a subtle change in direction from the current offences which are targeted at the propagation of race hate among the community rather than subjection of an individual to a racially abusive verbal assault. The expanded version would accommodate both objectives. In doing so, however, it would represent a further encroachment on freedom of expression compared to the existing offence, and would do nothing to enhance certainty in the scope of the offence. By bringing the criminal law into verbal exchanges between individuals from different racial backgrounds it runs the risk of emphasising difference at the expense of integration. It could send out the message that references to a person’s race is a ‘no go’ territory. While that may not be objectionable in itself, the question must be asked is whether it is appropriate that the message should be disseminated through the criminal law. By singling out race in this manner there is a danger that it will convey the impression that everyone’s freedom of expression is being curtailed in order to protect the sensitivities of persons from racial minorities. This in turn may provoke a backlash against these minorities.

These difficulties could be avoided by creating a new offence of subjecting another person to threatening, abusive or insulting words about his race etc, with the result the person feels threatened or fearful for his safety or for that of his companions or for his property. The inclusion of this element relating to fear or feeling threatened ensures that the offence is firmly rooted in general assault and public order offences already known to the law. At the same time it provides a vehicle through which verbal racist abuse can be tackled and punished directly through the criminal law.

Another limitation associated with the offences in the 1989 Act concerns the media though which the prohibited words, material and behaviour are disseminated. While the Act covers all of the standard media of expression prevailing in 1989, it may be that new technology has opened
up channels of communication that need to be expressly included in the Act. The obvious examples concern the internet and mobile phone technology. While currently, through strict monitoring and the work of the ISPAI, any material on the internet which comes within the parameters of the 1989 Act is withdrawn, it is suggested that Ireland should sign the Convention on Cybercrime and its Additional Protocol. Articles 3 and 4 of the Convention should be ratified, but again, it depends on the outcome of the Framework Decision as to how the State will have to address issues such as holocaust denial.

New offences

International standards on combating racism through the criminal law can no longer be satisfied by prohibitions on inciting others to hatred on the grounds of race. The Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires the introduction of further criminal offences, namely incitement to racial discrimination and membership of organisations which promote and incite racial discrimination. Some continental European countries also criminalise a denial of the Holocaust. It is necessary, therefore, to consider the implications of introducing such offences and others into Irish law either by extending the 1989 Act or through the enactment of free-standing measures.

In Ireland the criminal law is not generally used to combat discrimination in the provision of goods or services. Before resorting to the criminal law, therefore, it would have to be shown that discrimination on the grounds of race poses a threat to public order or the public good which is not posed by discrimination on other grounds. It is by no means clear, either in principle or in practice, that that is the case or that the available remedies in civil law are proving inadequate to combat racial discrimination compared with other forms of discrimination.

There is a case for dealing with incitement to discriminate differently from the substantive discrimination itself. Indeed, it is worth noting that it is only the former that CERD expressly requires to be prohibited through the criminal law. Incitement to discriminate has the capacity to stoke up racism to a degree that is absent in substantive discrimination itself. The impact of the latter is confined for the most part to the private relationship between the party supplying the goods or service and the party seeking to avail of them. Incitement, by comparison, has the potential to inflict broader and more lasting damage. It is aimed at encouraging others to act in a certain way in their dealings with third parties. In other words, there is a public dimension to incitement. As such there is a stronger case for tackling it through the criminal law. The contribution that it can make to the growth of racist practices and attitudes is too serious to be left to private remedies alone. Introducing a criminal offence of incitement to discriminate on the grounds of race would also have the benefit of bringing Irish law more into line with CERD.

The primary problem that must be addressed with incitement to discriminate offences is where to strike the balance with freedom of expression. This problem is easily overcome with respect to incitement to racial hatred, as provoking hatred against distinct groups in society presents a distinct public order problem which is appropriate to be dealt with through the criminal law. It
can be argued, however, that encouraging others to discriminate on the grounds of race in employment matters or in the provision of goods or services is of a different order. The expression of such views is not necessarily aimed at spreading hatred. It can take the form of advocating certain priorities in the distribution of social and economic goods. In other words it may be an exercise in legitimate political and social debate by, for example, trying to persuade others that jobs should be ‘kept for white Irish Christians’ in times of high unemployment, or that certain goods or services should be denied to immigrants ‘until they have paid their dues in this country’. Criminalising the freedom to express such views could be presented as an excessive and undesirable restriction on political and social debate in a liberal democracy.

Great care would have to be taken in drafting incitement to discriminate offences to ensure that they did not fall foul of the right to freedom of expression as guaranteed by the Constitution and the European Convention on Human Rights. It might be safe, for example, to criminalise incitement which advocated discrimination against certain racial minorities on account of their actual or alleged racial characteristics. By contrast, criminalising the advocacy of keeping ‘Irish jobs for Irish people’ might find itself exposed to censure under freedom of expression on the ground that it does not openly and directly denigrate groups on the grounds of their racial characteristics. Further complications would arise where the offences were broad enough to catch incitement to discriminate in employment etc in situations where there was a close and ongoing personal relationship between the employer and employee or business and customer.

