You Can’t Have One Without the Other One: “Gender” in Hate Crime Legislation

Jennifer Schweppe
Senior Lecturer, University of Limerick

Amanda Haynes
Senior Lecturer, University of Limerick

Canada; Comparative law; Gender; Hate crime; Ireland; Nottinghamshire; Offences; Protected characteristics; Transgender identity

This article argues the case for addressing misogynistic, as well as transphobic, crime, through legislation. We assert that gender as a protected category is presumptively inclusive of bias against trans and non-binary identities.

Introduction

The question as to whether gender should be included in hate crime legislation as a protected characteristic is one which is under consideration across the UK. It is currently being addressed in three separate law reform projects, in Scotland, in England and Wales, and Northern Ireland. It is noteworthy that across all three jurisdictions, transgender people have either been protected in legislation or included in police recording practices for a number of years. In Scotland, and in England and Wales, legislation names transgender identity as a protected ground. In Northern Ireland, hate crime legislation omits transgender people from the range of projected categories but police record “transphobic incidents”. A considerable amount of literature has been generated seeking to find a normative basis for the determination of the range of protected groups in hate crime legislation, and this article does not propose to rehearse these arguments, except to say that there is no agreement amongst scholars on the issue.\(^1\)

---

This article examines the question as to whether gender should be a protected category in hate crime legislation by seeking to understand what gender is, by elaborating its relationship to misogyny, and by placing it in the context of how legislation in both Scotland and England and Wales addresses transphobic hate crime. We argue that the construct of gender is inclusive of the full range of cis and trans gender identities, and the range of manifestations of transphobia and misogyny emanating from the system of power relations which gender signifies. However, we also argue that the current degree of imprecision in the interpretation and operationalisation of the terms gender, gender identity, and indeed sex, in case law and crime statistics, necessitates that we develop a legislative approach which is explicitly inclusive of the three terms.

In formulating our conclusions, we draw, in particular, on crime and victimisation data from Canada, as well as data from the Organisation for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights. We also analyse existing policing and legislative models in common law jurisdictions, in which gender has been included for a number of years, as well as an English pilot project which sought to address misogynistic hate crime in particular.

Defining sex and gender

Although legislators, policy makers and researchers have sometimes used the terms gender and sex interchangeably, we understand the terms to be related, but distinct. Sex is the label commonly used to refer to a biologically-based identity—male or female—which is assigned to an individual, usually at birth, based on the appearance and binary classification of their genitals and sometimes, where these are known, their chromosomal make-up. On the other hand, we understand gender as a concept which encapsulates the range of expectations, assumptions, constraints and privileges, which society confers on us based on whether we have been assigned male or female. Gender, far from being natural or neutral, “is a cultural and historical product, as opposed to essentialist definitions of the physical differences between the sexes” and “… a system of power and not just a set of stereotypes or observable differences between women and men”. Gender identity, then, is a person’s felt relationship to gender. Those whose gender identity does not align in a socially accepted way with their assigned sex can experience hostility, discrimination and violence.

---

2 "Cis is the Latin prefix for ‘on the same side.’ It compliments trans, the prefix for ‘across’ or ‘over.’ Cisgender’ replaces the terms ‘nontransgender’ or ‘bio man/bio woman’ to refer to individuals who have a match between the gender they were assigned at birth, their bodies, and their personal identity.” K. Schilt and L. Westbrook, “Doing Gender, Doing Heteronormativity: ‘Gender Normals’, Transgender People, and the Social Maintenance of Heterosexuality” [2009] Gender and Society 461.

3 Throughout this article we use the term trans inclusively, to refer not only to men and women with a trans identity or history, but also to non-binary identities.


“Gender identities develop within gendered societies, where the pressure to adopt the ‘correct’ and ‘corresponding’ gender according to presenting sex is strong.”

Non-conformity, therefore, represents a challenge to the gender order.

We acknowledge the complex relationship between gender and sex, and that binary sex categories are also socially constructed. Neither bodies nor identities can be accurately parsed into binary categories restricted to male and female, masculine and feminine. In both senses, people present on continuums which includes biologically intersex people, and people who identify as non-binary, genderfluid, and agender. Indeed, we have previously argued that misogyny and transphobia have common roots as expressions of hostility towards a person on the basis of their relationship to gender. Both represent hostility towards non-conformity to culturally embedded expectations regarding appropriate ways of being a man or a woman, and towards perceived challenges to the gender order, that is, institutionalised relations of power and privilege organised around gender.

The parallels between misogynistic crime and transphobic crime are clear—intimidation and violence enacted against the victim (a) manifests ideologically-justified unequal gendered power relations, and (b) punishes and seeks to prevent transgression of the existing gender order, from which (c) the offender also draws legitimation for their acts. Both misogynistic and transphobic hate crimes serve to police and defend the existing gender order.

