Defining Victim Groups in Hate Crime Legislation: Certain and Precise?

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Outline

• Context
• Core considerations in determining protected groups
• Legislating by analogy
• Provisos and core considerations
• The principle of certainty
  – Provisos
  – Sentencing
  – Core characteristics
• Proposed Irish legislation
Context

• England and Wales
• Canada
• New Zealand
• Australia
• Sweden
• Ireland
Core considerations in determining protected groups

Principles
• Marginalisation or “social fissures”
• Historical persecution
• Immutability of characteristics
• Evidenced hostility

Concerns
• Jurisdictional (social, cultural and historical) context
• Avoid entrenching marginalisation and further victimisation

An exclusionary means to an inclusive end?
Legislating by analogy

• Incitement to Hatred Legislation
  – Similar criminal context
  – Established
  – Old

• Equality Legislation
  – Different context
  – Established
  – Old
• Comparative analysis
  – Same criminal context
  – Established
  – Jurisdictional differences (legal; social and cultural)
  – Old...

• Police recording categories
  – Flexible
  – New(ish)
  – Same criminal context?
  – Evidence based?
• European Convention on Human Rights
  – Sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status
  – Article 14 (non-discrimination)
• **Vicțims’ Directive**
  – “… 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, or health.”

  – ? Social origin
  – ? Genetic features
  – ? Birth

  – ? Social, cultural and historical context (eg Traveller community)
  – ? Sex characteristics/intersex

• **Irish policing practices (operationalising the Directive)**
  – Age, race, gender, anti-disability, anti-Muslim, antisemitic, sectarian, anti-Traveller, anti-Roma, homophobic, transphobic.
Provisos and core considerations

“... an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability...” (Section 9(1)(h) Sentencing Act 2002 – New Zealand)

“... such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability...” (Section 21A(2)(h) Crimes (Sentencing Procedure) Act 1999 – New South Wales)

“... race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor...” (Section 718.2(a)(i) Criminal Code – Canada)
New South Wales – “social group”

– Dunn v R [2007] NSWCCA 312: “I am satisfied beyond reasonable doubt … that a significant factor in the offender’s motivation to commit these offences was his feelings of antipathy towards his neighbour … who he believed without any justification at all, was a paedophile.” [Para 17]

Canada – “reasoning by analogy”

– R v JS [2003] BCPC 442: “It strikes me that this section contemplates hatred against ‘peeping toms’ and/or ‘voyeurs’ as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but it is a sexual lifestyle all the same.” [Para 50]

– R v Cran [2005] BCSC 171: “… there is … no basis on the evidence before the court to equate ‘peeping toms and voyeurs’ to gay people…”

Principles and core considerations?
The principle of certainty

• *Nulla crimen sine lege certa*

• *King v Attorney General* [1981] 1 IR 233
  – Vagrancy Act 1824: “every suspected person or reputed thief”
  – Henchy J: “… the ingredients of the offence and the mode by which its commission may be proved are so *arbitrary, so vague, so difficult to rebut* … so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, *so prone to make a man’s lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge* … so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond a reasonable doubt that he has deviated from a *clearly prescribed standard of conduct*…”
• *People (Director of Public Prosecutions) v Cagney [2008] 2 IR 111*
  
  – “From a legal and constitutional point of view, it is a fundamental value that a citizen should know, *or at least be able to find out*, with some considerable measure of certainty, what precisely is prohibited and what is lawful.”
• *Douglas v Director of Public Prosecutions* [2013] IEHC 343
  – Criminal Law Amendment Act 1935: “cause scandal or injure the morals of the community”
  – Unconstitutionally vague

• *McInerney v Director of Public Prosecutions* [2014] IEHC 181
  – Criminal Law Amendment Act 1935: “offends modesty”
  – Unconstitutionally vague
Certainty: Provisos and reasoning by analogy

• *R v Rimmington* [2006] 1 AC 459
  – “Article 7 precludes the punishment of acts not previously publishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence. The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence. But any development must be consistent with the essence of the offence and be reasonably foreseeable, and *the criminal law must not be extensively construed to the detriment of the accused, for instance by analogy.*”

• Such as? Other similar factors?
Certainty: Aggravated sentencing

• *People (Director of Public Prosecutions) v Geraghty* [2014] IECA 2
  	“The principle of legality is at the heart of the criminal justice system. This implies that a citizen is entitled to order his or her affairs based on a system of clear rules and penalties which prescribe criminal conduct and the penalties which apply thereto.”
Certainty: Core characteristics

• Race

• Religion

• Disability?
• Race

• *R v White* [2001] 1 WLR 1352:
  – “The word ['African'] bears different meanings in different contexts and in different countries. The statutory language is intended to be given a broad, non-technical, meaning. Moreover words are to be construed as generally used in the jurisdiction of England and Wales. In our judgment, the word ‘African’ does describe a ‘racial group’ defined by reference to race. In ordinary speech, the word ‘African’ denotes a limited group of people regarded as of common stock and regarded as one of the major divisions of humankind having in common distinct physical features. It denotes a person characteristic of the blacks of Africa, to adopt a part of the definition in the dictionary.”
  – Due to the ‘range of physical characteristics in the populations of [South America], and the absence of prominence of any one group, is such that the use of the expression ‘South American’ does not being to mind particular racial characteristics.’ [2001] 1 WLR 1352, 1358.
• Religion
  – Charities Acts?
  – Equality legislation?
  – Evidenced hostility?
  – Principles and core considerations?
Proposed Irish legislation

- Age, asylum or refugee status, citizenship, colour, country of origin, ethnicity, homeless status, gender, gender identity, gender expression, membership of the Traveller community, membership of the Roma community, nationality, race, religion or lack thereof, sexual orientation, or sex characteristics.

- “disability” is understood as inclusive any chronic illness, or any physical, psychological, mental, intellectual, developmental or sensory impairment.
Conclusion

• Extensive list for purposes of inclusivity

• Counter-productive?

• Prevent entrenching marginalisation