OUT OF THE SHADOWS:
LEGISLATING FOR HATE CRIME IN IRELAND

Legislative proposals by the University of Limerick Hate and Hostility Research Group and the NGO Working Group on Hate Crime
‘Out of the Shadows’
Legislating for Hate Crime in Ireland: Preliminary Findings

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Commissioned by the
Irish Council for Civil Liberties
“Placing victims at the heart of their proposals, the Hate and Hostility Group at the University of Limerick have produced a thoroughly researched analysis of why hate crime laws matter. Their proposals will bring Ireland fully in line with EU and broader international standards, and their innovative approach in developing a set of specific offences will put Ireland at the forefront of international legislative practice, showing what can be done to support the effective investigation and prosecution of this most damaging violence, thus meeting the needs of victims and practitioners alike.”

- Joanna Perry, co-chair of the International Network for Hate Studies

“I represent a group of individuals who, since 2007 have met to advise the UK Government and the criminal justice agencies on the best ways to reduce the harm caused by hate crime. The group benefits from the views of academics, advocates and most importantly, from victims who have lost relatives to hate crime. I believe that the proposals in this report provide a positive route to improving state responses and, whilst the implementation will always need strong and inclusive leadership, these proposals will provide the foundations for an effective solution. Since the Inquiry into the failings of the UK state in response to the tragic racist murder of Stephen Lawrence reported in 1999, the UK has massively improved its capability to deal with similar tragedies in the future. The legislation was fundamental to demonstrate the State’s intolerance for hate but it also allows for hostility to be measured and challenged. I would respectfully urge serious consideration of these proposals in Ireland and we would be happy to assist in sharing our experiences if that would ever be helpful.”

- Mike Ainsworth, Chair of the Independent Advisory Group to the United Kingdom Government

“The 2011 Census established the fact that diversity is now a concrete fact of life for Ireland. Shifting patterns of in-migration have changed the racial, ethnic and religious composition of Irish society. At the same time, the voices of Irish Travellers, LGBTQ persons and persons with disability also means that these communities have become more visible. This metamorphosis has not been welcomed by all. Indeed, for some, diversity represents a threat to “Irishness” - a threat that frequently meets with violent opposition. This brief – and the research that informs it - demonstrates convincingly that targeted violence – hate crime – directed toward newcomers, sexual and gender minorities, Travellers, and non-Christians has also become a fact of life in Ireland. Yet, alone among European nations, Ireland has not introduced statutory protections from hate crime. In the absence of animating legislation, hate crime has “disappeared” from the frame of action for garda, prosecutors, and judges. If the harms of hate are to be acknowledged and countered, the Irish government must act to provide a legislative framework for the explicit naming of bias crime. Ireland must join other nations in ensuring that the violence of hate experienced by vulnerable individuals and communities is challenged head-on.”

- Professor Barbara Perry, University of Ontario Institute of Technology, Canada.
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Introduction

In October 2014 the Irish Council for Civil Liberties, in association with the NGO Working Party on Hate Crime, commissioned the Hate and Hostility Research Group at the University of Limerick to investigate the case for the introduction of hate crime legislation in Ireland. This Report represents the preliminary findings of this research. It addresses the treatment of the hate element of crimes under existing law, the suitability of various options for legislative reform to the Irish criminal justice system and presents proposals for legislative reform.

The Irish State has yet to criminalise the hate element of crime, citing as reasons for its inaction:

1. Generic criminal offences are sufficient to combat hate crime
2. The courts consider racist and xenophobic motivations at sentencing;
3. Introducing aggravated sentencing provisions would have broader ramifications for the criminal law, including a restructuring of penalties for basic offences;
4. The criminal law would in any event be insufficient to challenge hate crime which requires a broader educative measure to combat.

The findings of the research refute these arguments. As per a request from Aodhán Ó Riordáin, Minister of State at the Department of Justice and Equality and Arts, Heritage and the Gaeltacht with special responsibility for Equality, New Communities and Culture and Drugs Strategy, who formed the Working Group on Hate Crime, we have drafted the Heads of a Bill which sets out the potential form of legislation to address hate crime in Ireland.

We hold that in a society which expounds principles of inclusivity and diversity, which was founded on the idea that all people should be cherished equally, and which has recently celebrated the welcoming and embracing of difference, these experiences are simply unacceptable. It is not the responsibility of victims to avoid being targets of hate crime; it is the responsibility of the legislature to send a clear message to society that this behaviour is not tolerated. It is then the responsibility of the criminal justice system to ensure that this message is operative and functional. By adopting our legislative proposals we are providing tools that society needs to combat criminal expressions of hatred, hostility, prejudice, bias and contempt.
Methodology

The research adopts an inductive approach to break new ground in the context of hate crime in an Irish context. While the issues addressed in this project are well researched in some other jurisdictions (such as England and Wales), there is a dearth of information in an Irish context. How the criminal justice system operates in the context of hate crime remains almost entirely undocumented and the experiences of victims are equally under researched. The HHRG began the process of addressing these questions, from the point of view of civil society actors, in the Report A Life Free From Fear.\(^1\) However, a more comprehensive exploration of operational realities and possible gaps between policy and practice was required.

The findings of this Report are grounded in desk based research, in-depth qualitative interviews and a survey. The former included a comparative analysis of the form and operation of legislation in a number of common law jurisdictions, as well as the analysis of secondary data consisting of reports of hate crime received by Civil Society Organisations. This was followed by 77 qualitative interviews with 12 victims of hate crime, representatives of 22 Civil Society Organisations (CSOs), 22 criminal justice practitioners, 11 members of An Garda Síochána, 4 probation offices and a number of other relevant experts. A postal survey was completed by 36 barristers. Legislative proposals were critiqued in draft form by an expert workshop of leading international researchers in the area of hate crime hosted at the University of Sussex, and technical drafting advice was provided by a former Irish parliamentary draftsperson.

Sampling strategy

This study employs three types of probability sampling methods: purposive sampling, respondent driven sampling and volunteer sampling.\(^2\) Purposive sampling consists of inviting the participation of identified individuals who fulfil criteria which establish the relevance of their expertise to the research objectives. The cases chosen allow us to explore some feature or process which we believe may be important to understanding our research topic. Respondent driven sampling (RDS) utilises the professional and social networks of participants (initially selected through purposive sampling) to identify additional individuals who fulfil the criteria for relevance to the research objectives. RDS is an effective means of accessing hard to reach participants.\(^3\) This approach can be associated with a degree of closure, given that participants are connected; however, combining RDS with other sampling strategies overcomes this

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\(^1\) Jennifer Schwegge, Amanda Haynes and James Carr A Life Free From Fear: Legislating for Hate Crime – An NGO Perspective (CUES 2014).


\(^3\) John Creswell Designing and Conducting Mixed Methods Research (Sage 2011).
disadvantage. Volunteer sampling operates through publicising the research objectives and criteria for inclusion through channels likely to reach relevant participants and inviting those who consider themselves to meet the criteria for inclusion to contact the researchers. This sampling strategy is particularly appropriate where the population of interest is hidden or difficult to access.

A postal survey of barristers was disseminated in January 2015. The survey was sent to the professional addresses of all those barristers earning more than 5,000 euro a year from the State. A total of 36 completed surveys were returned. The information provided by survey respondents was helpful in identifying departures from stated practice and in developing questions for the qualitative phase of the research.

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What is a hate crime, what is hate speech?

This Report focuses specifically upon investigating the need for and informing the framing of legislation against hate crime. It does not address itself to any shortcomings in the law in relation to hate speech nor in any way analyse the impact or effectiveness of the Prohibition of Incitement to Hatred Act 1989. The key distinction between hate speech and hate crime is that in the context of the latter, hostile language is relevant only where it has been used in the course of committing a criminal offence. It may therefore be used to determine whether the offence which occurred was in fact a hate crime, or was at least more harmful to the victim because it was accompanied by demonstration of hostility. In summary, this Report discusses hate speech only in reference to circumstances in which it has a transformative effect on a criminal offence already known to the law. Hate speech offences are separate to and apart from hate crime laws.

Generally speaking, it is accepted that a hate crime is an offence which is known to the criminal law and which is committed in a context which includes hostility towards difference. The OSCE describe hate crimes as:

“... criminal acts committed with a bias motive. It is this motive that makes hate crimes different from other crimes. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence. The term “hate crime” or “bias crime”, therefore, describes a type of crime, rather than a specific offence within a penal code. A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias or prejudice. The term describes a concept, rather than a legal definition.”

The legislative definition of hate crime is complex, comprising as it does decisions as to what constitutes ‘hate’, whether that hatred must be proven to have motivated the offense or to have been demonstrated in its course, and regarding who is protected.

Hate Incidents

A hate incident is an occurrence which does not amount to a criminal offence but has a hate element to it. Often used for reporting and recording purposes on the part of a police service, the definition of a hate incident is often more broad and subjective than that of a hate crime. Further, various policing authorities may choose to record hate incidents against victim groups which are not named in legislation but where, due to localised experiences, it is important to record such events. For the most part, definitions of hate incidents are informed by the definition emanating from the

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6 Of course, speech is not the only way in which an offence can be transformed in this manner, as will be elaborated on in a later part of this Report.
Macpherson report on the murder of Stephen Lawrence. In England and Wales, for example, the College of Policing defines a hate incident as:

“Any non-crime incident which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on person’s race or perceived race [or religion, sexual orientation, disability, transgender]”.

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9 College of Policing, Hate Crime Operational Guidance, (College of Policing 2014) 3.
Ireland: Current legislative position in an international context
As we have explored earlier, there is currently no legislation in Ireland which requires a court to take a bias motivation, or a demonstration of bias, into account when determining the appropriate sanction to impose in a given case. While the 1989 Act does criminalise incitement to hatred, it is a hate speech provision and purposefully narrow in its scope and thus not suited to addressing the daily criminal manifestations of bias faced by people in Ireland. In this regard, as Perry observes, Ireland is unique in Western democracies in not having legislation which targets the hate element of a crime. This legislative void has been the subject of concern in a number of international contexts.

European Union: Framework Decision on Racism and Xenophobia
The 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law requires Member States, under Article 4, to ‘take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties’. The deadline for transposition was 28 November 2010, and Ireland has yet to introduce legislation to ensure compliance with the Decision. In a 2012 publication on hate crime in the EU, EUFRA noted specifically that Ireland, in addition to engaging in limited data collection, is “also limited because criminal law does not define racist or related hate offences as specific offences, nor does it expressly provide for the taking into account of racist motivation as an aggravating factor...the 2008 Irish Crime Classification System...does not cover offences with a suspected hate motivation”.

European Union: Victims’ Directive
The deadline for transposition of the EU Victims’ Directive is November 2015. Article 22(1) of the Directive states that, in assessing the needs of victims, an assessment must be carried out to determine if the victim has any particular “protection needs” and the extent to which they would benefit from “special measures” in the course of criminal proceedings “due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.” In this context, Article 22(2) states that the assessment should take the personal characteristics of the victim, the nature of the crime and the circumstances of the crime into account.

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11 Ibid 2.
13 Article 4 of the Framework Decision.
Article 22(3) then goes on to state that particular attention should be paid to victims who “have suffered a crime committed with a bias or discriminatory motive, which could notably be related to their personal characteristics.” It goes on to note that, in this regard, victims of hate crime “shall be duly considered.”

In the context of criminal investigations, the “particular attention” to be paid to victims includes the following measures which the Directive states in Article 23(2) should be made available to victims:

“(a) interviews with the victim should be carried out in premises designed or adapted for that purpose;
(b) interviews with the victim should be carried out by or through professionals trained for that purpose;
(c) all interviews with the victim should be conducted by the same persons unless this is contrary to the good administration of justice;
(d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.”

In the context of court proceedings, the Directive goes on to provide in Article 23(3) that the following measures should be made available to victims:

“(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
(c) measures to avoid unnecessary questioning concerning the victim’s private life not related to the criminal offence; and
(d) measures allowing a hearing to take place without the presence of the public.”

The Directive does not require legislation to be introduced which imposes an obligation on a court to consider a hate motivation as an aggravating factor, nonetheless, it does require that victims be treated in a particularly protective manner by the criminal justice system as a whole in the context of the investigation and prosecution of a hate crime. Where a system is, as we will show, essentially ‘blind’ to the hate element of a crime, it is difficult to see how this element of the Directive can be transposed in a manner which effectively protects victims of hate crime.
European Commission on Racism and Intolerance

In its fourth and most recent report on Ireland in 2013, ECRI repeated concerns that it had raised in its previous reports regarding the lack of criminal law specifically designed to combat racist and xenophobic offences as distinct crimes. It also expressed concern in relation to the absence of statutory obligations on members of the judiciary to consider racism as an aggravating motivation at sentencing. ECRI made specific reference to General Policy Recommendation No. 7 which states that specific provisions to address racism (and broader, “hate”) across the legal system have a “symbolic effect...[raising] the awareness of society of the seriousness of racism and racial discrimination and has a strong dissuasive effect”.

International Convention on the Elimination of all forms of Racial Discrimination

In its Concluding Observations in response to the first and second joint reports submitted by Ireland, UNCERD suggested that in order to fight racism, the Irish State should introduce legislation that specifically defines hate crimes based on race as distinct offences or place in statute an obligation on members of the judiciary to consider racism as an aggravating factor at sentencing. In its more recent Report, the Committee was more specific, recommending that legislation be introduced that prohibits racist organisations; that racism as an aggravating circumstance be consistently considered at sentencing; and that members of the judiciary undertake training to raise awareness of racism as a factor in criminal offences.

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19 United Nations, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination, Seventy-eight session’, (4th April 2011) http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAghKb7yhsl%2fyrM1B9TTQ6MeEkg0FJiGMDN%2fGaDxXcfrYvzl%2fcrN0v7wnHb0L7fDoxEB0Xjibwo%2f5mWhBPg7MYOFDFQ0zgpRtrVm9esS4KT3%2ft accessed: 3rd July 2014.
Universal Periodic Review
The first report in the UPR process submitted by Ireland was examined in October 2011, with the second examination scheduled for late 2016. In its first Report, UPR observers recommended that Irish authorities take steps to challenge racism and xenophobia through the introduction of legislation; furthermore, recommendations were also made that members of the judiciary and police undertake human rights training.

Conclusion
The international obligations Ireland owes under a variety of international agreements have been the subject of scrutiny; the State has dismissed these concerns by positing four key arguments which it believes justify the legislative vacuum:

1. Generic criminal offences are sufficient to combat hate crime;
2. The courts consider racist and xenophobic motivations at sentencing;
3. Introducing aggravated sentencing provisions would have broader ramifications for the criminal law, including a restructuring of penalties for basic offences;
4. The criminal law would in any event be insufficient to challenge hate crime which requires broader educative measures to combat.

Taking these arguments in turn, our research demonstrates clearly that while courts do on occasion consider a racist motivation as an aggravating factor, this is not always the case. It further presumes that the hate element of a crime will be present in the court proceedings: this is not always the case. What we will evidence in this Report is that the absence of a legislative position on this issue facilitates a system-wide ‘disappearing’ of the hate element. An absence of legislation creates not just Perry’s “permission to hate” within society, but also a systematic failure to acknowledge and attend to the hate present in the commission of a crime within the criminal justice system as a whole. In this context, and of direct and immediate importance, our findings suggest that Ireland’s current statutory position is in violation of our obligations under European Union law.

In the context of the second and third points, as we will see, the vast majority of our legal professional and criminal justice interviewees were of the opinion that introducing such legislation would not be overly problematic, and many gardaí were of the opinion that it would assist them in carrying out their duties and ensuring that the hate element of a crime was investigated.

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Thus, to date, the response of the Irish State to its international obligations in this regard can be described as, at best, inadequate. We will show that the absence of legislation means that oftentimes the hate element of a crime is not treated appropriately in a criminal justice context and further, that the human rights of those living in Ireland are being violated on a daily basis in a manner which is deeply damaging to both individuals and society. In this context, we show that the State is in violation of its obligations under international law and that legislation must be introduced to rectify this situation. The remainder of this report will refute the arguments made by the State in an international context and show the urgency of the need for hate crime legislation in this jurisdiction.
Prevalence of hate crime in Ireland

Given the absence of legislation recognising hate crime in Ireland and particularly given the lack of substantive hate crime offences, police recorded data is unlikely to adequately represent the phenomenon. As such, it is useful to also examine data collected through third party civil society reporting mechanisms.

In an Irish context the most significant parallel recording mechanisms which gather data on hate crimes are hosted by the European Network Against Racism, Ireland (ENAR Ireland), the Transgender Equality Network Ireland (TENI) and the Gay and Lesbian Equality Network (GLEN). We are very grateful to these organisations for their assistance in compiling data for this Report in advance of their own publication schedules.

In processing third party data we have focused exclusively on those reports relating to criminal offences as opposed to those incidents which would be dealt with by the civil law. We excluded all those offences which were classified as incitement to hatred, which would be addressed by the Prohibition of Incitement to Hatred Act 1989. In all instances we have included only those reports which were sufficiently complete to classify. Reports relating to Northern Ireland have been excluded.

Homophobic and transphobic crime

The Gay and Lesbian Equality Network (GLEN) began collecting data in December 2014 via their online reporting mechanism ‘stophatecrime.ie’. It should be noted that any reporting mechanism will take time to ‘bed down’ and become widely known and accessed by victims. It is therefore likely that the data gathered to date by ‘stophatecrime.ie’ represents only a small proportion of homophobic incidents occurring in this period.

Twenty-four incidents bearing the characteristics of criminal offences have been reported to GLEN’s reporting mechanism. A small minority were historical reports dating from prior to 2014. Nineteen incidents bearing the characteristics of criminal offences, are cited as occurring in or throughout 2014/2015. These included:

- 10 assaults
- 1 assault causing harm
- 1 criminal damage
- 4 harassment
- 3 public order offences

Homophobic and/or transphobic language was used in 6 cases.