The issues associated with an offence of incitement to discriminate on the grounds of race also apply to an offence of membership of or participation in an organisation which promotes or incites discrimination on the ground of race. Indeed, such bodies can be viewed as instruments for the collective and organised expression of incitement to discriminate by a number of individuals. It follows that they present a greater threat to public order and racial harmony than that posed by isolated individuals engaged unilaterally in the advocacy of discrimination on the grounds of race. The argument for introducing such an offence is stronger, therefore, than that for the offence of incitement to discriminate. On the other hand the same freedom of expression issues that apply to the offence of incitement to discriminate apply to the offence of membership of or participation in an organisation which promotes or incites discrimination.

A further problem arises with respect to the membership (as distinct from the participation) offence. Membership per se is essentially a passive state. It is the equivalent of a badge of identity, or a vehicle through which one declares one’s association with certain views, opinions or beliefs. Criminalising membership comes very close to criminalising the passive expression of one’s identity. A counter-argument is that through one’s membership of an organisation one is contributing to the activities of that organisation. If the organisation’s purpose is to incite discrimination and members of the organisation engage in that activity on its behalf, then it can be argued that members who have not been directly involved in the planning, resourcing or execution of those activities have nevertheless contributed to them through their association with the organisation.

The problem with this argument is that such a loose association with criminal acts is not traditionally considered sufficient to trigger criminal liability. The few examples in Irish law where passive membership of an organisation is prohibited are the result of express policy decisions which
have been implemented through legislation. Moreover, these have been generally associated with organisations that are committed to achieving their objectives through violence. Even if that is deemed an appropriate use of the criminal law, it can be argued that passive membership of an organisation which confines itself to the advocacy of discrimination on the grounds of race should not be treated on the same basis. Such a body is engaged in the mere dissemination of social and political viewpoints, albeit viewpoints that would be considered divisive and repulsive to most people. Criminalising the active dissemination of such views is in itself a dangerous encroachment on freedom of expression. To go further and penalise the passive membership of an organisation which promotes such views might be considered an excessive encroachment on one’s personal freedom.

It is worth noting that Irish law already recognises an offence of membership of an unlawful organisation in the Offences against the State Acts 1939-1998. Although the definition of an unlawful organisation in those Acts is exceptionally broad it is unlikely to extend to an organisation that was established to promote or incite racial discrimination (as distinct from racial hatred). The relevant provisions refer to an organisation which engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law. Since incitement to racial hatred is a criminal offence, membership of an organisation with that purpose would be an offence within the scope of the Acts. Incitement to racial discrimination, however, is not yet a criminal offence. Membership of an organisation that managed to confine itself to the advocacy of racial discrimination, without crossing the boundary into racial hatred, would not be a criminal offence.

The concerns about an offence of passive membership of an organisation are not wholly applicable to participation in the actions of an organisation. If incitement to discriminate is acceptable as an offence, then there should be little difficulty in principle in having an offence of participating actively with others in inciting discrimination through the medium of an organisation. This is quite different from the passive offence of membership. It reflects a move from the state of passive identification with a particular viewpoint to a state of actively contributing to a collective effort in the public dissemination of that viewpoint. Significantly CERD requires the introduction of a distinct offence of participating in an organisation which promotes or incites racial discrimination, but makes no mention of a distinct offence of membership of such an organisation.

Some jurisdictions make it a criminal offence to deny the occurrence of certain traumatic events involving a racial minority. In Austria, for example it is an offence to deny publicly the occurrence of the ‘Holocaust’. Generally these offences are motivated by a desire to prevent painful historical events being used by agitators to stir up racial conflict and fears. There is no precedent in Irish law for such offences. The recent adoption of the EU Framework Decision on combating racism and xenophobia may require Ireland to consider introducing such offences. The Framework Decision requires member states to include certain offences in their criminal law. These include publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and certain war crimes directed against a group of persons or a member of such a group defined by reference

397 The Council of EU Justice Ministers in Luxembourg on the 2nd of May 2008 achieved political agreement on the Framework Decision on combating racism and xenophobia. This allowed the negotiations at the European level, underway since 2001, to be successfully concluded under the German EU Presidency. “Europe is determined to forcefully defend its common values and to rigorously punish those who treat these values with contempt for humanity in the future, there will be binding minimum harmonisation throughout Europe of the provisions on criminal liability for disseminating racist and xenophobic statements. Public incitement to violence and hatred, as well as the denial or gross trivialisation of genocide out of racist or xenophobic motives, will be sanctioned across Europe. With this, we are sending a clear signal against racism and intolerance,” stressed Brigitte Zypries, Chair of the EU Council of Justice Ministers. See http://www.libertysecurity.org/article1431.html
to race etc. Critically, the measures leave Member States with a discretion on how to include these particular offences in their laws. The Irish Government has stated that it believes its current criminal law is adequate as it stands, and that it does not need to be amended to include the Framework Decision requirements.