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22 One further simple assault, reported to stophatecrime.ie, is likely to have occurred in 2015, but this cannot be confirmed from the available data
“... they then shouted "fucking faggot" at me and shouted other derogatory sexual comments such as "I bet you would like me to give it to you up the arse" etc. ... I still felt in danger as I was worried they would be outside waiting to attack me further verbally or physically.”

Victims identify offenders as including both men and women. In the majority of cases there was more than one perpetrator, most commonly 3 or more persons. In only one case did the victim know the perpetrator.

Only two victims reported their experience to the police. The most common reason provided for not reporting was the belief that the police could do nothing, followed by the perception that the police would not take the report seriously. Only two individuals included “not being out” among their reasons for not reporting.

Of the 2 victims of assault who reported their experiences to An Garda Síochána, one was satisfied with their experience and held that the gardaí had actively pursued the case. The other victim felt they had not been taken seriously.

“The initial remark from the garda I reported it to was ‘If you’re reporting an assault, why are you taking so long to report it?’ (I reported it 3 days after the initial attack) ... I had to CHASE UP the gardaí with numerous phone calls. ... I feel this crime is not treated seriously by the law in this country. I feel it was of no real importance to the gardaí, I feel they’ve no time or resources to deal properly with hate crime. I felt offended by the garda, on my initial contact with them when I called to the station in person, to report the crime.”

Transphobic hate crime

The Transgender Equality Network Ireland (TENI) began collecting data on transphobia and discrimination in Spring 2014.

Twenty-two incidents bearing the characteristics of criminal offences were reported to TENI as having occurred in 2014. In none of these cases does a report seem to replicate an entry in GLEN’s stophatecrime.ie database. The 22 incidents reported included:

- 8 public order offences
- 5 cases of simple assault
- 3 cases of harassment
- 1 case of assault causing harm
- 3 cases of sexual assault
- 1 aggravated sexual assault
- 1 case of threat to kill or cause serious harm
“There was a group of about 20 men with two in the middle fighting ... The two were fighting with knives. I made an effort to avoid them, but they noticed me. The two with knives came at me and the others were cheering them on. The[y] were shouting at me asking if I was a boy or a girl, calling me things like ‘dyke’, ‘it’. They made swipes at me with the knives but missed me on purpose, they decided they [would] ‘find out if I had a dick or tits’ by ripping off my shirt. I managed to get away with my shirt intact, I ran home and they followed me half way and stopped when they saw me put a key in the door.”

As was the case in relation to homophobic and transphobic crime recorded by GLEN, most victims were attacked by more than one perpetrator. Nineteen of the crimes involved the use of transphobic language, including every assault reported. Five of the 19 crimes were reported to An Garda Síochána. Two victims, who reported public order offences (in one case to an Lesbian, Gay, Bisexual and Transgender Liaison Officer), characterised members of An Garda Síochána as supportive.

“The gardaí were supportive and lodged it as an incident and sent out a patrol car, but not sure if the perpetrators were found and challenged.”

Three victims experienced members of An Garda Síochána as dismissive with one further characterising members as mocking and insulting.

“... he didn’t even record it as a case, because he said that I didn’t know the perpetrators name. He said, ‘If he knows your name, you must know his’, which is ridiculous ... his attitude was more distressing than the crime.”

Reasons for not reporting most commonly included the perception that the crime could not be detected, followed by a belief that the report would not be taken seriously.

**Racist and religiously aggravated hate crime**
ENAR Ireland’s iReport system is the most established of the three third party recording mechanisms, having been launched in July 2013.

One hundred and thirty-seven incidents bearing the characteristics of criminal offences are identifiable as having occurred in 2014. These crime reports include:

- 60 public order offences
- 40 assaults, including 7 cases of assault causing harm, one of which involves elements of kidnapping
- 20 reports of harassment
- 11 cases of criminal damage
- 2 offences under the Telecommunications Act
- 1 case of arson
In 24 of the 40 assaults reported, racist language was used; in 4 cases, language about the person’s religion was used and in 6 cases both racist and religiously aggravating language was used. Victims are most commonly identified as Black–African background, followed by Asian and/or Muslim (including white Irish reverts). Cases reported include a small number of anti-Semitic and anti-Traveller incidents.

“I wore the Jewish Kippot hat and then this large group of wild boys (in their late teens) started shouting across the street ‘Die Jew, Run Jew, Look a Jew!’ The street was crowded with people and it was incredibly humiliating and painful because I had to continue walking down that street without crying”.

Forty-eight crimes are listed as having been reported to An Garda Síochána.

“They took it seriously, acknowledged the racism aspect, and took details.”

In a small minority of cases victims note that a report was not formally logged.

“… the chat was informal and I was advised by the guard that it was a waste of time to try and accuse one of those guys of racism as it would never be believed.”

**Police recorded hate crime**

Ireland’s Central Statistics Office collates police recorded data relating to the MO flags associated with hate crime which identify motives as sectarian, anti-Semitism, racism, xenophobia and homophobia.

<table>
<thead>
<tr>
<th>MO Type</th>
<th>2012</th>
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<th>2015</th>
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<td>N</td>
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<td>Racism</td>
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<td>94</td>
<td>43</td>
<td>18</td>
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<tr>
<td>Xenophobia</td>
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<tr>
<td>All</td>
<td>118</td>
<td>113</td>
<td>53</td>
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</tbody>
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Official statistics contrast with those produced by the third party reporting mechanisms:

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23 2015 data refers to the first quarter of this year.
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<tr>
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<th>ENAR Ireland (2014)</th>
<th>GLEN (Dec 14-June 15)</th>
<th>TENI (2014)</th>
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<tr>
<td>Racist/Religious</td>
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<td>Homophobic/Transphobic</td>
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<td>Transphobic</td>
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The number of crimes reported to ENAR Ireland in 2014 exceeds the total number of all 'hate crimes' recorded by An Garda Síochána in the same year by a multiple of two. The number of homophobic/transphobic crimes recorded by GLEN in a seven month period, in their first year of data collection, exceeds police recorded data for homophobic crimes in many full 12 month periods. It should be reiterated that there is currently no flag for transphobic crime and that consequently members of An Garda Síochána may record those crimes using the flag for homophobia.

Members of An Garda Síochána to whom we spoke in the course of this interview fully accept that police recorded data represents a significant undercount of hate crime occurring in Ireland. Gurchand Singh, the Head of Analysis, observed that the official figures:

“... are not a reflection of the trends, extent, depth of hate crime in Ireland... [we cannot] assume that all incidents are reported to us. The challenge is knowing what [the] proportion of incidents reported to us are ....”

Third party reporting mechanisms are beginning to evidence how wide the gap may be.
Lived experiences of hate crime
The parallel recording mechanisms provided by ENAR Ireland, GLEN and TENI confirm the existence of hate crime in Ireland and on a significantly greater level than that suggested by police recorded data. Nonetheless, we also sought to speak directly to victims of hate crime in Ireland in the course of this research with a view to deepening our understanding of their experiences both of victimisation and the criminal justice system.

Targeted identities
In the five month period during which fieldwork took place we interviewed 10 victims and 2 family members of victims with intellectual/developmental disabilities. The 12 victims whose experiences are discussed in this Report include people with physical disabilities; people with intellectual and developmental disabilities; members of ethnic (including Traveller), racialized and religious minorities; lesbian and gay persons; transgender and gender fluid persons; and one person from an alternative subculture. Victims’ recounting of crimes committed against them signal the involvement of disabling, transphobia, homophobia, and racism, including anti-Muslim racism or Islamophobia, and alterophobia.

Interviews with civil society organisations have also alerted us to the targeting of groups which are less commonly named in legislation, including homeless people and sex workers.

Multiple victimisation
We spoke with each participating victim for up to two and a half hours. In that time, 12 victims recounted to us the details of 18 incidents which can be classified as crimes and which the interviewees perceived to be motivated by or to demonstrate bias against a commonly targeted identity. Other incidents were referred to in the course of the interviews but often there was not time in the course of the sitting to delve into every experience of bias-involved victimisation. We chose, therefore, to focus on those crimes which the victims had experienced personally (as opposed to accounts of hate crime victimisation within their networks and communities) and, within that category, those which the victims themselves regarded as the most significant. These caveats speak to many victims’ experience of abuse as an aspect of everyday life.

The commonplace nature of bias-related hostility, including hate crime, was one of the many worrying features of the interview findings, as was the degree to which many of the interviewees had normalised their experiences of hate.

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24 Both family members live with, care for and were directly involved in the reporting of victims’ experiences.
25 “... prejudice directed towards members of “alternative” sub-cultures ... manifest in criminal cases such as the murder of Sophie Lancaster in 2007 (UK)” Stephen James Minton, ‘Alterophobic bullying and pro-conformist aggression in a survey of upper secondary school students in Ireland’ (2014) 4(2) Journal of Aggression, Conflict and Peace Research 86.
26 These groups are not specifically addressed in this study, but their experiences will be reflected in future outputs.
“I have had so many of those incidents but you just learn to brush them off, I mean if I could count the number of times it would be ridiculous. Like, it is actually exhausting.”

“... you develop a tolerance yourself. You know, I can tolerate verbal abuse to an extent now unless it is physical. ... if you don’t develop a tolerance, if you don’t let it go, you can’t really work. ... we [the victim’s ethnic and religious community] say it is normal ... you advise each other - 'Just ignore it. Avoid it’.”

Not all civil society organisations shared an understanding of hostility as being widespread, and some highlighted the potential for differences in people’s exposure to abuse depending on their visibility or where they live for example. However, those advocating for ethnic and racialised minorities, and lesbian, gay, bi-sexual and trans persons, in particular, acknowledged that for some sections of their client communities bias-involved abuse is sufficiently commonplace to be a taken for granted aspect of daily life.

“... there are a lot of people that will say it’s a daily occurrence and it becomes normalised. You just get used to it. And it feeds into underreporting as well. People don’t report because it just happens, I’m just walking from the bus to my house and this is what happens you know and it happens every day and if I was to report it every single day I’d do nothing except be in and out to the Garda office. That’s what we’ve heard a number of times so the normalisation of it from that point of view I think is extremely shocking...” (Brian Killoran, CEO, Immigrant Council of Ireland)

“There is also a sense of tolerance I think ... or expectation. ... Almost expect to have some harassment because they’re LGBT. Or as perceived as LGBT ...” (Brian Sheehan, GLEN)

It was particularly striking that one gay man whom we interviewed was initially unsure whether his experiences would be valuable to the research because he had only twice been the victim of homophobic assaults:

“I’m not really sure can I be of help, I’ve only ever had two violent incidents of homophobia in my life ... [on the interviewer highlighting his normalisation of his experiences] if you have enough of it I suppose there might be a resilience thing I don’t know ... It just kind of bounces off eventually.” (emphasis added)

Manifestations of hate
In not one case did a hate crime detailed to us by victim interviewees reach court. As such, our crime classification of the incidents recounted is our assessment of the
charges which would have been most appropriate to the experiences interviewees narrate.

The 18 incidents detailed by victim interviewees which we hold can be characterised as crimes can be further classified as:

- 6 cases of simple assault
- 5 cases of assault causing harm
- 5 cases of criminal damage
- 2 cases of harassment

Below we present excerpts from some of the victim interviews in order to illustrate the character of hate crimes to which victims are subject in Ireland. In some cases, these narratives reveal the gravity of the physical injuries endured. In all cases, the character of the attack reveals the disciplinary intent of hate crimes as a means by which the victim’s difference is demeaned and penalised.

**Disablist assault**

“He was standing there and three boys came towards him and started shouting and calling him a weirdo. So of course we always said to him if anybody says anything to you like that’s not nice run. So [he] decided to run. He knew it was a bad situation. So one of the lads said “quick get him” and they came along, ran after him. He said they kicked and punched him and that’s when he landed and fell, banged his head and where he had fallen there was rocks and boulders. So we think he may have hit his head off one of them, the big boulders. When he was down, he was kicked punched. He said they took out their mobile phones to video him. They took out a lighter and said they were going to set him on fire, rape him and kill him. So I don’t know how he managed but he managed to – it turned out to be five anyway in the end from witnesses’ accounts. It turned out to be five boys but there was only one kind of instigator telling everybody to do this or do that. So he managed to get up and ran.”

**Homophobic assault**

“... [Victims were holding hands] They said something really rude and I told them to get lost and they were still walking ahead of us and I was just like leave us alone like get lost. And we kept walking ahead and the next thing they turned around and came back and one guy came over to [other victim] and said ‘I wouldn’t hit a girl but sure you’re not a girl’. ... then one guy shoved into me and then I shoved him back and all of a sudden he was just punching and shoving us to the ground. I just remember being on the ground and somebody stepping on my chest. One of the guys stepping on my chest while the other guy literally threw [other victim] around the place and the guy was just standing on my chest. ... They were just punching us and shoving us into walls...”
Racist assault

"... quite a large group coming towards me and they were kind of just throwing insults to people here and there as they were going by and I just put my head down because it was not something that I would want to engage with and I kind of turned away—I was standing in a doorway and they were coming up next to me and they yelled something to one side and then they turned to me immediately and just said loads of stuff, particularly—what impacted me the most—they said... ‘You are a fucking chink’ and to me, I was just taken aback, ... but I am really angry as well so I retaliated, so I was just like you know pretty much like, ‘Fuck you, what are you doing?’ ... and so one of them spat at me and it just got in my hair, so I just had to pull it out of my hair and they just continued on their way laughing, and I just stood there, and I was so in shock ... first I was pissed off because that had happened but also because people around me had seen the group and it was a really busy day—it wasn’t as if it was a really quiet time in the day - and no one came up to me afterwards to ask if I was okay ... “

Disablist assault

“... it was on [social media]. ...one of the members of the gang ... was recording it and told everybody his name and told everybody to go on [his social media account] to see it. ... He didn’t record the burning part obviously because even he ... realised that was really overstepping the mark but he did record the [objects] in the mouth and [victim] having his trousers and pants taken down. ... [The victim] said these people said pull down your trousers and pants or else. So I know he was absolutely terrified he was going to be murdered or something similar. Something really huge in his head. So he pulled his own trousers and pants down because they had threatened him. And he didn’t know what the threat meant. So he didn’t know what they were going to do. So he did do that, which is why he was crying as well, because he was terrified.”

Religiously aggravated assault

“I picked up three grown up guys [in my taxi] ... they were laughing and they were name calling Osama Bin Laden ... I [told] them please be quiet and don’t disturb me and even before I can say that one of the guys actually grabbed me from behind ... he pulled my turban like this from [the] back as I was driving and we were on a ... dual carriageway. ... the way he grabbed my turban and like my hair ... He pulled it off. Just flew it off and oh my God I was just so angry but I couldn’t do it because there were three guys...”

Homophobic assault

“... my backpack bag has a Yes Equality badge ... I didn’t hear them coming. Just at that wall we walked past, the [name of commercial premises] it’s called and
they just came up behind me and whack on the back of the head. Now I’ve been punched in the head before and it’s gonna hurt him more than it hurts me which is the only comfort I took from it - but ... he just thumped me on the back of the head and [said] ‘fucking fagot’ and he didn’t ... just didn’t see the dog in front of me. The dog turned and let a roar and jumped at him. And him and his mate tore off that way. And that was comedy. Do you know what I mean? It’s when I got home and (participant takes a deep breath) ‘What was that?’ do you know what I mean? I kind of bustled home and got [name of dog] in and just sat down and took my coat off and ... 'What? Is this still going on?... Is this still going on?' And it is.”

Transphobic assault
“... we were just chatting to a group of people and the next thing - this was bad, now this was the worst - I just felt this blow to the side of the face. Like an absolute bang and I dropped to the ground. [Name of friend] said, I can’t remember dropping to the ground but my friend [name of friend] said I dropped to the ground. I can’t remember it. And apparently I got up and there was blood everywhere ... there was blood all over my face.”

Racially aggravated criminal damage
“... Last time I was driving and someone flagged me. And then I looked at the person through my window and asked good night, where are you going? He said [place name]. I said no, I'm not going to [place name] – by then he was holding a screw driver. ... the screwdriver punched my car. [He said] ‘Fucking nigger’. Made a hole in my car.”

Racially aggravated criminal damage
“... the words knacker, pavee and get out. ... Painted on my windows ... like I’d just rented the house and I had difficulties even renting the house because of being known ... I would be very open about my ethnicity and my identity, so I’d never hide it. So it’s difficult enough to get the house and then to get the house and have graffiti smeared all over it. ... I started crying. I went back into the house. Closed the door and stood in the hall for a second and thought – ... I hope the child doesn’t see this. All these things. Your reaction is about the child, the landlord all these different things and so you stand there for two or three minutes processing it and then you just have to get to work and scrubbing it off.”

Transphobic harassment
“... I heard someone shouting, bar that fucker, ... there were strong expletive words used anyway and I hadn’t a clue who this was at and I kept walking and it took a minute or two for me to realise that it was at me and it just gradually got to me and ‘That fucking cunt. I will bar him, I will bar him’. ... I went into [commercial premises] to try and get away from him and he followed me into
[commercial premises] and I went upstairs to look for somebody to complain – to go to – and he followed me upstairs ...”

(Mis)perception
In all cases the victim perceived the crime to have been motivated by or involved the demonstration of bias towards an aspect of their perceived identity. One victim, a member of the Sikh community, is regularly the target of anti-Muslim racism, evidencing the importance of protecting victims who are attacked on the basis of a misperception:

“...before you even can say something people ascribe your identity... all that hate they have for the Muslim ... you become.... a victim of that”.