The distinctive feature of these offences is their association with events that were so traumatic and so closely linked in recent history to the attempted annihilation of a racial (using that term in its broadest sense) group. The primary argument in favour of having the offences is that any attempt to condone, deny or trivialise the events in question will instigate fears among the groups affected that they could happen again. Keeping the memory alive is a vital protection against their recurrence. They also help prevent racists from using the events to promote hate for the groups in question. Introducing the offences into Irish law would have the benefit of bringing Irish law in this area into line with that in other continental European jurisdictions. This, in turn, would help ensure that those who seek to condone, deny or trivialise such historical events to promote their own racist agenda in Europe could not use Ireland as a base for this purpose or as a refuge from prosecution by the authorities in other European countries.

Using the criminal law to punish someone for condoning, denying or trivialising an event that happened in the past is a huge challenge for freedom of expression in a liberal democracy based on respect for human rights. Giving the State the power to punish the publication of views or interpretations of past events which conflict with the official version adopted by the State is a method more frequently associated with totalitarian States. By silencing the voices of dissidents who refuse to toe the ‘party line’, those in power can promote a version of history which serves their own partisan interests and helps perpetuate their own position in power. While the offences specified in the Framework Decision can hardly be presented in that light they do nevertheless represent an attempt to promote an official version of historical events and the suppression of alternative views. They provide a precedent for the development of such measures by others in the future. Indeed, it may well be asked why some historical events have been chosen and others excluded. There are other examples in history of gross suffering inflicted on groups of persons on account of their race, religion, national origin etc. Should these not be included?

It can be argued that using the criminal law to suppress revisionism in history is counter-productive. Attempts to suppress a racist view of history, in particular, is likely to render that view more credible among those who want to hear it and those who are susceptible to conspiracy theories. The proponents of the prohibited version can present it as ‘the truth that the State does not want you to hear’. A more effective approach in a healthy liberal democracy might be to expose racist ideas and racist interpretations of history to challenge in the open market place of historical research and debate.
Racially Aggravated Offences

Arguments For Introducing Hate Crimes into the Criminal Law

The main arguments for introducing hate crimes can be broken down into three categories. First, the offender, second, the victim, and third, the broader community:

- **Offender**
  - Greater culpability of hate crime offenders
  - Deterrence

- **Victim**
  - More severe emotional harm to hate crime victims

- **Community**
  - Protection for members of victims groups and victim communities
  - Greater potential to trigger retaliation and intergroup conflict
  - Compassion for traditional targets of hate
  - The making of a political statement that race crimes will not be tolerated.

**Political Statement that Race Crimes will not be tolerated:**

Regarding this third point, Levin and McDevitt state, “A strong prison sentence sends a signal to would-be hatemongers everywhere that should they illegally express their bigotry, they can expect to receive more than a mere slap on the wrist.”\(^{399}\) This argument, can be countered by the fact that any conduct which hate crime legislation seeks to criminalise is already subject to criminal sanction – thus, Jacobs and Potter ask, “how many additional crimes will be deterred by threatening potential hate crime offenders with higher maximum or minimum penalties.”\(^{400}\) They also question the belief that hate crimes are more amenable to deterrence than non-hate crimes.

**Victim and Community Impact Greater for hate crime than non-hate crimes**

Weisburd and Levin state that hate crime victims suffer greater emotional and psychological injury than other crime victims: “Because the violence is so brutal, the degradation so complete and the vulnerability so omnipresent, bias crime victims exhibit greater psychological trauma than non-bias victims.”\(^{401}\)

Bowling and Phillips\(^{402}\) remark that the harm that racially motivated offences cause is higher than that of a ‘normal crime’ to both the victim and their community. They note that being targeted for an attack, rather than being picked at random, creates feelings of hostility and tension, which make both the victim and the community feel vulnerable to future attacks.\(^{403}\)

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399 As quoted in Jacobs and Potter *Hate Crimes* (Oxford University Press 1998) at page 89.

400 Ibid.


403 Ibid at page 121.
Effectiveness
Arguably, the main argument for introducing this type of legislation is, simply, that it works. By criminalising racist behaviour, the legislature is sending a clear message that it will not be tolerated in any form in society, thus reducing racism generally. Munro notes that since the introduction of race crime legislation in Britain, certainly the “cruder manifestations of discrimination such as colour bars in pubs or openly discriminatory advertisements” have been eliminated.404

Scope of Legislation
If it is accepted that new offences should be introduced, the next question is how to incorporate the racist element into the offence. In England and Wales, offences become racially aggravated for the purposes of the Crime and Disorder Act 1998 if:

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

It is interesting that that Act targets “hostility” rather than “hatred”. While the Act does not define hostility, it is assumed that this is a lower standard of animosity than hatred. It is thought that is sufficient if, for example, the accused used words or actions either before, during or after having committed the offence which conveys his animosity toward the victim on account of the victim’s racial or ethnic background or association, and that this animosity was a motivating factor in the commission of the offence.