The Impact of hate crime: Victims pay the penalty

In the absence of an adequate criminal justice response to hate crime offenders, victims continue to pay for these crimes. Previous studies provide convincing evidence that victims of hate crimes suffer more severely than victims of equivalent crimes which are not associated with targeted hostility.\textsuperscript{27} Those who have experienced hate offences report a wider range of negative psychological impacts which also last longer than those exhibited by victims of non-hate parallel offences.\textsuperscript{28}

From these studies, we can conclude that the psychological impact of hate crime can manifest as:

- Fear
- Anger
- Shock
- Loss of confidence
- Sadness and depression
- Suicidal ideation
- Anxiety and panic attacks
- Nervousness and feelings of vulnerability
- Hyper-sensitivity in relation to repeat victimisation
- Powerlessness
- Trouble sleeping and/or concentrating
- Social withdrawal

Recent British Crime Survey findings demonstrate that victims of hate crime “were more likely than victims of BCS crime overall to say that they were emotionally affected by the incident (92% and 86% respectively) and more likely to be ‘very much’ affected (38% and 17% respectively)”;\textsuperscript{29} victims of hate crime reported higher levels of anger, shock, loss of confidence/feeling vulnerable, fear, anxiety/panic attacks, crying/tears, difficulty sleeping and depression.\textsuperscript{30}

Victims of hate crime cannot simply assert that their experience was an unlucky occurrence - wrong place, wrong time - “instead they are forced to accept that their

\textsuperscript{27} Paul Iganski, \textit{Hate Crime and the City} (Policy Press 2008).


\textsuperscript{30} Ibid.
social identity was targeted and they remain at risk of repeat victimisation”. As victims are chosen on the basis of real or perceived characteristics they cannot change, those vulnerable to hate crime may experience this phenomenon at anytime, anywhere. Victims of hate crime may also internalise the hatred which the perpetrator manifests. Victims of hate crime may feel that, as they are being targeted on the basis of who they are, there is little they can do to manage the risk of future victimisation.

Nonetheless, in discussing the aftermath of hate crime victimisation with interviewees, we found that, in addition to impacts on their mental health, most reported having actively responded to their experiences by developing practical strategies to manage their perceived risk of repeat victimisation or to cope with the mental health effects of their experience. These strategies and coping mechanisms shape how victims live their lives, sometimes in very consequential ways. Strategies include relocation, restricting participation in public life, self-segregation and assimilation. These strategies are not mutually exclusive and victims often spoke of employing multiple mechanisms to respond to hate crime and manage the risk of further victimisation.

Relocation: forced out of home
Just as one offender is said to have been forced out of his community in response to his hate crime offence, 4 of the 12 victims whom we interviewed reported having relocated in direct response to hate crime victimisation.

Two victims permanently relocated their families in order to leave the neighbourhood in which they had been victimised. In one case the family had been victimised by their neighbours. In the second case, the crime had occurred in close proximity to the victim’s home. In this second case, relocation was a direct response to the impact of a hate crime on the victim’s mental health.

“...we didn’t want to live in that apartment anymore because we were looking out our bedroom windows – you can see exactly what happened.... or where it happened and it was just looking out that window was so depressing.”

In the other case it was also a practical response to the very real prospect of repeat victimisation.

“I stuck it out for probably two or three years in that house and then I did eventually move ....”

32 This list is not exhaustive, but most practical strategies discussed by victims can be classified within these categories.
One victim and their family have temporarily vacated their home. The victim was targeted by members of their local community. The interviewee explains that the family cannot remain in that community both because of the negative associations resulting from this and other experiences of targeted victimisation and because of the risk of repeat victimisation. Like the fourth victim, who became effectively homeless rather than remain at a location where they had been subject to harassment on the basis of their identity, this family can be understood as having been made homeless by hate crime, and arguably by the failure of the criminal justice system to respond adequately to their victimisation.

“I can’t be in [town] at all at the moment. I hate the place, I just want to leave and I want to get [family member] safe and away from there.”

Brian Sheehan of GLEN suggests that some LGBT persons pre-empt these decisions by taking risk of homophobic victimisation into account in deciding where to live:

“... you wouldn’t live in a certain area cos it wouldn’t be safe walking home. You wouldn’t live in a certain apartment block.”

**Retreat: Limiting public participation**

The terroristic effect of hate crime impacts upon how people live their lives and manage their comings and goings, including how and when they go out and where. This in itself may perpetuate feelings of anxiety, fear, low self-esteem, and result in victims living a restricted existence. Victims commonly discuss self-imposing limitations on their participation in public life in response to and in order to manage the risk of hate crime victimisation. Many victims place limitations on their use of public space and public transport in particular. They restrict their presence in, their use of, and their transit through, public space because of the risk of hate crime.

“... We can’t get the bus or anything. Cos he’s afraid. It’s absolutely disgraceful. ... [He is afraid] he’ll get beat up or if he gets slagged or assaulted. He’s been assaulted before. He was dragged down an alleyway before for being gay.”

Members of the LGBT community raised our awareness of coming out, not as a singular event, but as a process which people must choose or not every time they encounter people who are not already aware of their identity.

“Even for me to have to come out again to someone in another setting is still a strain. And I’m probably as out and proud and comfortable as you can get, and it still can be a strain.”

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Public transport and transit through public space on foot were also identified as problematic by members of racialized and ethnic minorities whose difference is often inscribed on their skin and impossible to hide:

“... I am used to it, but you kind of start doing things to avoid the possibility of something like this happening to you. ... I usually keep taxis to a minimum ... when I get a taxi I try to keep quiet. ... I don’t walk through certain places in Dublin, like, I will try and do a beeline to try to get to different places because I know there are rough areas, and not just because it is a rougher area but chances are that I could be yelled at or something like that ...”

“... there are only a few places where you feel that you are comfortable sitting. Even in the buses. You would prefer standing than sitting.”

These accounts confirm Carr and Haynes’ findings regarding the spatial limitations experienced by some members of minority communities as a consequence of the risk and realities of anti-Muslim racism in Ireland.34

For some victims, their efforts to avoid hate crime victimisation extend spatial peripherality into a deeper public invisibility. In order to avoid being targeted victims may feel that they must keep a low profile.

“... it’s kind of sad admitting this but I usually go around face down like looking at the ground when I am walking. Sometimes it is hard when you make eye contact with people you almost feel as if they are going to say something to you and sometimes they do say something and you are like ‘Well what did I expect?’. ... you kind of stop doing things just to avoid any sort of interaction and I am sure that I am not the only one to do it ... after that incident I still very much had that feeling of you know keep a low profile ...”

The impact on both the individual’s self-actualisation and on society’s capacity to benefit from their contributions is of concern.

For young people and victims with significant intellectual/developmental disabilities, decisions to limit their freedom of movement as a consequence of hate crime are rarely made alone. Indeed, the fear of losing that freedom may discourage some from disclosing experiences of victimisation:

“Didn’t tell my dad cos I was afraid that he wouldn’t let me out again. ...”

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“He was afraid to say to me because ... He's not supposed to be [location of assault] and he claimed he fell. But then he was sitting there and he started crying ... ‘Why me, what did I do?’”

Members of ethnic minorities, who have moved away from their communities, also discuss the consequences of revealing their victimisation:

“I needed a bit of space, but I knew if I told them that they would say ‘Forget the space, you’re coming home’.”

Self-segregation

For families of people with intellectual/developmental disabilities who have struggled to empower their loved one to become integrated, retracting the freedom that necessitates in order to manage the risk of victimisation is experienced as a particularly harsh penalty:

“... we did all the [...] therapy which is to help [him] gain his own independence we stopped wrapping him quite as much cotton wool... ... I don’t want that for my son, I want him to be able to integrate into society. But by doing that I expose him to these threats. So you know, some people [might say] .. ‘She should have wrapped him up more’. Well no, I can’t. Because he has to grow as a human being as well.”

Jim Winters of Inclusion Ireland, suggests that for people with intellectual/developmental disabilities, crime victimisation simply further concretises a pre-existing marginalisation from mainstream society:

“... unfortunately the way our society is structured, the approach to people with an intellectual disability is one of quite often segregation and congregation and exclusion from the mainstream of society. So you can imagine that if a person with an intellectual disability who is participating on the fringes of society, if you like, and who isn’t accepted into mainstream society through systemic discrimination, that when they’re a victim of crime or a victim of abuse that that further marginalises them”.

Kevin Whelan, CEO of Irish Autism Action highlights a potential cruel correlation between increases in hate crime victimisation and the deinstitutionalisation of people with intellectual/developmental disabilities:

“... if you think about it in terms of Autism this generation of persons diagnosed with Autism – this is the generation where we have adults in the community so what is going to happen is that the prevalence of these issues will increase because we will have much more people that are susceptible in the community.
… why it’s not high on the agenda [at the moment] … is that it’s institutional and school based. And they have systems for handling that.”

The segregating effects of hate crime extend to other commonly targeted groups. A victim of anti-Traveller racism experienced a similar set back: bias-motivated harassment and criminal damage forced her to relocate her family from a settled community to a Traveller-majority community. A Sikh victim talks about members of his community in Ireland emigrating to countries where there is a more established, and better respected, Sikh presence. Jamal Abdallah with Sports Against Racism in Ireland also perceives hate crime to have segregating effects:

“I think it [hate crime] makes people want to just, not even assimilate, but they just want to stick to their own. … then at least I’m protected. We’re part of a group, so it’s a community thing as well.”

Many of these victims and their families let go of the choices they had made to integrate into majority Irish society with great reluctance. Where hate crime forces victims to self-segregate, it is arguably the population as a whole, not just the direct victim, which is penalised.

“… we have a history of treating ethnic minorities so badly in this country … one of the consequences of that is that there is then a disengagement by those ethnic minority groups from playing a full and active role in this society... " (Solicitor)

“… the impact that that has not only on the person themselves but on the community and the integration of people from different backgrounds in Ireland in general… we can’t get a grasp on it because it’s so potentially huge.” (Brian Killoran, Immigrant Council of Ireland)

**Forced assimilation**

For those participants whose difference is written on their bodies, hiding their distinctiveness is not an option. Other participants do, however, report having taken decisions to hide their authentic self in direct response to hate crime victimisation.

“… ultimately it disciplines …and it raises everyone’s fear and anxiety levels … and it becomes internalised too. We self-discipline and we discipline our own community …” (Clíodhna Sadlier, Rape Crisis Network Ireland)

This experience of what is effectively forcible assimilation is shared by people across a range of commonly targeted groups, and in our interviews with victims was reported by people who were targeted on the basis of their visible expression through dress, of gender fluid identity and membership of alternative subcultures.
A gender fluid victim of transphobic hate crime recounted that following an assault:

“... I shaved my head. ... I didn’t wear makeup. I didn’t do anything. I was so embarrassed. I was so scared ... my dress went more masculine. Just to protect myself. I was so frightened to be myself - to wear, express, the clothes that I want to wear. So terrified. ... I kind of grannied my walk. ... I was afraid to express myself.”

A former Goth, states that following having her nose broken in an alterphobic assault:

“... I changed my look completely ... I loved how I could just wear whatever I wanted and just feel creative ... Now I feel a little bit stifled ... [the experience] made me change physically, mentally, everything ...”

A member of a religious and ethnic minority is also aware of men in his community who have made a decision to remove markers of their identity in response to hate crime. This strategy has not always proved successful however, as having been targeted on the basis of religion they were instead targeted on the basis of their skin colour:

“... he said like ‘I used to have a beard - I was Bin Laden. Now [having shaved off my beard] I’m Paki’. So that guy actually after a few years he said, ‘I better keep my turban on’.”

Ironically, offenders misrecognised the victim’s identity in both instances.

Among people whose difference may be ‘outed’ through actions rather than appearance, such as gay and lesbian persons, the risk of hate crime factors into determinations of where and when to enact one’s difference, in these instances particularly limiting the contexts in which people can express love, intimacy and attraction. Brian Sheehan, CEO of GLEN highlights that:

“Simply put people don’t hold hands with their partners in public. That’s the most obvious and most immediate example of it. So all touches of affection by and large people are very cagey about. ... And couples who do would make calculations about where they express that affection. Is it safe in this street or no? Is it safe to go into this cinema and hold hands or lie into each other’s arms or whatever everyone else does? That’s the most obvious example of it.

This point was confirmed by a range of LGBT interviewees:

“... Places just in town you just wouldn’t [hold hands or kiss].”
.. we didn’t want to go down the street holding hands together and then it was like d’you know if I’m not there she can’t get attacked"

“I remember saying please don’t kiss anyone tonight. Please don’t kiss anyone tonight please, because I’m so scared I’ll get a punch.”

Despite winning the right to marry, there are other realities that impinge upon lesbian, gay and trans persons rights to participate fully in society, including as loved and loving persons. This type of conformity under threat, this forcible denial of one’s authentic self, is expressed eloquently by one victim as a source of oppression:

“I’m just trapped in my own culture. Not trapped in my body, because I know who I am and I’m very comfortable in who I am. I love my body. ... But I’m very, very guarded and very scared and I’m trapped in my own culture .... .”

**Mental health impacts**

A small minority of victims display absolute resilience in the face of hate crime:

“I’d be upset about this for a minute but it’s not going to beat me do you know what I mean? Bounce back, don’t let it get to you like.”

However, the vast majority of victims describe emotional and/or mental health consequences resulting from hate crime victimisation and (fear of) repeat victimisation. One parent of a victim with an intellectual/developmental disability, having no access to other supports, is paying privately for therapy for her child in part to address the trauma of a degrading disablist assault.

“... he’s suddenly got really distressed and they said he was having a meltdown. ... he did get very, very upset ... I think he’s still very troubled about certain events.”

Family members of victims with intellectual/developmental disabilities describe their distress:

“Sad like. Not mad, sad. Not afraid or terrified. Sad. That was his way of expressing he was terrified. Sad. D’you know?”

For other victims, expressions of the emotional and mental impacts of hate crime were shared across diverse identity groups. Some victims shared anger, emanating in particular from repeat victimisation:

“... when something builds up for so many years you are just so angry more than anything...”
Where couples are victimised together, individuals talk about their guilt:

“It was just an endless thing of regret and guilt and the fact that you wanted to protect your partner.”

“. traumatised by it because he feels guilty for the whole thing”

But most commonly, victims talk about the fear that they experienced and continue to experience as a consequence of hate crime:

"... it was a traumatising thing long after it happened ... I was scared that they could be standing right next to me and I wouldn't know but they would totally recognise me ... ".

“I had night terrors. I woke up screaming.”

"It really changed my life ... Everyday I live in fear because I don't trust anybody no more. ... I've been really, really traumatised".

“You’re on your nerves. You’re living on the edge all the time.”

“We don't want to have to live in fear, be afraid of going on a night out in case something happens. Nobody should have to live with that ... walking around during the day – honestly if you asked us this when we were still living in the apartment we would have said we’re still frightened to leave the apartment.”

Hate crime is terrifying because you – not your assets or your location, or your behaviour – you are the target. In the risk associated with having a bullseye inscribed on your very being lies the longevity of the effects of hate crime. The perpetual management of that risk is a drain on the individual and collective emotional and mental resources of commonly targeted communities and therefore the societies which permit their victimisation.

“... it is actually exhausting ... ”

and its effects can be intergenerational. Speaking of her son, one victim realises

“He isn’t just living with [me] managing his behaviours. He’s absorbed the fear too.”
Teresa Buczkowska from the Immigrant Council of Ireland who works on a daily basis with people affected by racism is all too familiar with the emotional and mental health costs of bias-related hostility on children:

“... people are you know reporting sleep disturbances, anxiety attacks, depression. We had women who twice reported miscarriage due to stress related issues from verbal abuse by their neighbours. ... and on children the abuse has huge impact. I was working with a mother last year whose son was abused by [a] neighbour physically, verbally, they suffered property damage – spray paint on the house. The child tried to kill himself twice. He poured detergent over his skin because he thought it would make him white. The other issue was a young girl in a school. It was a one off incident where she was told you’re not welcome, go back to your own country. She wrote a letter where she expressed her wish to die. And that was a one off incident so we can see a pattern of incidents or one off incidents can have extremely damaging effect on young people.”