Similarly, in the Criminal Justice (No 2) (Northern Ireland) Order 2004 section 2 provides that where an offence was aggravated by hostility, the court must take that into account in the sentencing process. The Order provides that an offence is aggravated by hostility if, at the time of committing the offence, or immediately before or after committing the offence, the offender demonstrates to the victim hostility based on one of the stated grounds. The hostility on one of the stated ground does not need to be the sole factor for the offence being committed.

Arguments Against Introducing Hate Crimes into the Criminal Law

Existing Criminal Legislation Provides for an Adequate Punishment
The primary reason for not introducing hate, or race crimes into the criminal law is that the law is currently fully equipped to deal with the issue – there are no gaps that such an offence, or range of offences, needs to fill. While some argue that hate crimes are generally more brutal and cause more serious injury than other crimes, it is argued that the current range of offences, from simple assault to aggravated assault, or the range of sentencing options open to a sentencing court on a particular offence, such as arson, is sufficient to adequately punish the offender.

Emotionalising the Criminal Law/Punishing Motivation Unacceptable
Sullivan questions the very idea of putting an emotion, ‘hate’, into the criminal law. He writes,

“For all our zeal to attack hate, we still have a remarkably vague idea of what it actually is ... For all its emotional punch, ‘hate’ is far less nuanced an idea than prejudice, or bigotry, or bias, or anger, or even mere aversion to others ... sentiment is a poor basis for law, and a dangerous tool in politics.”405

Jacobs and Potter406 also ask whether “prejudice is more morally reprehensible than other criminal motivations like greed, power, lust, spite, desire to dominate [or] pure sadism?”407 Is it more blameworthy for an individual to attack an individual because of their race, or for example, attack an elderly person because of their infirmity or vulnerability? And can, or should, the criminal law create such a hierarchy of victims?

Brick makes the point that:

“Americans are not equal under the law if crimes against a particular ‘victim’ group are punished more harshly than identical crimes against someone who is not a member of a government-protected group.”408

Jacobs and Potter ask why history of a condemnable motivation should be the basis for more punishment, and other criminal motivations, such as greed, lust or politics not be regarded as being politically based.409

They then note that defenders of hate crime legislation argue that more severe penalties for criminals motivated by prejudice410 “are justified because such offenders are morally worse – more culpable – than criminals who engage in the same conduct, but for reasons other than prejudice. It is argued by Jacobs and Potter that, rather than being more responsible, a prejudiced offender might be less culpable than his or her counterpart who is motivated by greed or lust: he could argue that his prejudice against homosexuals, for example, was the result of religious training.
Politicisation of Laws
The politicisation of the issue is also cause for concern. For example, if race crimes are introduced, it would be a rare politician who would stand up and state that while being strong on race crimes, they don’t feel the need to be as hard on crimes against those with disabilities, those of a particular sexual orientation or those of a particular gender. The question as to where the legislature would stop is a difficult one – would the introduction of race crimes lead to a broad-sweeping piece of legislation which does not protect minorities, but instead punishes this elusive concept, hate? This point is made clear by the comments of the Committee on the Administration of Justice in Northern Ireland in their comments about race crime:411

“by not including hostility against disabled people within the Draft Order [the Government] is unintentionally encouraging the perception that disabled people in Northern Ireland are less deserving of specific legal protection than disabled people in England and Wales.”

Possible backlash
Bowling and Phillips412 also note that more severe punishment for racist crimes could lead to further victimisation within minority communities. They note that some critics argue that protecting minority ethnic communities by penalising racist violence could provoke a ‘white racist backlash’, particularly amongst those who either hold racist views. It is also recognised that if a punishment is perceived to be unfair – such as an increased penalty for a racist motivation – this can have the effect of defiance and the confirmation of deviant identities which lead in turn to increased rather than decreased levels of offending.413

More Difficult to Secure Convictions
From a prosecutorial point of view, it has been seen in England and Wales that, due to the social stigma attached to race crimes, few people will ever plead guilty to a race crime, preferring instead to contest the charge. Given the difficulty with proving an offence to be one motivated by hostility, the offender is generally then found guilty of the simple offence, rather than the racially aggravated one. This factor would have to be seriously thought through in the Irish context.

411 Committee on the Administration of Justice Response to the Race Crime and Sectarian Crime Legislation in Northern Ireland (Committee on the Administration of Justice 2003)


Conclusion

While it is clear that some measure has to be introduced whereby a sentencing court can increase the penalty imposed where the offence is racially motivated, it is suggested that the introduction of a new range of offences is not the most appropriate way to do this. This is for a number of reasons, some practical, and some theoretical.

Due to the social stigma attached to being convicted of a “hate crime” or a “race crime”, defendants are unlikely to plead guilty to such an offence, thus leading to lengthy and expensive court proceedings. Proving that an offence was committed with a racist motivation or on the grounds of hostility to a standard satisfactory to the criminal law can also prove problematic. While it is important for the legislature to make it clear through the law that racism will not be tolerated, that message will lose much of its impact if there are very few convictions under the Act.

Given the current scope of the equality legislation and, indeed, the protection afforded by the Prohibition of Incitement to Hatred Act 1989, from a practical point, any legislation introduced to combat racism would have to have a wider ambit than racist offences. Thus, while the aim of the legislation might be to combat race crimes, ultimately, it might end up also aimed at crimes against people due to their sexual orientation, gender, disability, marital status, family status or age. While it is agreed that crimes committed for such reasons should be punished, and that perhaps they should be punished more harshly than those committed opportunistically, the purpose for introducing race crimes is then lost. The reason for introducing race crimes is to send a clear message that society will not tolerate racism of any form. If, however, the legislation covers crimes committed for a range of reasons, that message is lost. This argument might seem circuitous, but the underlying reasons for introducing this legislation should not be lost.

In the opinion of the authors, from a theoretical perspective, the arguments against introducing a new range of criminal offences into the code are persuasive. In particular, the argument against elevating racism to a level higher than, for example, crimes against the elderly or children, is a cogent one. If what is required is harsher sentences to be meted out to those who commit crimes which are racially motivated than those who commit crimes for other motivations (even though they may be as reprehensible) then one approach might be to increase the maximum sentence available for specific offences. This approach was the one taken in Northern Ireland, and might fit more easily into the current criminal code. This might have to be accompanied by a specific provision providing that crimes which are racially motivated should be subject to an increased sentence, which is the subject of the next section of this paper.

414 These are the nine grounds of discrimination set out in the Equality Acts.
Racially Aggravated Sentencing

Current Position in Ireland
As is the case with racially motivated offences, similarly, there are no statutory provisions prescribing aggravated sentences for offences committed with a racist motive. While it may be open to a judge to treat a racist motive as an aggravating factor when determining sentence in any individual cases, there is no statutory authority or binding precedent compelling him to do so. Indeed, with the current sentencing system in this jurisdiction, there is little statutory guidance on how judges should sentence any given offender.

The first clear option for reform in this regard is to introduce a statutory provision which provides that, unless there are exceptional circumstances, where an offence appears to the court to have been committed with a racist motivation, the court must treat that factor as an aggravating circumstance when considering the appropriate sentence for the offender. This option would replicate the 1984 bail provisions in form.

In England and Wales, section 145 of the Criminal Justice Act 2003 specifically requires a trial judge when sentencing to treat the fact that the offence was racially aggravated as an aggravating factor. It states that:

“If the offence was racially or religiously aggravated, the court –
(a) must treat that fact as an aggravating factor, and
(b) must state in open court that the offence was so aggravated.”

It is important to note that the section as a whole does not apply to the racially aggravated offences provided for in the 1998 Act as outlined above.

A second option is to leave the situation as it is currently, to wait for the decision in DPP v Jones and Derwin[^415] to be reviewed on the grounds that racist motivations should be considered an aggravating factor in sentencing. This approach is, however unsatisfactory for a number of reasons. First, it declines to take the opportunity to send the clear legislative statement that racist attacks are not to be tolerated, and secondly, it depends on a suitable case arising where the Director of Public Prosecutions is of the opinion that a sentence imposed on an individual was unduly lenient in the circumstances.

Arguments For and Against Introducing Aggravated Sentencing Provisions

Arguments For Introducing Racially Aggravated Sentencing
The primary reason why the sentencing option is so attractive is that it provides a statutory statement that racism generally, and racially motivated crimes in particular, are unacceptable. While introducing new racially aggravated offences would also make this clear statement, providing for aggravated sentencing provisions rather going the offences route is more sympathetic to the current framework of the criminal law.

[^415]: Unreported Court of Criminal Appeal 1 November 2004 Hardiman J (ex tempore).
The introduction of a statutory provision requiring courts to increase a sentence where it is established that the offence was racially motivated is largely uncontroversial. While there is no formal statutory sentencing framework, section 11 of the *Criminal Justice Act 1984* serves as a useful indicator first, that providing for such aggravating factors in legislation is permissible, and second, the form that such legislation should take.

It is argued that this is a way of providing that those who commit crimes with a racist motivation are given harsher penalties, and also, that the point is clearly made that society will not tolerate racist attacks. Introducing sentencing guidelines rather than a raft of new offences is also in keeping with the current approach taken to defining offences in terms of the act and intention, rather than including the motivation to the crime.

**Arguments Against Introducing Racially Aggravated Sentencing**

**Judicial Sentencing Discretion**

The argument can be made, however, that providing for statutory aggravated sentencing is an interference with judicial sentencing discretion, and could be challenged as being unconstitutional as being a violation of the separation of powers. This argument can easily be countered by reference to the numerous statutory provisions which explicitly provide for maximum, minimum and mandatory sentences. Indeed, provision is made in the *Criminal Justice Act* for aggravating sentences where the offence is committed on bail.

In keeping with the language in the *Criminal Justice Act* it would be possible to provide for discretion not to increase the sentence where the court finds that there are exceptional reasons not to do so.