The ripple effect: targeted communities as indirect victims

Hate crime is a message crime. The targeting of victims on the basis of their social group membership communicates to all members of that group that they are equally at risk and that they do not belong. As such, the terrorising effect of hate crime goes beyond the individual to generate fear and anxiety among the broader community of which the victim is part; what the EUFRA refers to as the “resonating nature of hate crime”,35 or which Perry and Alvi refer to as the “in terrorem” effect of hate crime.36 Victims tended to discuss impacts on their immediate networks of family and friends, for example:

“... when you talk to trans people one of the biggest challenges with families is when you are talking to them about say their child being trans one of the first things they’ll say is that ‘I’m afraid for my child that they are going to get killed they are going to get attacked, they are going to get raped’. When I came out as trans this is what my Mom said. So there is a real understanding that you are potential - and I hate to use the word - you are potential victims and certainly that you are targeted. So I think there is an understanding in families and a fear of families and friends if you go down this journey if you come out as trans if you start that process that you are very likely going to be a victim or a target for hate.” (Broden Giambrone, Director, TENI)

Civil Society Organisations were cognisant of the impact on the client communities with whom they work. While not every civil society organisation to whom we spoke was aware of a fear of victimisation among the community for whom they advocate,

36 Barbara Perry and Shahid Alvi, ‘We are all vulnerable’: the in terrorem effects of hate crimes’ (2012) 18 International Review of Victimology 57.
organisations across all commonly targeted groups made the case for the relevance of the ‘ripple effect’ in an Irish context:

“... from a kind of a community perspective because there’s a lot of tightness in the Sudanese community or the Somali community or whatever, that then impacts on the rest of the community as well. ... it kind of sends shock waves through the rest of the community and people become nervous and they become kind of defensive and I think it absolutely has to .. I think it does and it does clearly cause additional harm.” (Fiona Finn, CEO, NASC)

So we speak about people living a life of fear. That’s certainly been our experience. Fear is the common word used with an intellectual disability or to explain their experience of abuse or assault or indeed to explain their fear of participating in mainstream events. We would organise quite a lot of events for people with an intellectual disability to attend. On a broad range of areas. And people with an intellectual disability would attend in pairs, in groups, they will plan their attendance and the question is why. We ask people. And it’s safety. So people with an intellectual disability are afraid of things. What are they afraid of? They are afraid of being targeted. They’re afraid of being robbed. They’re afraid of being assaulted.” (Jim Winters, Policy Officer, Inclusion Ireland)

“I think people are afraid, people are frightened you know that they could be the next victim, that they could be assaulted, that they could be beaten up... worried about their family and friends ... I think it sends a tremor through the community.” (Martin Collins, Director, Pavee Point)

Hate crimes then can be perceived as “symbolic crimes” that communicate Otherness and operate as an exclusionary practice.\(^{37}\) They have the effect of regulating marginalised social groups. Indeed, the targeted community must be counted as the secondary victims of the offender.\(^{38}\)

“Whether the intention is there or not they are perceived to be message crimes. ... I can just talk about a work shop I was giving last week with the South Circular Road Mosque and we were talking about the impacts. Individuals’ behaviours have changed. Nine years after an incident people’s behaviours are still different. People still live in fear and the whole community hears about it


and starts to behave differently. I mean this is the stuff that marginalises communities. ... I would actually argue that this is the key difference between hate crime and common garden [offences] is the impact on community relations.” (Shane O’Curry, Director, ENAR Ireland).

While hate crime has the potential to disseminate a message of unbelonging to a community, we argue that it is society’s response to their victimisation which determines whether or not that message is believed and internalised:

“... So every time there is a new incident it feeds into this expectation that that is what can and does happen to trans people and then you know feeds into fears of people going places and doing things. Because they expect that this is going to happen to them. And when you expect that something is going to happen to you, when it does it’s obviously horrific but it doesn’t perhaps have the same impact as it would to somebody who didn’t expect it. Cos somebody who doesn’t expect it would then go ‘Absolutely that unacceptable and I shouldn’t have had to deal with that’ and all of that and then you know you go into that process. Whereas I think for a lot of trans people and there are exceptions of course but for a lot of trans people ‘Ah well it was just a matter of time really’. And that’s totally unacceptable.” (Broden Giambrone, TENI)

The responsibility of responding not only to the direct but also the indirect harms of hate rests with society. A solicitor interviewed in the course of this research highlights the impact on minority communities of the failure to address hate crime:

“... The thing people get most upset about is that this is continuing. ‘I experience this but my children and grandchildren will also experience it’. It’s often times to protect the future generation. Upset obviously, anger ... disappointment, frustration. The people who worked in the area of lobbying for rights and equality all their lives, given their whole lives to it and then you see that happening. And you see people getting away with it. I think you can get very disappointed and very disillusioned.”
Current Irish criminal justice responses to hate crime

Having established that hate crime is a problem, we sought to determine the manner in which the Irish criminal justice system currently addresses it. We believe that there are five key moments in the system during which the bias element of an offence should be addressed: and where, conversely, it can be lost. These five key stages are: reporting and recording; investigating; court proceedings; sentencing; and post-conviction. In examining the treatment of a hate element at these key points in the system, we pay particular attention to evidence either for or against the State’s assertions that generic criminal offences are sufficient to combat hate crime and the courts consider racist and xenophobic motivations at sentencing.

Reporting and recording hate crime

The Garda Inspectorate Report *Crime Investigation* observes that the garda definition of a racist or homophobic incident is that which is used in the United Kingdom – often known as the ‘Macpherson definition’ and is: “any incident which is perceived to be racist or homophobic by the victim or any other person.”

In its Report, the Garda Inspectorate uses the terms racist and homophobic incidents, observing that the term ‘hate crime is not used by the Garda Síochána.’ (2014, Part 6: 45) During its inspection visits (which included engaging with approximately 1,000 garda members and staff) not one garda had ever reported that they had either recorded or investigated a hate crime.

Our research reflects and advances upon the findings of the Garda Inspectorate. One garda interviewee succinctly summarised the myriad of issues which might impact on recording a hate crime appropriately:

“You’re relying on three groups of people to have it recorded. So those three groups of people: ... the victim ... may not be aware [it’s a hate crime]; the garda probably won’t have it in their head, they’ll just see this as a crime, they’ll look for criminal evidence; and then you have the person who records it on the system ... who probably isn’t aware of what a hate crime is anyway ... They’ll have even less of an understanding. Then you come to the fourth group of people which is at management level, and is there a management understanding this is even a thing? So when you don’t have management constantly reviewing, like they do in the UK, the hate crimes that happen in an area, looking for [those] crimes, ...

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40 The Inspectorate recommends the implementation of both a victim-centered policy and good investigate practices in racial, homophobic and other similar crimes to encourage victims to report offences. To accomplish this, the Inspectorate suggests the following key actions be taken: - Ensure that all crimes containing elements of hate or discrimination are flagged on PULSE - Create clear modus operandi (MO) features on PULSE that allow the accurate recording of the nine strands of the Diversity Strategy; - Develop third party reporting sites to accommodate victim reporting; and - Review the decision to merge the role of ELO/LGBT officers.
following them up, making sure something's done about them ... we're back to what's measured is done. This stuff isn't measured, it's not done.”

The interviewees to whom we spoke from An Garda Síochána were drawn from among the ranks of those members who are considered to have specialised in working with commonly targeted communities, raising questions regarding their access to continuous professional development which is essential to maintaining the currency of skills and knowledge in any profession.

Garda perspectives on recording hate crime
The process of formally flagging a crime as bias-motivated within An Garda Síochána rests primarily upon the assignment of a bias-related motivation when recording the crime on PULSE, the national police intelligence and crime database. Motivations are selected from a drop down menu, which interviewees explain provides for an extensive range of options, including unknown and other. It is compulsory to select a motivation for each crime recorded on PULSE. Gurchand Singh, Head of Analysis confirmed that official garda recorded data on hate crime is generated using only those crimes where a bias-related motivation has been logged using this menu. Garda interviewees explained that one can record multiple motivations for the same crime, although there was some lack of clarity as to how many may be selected for a single record. Most commonly gardaí held that at least 2 motivations can be logged.

The perception test
Central to the Macpherson definition of a hate incident is the stricture known as the ‘perception test’, i.e. the requirement that the police record an incident as a hate crime:

- when any individual, whether a witness to the incident or not, perceives it as such; and
- without requiring an evidential base - the perception of the victim or any other person is sufficient

The purpose of this inclusive approach to recording is to ensure that institutional bias, among other factors, does not preclude the thorough investigation of possible hate elements. This test does not apply in the context of a prosecution, where proof of the hate motivation or demonstration is required.

Garda interviewees differed in the degree to which they had fully integrated the perception test into their operational approach to the recording of hate crime. Some garda participants evidenced absolute clarity regarding the right of any individual to trigger the flagging of a crime as racist. Others interpreted the perception test as transferring the responsibility for identifying a hate motivation to the victim:
“… when an incident is being recorded … it’s not whether or not the Gard feels that there is racism involved, it’s whether or not the victim feels that racism is involved and it should be recorded as racist. A lot of Gards I don’t think are even aware of that though.”

Two garda interviewees asserted crimes would not be flagged as motivated by bias in the absence of supporting evidence.

“Interviewee: When you’re responding to the scene … the injured party is going to tell you what happened … If the gard is told that and there’s evidence to support it, he’d record it that way.
Intervieweer: What if there is no evidence to support it?
Interviewee: I would say it wouldn’t be recorded, it wouldn’t be put in. But it might be put in the narrative of the incident which then is a whole different ball game.”

“I can tell you both formally and informally that the garda policy is to record a racist incident as a racist incident if the facts support it.” (Emphasis added)

This practice contradicts the intended purpose of the perception test. A failure on the part of the attending garda to record possible bias-related motivations at the outset may effectively preclude their investigation.

The third point on which the formal MO flag diverges from the Macpherson definition is in relation to the character of the hate element recorded. The Macpherson definition permits the flagging of incidents involving either hate motivations or the demonstration of hate in the course of an offence which is otherwise motivated. Garda practice permits the formal flagging of hate motivation only.

**Recording homophobic, anti-Semitic and sectarian crime**

In an Irish context, PULSE permits the flagging of racist, xenophobic, homophobic, anti-Semitic and sectarian motivations. Although the Garda Inspectorate Report *Crime Investigation* refers to the existence of an organisational definition of both racist and homophobic incidents, An Garda Síochána interviewees referred only to an organisational definition of racist incidents.

“Interviewer: Is there a definition of homophobic crime in An Garda Síochána?
Interviewee: No.”

As such, it is perhaps unsurprising that racist crime was the primary, and sometimes the exclusive lens, through which hate crime was understood by garda interviewees.
While all of the interviewees were aware that it is possible to record a crime as racially motivated using the drop down motivations menu, there was less consistency in awareness of the other available prejudice-related categories. Few garda interviewees mentioned the categories of xenophobic or anti-Semitic motivations. None mentioned sectarian motivations. While there were generally high levels of awareness of the potential for homophobic crime, one ELO/LGBT officer was unaware that it was possible to record a homophobic motivation on PULSE.

“Interviewer: Do you know if you can record a homophobic motivation?”
Interviewee: No. Definitely not.
Interviewer: You can’t?”
Interviewee: Could you flag it as homophobic? ... apart from the narrative? I don’t think you can.”

Recording transphobic and disablism crime
Internationally, trans persons and people with a disability are recognised as being at particular risk of hate crime victimisation. PULSE does not currently offer the option of a flag for motivations relating to bias against either identity.

In general, we found low levels of awareness of transphobic crime among interviewees. One member sought an explanation of the term transphobic crime.

“Interviewer: What about transphobic crimes?
Interviewee: “Transphobic crimes? Tell me what a transphobic crime is?”

Only those gardaí who have committed to working specifically with LGBT communities displayed knowledge of transphobic crime.

One garda interviewee argued that members’ lack of awareness of transphobic crime and of the trans community more generally is reflective of the levels of knowledge regarding trans issues in society generally. He held that in the absence of training it is disingenuous to expect members of An Garda Síochána to be any more knowledgeable than the average citizen.

“Gards don’t know what transphobic is, they don’t know what transgender is, they haven’t had any training in it – they don’t even understand the concept. Most people don’t!”

One garda interviewee raised the point that people with mental health difficulties may be victimised because of their difference:

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41 Alan Roulstone and Hannah Mason-Bish (eds) Disability, Hate Crime and Violence (Routledge 2012); Fundamental Rights Agency Being Trans in the EU: Comparative analysis of the EU LGBT Survey (FRA 2014).
“God forbid that you might be identified as different from the residents either, maybe slightly mental health issues, slightly odd, you know, keep to yourself, they tend to be targeted for crime too equally, as well as their next door neighbour who might be Black.”

With this exception, interviewees did not demonstrate any knowledge of disablist hate crime, nor familiarity with this category of bias-motivated crime. One other interviewee named disability without prompting and they expressed uncertainty regarding the relationship of this identity to the phenomenon of hate crime.

“If people with disabilities were subject to hate crime because of their disability – so it’s an area that’s very hard to define as such.”

Interviewers raised the question of how bias-related motivations such as transphobia and disablism which are not available through the motivations menu on PULSE might be recorded. Responses varied; some interviewees suggested that they would use the menu entry for homophobia in flagging transphobic motivations while others suggested that they would just note the motivation in the narrative section of the report.

“Interviewer: What about transphobic now?
Interviewee: We have to record it under homophobic because there is no other place for it. The workaround at the moment ... is to include transphobia in the narrative.”

In one case the interviewee was unable to say how they might record either a transphobic or a homophobic motivation.

Interviewees alluded to the fact that further additions to the motivations menu may be made. An Garda Síochána have made us aware that for the latest release of PULSE 2015, there will be a new MO tab, “Discriminatory Motive” which will have a number of sub-categories including gender, anti-disability, ageism, transphobia, homophobia, anti-Semitism, sectarian, anti-Muslim, racism, anti-Roma, and anti-Traveller. While this is welcome, in the absence of other direction such as definitions of named categories, strategies for the investigation of hate elements and for raising them in the course of prosecution further additions will occur within a policy vacuum, compounded by the impacts of an absence of legislation, which will not lend itself to consistent practice.

To ensure that a crime is appropriately recorded as a hate crime, one solicitor outlined the advice that she gives to clients when making a statement:

“I would say to them in their statement make sure the gard has written that down this was a hate crime. ‘Make sure you write ... down that I believe this was racism
or hate crime’ … I would tell them to be very assertive around it. Because a lot of the time that is the issue they are coming to me about, that will be the main part, might not necessarily be the assault, it would be the hurt ... " (Solicitor)

Victims experiences of reporting hate crime
The victims whom we interviewed provided details of their encounters with members of An Garda Síochána. Of the 18 crimes of which we have been provided details, victims directly alerted An Garda Síochána in 13 cases. In one further case, An Garda Síochána were called by another service to the scene and in a second members of An Garda Síochána witnessed the assault.

Victims’ experiences of reporting vary widely. A minority of victims relate very positive experiences of reporting, even where this might not have been their expectation:

"We’ll get them don’t worry’ – they were really nice about it. Like, that was a different side to the gards I have actually seen".
"Rang them and they said you’ll have to come down. I rang them told them what happened. Gard was brilliant on the phone, said ‘Come down tomorrow or now or whatever, we’ll talk and take a statement’. Couldn’t have been nicer.”

“... they were brilliant. ... They didn’t even question us on that [the crime was homophobic]."

It is notable that all of the individuals with disabilities to whom we spoke encountered a speedy and professional first response on the part of An Garda Síochána.

A minority of victims related mixed views regarding their experiences of reporting a hate crime, with negative assessments generally critiquing an individual garda’s demeanour rather than their actions.

In relation to just under half the reported crimes, victims’ experiences of reporting were expressly negative. In at least 2 cases, victims chose to abandon their efforts to report a crime as a direct consequence. Speaking to the priority which their experience was accorded, criticisms focus most frequently on a failure to send anyone out to attend the

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42 Victims and members of An Garda Síochána may not share the same interpretation of reporting encounters. Victims are rarely aware of the difference between telephoning for assistance, making a report and making a statement and may believe that that telephoning for assistance equates to a report, or that a report is sufficient to prompt an investigation. Adding further complexity to the interpretation of reporting encounters, success in alerting An Garda Síochána to the commission of an offence does not guarantee that a crime has been reported. An attending Garda may determine, in conjunction with GISC, that the incident reported does not constitute a crime. More problematically, the Garda Inspectorate report Crime Investigation found evidence of “... an unacceptable practice where individual Gardaí were deciding not to record a crime” and “failure to record crimes and incidents was consistently reported to the Inspectorate across all seven divisions”.

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scene to take a report following an initial phone call by the victim. In one instance this resulted in the perpetrators leaving the scene without being formally identified:

“I waited twenty/twenty five minutes and I made sure they [the offenders] didn’t run ... I rang again and they said ‘It’s not going to happen. You go to the police station’. ... then another taxi came and they hailed a taxi and I tell them ‘Don’t take them, but you know they took them anyway.’”

In another instance, in which an opportunity to identify the perpetrator at the scene was lost, the gardaí had attended to take a report, but refused to go with the victim to identify the person who had assaulted him. The victim’s naming of the crime as hate motivated was ignored:

“... [Dispatch said] ‘stop ringing clogging the line, you’ve rang three times now we know, we’ve sent someone out, they’ll get there when they get there’. ... 40 minutes to an hour. ... [The attending gardaí said] ‘There’s nothing we can do, it happens all the time’. I said, ‘Does hate crime happen all the time? And they said, ‘Well people get into fights in clubs all the time’. ... there’s a difference between a fight and being picked on for absolutely no reason because of who you are. ... Absolutely dismissed it. Rubbed it into the ground and kicked it under the carpet. ... the gard said, ‘We have work to do. We’re not going to wait till he comes out’. ... So they went and about 10 minutes after they went he came out.”

In one case, a young Goth woman recounts abandoning her attempt to report an assault in which her nose was broken having been subjected to a justification of the assault by the officer to whom she was attempting to make the report:

“...it was like ‘What is a young girl doing out at night dressed like that’ and that kind of thing ... I remember making this point, even if I am dressed in the most inappropriate of clothes, I should still have the right to walk down the road ... but again he didn’t see it that way so I just left ... if this is the reaction that I am going to get then what is the point ... I kind of argued with him and that was it, he didn’t try to say ‘Listen, I am sorry for what I said and you really should report it’…”

The woman was wearing a facial cast at the time she attempted to report.

In one case, a victim relates that a garda at a local station rejected an attempt to report a crime on the basis that he regarded the case to be a civil matter.

Although victims and their family members perceived that they had been targeted because of their identity none of them were certain whether this had been flagged in any report associated with their case. This was an issue highlighted in particular by
GLEN, who also host a third party reporting mechanism for homophobic and transphobic incidents:

“Even when somebody comes in and says it might have happened because they’re LGBT whether it’s … recorded as homophobia on the PULSE system is the unknown.” Craig Dwyer, former Policy Officer, GLEN

Investigation: making a statement

A formal statement is distinct from a report. The making of a statement requires that the individual be interviewed by a member of An Garda Síochána, preferably the garda who attended the crime scene. That garda uses the interview to draw up a detailed written account of the crime, and the individual making the statement formally signs the transcript to attest to its accuracy. Many victims were evidently unaware of the difference between a report and a formal statement.

According to garda interviewees, in this jurisdiction an essential prerequisite to proceeding with the case is a victim making a formal statement. While in England and Wales, there are guidelines in place which provide for circumstances in which the prosecution may, in the public interest, proceed with a case in the absence of a victim statement, garda interviewees did not anticipate this occurring in an Irish context:

“Interviewer: How feasible is it to proceed with a case without a statement from the victim?
Interviewee: You can’t. The only time you prosecute someone without a statement of complaint is a murder.”

Victims interviewed for the purpose of this research confirm the same perspective:

“… if [victim] does not make a statement then … [the garda] said they wouldn’t … the gards would not be in a position to look at the video until [victim] had made a statement. So if he was not going to make his statement there will be no video footage evidence because they will not have looked at it. … I really didn’t understand that and I found that very upsetting.”

Given this context, whether victims made a formal statement and, if not, the reasons for failing to do so, are important.

It is worth noting therefore that not all reports resulted in a statement. In one case a victim, who understood the difference, felt there was little point in taking the time to make a formal statement relating to his experience of a simple assault as it was unlikely that the crime would be detected. This sense of futility was something which civil society organisations were also aware of:
“... the other reasons for not reporting - they don’t think the gards can do anything about it ... (Craig Dwyer, Policy Officer, GLEN.)

In several other cases, interviewees do not report receiving follow up information regarding or requesting them to make a statement. In some cases interviewees interpreted this to mean that they had done all that was required of them to ensure that the case would be pursued to its conclusion by An Garda Síochána.

Of the 15 crimes of which An Garda Síochána were made aware, victims were facilitated to make a formal statement in 6 cases and successfully did so in 5 cases. In 3 cases, the experience of making a statement was very positive.

“The garda [perceived by the victim to be from a specialist unit] ... he was really thorough ... he was like ‘It is a racialized hate crime’ ...”.

“... he [identified by the victim as a diversity officer] listened very carefully and he seemed to be very empathetic and understanding.”

“... [local] Gards were brilliant in the sense that you know, they took us seriously. Came out, took statements, looked at the area I suppose, the crime scenes or whatever you want to call them.”

In one case, a victim of a homophobic assault causing harm arrived to give their statement at the appointed time and the attending gard was unavailable. From the victim’s perspective, no one at the station seemed to be aware of their appointment. Another gard was located to take the statement, but the substitution was experienced negatively by the victim. The victim remains concerned that the statement does not fully reflect the character of her experience:

“Interviewer: Did you feel it was a good reflection of what happened to you? 
Interviewee: Not exactly – felt like it was missing things like. On the piece of paper like it looked so little. Looked so very small and crammed. It was more than that.”

The victim cannot distinctly recall that either the homophobic aspect of the assault, or any evidence that would speak to this fact, was included in the statement. Members of An Garda Síochána assisting us in this research confirmed after the fact that the case was not formally flagged as having a homophobic motivation.

**People with intellectual/developmental disabilities’ experiences of the pre-trial process**

As we have noted in a previous section, victims with disabilities and their families uniformly highlighted a speedy and professional response from members of An Garda
Síochána to their initial reports of victimisation. Nonetheless, interviews with families and civil society organisations supporting people with intellectual/developmental disabilities raised a number of issues regarding the pre-trial process which merit additional attention if this or other legislation is to afford people with intellectual/developmental disabilities access to justice. These include the quality of supports available in making statements; the availability and quality of accommodations during court proceedings particularly with regards to taking the stand; assessments of competency; and definitions of disability.

In regard to definitions of disability we note in particular that one of the families of a victim with a disability withdrew from the criminal justice process, consequent to being informed that the victim did not in fact qualify as a person with a disability for the purposes of the court proceedings. The victim has a diagnosed developmental disorder and is in receipt of disability allowance. Specialist garda interviewers informed the family that the victim’s particular diagnosis is not regarded as a disability for the purposes of the court. The family characterises the victim as having the emotional age of a seven year old and recounted characteristics which speak to many of the “significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behaviour, which covers a range of everyday social and practical skills” which characterise intellectual disability. Nonetheless, the family were informed that if their child, having reached adulthood by the time the case went to trial, recanted his statement in court he would face legal consequences:

“... when he’d gone out of the room they said, ‘Well of course if he changes his statement he’d be considered a hostile witness. ... [I asked] ‘What does that mean?’ and they said, ‘Well he could be done for contempt of court.’”

Jim Winters of Inclusion Ireland explains that “The [1992] Act ... does not provide a definition of mental condition or mental handicap.” As such, the interpretation of the Act in relation to people with developmental disorders needs to be clarified.

43 Claire Edwards, Gill Harold and Shane Kilcommins Access to Justice for People with Disabilities as Victims of Crime in Ireland (National Disability Authority 2012) highlight that even were the victim recognised as a person with a disability for the purposes of the courts, the fact that pre-trial video recorded evidence can be presented in court does not preclude the victim from being forced to take the stand: “the complainant may still have to suffer the trauma of undergoing cross-examination in court”.

44 Shane Kilcommins, Claire Edwards and Tina O’Sullivan An International Review of Legal Provisions for Support of People with Disabilities as Victims of Crime (ICCL 2014) recommend “A more accommodating test of competency to testify ... which is designed to facilitate access to justice. The threshold test should be one requiring a witness to be capable of imparting relevant information to a fact finder ...In making a determination about competency, a judge should seek the assistance of an expert on the relevant impairment of the witness. He or she should be reluctant to exclude the evidence of such a witness on the grounds of incompetence without the assistance of such an expert ...”


46 Email communication, July 2015.
Prosecuting hate crime: selecting charges

Many of the members of An Garda Síochána to whom we spoke voiced a personal commitment to addressing hate crime. As such, they were very knowledgeable regarding the charges which are most appropriate to prosecuting hate crimes in a jurisdiction which lacks substantive offences in that regard.

None of the garda interviewees regarded the 1989 Act as adequate to addressing hate crime. Only one regarded it as having any utility.

“Sure you can see from the amount of prosecutions taken, is it successful? No it’s not. Has it been of benefit? Not really like you know? It takes a lot to get a charge out of it … It isn’t strong enough in relation to individual issues and problems, and you know, we’re just leaning back on other acts that were there that don’t probably encompass the actual ingredients of the crime that was done.”

One of the interviewees refers to the Act as ‘obscure’ because of its lack of utility:

“Prohibition of Incitement to Hatred Act. 10,000 gards. Maybe, maybe 10 percent of them would know it exists … and certainly those ten percent would be like me. Most operational officers it’s not something you deal with on a daily basis. … Have you ever seen the Garda Síochána guide? … It runs to two volumes. That size. Out of date. And in it there’s about 6 pages of the Prohibition of Incitement to Hatred Act. Right? It’s on the syllabus for promotion from garda sergeant to inspector. The exams are being done at the moment. There won’t be a question on it. You can be sure of it. … Cos it’s obscure. Nor should there be because it’s not something that you are going to deal with on a daily basis. … From time to time you would dig it out and say ‘Is it is appropriate in this particular case?’ and it’s not …”

Two garda interviewees had attempted to prosecute a case using the 1989 Act. In both cases the DPP directed that the offender be charged with a different offence. The attempts to bring a charge under this Act speak favourably however of garda interviewees’ recognition of the need to address a hate element, and their willingness to utilise less familiar legislation where they feel it might serve this end.

In the absence of effective substantive offences addressing hate crime, the base offences which members of An Garda Síochána use to address crimes involving a bias motivation are:

- Assault
- Harassment
- Criminal Damage
- Section 6 of the Public Order Act
• Section 4 of the Public Order Act
• Breach of the Peace
• Threats to Life

Interviewees have sometimes brought a public order charge in addition to another standard offence with a specific view to ensuring that language which speaks to a hate element is entered into evidence. The manner in which the gardaí seek to find creative ways to ensure the hate element is included in a case was commented on favourably by a solicitor interviewee:

“... We don’t have adequate laws in place to prosecute people for x, y and z ... So in fairness to the police they do try and think quite creatively around offences that might capture the incident that has occurred.”

The question arises as to whether all members of An Garda Síochána routinely display such initiative in developing workarounds which permit them to evidence a hate motivation to a judge. This question is particularly pertinent given garda interviewees assertions that for a hate element to be considered as an aggravating factor it must be evidenced as part of the facts of the case. The importance of this issue is further underlined by the minority of legal professional interviewees who raised concerns regarding what they perceive as a decline in the standard of garda investigations.

A number of interviewees, personally committed to using standard offences as best they can to address hate crimes, hold that their colleagues across An Garda Síochána also fully investigate and gather evidence of any hate element in standard offences.

“Interviewer: And to what extent would they investigate the motive? Interviewee: Massively.”

“[The language used] contextualises it ... because ... if you’re dealing with assault you have to establish the fact that the individual intended – it’s the intent. So all of this is about ...trying to indicate or establish the intent ... It’s being able to establish the mens rea. What were the factors that motivated him towards that intent.”

Contradicting an assertion made to the Garda Inspectorate that all cases are fully investigated, the majority of garda interviewees participating in this research were however sceptical that motivation is fully investigated where it is not required as a proof of the core charge.

“Interviewer: Where the box has been ticked, what happens then? Interviewee: Nothing. Interviewer: Is it investigated differently?
Interviewee: No.

Interviewer: It does not mean that the hate element was investigated?
Interviewee: No ... Very very rarely. I’d imagine very very rarely ever.”

“In one incident there was an assault with a racist element but it was treated as ... an assault. In relation to that ... and in relation to a lot of incidents we deal with, there is a deficiency there. For us as gards ... if somebody says something to somebody and then hits them we’ll deal with what we deem to be the most serious part of it which is the assault. And probably looking at it from an overview, what does that person who is the victim – what do they feel was the most serious part of that? Is it what was said to them or was it the actual physical assault?”

“What you find is from the moment the victim made a statement ... whether it's being racially motivated or supporting them kind of goes in the background because you have a mountain of work after that.”

The Garda Inspectorate has recommended proportionality in respect to the resources allocated to the investigation of minor offences.47 In the absence of hate crime legislation many of the charges which will be brought to address hate crimes fall into that category. Garda interviewees’ statements indicate that there is the potential for such a development to further constrain the gathering of evidence in relation to the hate element of crimes unless substantive offences are created.

Raising the hate element: court proceedings
Given the fact that the official position of the State is that a hate motivation is always considered an aggravating factor at sentencing, it is important to assess how a hate motivation is brought up during the course of a trial, particularly in the context of district court proceedings and in the context of guilty pleas. If the State’s assertion that judges reflect a hate motivation through an aggravated sentence is correct, then judges must necessarily be made aware of the hate element during the course of a hearing, a trial or a guilty plea. Our findings show, however, that the hate aspect of an offence will often be ‘disappeared’ from proceedings, meaning that the court will never be made aware of the bias element to the crime. This ‘disappearing’ element occurs in three ways: first, where it is pleaded out; second, where it is deemed inadmissible; and finally, where the hate element is ‘coded’ during the course of the trial. It is important to note at this point that in the vast majority of cases which are dealt with in the District Court, a member of An Garda Síochána will prosecute the case on behalf of the State.

**Pleading out the hate element**

According to the majority of interviewees, where an individual has been charged with an offence which included a bias element, the defence would suggest to the prosecution that the individual plead guilty as long as the bias motivation was not presented in evidence:

“... you see if you enter a plea bargain with the gards, there might be I suppose - certain finesse might be put on how the facts are presented. ... So the end result will be what the gardai were looking for – a conviction, slap on the wrist for bad behaviour. But the manner in which we’ll get to that point may have excluded the ... commentary and the racial commentary ... The judge [will] only deal with the facts as they are presented. So you might come to an arrangement with the State that ‘Look. Tone down what might come across as being racist comments. We can ... not over-emphasise some aggravating points in the whole prosecution ... as part of a plea bargain .. not plea bargaining but an agreement’... What happens before you go into the court room is the manner in which the presentation of evidence is done and that’s part and parcel of the way the system works.” (Solicitor)

“But in terms of what does go on here, discussions do go on between prosecution and defence as to what evidence will be offered, how much emphasis will be placed on different elements and I think my experience would be that where certain things are said and it’s most often this verbal commentary that would suggest a motivation borne up of prejudice or hatred that any defence lawyer would look very hard to get that excluded from the testimony the court hears prior to determining sentence. And certainly my experience is most police officers will leave it out if you ask them.” (Barrister)

In England and Wales, the Crown Prosecution Service has a particular policy in relation to guilty pleas for race and religiously aggravated hate crime. The policy states:

“Where there is evidence available to prove the racial or religious element in the case, we will make sure that this evidence is placed before the court, either during the trial or when the court is considering sentence.”

The CPS policy holds that a guilty plea will not be accepted in the context of the basic offence alone unless there are "proper reasons for doing so", such as where the evidence needed to prove the aggravated element of the offence is no longer available or where the court refuses to allow the evidence to be given. The policy explicitly states that in considering whether a plea of guilty will be accepted, the victim or their family will be consulted.

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Admissibility of the hate element
Interviewees further discussed the question of whether the hate element would be introduced in a trial or hearing and whether it would be challenged where it was introduced. A number of practitioners suggested that prosecutors would be typically wary of introducing such evidence as its introduction would be challenged by the defence:

“I can see the defence jumping up straight away and saying this is more prejudicial than probative and that doesn't form the necessary proof of this offence.” [Barrister]

Garda interviewees’ perception of an imbalance in power between prosecuting gardaí and defence solicitors is particularly significant given this assertion. Some garda interviewees were particularly alert to the potential for such challenges:

“…the solicitor would object that it has no relevance or bearing on the charge before the court and that like. So it would be – it may be somewhat hard to get that evidence before the court.”

“… the defence solicitor could turn around and say well he’s pleading guilty to assault and we only want the details of the injuries and the actual how many punches were thrown and stuff like that. ... they might say there's no proof of [the hate element], it's our client's word against your client – there is CCTV of him punching him in the face, we can’t deny that, but what’s been said is you know…”

There was no consistency on the question of admissibility, however, with almost an equal number of practitioners being of the view that a hate element would routinely be introduced, providing as it does the context to the offence:

I don’t see how that’s inadmissible. I would be leading it if I was prosecuting it. And even though I might try and exclude it if I was defending cos obviously it doesn’t make my client look very good, I cannot think of a legal basis on which you could validly exclude it. Because it is … I mean it is like saying you can’t tell the judge my client told the victim you know to fucking shut up and put her fucking head down or we’ll kick her in the teeth. ... And of course it’s relevant cos the court needs to know the circumstances in which the offence occurred to decide how serious it was. And that’s just one of the factors. [Barrister]

That said, where the hate element of the offence is raised, two practitioners advised that they would not challenge it in proceedings, as to do so would paint their client in a negative light before the court:
“Now, here’s the news ok – if you’ve pleaded guilty you do not want to be entering into an argument with the prosecution in front of the sentencing judge over the mode of commission of the offence ... If you’re pleading guilty your policy almost always must be play ball, do what you can to get the ... the most benign description feasible but if you come to a conflict where you can’t agree the next step is a Newton Hearing in front of the sentencing judge and that you do not want. Because you’re upsetting everybody. You’re requiring witnesses. You’re losing the benefit of the plea. You’re losing the benefit of the spirit of cooperation. All remorse is ignored.” (Barrister)

A second interviewee elaborated on why a Newton hearing would not be in the interests of the defendant:

“... it’s a bit of a pity when you’re defending to have to look for a Newton hearing because the reality then is that the sentencing judge ... will then [hear] the prejudicial evidence in an effort to find out whether or not the prosecution’s case can be proved beyond reasonable doubt and that would involve calling, usually in the situation we’re considering, an injured party that you don’t want to call. Because you want to lessen the trauma for them and you want to get the best mitigation you can for your client and if you have to bring in the injured party anyway at least you’re not suggesting he’s lying about it or she’s lying about the robbery but you are suggesting that he or she is lying about a particular thing or mistaken about a particular thing. And while it can be done sensitively it’s still not pleasant for them and you really would prefer not to have to do that so I’d say it’s very unusual for those reasons. You tend to just advise your client ‘Look, suck it up’...” (Barrister)

This view of the sentencing process is important. In England and Wales, in R v Newton49 the court held that where a factual question has not been determined during the course of a trial, a hearing may be held to resolve the question. In the context of guilty pleas, the case of R v Underwood offers further instruction.50 This strictly formalised process is discussed by the Crown Prosecution Service in the context of hate crime, where the hate element must be determined to the satisfaction of the court.51 One practitioner who had practiced in England and Wales as well as in Ireland observed the very different approaches taken to the sentencing process in both jurisdictions noting that, in England, Newton Hearings were “a big part of criminal law practice there. They are practically unheard of here.” This fact is important in determining the manner in which hate crime legislation will be drafted. If aggravated sentencing is the sole manner in which the bias

49 [1993] 14 Cr App R (S) 226
50 [2005] 1 Cr App R (S) 90. See further, Crown Prosecution Service Newton Hearings.
element is addressed in statute, it is likely that the hate element simply will not appear before the court in the context of a guilty plea.

“Coding” the hate element

One barrister suggested that while the hate element of a crime would not be overtly mentioned or introduced in any formal way, it would be apparent to a “competent judge” who would “pick up” what was going on in the context of crimes which are committed with a hate element:

Interviewee: So the unspoken. Often what’s put forward I think in that context is this was a gratuitous assault.
Interviewer: And that’s code/
Interviewee: /Code – quite correct. Cos code this often – the older judges would say of course that the best way often of making in point in court is not to say it. In a kind of roundabout way.