**Guilty Plea**

One issue with using aggravating sentencing as the primary tool for combating race crimes through the operation of the criminal law is that if an individual pleads guilty at the very early stages of the case where the crime was racially motivated, that will not have been established in court during a trial, and thus it is questionable whether a judge could take this factor into account to increase the sentence when it hasn’t been proven in accordance with the strict burden of proof demanded by the criminal law.

Whereas issues such as that the crime was committed on bail, and that a weapon was used in the commission of an offence are currently treated as aggravating factors, these are issues which are easily established by the sentencing court. If racist motivations were included as an aggravating factor, it would arguably be more difficult to establish this at a sentencing stage. A defendant might plead guilty to an offence, but contest the fact that he committed the offence with a racist motivation. This element of the sentence would then have to be established according with the usual rules of criminal procedure, and might ultimately lead to what could be referred to as a “trial within a trial”. O’Malley, however, notes that “any fact which bears upon sentence must be properly established, and a judge should particularise the evidence which has led him to identify the presence of an aggravating factor.”

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Conclusion

The Criminal Justice (No 2) (Northern Ireland) Order 2004 provides that where an offence was aggravated by hostility, the court must treat that as an aggravating factor which increase the seriousness of the offence, and must state in open court that that is the case.

It is suggested that a similar approach should be taken in this jurisdiction, taking as a guide section 11(4) of the Criminal Justice Act 1984. The new section might provide that where a court is determining the sentence to be imposed for any offender, and it appears to the court that the offence was one which was committed with racial or religious hostility, then the court must treat that hostility as an aggravating factor.

This then ensures that a clear message is sent out that racist attacks are not tolerated by either society or the law, and that such attacks are punished accordingly without compromising the criminal law in any way.
Chapter Ten

Flanking Measures
The title of this Report is “Combating Racism through the Criminal Law”. Thus, in it we have purely addressed the question of the role the criminal law has to play in addressing the problem of racism in Irish society today. However, it is trite to note that whatever role the criminal law does play in this effort, it is, or indeed it should be, a minimal one. Indeed, it could be said that one of the main purposes of the criminal law in this regard is to send a clear message to society that racist behaviour is not to be tolerated.

Thus, the authors suggest that a number of “flanking measures” should be introduced in order to ensure that the criminal law is indeed used as a last resort in combating racism and moving towards an intercultural society. Some of these flanking measures include:

1. An Garda Siochana

It came to the attention of the authors in the preparation of this Report that while the Gardaí are reasonably well aware of the provisions of the 1989 Act, they are unaware of how they operate and the proof required to secure a conviction under the Act. It would also appear that once Gardai decide that the level of racism does not meet the relatively high standards of the 1989 Act, they are under the impression that this evidence can not be presented in court. This is not true.

Gardai must also be made aware of the definition of a racist offence for internal statistical purposes. While the Garda Racial and Intercultural Unit are to be commended for adopting the Lawrence Report definition of a racist incident, anecdotal evidence collected by the authors of this Report suggests that Gardaí across the country are not aware of this definition, nor how to use it.

We recommend that all members of An Garda Siochana, up to and including Inspectors, undergo anti-racism training, training in the operation of the 1989 Act, as well as the alternative measures that can be used to address racist aggravation or racially motivated offences by setting forward evidence of the racial element of the crime at the sentencing stage.

While the statistics received by the Gardaí were useful, it is suggested that a coherent and consistent approach be taken to the collection of these statistics. From year to year, the categories vary, which makes assessing the figures in any meaningful way difficult. More detailed statistics are required, including the profile of the accused individual, as well as the victim. These figures, including a detailed analysis should be published as an annual report. Without this data, it is impossible to establish informed policy responses to the problem.

The Gardaí however, have made strides to improve their approach to racist incidents generally. The Garda Racial and Intercultural Office though understaffed, has made many positive steps in improving the way the Gardaí handle racist incidents. For example:

- training of Gardai, alone and with the assistance of the NCCRI
- meeting with the NCCRI and victims of racist incidents to discuss how the incidents are handled by the Gardai

• encouraging members of minority ethnic communities to become Gardai and thereby diversify the force.

Continuous emphasis must be placed on reminding Gardai of their responsibility to handle racist incidents with the utmost attention because of the long and short term effects such incidents can have on individuals and communities at large.

Additional resources to the Garda Racial and Intercultural Unit, including additional resources for training ethnic liaison officers

The establishment of consultative forums across all Garda Divisions to allow for more pro-active liaison with minority and migrant communities, building on progress to date. There should be further initiatives to encourage the reporting of racist crime

2. Judiciary

It is suggested that all members of the bench receive training in sentencing race crimes, as well as general race relations training. This training should also be extended to all those working in the administration of justice generally.

3. Media

We also suggest that the Press Ombudsman and Press Council ensures that their Code of Conduct is effectively monitored and enforced and pro-active strategies are put in place to encourage good practice in the media building on existing work in this area.