This ‘coding’ of the hate element was described by a number of practitioners.

One garda interviewee similarly suggested that a hate element might be summarised as abusive language:

“... you might just say he used abusive language. [And then the racist element] can easily get lost in that situation.”

Another barrister spoke about how, while the bias element may not overtly be present in a case, the jury may nonetheless become aware of the hate element during the course of the trial:

“I suspect the jury were aware of it though because of the fact that it was in the case through the way certain witnesses gave evidence and cross examination revealed certain aspects of the case which probably weren’t obvious but juries are ... a clever, collective unit, individually bright I’m sure but collective, a unit of twelve ... sees around corners.” (Barrister)

Thus, it is not clear that even where there is a hate element to a crime, that it will be introduced by counsel, or if it will be excluded by the court. We asked a prosecutor what they would do if in the context of prosecuting a case it were clear from corroborated witness evidence that there was a hate element to a particular offence which was not identified by the Office of the Director of Public Prosecutions and they replied, “Currently probably nothing.”

Garda as prosecutor

In considering the role of An Garda Síochána in the prosecution of hate crimes it is worth noting that The Garda Inspectorate Report Crime Investigation observes:
“The Inspectorate found a wide variation in who actually presents cases in court and the abilities of those performing this role. The Inspectorate observed several members in courts and while most were very proficient, some lacked the skills to perform this role.”\textsuperscript{52}

While in the Dublin Metropolitan Region and some other districts specific gardaí are assigned the full time role of court presenter this practice does not extend nationwide. A number of interviewees held that members of An Garda Síochána are at a disadvantage with respect to defence solicitors. Two garda interviewees highlighted what they perceive as shortfalls in the prosecutorial training available to members:

“... it can be quite intimidating. Especially ... younger gards ... it can be quite intimidating, and what you’ll find is that the judge will just [snaps fingers] instantly side with them. Because they’re a legal professional. And I have challenged solicitors before on certain things ... just on minor things... what they’re saying is ... factually wrong ... But what I find is we’re not trained ... in certain things in law ... Then you go into court and you know a solicitor then ... someone who speaks better than you, and uses bigger words than you, can be very intimidating. And then when they’re talking about case law that you mightn’t ever have heard of and ... objecting to what you’re saying and ‘This is prejudicial to my client’s case’. It’s easier just to shut up and say nothing ... We all said it, all of us that trained there [in Templemore], that we weren’t ready for court going out.”

It is worth noting also that in England and Wales prosecutors have available to them developed policy and guidance on the prosecution of five categories of hate crimes.\textsuperscript{53} In the Netherlands and in Barcelona specialist units have been developed dedicated to the prosecution of hate crime.\textsuperscript{54}

**Sentencing the hate element of a crime**

As we have observed, the response of the Irish government to the question as to whether hate crimes are treated more seriously by the criminal justice system is to state clearly and unequivocally that judges will typically exercise their discretion and will always aggravate a sentence where a hate motivation is evident. We have already shown that, in a number of scenarios, the hate element will simply not be presented to the court. However, during the course of our interviews, we also explored the question as to how the hate element is addressed at sentencing where it is raised either through a guilty plea or following a hearing.

\textsuperscript{52} Garda Inspectorate Crime Investigation Report (2014) at page 32.
\textsuperscript{54} ODHIR Prosecuting Hate Crimes: A Practical Guide (OSCE 2014).
In a recent judgment from the Court of Appeal, Birmingham J observed that in sentencing the appellant for a section 3 assault, the sentencing court had imposed the maximum sentence of five years imprisonment, noting that the racist element to the attack was an aggravating factor.\textsuperscript{55} This racist element was present at the beginning of the series of events which took place: “at this stage there was a reference to ‘eff off’... ‘eff off Packi bastards’.”\textsuperscript{56} In assessing whether the sentence imposed was appropriate, Birmingham J discussed the aggravating factors:

“Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact.”\textsuperscript{57}

This statement is important, indicating as it does that the Court considered a racist element to be one which appropriately aggravates the sentence. The question is then, whether courts routinely treat a bias element as aggravating a sentence.

In our survey, responses to the question of how an established hate motivation or a demonstration of hatred, is treated at sentencing, were varied.\textsuperscript{58} Of 36 barristers, ten barristers held that a hate element would always be treated as an aggravating factor, although one noted that it might not be made explicit:

“While it may not have been made explicit by a judge in passing sentence, based on the actual sentence it was clearly factored in”. (Barrister)

Six barristers held that the hate element would sometimes be treated as an aggravating factor. While one of these respondents noted the difficulty in clarifying motivations, another held that a hate motivation could in some cases be treated as a mitigating factor:

“The court would assess whether the hatred was somehow provoked/invited by the injured party.” (Barrister)

\textsuperscript{55} Director of Public Prosecutions v Elders [2014] IECA 6.
\textsuperscript{56} Ibid para 2.
\textsuperscript{57} Ibid para 11.
\textsuperscript{58} The exact question was: “In cases in which you have acted as a barrister where a hate motivation, or a demonstration of hatred, was established, how has the court treated this at sentencing?” Respondents were asked to select one of the following responses - Always treated as an aggravating factor; Sometimes treated as an aggravating factor; Never treated as an aggravating factor; Unsure as to whether it was treated as an aggravating factor.
It is notable that the 8 respondents who categorised themselves as unsure whether hate would be treated as an aggravating factor at sentencing included the two most experienced barristers responding to this particular query. A further barrister who classified themselves as ‘unsure’ noted that no reasons are given for decisions taken at district court level.

Our interviews with criminal justice practitioners reflected the survey findings. It is clear that some judges treat the hate element of a crime very seriously and will consistently and appropriately aggravate the sentence when it is present.

“Well it’s straight away an aggravating factor. There is … like what I’d say about this bringing in hate crime legislation and things like that it’s obviously an aggravating factor and it’s already treated by the courts as an aggravating factor.”

(Barrister)

One judge in particular described by a member of An Garda Síochána as “probably one of the most fairest judges I’ve ever seen” when confronted with racist, homophobic or sexist language which was used during the course of the offence “… all of a sudden he’d turn like that and he’d become very scathing of the offender … he would take it quite personal if anything sexist or homophobic or racist was said”.

A minority of interviewees held that a bias motivation will not typically be seen as an aggravating factor at sentencing:

“Interviewer: Do you think that hate is currently treated as an aggravating factor? Interviewee: No. It is not. It certainly is not.”

(Solicitor)

One individual spoke specifically about the summary nature of proceedings in the District Court, and that it was difficult to determine how the judge came to their decision as to the appropriate sentence to be imposed:

“Very very rarely would it feature … In the District Court the judges just don’t go into aggravating and mitigating factors to the same extent because, while there is a DAR recording system in the District Court, there isn’t a transcript system. They are not under the same scrutiny. They are just not. So often times in the District Court you will find that judges just barely listen to a plea in mitigation in the first place when you’re defending and in the second place they just render sentence very summarily…”

(Barrister)

A significant number of interviewees perceived the hate element to be treated as an aggravating factor but said that it was not always stated clearly by the judge to be such. Thus, in the same way that the hate element can be ‘coded’, the aggravating element of the penalty can also be coded:
“That it maybe be that even as an aggravating factor it will be unspoken and you know, that will be a feature.” (Barrister)

One interviewee suggested a reason for this – that the judge may fear their decision being appealed by the defence:

“They might not ever say it. If they do take it into consideration, if they were to openly say that there were taking it into consideration, it could be a reason for the defence to object and appeal a sentence so they’re not going to say it so you don’t 100% know.” (Solicitor)

Two practitioners spoke of cases they were involved in where the hate element had not been explicitly raised, but where they nonetheless perceived the court as having taken it into account as an aggravating factor in sentencing.

“And whilst having said that there are clearly judges who have looked at crimes before and … almost in a very strange way have sort of said well look there’s more to it than you just hitting that person clearly because that person was Black. And almost of their own volition acknowledged a type of … hate element to the crimes before them.” (Barrister)

Two practitioners also spoke of one particularly infamous case where the hate element was treated as a mitigating factor.

“I remember years and years ago … there was a gay man killed in Fairview Park. And I thought the sentencing there was ridiculously lenient. And it was frighteningly lenient d’you know. It sticks in my head to this day and that was an awful long time ago. So that’s the only one… that actually was the other way round.” (Solicitor)

Pre-sanction reports
Another means by which a Judge may be made aware of the hate element of a crime, is via a report from the probation services. Vivian Guerin, Director of the Probation Service noted that only in “a tiny percentage” of cases will the sentencing judge request that the Probation Service conduct a pre-sanction report:

“You know so some judges would look for a lot of reports from us. Others would look for a little or none. Some would look for none.”

Given that fact that the Probation Officers’ own awareness of the possibility of a hate element will often come from the Book of Evidence, the précis or summary of the case prepared by the garda, or information provided by the offender, and given that the hate
element will not always be visible in this documentation, the Probation Service may not be aware of it:

“And I think there are probably a lot of cases that we deal with that have had direct or indirect – if they are the right words – hate crime element that we wouldn’t be aware of. And we deal with them the same as we deal with everybody in that category of … offence.” (Vivian Guerin, Director of the Probation Service)

Where a Probation Officer is certain that a hate element is present, the Director believed they would mention it, but with no greater emphasis than any other aggravating factor:

“... So equally as we’d say you know he committed this series of robberies to feed a drug habit or because ... he has a propensity to violence when .... somebody presses this button or that button. We would say it but it wouldn’t feature beyond that I think. It would feature in terms of our description of our understanding. Of the offence. But outside of that to be honest ...”

In a similar observation to those made by members of An Garda Síochána, he noted that the absence of legislative policy influences how the Probation Service operates in the context of hate crime:

“If there is legislation and policies and so on that are in your face, that say this is how this problem is to be defined, you know you’ll go down a certain track. Where[as] we don’t have that in relation to hate crime. You’re dealing with what otherwise is hate crime under other headings so. And, as I said earlier on, whether something is really a hate crime in terms of its motivation ... may not emerge. At the end of the day, the bottom line is we are dealing with somebody who has committed an offence or offences ... And we try and deal with those issues in a generalised “homogenous” kind of way. Now that may or may not be very satisfactory for the ones that fit within a hate crime scenario.

Thus, he believes, the naming of an offence is key in terms of how the Probation Service will engage with an offender:

“I think domestic violence is among our case load in a much more significant way that we just don’t pick up because somebody is referred to us for assault or whatever. And it just doesn’t emerge... we’re not necessarily aware of it or we’re suspicious of it. But it hasn’t been named. So therefore when we are dealing with that person for an assault that’s really in a domestic violence context. We are dealing with him in the same way as somebody else who punched a fella in the street. By and large. So and I think we are in a similar situation and probably worse if you like in relation to hate crime.”
While the Probation Service has a guideline document on completing pre-sanction reports, there is no section on hate crime.

**Case outcomes**

Of the victims and family members we interviewed, and of the 15 incidents relating to these 12 victims of which An Garda Síochána were made aware, not one case resulted in court proceedings.

- Of the five cases in which a victim statement was taken by An Garda Síochána:
  - Two were not detected and victims report that An Garda Síochána linked the failure to detect to CCTV cameras having been disabled or turned away.
  - In two cases it is unclear whether the crime was investigated as the victim received no follow up from An Garda Síochána following provision of their statement.

  “... I remember we rang them the last time I went down and we rang again and then we rang from the house phone and there was just nothing. Nothing. ... We asked for his contact number. They wouldn’t give it to us, it was confidential. They’d have to wait until he comes in. They weren’t sure when he was on and then we asked for the records and they said we didn’t have them that he’d have them. The buck was always passed. So it was very difficult to get anything progressed you know.”

  - One case involving a minor resulted in a diversionary restorative justice panel rather than court proceedings. The victim participated in this decision and was keen to engage with the educative potential of restorative justice, although she does feel that it was the option favoured by An Garda Síochána.

  “Now it was my choice but they were pushing it so—I did think it was the right choice but they were heavily suggesting that restorative justice was the way to go”

- In a total of seven other cases of which members of An Garda Síochána were made aware, no victim statement was made. In six cases the statement was not sought from the victim. In one case the victim chose not to make a statement as they perceived that the case would not be detected. It is likely that these cases were not investigated.

- Five further cases can be classified as not having been investigated as they were not successfully reported. In three of these five cases the victim chose not to alert An Garda Síochána to the crime. One report was rejected as it was perceived as a
matter for the civil law, and one victim aborted her attempt to report based on the prejudice she encountered at her local garda station.

- In one case the family of the victim, a minor with an intellectual/developmental disability, reluctantly dropped the case in response to a belief communicated by members of An Garda Síochána that the victim would receive no accommodations in court, would be made to take the stand and might be subject to legal repercussions if he recanted.

The failure to formally penalise offenders for these crimes may not always mean that they escape consequences. Interviewees have in some cases heard of offenders being victimised by persons (unknown to the victims or interviewees) who have decided to take the law into their own hands.

"...one family had actually to move out of [town] because of what had happened."

"...from what I heard they're in hiding."

For these alleged offenders, there was no opportunity to refute allegations made against them.

An Garda Síochána also participate in informal solutions to hate crime. A number of garda interviewees spoke of resolving crimes informally, and in one case, the interviewee clarified that no official record had been made in relation to the alleged offence. In our interviews, in one instance a victim reports that a member of the service, having identified the alleged offender, but being unable to pursue the case stated that he spoke harshly with him. In a second case, an offender was rehoused away from their victim. Whether these informal and individualised responses, which may well reduce a single person’s risk of repeat victimisation by a single offender have any impact on that victim’s wider vulnerability within a society which lacks adequate formal responses to hate crime is questionable. Indeed, deserving of further consideration is the question as to whether informal responses impact the chances of the offender victimising another member of the community against whom they hold biases. Certainly, in both of these cases the victim would have preferred to pursue the offender through the criminal justice system.

“I’m not happy with the outcome. But the way in which it was dealt with gave me no choice ... I just felt I had no choice ...”

**Prejudice within the criminal justice system**

In England and Wales, reorganisation of the approach of the criminal justice system to hate crime was prompted by a recognition of the existence of prejudice within the
system and an acknowledgement that this had, and could, impact upon both victims’ and offenders’ access to justice, something with which the jurisdiction still struggles.60

The issue of bias within the Irish criminal justice system was raised by a number of survey respondents and interviewees. Some highlighted the manner in which actors in the criminal justice system are subject to the same cultural prejudices as the general population:

“I think we’re all racist ... when you don’t have that understanding, you’re just racist. The homophobic stuff – it’s just whatever they picked up [on the] pitch ... I don’t think they necessarily understand it or mean it ....” (Member of An Garda Síochána)

“I mean I have no hesitation saying judges are human like the rest of us. They have all sorts of baggage and prejudices ...” (Barrister)

Indeed, if the victimisation of particular groups on the basis of their difference is understood as reflecting cultural and societal prejudices,61 then it is perhaps disingenuous to expect that these same biases will not in any shape or form impact upon or manifest in the operation of the criminal justice system.

One interviewee suggests that the very nature of criminal justice work can make it difficult, and all the more necessary, to challenge cultural stereotypes:

“... the way we interact with people – we see people at their worst ...” (Member of An Garda Síochána)

Some interviewees asserted that criminal justice professionals are blind to difference, uninterested in the identity of the victim.

“... in general ... a victim is a victim. That’s about it. And it’s more – well, again, I’m going for a personal point of view - when a victim reports a crime, the things going through my head, it’s not what religion are they, what sexual orientation are they ... [It’s] What do I need to do?... The thousand and one other things I need to answer. Race, all that, that doesn’t come into it. Obviously it would be incorporated into the investigation but it’s not something you’d generally think of as such ... There’s no open racism. I’ve never seen anyone openly act racist.” (Member of An Garda Síochána)

60 Ibid 125-6.
61 Barbara Perry In the Name of Hate: Understanding Hate Crime (Routledge 2001).
“… we see so much mad shit every day, someone being gay is actually irrelevant, we don’t actually generally care.” (Member of An Garda Síochána)

Others, however, disagreed, holding that there are instances in which practice is coloured by prejudice. Of the 12 victims or family members to whom we spoke, the 2 individuals who chose not to contact An Garda Síochána (one in relation to two separate bias-motivated crimes) both cited previous negative encounters with individual members or units which had tainted their trust in the Service.

“… when that happens in your family, as an institution you know every gard’s not bad but you know until something changes within the institution that you could be a victim of that yourself.”

One solicitor spoke to the impact that even a single prejudiced comment on the part of a member of the judiciary may have on an entire communities’ trust in the system:

“Put yourself in their shoes like. … Let’s say if you were a victim of hate crime and you go to the gards and the DPP says prosecute. But then you hear this remark made, you read it’s a hate crime and you see, ‘Judge, I’m a Roma person’ and judge says ‘Roma people are x, y and z’. You say ‘Hang on a minute I can’t go ahead with that’. Because it’s hard enough…” (Solicitor)

A representative of the Irish Traveller Movement reflected these concerns:

“… judges have been able to make anti-Traveller comments and have no sanctions against them. How much freedom they have themselves and the autonomy they have themselves to interpret the law and to apply the law and to bring their own bias into their sentences and to bring their own opinions and whatever they carry themselves into how they treat the people before them. Unfortunately the judiciary have left us down…” (Brigid Quilligan, Irish Traveller Movement)

Other civil society organisations raised concerns that operational roles can frame some communities’ relationship with An Garda Síochána as punitive rather than protective;62

“I think that there would be trust issues in terms of seeing the gards as the enforcement to Immigration.” (Brian Collins, Irish Refugee Council)

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62 It is worth noting that among those who chose to contact An Garda Síochána are victims who have had previous negative experiences with individual members of the service. It cannot be assumed that a negative history with the service will cause a victim to withdraw from engagement with the criminal justice system. Equally, some individuals continue to report to An Garda Síochána despite an expectation that the criminal justice system is not adequate to their need for protection.
Garda interviewees commonly spoke of the time they expend in trying to overcome such barriers to migrants seeking the protection of the criminal justice system.

We assert that even the possibility, or perception, of individual or institutional prejudice is an argument in favour of placing the treatment of bias-motivation and the demonstration of bias on a formal legislative footing:

“Again that’s why legislation is needed because you will have people making up their own minds on things and having their own biases coming into it. You know. And unfortunately, there’s human frailty everywhere. There’s human frailty in judges as well…” (Solicitor)

Do we need to legislate
Finally, we spoke with our interviewees as to the need for hate crime legislation in Ireland. The vast majority of solicitors and barristers we spoke to were in favour of introducing legislation which would allow the hate element to be addressed in court. Of the two who were opposed to its introduction, one spoke to their conviction that the hate element can already be addressed by the current system and one spoke to the complexity they felt it would create in the system:

“The more complex the legislation, the longer the statement of charge and the more boring law the judge has to tell the jury. When you’re prosecuting you don’t want much law involved…. The more things you throw in the more things I have to worry about. I want everything to be simple.” (Barrister)

However, two other practitioners were of the view that complexity should not be a reason to avoid legislating:

“… just because there may be difficulties in it doesn’t mean it shouldn’t be done … You know, I think as long as the principle is established then we can work out the difficulties or we can put appropriate safeguards in place.” (Barrister)

One practitioner who was of the opinion that the hate element could be addressed under the current legislative regime was nonetheless of the view that introducing hate crime legislation would be of benefit in this regard:

“I struggle to think of a case in which I would be greatly assisted by having any alteration of the law. But on the other hand, I would also see that perhaps if you’re looking at it from the victim’s point of view or groups of victims … it might be greater solace if there was some sort of legal mechanism about which it could be more readily complained.” (Barrister)
Of those practitioners in favour of introducing legislation, a significant number spoke to the needs of the victim:

“... I don’t know how big a deal hate crime is. I don’t know how big a deal intolerance is. I don’t know if there’s a need for it but I do perceive in certain situations there would be a benefit to having it. ... I would think that when one is engaged in that sort of behaviour against people of various protected classes there is a societal need to ensure that it’s punished more than if one’s merely engaged in that. Because of its effects.” (Barrister)

“I mean all of those low lying but persistent and nasty type of incidents which may in themselves seem fairly ... and even among people who are the victims they sort of wipe it off just you know .... that shouldn’t be acceptable, do you know what I mean? But you know there is almost as you say a sad acceptance on their part that this is just part of life ... We need our laws to say no – this is not part of life and this should not be part of your life.” (Solicitor)

That said, a number of solicitors and barristers were firmly of the view that the hate element to an offence is not being addressed appropriately under the current legislative regime.

“... I think there’s probably an argument that no offence really covers the racist element ... being able to actually isolate a racial motivation or a prejudice against sexual orientation or gender or anything else becomes quite problematic and if it’s problematic or complicated then policy makers within law enforcement are probably not going to go to all the trouble of trying to explain the nuances to policemen who are often doing a difficult job, they might have to make decisions on the spur of the moment. So it drops away in terms of importance and emphasis...” (Solicitor)

Members of An Garda Síochána interviewed for the purpose of this research were overwhelmingly in favour of the introduction of new legislation to address hate crime. Members clearly perceived a need for a legislative solution.

“I’m sure every gard you’ll meet and everybody will say, you know, we need something more. We need something maybe a lot more tighter [than the 1989 Act] in relation to getting prosecutions.”

“I don’t think the legislation is strong enough – I don’t think it’s there to cover it even.”
The educative role of hate crime legislation

Aside from the traditional role of the criminal law in relation to penal sanctions, hate crime legislation is accepted internationally as having a particularly educative role. Essentially, the message is being sent to society that it is unacceptable for people to criminally target individuals based on their personal identity, a message which is supported by penal sanctions. Interviewees discussed this educative role of the criminal law in the context of hate crime legislation. Two interviewees rejected the notion that the law has an educative function in this regard:

“You’re trying to alter behaviour. Criminal law doesn’t alter behaviour.” (Barrister)

However, three interviewees referred to “drink driving” laws as ones which changed the manner in which society views a particular social ill, referring to the fact that the system as a whole treated this behaviour seriously:

“It's the same with drink driving. I mean I’m using a very different ... and I’m not trying to be casual about it. It's the same with drink driving for example ... It is socially unacceptable for younger people. They just don’t do it to the same degree. Of course we have still have young drivers but it’s just seen ... it's a generational thing as well. It's socially unacceptable. ... But I do think that increased penalties and the fact that there was no discretion on judges about you know all those kind of things ...” (Solicitor)

“I've thought this for a long time and I remember when I first read about [the educative role of the criminal law] it was in the 1990s and I was reading about the huge campaign against drink driving which in my lifetime has changed completely. It used to be a badge of honour in the 1980s and now people are appalled at the very idea. ... But yeah, it can be helped along, nurtured along by the law I think.” (Barrister)

“And if it's taken seriously, it can really change attitudes. Like, if you just look at drink driving for instance. I mean certainly in my generation I don’t know anybody that drink drives ... very few ... It is because there are harsh penalties imposed and because it’s prosecuted.” (Barrister)

The majority recognised the value of legislation in this context as a means of shaping behaviours.

“I clearly believe the law has an educative role in society and in terms of addressing issues like racism you know ultimately the law is not going to make everybody like travellers but it certainly will control whether or not you can spread shit on their caravans. And that to me is important.” (Barrister)
“We determine that some things are harmful to society and we legislate against them and if they hit the point where we determine that they are sufficiently harmful the legislation should be criminal legislation. No difficulty with that.” (Barrister)

“Well just culturally if it becomes accepted that this is a problem or at least maybe that it’s not a problem but that it is something we actively discourage that as a community we want to discourage. Yeah I don’t... I can’t argue with that. I can understand that benefit of having a specific named as you say named offence yeah.” (Barrister)

Two interviewees also spoke of the educative role hate crime legislation could have within the criminal justice profession.

“There is one way of looking at this that suggests that none of it is necessary because it can be accommodated by the system. But I also, that’s why I’m giving you that awful lawyer’s answer of on the one hand. But on the whole I wouldn’t be opposed to this idea because of the educative value ... when something is spelled out as being wrong and spelled out as being an aggravating factor it’s probably more helpful in educating people than just to assume that the lawyers and the judges are going to apply it in a certain way. When in fact they may not.” (Barrister)

A number of people to whom we spoke noted that while the law has an educative role in this regard, it must be operative, and utilised appropriately.

**Conclusion: hate crime in the shadows**

While the position of the Irish state is to consistently argue that hate crime is currently being adequately addressed by the criminal justice system, we hold that this is not the case. Hate crime lives in the shadows of Irish criminal justice and is systematically disappeared from the criminal justice process. It is important to note that no single organisation or policy is at fault in this process. It is a system-wide failure to recognise the harms of hate: this systematic blindness results in a ‘disappearing’ of the hate element of crimes in the criminal justice process and a failure to provide victims with appropriate protection under the law. This occurs for a number of reasons:

- Although individual members of An Garda Síochána work to compensate for the legislative vacuum as regards hate crime, they are hampered in their efforts by a lack of dedicated tools, structures and supports;
- The term ‘hate crime’ is not part of the language of An Garda Síochána;
- Few members of An Garda Síochána have any training in hate crime, its recording, investigation or prosecution;
- Members of An Garda Síochána have little direction on the treatment of racist incidents, and no access to policy or directives relating to homophobic, transphobic or disablist hate crime among other manifestations;
- The hate element of a crime is not consistently acknowledged or recorded by An Garda Síochána (and in some cases, cannot be formally flagged);
- Consequently, and given that it is not core to many of the standard charges which are currently used to address victims’ experiences, the hate element of a crime is not consistently investigated by An Garda Síochána;
- While individual members of An Garda Síochána make great efforts to use existing offences to draw attention to the hate element of a crime, none of the gardaí we interviewed regarded existing offences as adequate to that task;
- Where the hate element of a crime is investigated, it is not always raised in court;
- In some cases, prosecutors feel precluded from raising the hate element of a crime in court;
- The solicitors and barristers we spoke to, consequently, had limited experience in either prosecuting or defending a hate crime;
- Where the hate element is raised in court, it is not always addressed.

A simple way of illustrating the current problems manifesting in the system is that, while the vast majority of the victims to whom we spoke reported their experience to An Garda Síochána, only one crime was dealt with through the criminal justice system (and in that case, through a diversionary restorative justice panel). The solicitors and barristers we spoke to, consequently had extremely limited awareness of, and experience in, either prosecuting or defending a hate crime: the hate element is infrequently raised in Irish courts. Legislation is required to bring hate crime out of the shadows of Irish criminal law.
Legislative proposals: a brief explanation

The term ‘hate crime’ is utilised in the name of the Bill, having as it does a currency in the general population. The name of the Bill will be the *Criminal Law (Hate Crime) Amendment Bill 2015*.

**What is the ‘hate’ in a hate crime?**

While criminal justice actors, policy makers and academics alike use the term ‘hate crime’, the phrase ‘hate’ is rarely used in isolation in legislation. In England and Wales and in Northern Ireland legislation uses the term ‘hostility’. The Canadian Criminal Code uses the phrase “bias, prejudice or hate” in section 718.2.

Burney and Rose are of the opinion that when interpreting the term "hostility", a jury

“… would probably accept that, while clearly a less strong word than ‘hatred’, ‘hostility' must imply a degree of animosity, rather than mere prejudice.”

Writing in 2014, however, the Law Commission observes:

“The ordinary dictionary definition of 'hostile' includes being ‘unfriendly’, ‘adverse' or ‘antagonistic'. It may also include spite, contempt or dislike.”

There is no definition of the term ‘hostility’ in the Crime and Disorder Act 1998 and that there is no standard legal definition of the term.

In its 2014 Consultation Paper, the Law Commission of England and Wales considers the use of the term ‘hostility’ in its legislation, noting that the broader term ‘bias’ could be more useful in the context of such legislation, being, “a potentially broader signifier for an attitude towards a group or a particular victim, which could encompass deliberate selection by an offender due not only to hatred or hostility, but also to the victim’s perceived vulnerability or inability to resist or defend against the crime.”

Thus, the question arises as to how ‘hate’ should be framed in the legislation. In our Report *A Life Free From Fear* we suggested the use of the terms “hostility, prejudice, bias or hatred”. When discussing the options for legislative reform with criminal justice practitioners, we asked them their views on which terminology might be most appropriate. We also explored the question as to whether a capitalisation on the perceived vulnerability of a victim could, or indeed should, be encompassed within any such legislative definition.

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64 Law Commission *Hate Crime: Should the Current Offences be Extended?* (Cm 8865 2014).

65 Law Commission *Hate crime: the case for extended the existing offences* (CP 213 2013).

In the context of the terminology used to describe the ‘hate’ element of the crime, there was little consistency from criminal justice professionals as to what form would be most appropriate. Most interviewees, however, advised that utilising the term ‘hate’ would be inappropriate as being too strong a term, or one which is not commonly understood in criminal law. One considered that the use of the term could be counterproductive in the sense that it could deter rehabilitation:

“I think hate is too strong. I really do. You just cringe when you see it cos you’re saying that’s going to cause a bigger divide. We’re actually trying to get people ... [to] realise the error of their ways. Whereas by putting down hate there you know it’s like there’s no come back from that. There will be hatred for ever more kind of stuff. ... I think I’d keep it a bit lower down than that ... You know, try and make people see the errors of their ways so then maybe you can get on to - this is obviously an area where you really be looking to get restorative justice in.”
(Solicitor)

Aside however from a general view that the term hate is inappropriate, solicitors and barristers were not in agreement as to what phraseology would be appropriate:

“I don’t think hostility gets it across at all. I think that’s way too woolly.”
(Barrister)

“I think would hostility not be easier to potentially prove than bias, hatred or prejudice... I think hostility ... you don’t need to get into the person’s brain.”
(Solicitor)

Drawing on the experience in North America, and the definition utilised by the OSCE, the expert group were in full agreement that the term bias was most appropriate.

A further concern in relation to this issue is one highlighted by the Law Commission in England and Wales in the context of hate crimes committed against those groups who are perceived to be vulnerable:

“[A] problem that can arise ... is the difficulty of distinguishing between offending motivated by hostility towards disability, on the one hand, and crimes which target a disabled person because their disability is perceived as making them less able to resist, and thus more vulnerable to a particular type of crime, on the other.”67

Our interviewees also spoke to this issue:

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“It seemed to me that he had just assumed that because of all of her disabilities there was no way she’d be able to speak against him and if she did she wouldn’t be believed.” (Barrister)

“It’s not so much they hate the disabled as they recognise their inability to talk or perhaps be believed. Particularly if it’s an intellectual disability. There’s a clear incentive there. If you were going to rape someone wouldn’t you pick the person who is less likely to be able to describe it coherently.” (Barrister)

Given the absence of agreement between criminal justice practitioners, in order to ensure that hate crime in all its forms is addressed in the legislation, we have utilised the term ‘bias’ as a generic term to indicate the ‘hate’ element of the aggravated offence. This term draws on international best practice and is, we believe, most appropriate in this context. We further suggest that the term ‘bias’ then be defined in the legislation as including ‘hate, hostility, bias, prejudice and contempt.’

Who are the victims
In designing and developing hate crime legislation, a key determination needs to be made as to the identity groups named. England and Wales establish five protected ‘strands’ – race, religion, disability, sexual orientation and transgender status. These identity groups are however afforded different levels of protection under the law, an issue which is discussed in more detail in this Report. The aggravated offences established in the Crime and Disorder Act 1998 apply only to “racial groups” and “religious groups”. Thus, aggravated offences (and extended penalties) only apply to these two strands. The remaining three identity groups are protected by means of provisions for the application of aggravated sentences. In Northern Ireland, the operation of the legislation is limited to enhancing penalties and applies, under section 2(3), where an individual is targeted because of their membership (or presumed membership) of a racial group, a religious group, a “sexual orientation group” or because of their disability (or presumed disability). Section 2(5) of the Order provides that membership in this context includes association with members of that group.

The Canadian Criminal Code is markedly different in its approach to protecting victim groups. Under section 718.2(a)(i), the operation of the aggravating provisions apply to an individual who targets their victim because of their “race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor.” The ability of section 718.2(a)(i) of the Code to extend the reach of the legislation to ‘other similar factors’ while noting a range of protected groups means that it is very broad in its reach. According to Lawrence et al (2009) the ‘other similar factors’ recorded by the police have also included extremist political perspectives, or membership of a particular identifiable profession. In one particular incident a member of the judiciary was assaulted in a family court. In sentencing the
offender, the judge utilised section 718.2(a)(i) to enhance the sentence, treating it as a hate motivated offence (Lawrence et al 2009). The inclusion of an ‘other similar factor’ as evidenced in the Canadian context has the effect of avoiding the hierarchical valuing of particular identity groups currently in operation in England, Wales and Northern Ireland. Thus protection is afforded not just to those identified in legislation, in effect future-proofing the legislation and providing the criminal justice system with the ability to be dynamic and react to societal changes.

Interviewees were clear that, due to the constitutional requirement for precision, it is not possible to include the Canadian ‘proviso’ in Irish legislation, despite its clear advantages. Irish equality legislation, whilst providing a useful set of protected characteristics, is narrow in its scope. Given the obligations of the State under the Victims’ Directive, for the purpose of the legislation, the protected grounds are drawn from the Victims’ Directive. This strategy provides for a list of protected grounds which is more extensive than the 9 grounds employed in Irish equality legislation, is more closely aligned with commonly targeted groups than the 9 grounds, is current, is endorsed by the European Union and is drawn from a Directive which specifically references the rights of victims of hate crime.

Thus, the protected grounds listed in the proposed legislation includes:

“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, gender, gender expression, gender identity, sexual orientation, residence status and health.”

We problematis the term ‘race’ and advocate that the national transposition of the Victim’s Directive should consider excluding the term in favour of racialized identities or omit it entirely. Should this occur, we will reflect these changes in this legislation. We make two additions to the Victim’s Directive list; we are required to specifically name the Roma and Traveller communities given the persistent refusal of the Irish State to recognise the Traveller community as an ethnic group. In the manner of the European Commission, the term Roma is understood as inclusive of Roma, Sinti, Kale, Gypsies, Romanichels, Boyash, Ashkali, Yenish, Dom and Lom, and a definition to this effect is included in the interpretation section of the legislation. We further recommend the explicit inclusion of ‘sex characteristics’ as a category so as to include individuals who are intersex. Though there may be arguments made that people who are intersex are protected by the category ‘genetic factors’, if a group or characteristic is left unnamed or where it is unclear if they are protected in legislation, this will lead to further marginalisation and disadvantage for that group.
Recognising the aggravation: new offences or enhanced sentencing?

Key to developing the legislative proposals was the initial determination as to the form that the aggravating element should take: should we adopt the approach in England and Wales, and introduce aggravated versions of offences already known to the criminal law; or like the Canadian and Northern Ireland approach, introduce a provision which states that a bias element should be treated as an aggravating factor in sentencing.

In our interviews with members of An Garda Síochána, interviewees clearly favoured introducing aggravated versions of existing offences. Similarly, the majority of those solicitors and barristers interviewed were in favour of introducing aggravated offences. Both groups of interviewees gave a variety of reasons as to why aggravated offences should be introduced.