4. Government Ministers, Elected Representatives and Civil Servants

We believe that those that are elected to represent the nation must be held to a higher standard of account than everyday citizens of this country. Thus, we suggest that all politicians and civil servants receive awareness training in how to deal with racially sensitive/intercultural issues when going about their day-to-day work. Some Departments have been very proactive on providing such training in particular in health and social welfare, while others have been less active.
5. Internet based material

There is increasing amount of racist material appearing in discussion forums on websites. It is recommended that moderators of these internet discussion forums should be under an obligation to take account of what is happening in their forums, remove any racist material and ban individuals engaged in such activity. The internet Hotline www.hotline.ie provides an anonymous facility for the public to report suspected illegal content encountered on the Internet, in a secure and confidential way. The primary focus of the Hotline is to combat child pornography online, but other forms of illegal content and activities that exist on the Internet may be reported. Given the ever increasing racist material appearing on the web it would be beneficial for Hotline to be expanded to provide the resources needed to adequately address racist incidents online.

7. Local authorities

Local authorities should include a focus on addressing crime/anti social behaviour as part of city/county integration strategies. The Housing (Miscellaneous Provisions) Bill of 2008 provides additional powers to deal with all forms of anti social behaviour. Racism should be recognised and targeted as a specific form of anti social behaviour to be included under the measures proposed by this legislation.

8. Data collection, Monitoring and Reports

The gardaí should consider producing a detailed annual report on crime where racism has been a factor in Ireland. This would include both publication of data and analysis of data captured as well as an update on Garda responses to the issue. Such reports are complied by other police forces. At present only data is produced.

The Courts Service to consider monitoring and summarising cases involving racism on a regular or periodic basis, ideally also through an annual or periodic report.
EXECUTIVE SUMMARY

The challenge presented by racism

1. Racism denies the basic human rights, dignity and respect of the individual as a person and as a member of the community.

2. Racially motivated criminal acts present a more insidious threat to the health and wellbeing of the individual, communities and civil society than the same criminal acts committed without a racist motive. They instil fear not just in the individual victim but also in the ethnic community from which the victim comes. In some instances it is the ethnic community itself which is the target, as distinct from a specific individual in that community.

3. Racism is a complex and multi-faceted concept, ranging from small, everyday acts of discrimination, through the barriers and omissions that may inadvertently be established at an institutional level, to acts of threatening behaviour and actual violence (Planning for Diversity: The National Action Plan Against Racism).

The incidence of racism in Ireland

4. The official crime statistics suggest that there is low incidence of racially motivated crime in Ireland relative to other West-European countries. However, they do show an upward trend. Anecdotal evidence suggests that the actual levels of racist behaviour and crime in Ireland are significantly under-stated in the official statistics.

The role of the criminal law in combating racism

5. The criminal law has a key role to play in combating racism by proscribing distinct forms of racist behaviour and by treating a racist motive in the commission of any offences as an aggravating factor for the purpose of sentencing.

6. The criminal law cannot operate in a vacuum. It must be complimentary to a systematic or holistic approach to combating racism on society. In this regard the authors draw attention to the importance of the Government’s National Action Plan Against Racism in promoting an anti-racism and intercultural framework in Ireland and the role of bodies such as the National Consultative Committee on Racism and Interculturalism (NCCRI), the Reception and Integration Agency and the Irish Human Rights Commission.
International standards

7. Legally binding international instruments require the use of the criminal law to combat:
acts of racially motivated violence; incitement to racial discrimination, hostility, hatred and violence; participation in organisations or activities which promote racial discrimination.
A range of non-binding international instruments call for further distinct criminal measures such as: committing an existing offence with a racist motive; racial discrimination; creating or leading a group which promotes racism; denying, trivialising or condoning, with a racist aim, crimes of genocide, crimes against humanity or war crimes; and treating a racist motivation as an aggravating factor in the punishment of an offender.

Freedom of expression

8. Care must be taken to strike an appropriate balance between the rights of individuals and groups to be protected against racist behaviour and the need to protect everyone’s freedom of expression when using the criminal law to combat racism.

9. The need to protect freedom of expression is most acute when framing criminal laws which penalise things said or done which do not entail the use or threat of violence to person or property, or behaviour which puts others in fear for the safety of their person or property or that of others.

10. The criminal law should not be used to penalise the expression of views or opinions which others would find offensive, except to the extent that they were expressed in a manner calculated to stir up hatred against others on the ground of race.

11. Criminalising the verbal abuse of another on account of his or her race would not constitute an excessive encroachment on the freedom of expression where the circumstances were such that the victim feared for the safety of his or her person or property or that of another person.
EXECUTIVE SUMMARY

The expression offences

12. The Prohibition of Incitement to Hatred Act, 1989 punishes words or acts which are intended, or which are likely, to incite others to hate a group of people on account of their race etc.

13. The offences in the 1989 Act reflect the minimum standards that must be respected in the public expression of race-based views and opinions on others. They provide an essential affirmation of the importance of racial harmony in civilised societies.