First, both sets of interviewees spoke to the availability of objective indicators of recorded hate crime and of the capacity to recognise hate crime convictions as part of an individual's criminal record:

“... if there is repeat offending that should be recorded in some form or fashion ... and the only way you could record that is previous conviction, and what is the conviction for, if it's just section 6 public order act, or if it's section 6A public order act [the proposed aggravated offence]. Obviously the 6A would be a lot stronger and better. There is no doubt there has to be an element brought in there ... in the law.” (Member of An Garda Síochána)

“... when it comes to previous convictions ... they reoffend again and ... the previous convictions, there's going to be nothing there. Technically a judge asks us for previous convictions, a lot of the time even any relevant previous convictions, so a guy's, you know, convicted with assault and he could have a ... string of previous convictions for stealing cars and they don't want to know it. All you're giving them is the section of law that they're convicted of and their penalty and when it happened.” (Member of An Garda Síochána)

“I think that if you are convicted of a hate motivated crime then that should stick on your record.” (Solicitor)

Second, the availability of a clear set of proofs to evidence a hate crime was argued as a reason:

“... the police man or woman will understand the idea of gathering evidence to prove something. That's what we do. And there's an element of that in how we do our business. You know, we'll gather that evidence. We even like the idea of gathering that evidence. Culturally, it's acceptable to us ...” (Member of An Garda Síochána)
“I think the element of introducing legislation that sets out a type of criteria that they’d have to follow. ... If the hate crime legislation was set out clearly – the ingredients of the actual crime I think garda would have to. I mean that’s what they are trained to do.” (Barrister)

Members of An Garda Síochána spoke to the need for such offences to offset the potential for solicitors to challenge the introduction of evidence of a bias motivation as prejudicial. Some barristers also spoke to the fact that where aggravated offences are introduced, it allows the defendant to challenge the aggravated element:

“...You want it to be regarded as serious. You want judges to have an opportunity and you want to encourage in certain circumstances bigger prison sentences. Well, as far as I’m concerned if you’re gonna do that give the right to the accused person to argue the thing out in front of a jury if it’s a serious matter. Or in front of the sentencing judge ...”(Barrister)

Solicitors and barristers also noted that the absence of legislation means the hate element of a crime is being ignored by the criminal justice system, and by introducing legislation, it will ensure that the hate element is addressed:

“Is there room for it on amongst the other statutory provisions for criminal law yes there is. I think there is yeah. There is hate crime out there. It's probably just not prosecuted. Or it's not being presented as hate crime.” (Solicitor)

By introducing legislation, as this interviewee observes, the system cannot ignore the hate element:

“I could see that gardaí don’t really entertain the full extent to which maybe language might be threatening or abusive. You know. And if hate crime was there, “well judge it was this falls within hate crime” .. the definition of hate crime ... you can’t really say that in court now because there is no definition of hate crime. For that to be there yeah – that would be great.” (Solicitor)

One barrister who familiarised himself with the legislative position in England and Wales prior to our interview, which provides for both aggravated offences and aggravated sentencing, was of the opinion that this was “quite a sensible approach”.

A minority of criminal justice practitioners argued against the introduction of aggravated offences. The reasons against introducing such offences were twofold: first, that they would be difficult to prosecute; and second, that the hate element would be pleaded out:
“I just wonder ... really coming on to what you're asking about is I feel that this may be hate motivation as part of the substantive offence. You'll have this technical requirement to prove that. And will prosecutors even do that ... Will they just still go to the more straightforward – section 3 assault, section 2 assault, production of a weapon, making threats – rather than if there is to be a specific hate crime?” (Barrister)

“And you may therefore find there is a practical base if you charge somebody with assault with hate ... is that people may simply fight the case on that basis. Because they don’t wish ... to have such a malign conviction.” (Barrister)

A solicitor interviewed reflected on this latter issue, and argued that it is not a problem which is particular to hate crime:

“I think what you are going to find is you’re going to have... as result of that you’re going to have more contested cases. I think that’s an inevitable consequence. Or you’ll have a plea bargain. You'll plead guilty to that section 2 assault but you won’t plead guilty to the aggravating part of it. ... But we have that already. And there are people out there who are committing hate crimes who cannot be prosecuted because we do not have the architecture in place. ....” (Solicitor)

One garda interviewee, while advocating for the introduction of substantive offences, also warned that there is potential for high rates of offenders pleading out of the aggravated offence in favour of the base offence. The interviewee recommended that this possibility could be offset by the DPP and through the appointment of specialist prosecutors.

“... you’ll find that we’ll be charging people with section 3A and their solicitor and their counsel will be negotiating like – drop that and we’ll plead to a section 3 and that's what's going to happen. So all that's going to do, and I suppose it'll save money and it'll save time in court which is what the State want to hear 100% is that by charging them with that it’s going to force them to plead guilty earlier or to a different offence and it saves court time. Is there an alternative? The way the current system works they are the two options open to you that I can think of. If you bring in the legislation ... other sides have to reform for that to work. Part of it dedicated prosecutors. Has to be. And I know it’ll be controversial – you know, you have to make it worth their while ... And they’re briefed that if someone is charged with a hate crime, it’s not to be bargained down. With judges, how do you reform judges? [laughs] ... Mandatory doesn’t work in Ireland because it’s taking power from judges and they don’t like that”
A minority of barristers and solicitors were in favour of introducing aggravated sentencing provisions as opposed to aggravated offences. The primary reason given for this was that it would be more simple and more practical to deal with the bias element:

“Would it not be simpler to raise awareness of this as an aggravating factor as opposed to changing every law in relation to every offence?” (Barrister)

Two members of An Garda Síochána also advocated for sentence enhancement over substantive offences. Both members reasoned that aggravated sentencing would require less strenuous proofs than a substantive offence:

“I feel it would be a lot easier for us to get that message across or to give that ... it doesn’t have to be the main factor ... we don’t have to prove probably motive as such – that we can just say it was a factor in the attack that we’re satisfied that it was a factor in the attack.”

“What type of ... fine measurement tools can you apply separate from the person’s feelings – because they are quite subjective – that would give you the tools to say actually this is clearly a hate motivated... If you’re going to record that, that that actually refers to a hate crime and you do a review and there’s nothing that actually indicates, ... concrete other than someone’s sort of perception it makes it quite difficult to reinforce it. It might be fine from a policing perspective but it becomes more difficult from a prosecutorial perspective.”

Some of those legal professionals who were in favour of introducing aggravated offences spoke to an inability on the part of the law to fetter judicial discretion in the context of sentencing:

“... I suppose I can see some difficulty at the aggravated sentencing element in the sense that like judges are quite independent and they quite value the particular discretion around sentencing so whilst there’s a merit ... you’re running into difficulties of the judge’s discretion in discretionary powers and what they feel they can do and can’t do.” (Barrister)

“... if a sentencing court is obliged to consider aggravating and mitigating factors just by saying they have to consider that as an aggravating factor where does it get you? What’s the purpose of that? What’s the result of that?” (Barrister)

Some interviewees were of the view that introducing aggravated sentencing provisions would have no practical effect:
“If you’re bringing in that judges have to take it into consideration that won’t work. I would say 110% it won’t work … If you bring it in that he has to take it into account, the judge will say, no problem I’m taking it into account, he’s getting three years. What would he have got if he didn’t take it into account, you know? … There’s no … check and balance to it. You’ve no way of knowing if they actually have. They might say that they have … and that could be a box ticking exercise for them. … They hate when their sentences are appealed. So they ... know by giving a lesser sentence there’s less chance of the DPP appealing it than there is the defence appealing it. ... If they do take it into consideration, if they were to openly say that there were taking it into consideration, it could be a reason for the defence to object and appeal a sentence so they’re not going to say it so you don’t 100% know.” (Member of An Garda Síochána)

“… how do you actually get judges to treat seriously the obligation to treat it as an aggravating factor which is actually going to impact on sentence. I mean … I think it is fair to say that unless you have some formulation that creates an obligation, an actual obligation that you can’t avoid then many judges are going to avoid actually giving a higher sentence.” (Barrister)

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

Offence types
Having determined that aggravated offences should be introduced, the next consideration was to establish which offences should be aggravated. We used as our starting point those offences which are aggravated in England and Wales, which one solicitor observed were “the four I would have come across the most.” However, this solicitor went on to argue:
“Maybe when we have an opportunity at legislating for hate crime maybe it could be more extensive... With an opportunity to legislate – maybe look for more ...”

(Solicitor)

Rather than restrict the legislation to those offences which are aggravated in England and Wales, the offences we propose to create have been selected because they represent the most common manifestations of hate crime across all identity categories or they represent manifestations of hate crime which are especially prevalent among particular commonly targeted groups. These assessments are based upon police-recorded hate crime data in other jurisdictions, hate crime data recorded by civil society organisations in Ireland and the experiences of victims and family members to whom we have spoken directly in the course of this research.

Interviewees disagreed on the question of whether aggravated versions of sexual offences should be introduced.

One barrister suggested that even where the maximum sentence is life imprisonment for the base offence, that does not preclude an aggravated version of the offence being created:

“I would say on a policy basis if you’re looking at it from the policy basis I think having it as an aggravated offence there’s something to be said for that irrespective of the sentence or the maximum. I don’t think I’d take the approach that there’s no point in aggravating it because the maximum attaches in any event.” (Barrister)

In the context of murder, while there is a fixed penalty of life imprisonment for this offence, we have included a bias aggravated version of it in the Bill. As one barrister we spoke to highlighted, while there are no degrees of murder in this jurisdiction:

“I do believe there's a distinction, every crime has a distinct feature and if one actually commits a murder even though there's no degrees of murder in this jurisdiction, that you commit a murder and it's just a momentary row and you lose the plot and you kill someone. ... and maybe then it's slightly different if someone does it for, kind of, racial or ethnic motivation, you know so but the way it is it’s not a necessary item for the court to consider because I mean if you murder the outcome sentence is the same.” (Barrister)

This interviewee observed that the aggravated element may well be a factor that is considered by a parole board when considering the release date of the offender.

**Bias motivation or demonstration of bias**

While in Canada, the legislation requires that a hate motivation is established in order to enhance a sentence under section 718.2(a)(i), in England and Wales and in Northern
Ireland, the legislation provides that where the offence was either motivated by hatred or hostility, or where hatred or hostility were demonstrated during the course of the offence, the aggravated element is established.

In interviews, we discussed the motivation/demonstration distinction, and explored which approach might be more favourable in an Irish context. Practitioners were initially unsure as to the distinction, being unfamiliar with the terminology as applied in a UK context:

“I’m not comfortable with this expression demonstrated because I don’t really know what it means.” (Barrister)

“... if there is a hate motivated crime and then there is demonstration of hostility—I would have thought that the demonstration of hostility is the proof of the hate motivation because you are getting intent ... So I think the actual—the assumption that you could find the definition of hate motivation crime or whatever it is that is satisfactory, that would almost be a subset, or one of the subsets of a demonstration of hostility but without the demonstration of hostility, you couldn’t really find it to be a hate motivated crime. It seems to me that they are two ways of looking at the one thing.” (Barrister)

One practitioner observed that motivation is generally useful in the context of a jury trial but otherwise not considered by practitioners:

“Well the one thing is motive by and large is almost entirely a cultural construct and lawyers rarely think about motive. Not because it’s irrelevant but usually because it’s so mixed in with it. So for instance, as you know the legal position is it’s not necessary to prove a motive. It is helpful if you do. What a prosecutor is worried about it is – if you have a crime for which there is not motive a jury may look less favourably on it in the case of the accused.” (Barrister)

In addressing the question as to which formulation should be used in the legislation, some practitioners considered a hate motivation to be very difficult to prove to the standard required in a criminal trial:

“I think motivation is always going to be difficult to prove beyond reasonable doubt depending on your evidence. In the hypothetical example of a shaven headed white person who’s wearing an SS uniform and has swastika tattooed on every visible piece of skin being prosecuted for badly assaulting a Black man while screaming racial abuse at the man – motivation would probably be quite easy to prove. But rarely do you get cases that are that obvious.” (Solicitor)

Though the difficulty of the threshold was suggested to be appropriate by this barrister:
“I think it’s harder to show motivation ... in comparison just say somebody said x whilst doing y. There might be many reasons for somebody saying x inadvertent or otherwise I don’t know but to actually prove motivation I think it’s harder so if I’m looking at it with my defence hat on or with my constitutional hat on I think I’d prefer that.” (Barrister)

Garda interviewees were less concerned about the requirement to prove motivation, particularly if it could be inferred from the content of speech or text.

“Interviewee: You just look for the presence of bias indicators with the offence, sometimes it’s subjective, sometimes it’s black and white. 
Interviewer: Subjective indicator?
Interviewee: You call someone a queer before you punch them in the face. 
Interviewer: Black and white?
Interviewee: “Queers out” written on someone’s front door.”

“... you’re investigating the incident anyway and what ... arises in it would be dealt with in the statement I would hope anyway. It shouldn’t be that much harder. ... when you’re proferring charges there might be an additional charge to be professed and that’s probably the only extra work that would be involved. I don’t see it as being a huge insurmountable part of it.”

There was general agreement that a crime motivated by bias was qualitatively different, and more serious, than a crime committed during which bias was demonstrated:

“And any lawyer defending I think would be able to make quite a compelling argument that a person who commits a crime of opportunity versus a person who plans it some way in advance is lower on the scale of offending and therefore should face a lighter penalty and I think the same rationale would have to apply to someone who exhibits unacceptable abusive behaviour towards a person based on race or sexual orientation or gender or religious beliefs in the spur of the moment or the heat of the moment rather than someone who goes out with a petrol bomb or a baseball bat or you know a paint can with the intention of inflicting damage or injury because the person is Black or Asian or gay or Sikh or Muslim or whateve, I think there’s two very different classes of offender within those categories.” (Solicitor)

A significant number of practitioners argued that the demonstration model is too low a threshold for an aggravated offence:

“I have to say I can see the argument for motivation being an aggravating circumstance. I must say I’m just not convinced about the other one.” (Barrister)
One barrister suggested:

“I mean you could have an Irish solution and just make it aggravated circumstances and then everyone would ... then we’d all sort of have a happy mushy deal...” (Barrister)

Bias aggravated offences

Drawing on our interviews, and our analysis of legislation from other jurisdictions, we propose to create a series of bias aggravated offences. Those offences which are bias motivated will require that the prosecution prove that the offender was motivated by bias when they targeted their victim. Merely demonstrating bias is not sufficient for the purposes of the majority of the offences. This requirement makes it more difficult for an offender to be convicted of a bias motivated offence than in England and Wales for example, where an the demonstration of hate or hostility toward the victim will elevate an ordinary crime to a racist or religiously aggravated hate crime. However, the majority of legal professionals and members of An Garda Síochána to whom we spoke felt that they could prove motivation if this can be inferred from the circumstances of the crime, e.g. what was said, before during and afterwards, as in other jurisdictions. The prosecution would not have to prove that the offender was wholly motivated by bias, only that they were at least partially motivated by bias. This is particularly relevant where an offender's biases regarding a victim's identity leads them to target that person on the presumption that they are an ‘easy target’, for example.

Some of the offences we propose to create permit the prosecuting authority to choose whether to establish that the offender was wholly or partially motivated by bias or whether to seek to prove only that they demonstrated bias in the course of the offence. In most instances, it is likely that prosecutors will opt to prove demonstration only as this is less complicated than proving motivation. We have provided the option of proving demonstration only where speech or text (e.g. graffiti), the means by which bias is most commonly demonstrated, is usually the core of the offence.

At this point in the process of developing the legislation, we propose that the penalties associated with these dedicated offences will be the same as those associated with equivalent standard offences.

Offences Against the Person

- Bias motivated murder
- Bias aggravated assault
- Bias aggravated assault causing harm
- Bias aggravated assault causing serious harm
- Bias aggravated harassment
Property Offences
- Bias aggravated theft
- Bias aggravated making gain or causing loss by deception
- Bias motivated damaging property
- Damaging property with a demonstration of bias
- Bias motivated threat to damage property
- Threat to damage property involving a demonstration of bias

Sexual Offences
- Bias aggravated rape
- Bias aggravated sexual assault
- Aggravated sexual assault aggravated by bias
- Bias aggravated ‘rape under section 4’

Public Order Offences
- Bias motivated disorderly conduct in a public place
- Disorderly conduct in a public place with a demonstration of bias
- Bias motivated threatening abusive or insulting behaviour in a public place
- Threatening abusive or insulting behaviour in a public place with a demonstration of bias
- Bias motivated violent disorder
- Violent disorder with a demonstration of bias
- Bias motivated affray
- Affray with a demonstration of bias
- Bias motivated blackmail, extortion and demanding money with menaces
- Blackmail, extortion and demanding money with menaces with a demonstration of bias

Aggravated sentencing
Using enhanced sentencing provisions, we propose to encourage judges to reflect upon the hate element of a standard crime at the point of sentencing. It is not feasible within the Irish criminal justice system to require judges to treat a hate element as an aggravating factor, but this provision will encourage them to at least give consideration as to whether the presence of a hate element might merit such a response. At present it is entirely at the discretion of the judge as to whether they give it attention or not.

Enhanced sentencing does not offer any of the advantages of dedicated offences listed above. However, this provision provides a safety net for victims who experience hate crimes for which we have not created dedicated offences. The offender can be charged with a standard offence which will not recognise the hate element of the crime. During the course of the prosecution, where the hate element of the crime is established (and the creation of dedicated offences should create a culture in which this becomes
normalised over time), the judge will be required to consider whether to treat the hate element as an aggravating factor where the offender is convicted of the standard offence.

It is unlikely that we will be able to track either the application of enhanced sentences or offenders whose sentences are enhanced in this fashion, but this provision does provide an opportunity for judges to recognise the harms of hate in cases where no dedicated hate crime offence is applicable.