14. The 1989 Act does not penalise verbally abusing someone directly on account of his or her race. Nor does it create offences such as: incitement to discriminate, participation in a racist organisation or denial of war crimes.

15. The complex nature of the offences in the 1989 Act arises primarily from the overriding need to balance fundamental rights, such as freedom of expression, privacy and basic principles of criminal liability, with the need to protect individuals and groups against vicious racist abuse.

16. The offences in the 1989 Act strike a necessary balance between the need to restrict the expression of race hate and the rights of privacy and private property.

17. Despite its subjective vagueness, it is difficult to improve on ‘hatred’ as the appropriate trigger for the application of the criminal law to the public expression of racist views and opinions. A lower threshold such as ‘ridicule’ or ‘contempt’ would intrude too deeply into freedom of expression.

18. An offence of intentionally or recklessly subjecting another person to threatening, abusive or insulting words or behaviour on account of his race would in itself amount to an excessive encroachment on the freedom of expression.

19. There is a need for an offence of subjecting another person to threatening, abusive or insulting words about his race, with the result the person feels threatened or fearful for his safety or for that of his companions or for his property.

20. There is a need for an offence of incitement to discriminate on the ground of race. However, great care will have to be taken in drafting such an offence to ensure that it does not encroach on the freedom of legitimate debate on matters such as the allocation of social goods and services.

21. Penalising the passive membership of an organisation which promotes or incites discrimination on the ground of race is an excessive encroachment on the freedom to express one’s views, opinions and identity.
EXECUTIVE SUMMARY

22. There is a case for introducing an offence of active participation in (as distinct from passive membership of) an organisation which promotes or incites discrimination on the ground of race.

23. Irish law already recognises an offence of membership of an organisation which engages in, promotes, encourages or advocates the commission of any criminal offence (including incitement to racial hatred). It follows that it is an offence under current Irish law to be a member of an organisation committed to acts of violence against groups on the ground of their race or to inciting others to hatred of such groups.

24. Using the criminal law to punish someone for condoning, denying or trivialising an event that happened in the past presents a major challenge for freedom of expression in a liberal democracy based on respect for human rights. A more effective approach to tackling racist revisionism in history might be to expose racist ideas and racist interpretations of history to challenge in the open market place of historical research and debate.

Racially Motivated Offences

25. With the exception of incitement to hatred, racist behaviour does not attract any special attention from the criminal justice system in Ireland.

26. Where an offence is carried out with a racist motivation, or where the offence is racially aggravated, the trial judge can take this into account in the sentencing stage.

27. It is suggested that it would be inappropriate to introduce racially aggravated offences into Irish law. Rather, any aggravating factor should be taken into account at sentencing.
EXECUTIVE SUMMARY

Sentencing Race Crimes

28. As is the case with racially motivated offences, similarly, there are no statutory provisions prescribing aggravated sentences for offences committed with a racist motive. While it may be open to a judge to treat a racist motive as an aggravating factor when determining sentence in any individual cases, there is no statutory authority or binding precedent compelling him to do so.

29. The Criminal Justice (No 2) (Northern Ireland) Order 2004 provides that where an offence was aggravated by hostility, the court must treat that as an aggravating factor which increase the seriousness of the offence, and must state in open court that that is the case.

30. It is suggested that a similar approach should be taken in this jurisdiction, taking as a guide section 11(4) of the Criminal Justice Act 1984.

31. This would ensure that a clear message is sent out that racist attacks are not tolerated by either society or the law, and that such attacks are punished accordingly without compromising the criminal law in any way.

Cyber-Racism

32. The Internet has provided those with racist and xenophobic beliefs a perceived unlimited platform in which they can air their views. Many of the same issues that arise in relation to hate speech and written material also apply to race crimes and the internet.

33. While it could be argued that the 1989 Act can be used to combat racist material on the internet, in order to comply with best international practice and standards, it is recommended that Ireland sign and ratify the Protocol, and introduce the compulsory measure to eliminate the dissemination of threats which are of a racist or xenophobic nature. Care, however would have to be taken to protect privacy rights in this context. The discretionary measures would have to be examined carefully before their incorporation, and particular attention would have to be drawn to the requirements under the Framework Decision in this regard.

Flanking Measures

- In order to combat racism in society, a number of flanking measures must be introduced to improve the efficacy of the Criminal Justice System. These flanking measures include issues concerning An Garda Siochana, the Judiciary, Internet related issues, the Media and Elected Representatives. Measures include training, awareness raising, strategic planning, especially by local authorities and data collection.
FINAL RECOMMENDATION

The Criminal Justice System can only be used as a last resort for combating racism in society. The main purpose of the criminal law in this regard is to send a clear and strong message to society that racist behaviour will not be tolerated. That said, changes must be made to Irish law to facilitate the prosecution of the most egregious forms of racist behaviour, whether this behaviour comes in the form of the expression of racist comments, where a crime is committed with a racist motivation, or where a crime is racially aggravated.