Thus, when we discuss including “gender” as a protected ground in hate crime legislation, we are not only concerned with the inclusion of cisgender women and men, but also transgender and non-binary people, as well as the range of justifications on which offenders draw for targeting people of any gender identity who do not conform to hegemonic gender relations. Importantly, this approach may exclude intersex people where they are targeted specifically on the basis of biological difference, rather than perceived non-conformity to a binary gender order, and thus it is also worth observing that either sex or sex characteristics are terms which can accurately be used to be inclusive of such experiences.

Law reform processes in the UK

Both Scotland and England and Wales are currently considering whether sex and/or gender should be included in hate crime legislation, and this question is also

---

9 C. Delphy, “Rethinking sex and gender” (1993) 16(1) Women’s Studies International Forum
14 “Intersex is ... an umbrella term to denote a number of different variations in a person’s bodily characteristics that do not match strict medical definitions of male or female. These characteristics may be chromosomal, hormonal and/or anatomical and may be present to differing degrees.” EU Fundamental Rights Agency, “The Fundamental Rights Situation of Intersex People” (2015) 4 EUFRA.
expected to form the basis of discussions in the recently announced Northern Ireland review. The Law Commission of England and Wales will address this question in the coming months, and the terms of reference particularly include a question as to whether:

“… crimes motivated by, or demonstrating, hatred based on sex and gender characteristics, or hatred of older people or other potential protected characteristics should be hate crimes, with reference to underlying principle and the practical implications of changing the law.”

In Scotland, Lord Bracadale conducted an independent review into the need for reform of hate crime legislation in Scotland, which was preceded by a comparative report by Chalmers and Leverick. This process specifically asked whether gender hostility should be included as a protected ground in legislation. In Chalmers and Leverick’s report, they observe that sex is a protected characteristic in Canada, the District of Columbia, Iowa, Maine, Vermont and West Virginia. Gender is protected in Louisiana and Maryland, and in the draft South African Bill, both are mentioned. They suggested that it is relatively easy to make a case for the inclusion of sex (their term) in hate crime legislation: “it could be done, for example, on the basis that women [and the elderly] are groups who experience (unjustified) marginalisation in society”.

In his Report to the Scottish Parliament, Lord Bracadale stated at the outset that he used the term “gender” rather than “sex” because it was the term used by most organisations and consultation respondents. In considering whether gender should be included in legislation, he stated clearly:

“I am persuaded that there are patterns of offending which relate particularly to the victim’s gender and which should be addressed through legislation which might be seen as falling under the hate crime umbrella.”

Lord Bracadale was of the view that there was evidence that certain crimes (namely, online and offline abuse, assault, and harassment) are committed against women for a reason “related to their gender” and which could be dealt with by the law more effectively than currently. He was of the view that categorising such behaviour as hate crime would achieve the following results:

“1) It would make it more culturally acceptable to object to the behaviour—victims would have more confidence that it will be taken seriously by the criminal justice system (whether the police, prosecutors or the courts).

2) It would recognise the additional harm caused to the individuals involved and others who identify with them.
3) It would have a symbolic value—giving security to community and “send a message”.
4) It would allow for record keeping, the collection of data, and a targeted response to offenders."

As such, recent policy debates as to whether sex or gender should be included in legislation have been framed specifically in terms of whether cisgender identities, specifically cisgender women, should be included among the range of protected grounds. The question has been approached as one which addresses the means by which misogynistic hate crime might be recognised and sanctioned.

Prior to providing our assessment as to how cisgender and transgender identities can be best included in legislation, we first address two current models whereby cisgender identities have been considered in criminal justice processes: one which specifically names gender as a protected ground in legislation, and the other which records gender-related hate crime through policing.

Addressing misogynistic hate crime in practice: a legislative model

Introduced in 1995, s.718.2 of the Canadian Criminal Code provides that when sentencing, a court should consider a number of factors, and aggravate or mitigate the sentence accordingly. The first of these factors, provided for in s.718.2(a)(i), is relevant here: until 2017, it provided that

“evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor”

should be taken into account in sentencing. In 2017, the section was amended to include “gender identity or expression”. In Gray the Court of Appeal of Alberta stated that s.718.2(a)(i) was a reflection of Canadian values:

“The courts must be vigilant to preserve and sustain the freedoms enshrined in the Charter which reflect the moral compass of our Nation. Bias, prejudice or hate based on race, national or ethnic origin is anathema to the values that we cherish, cannot be tolerated and must be condemned.”

There is very little information available regarding how s.718.2(a)(i) is operating in practice, and Corb observes that this is particularly the case in the context of “judicial practice and legal process’ relating to hate crime in Canada.”

---

22 The criminalisation of hate speech is provided for in ss.318, 319 and 430 of the Canadian Criminal Code (the advocacy of genocide, public incitement of hatred, and attacks on religious property and institutions respectively), and are considered by A. Corb, “Hate and hate crime in Canada” in N. Hall et al (eds), The Routledge international handbook on hate crime (Routledge, 2015), pp.278–288.
et al observe that one of the reasons for this is that s.718.2(a)(i) is a “rarely used provision”.27

In terms of self-reported data on the prevalence of hate crime, the General Social Survey of Canada addresses the topic of victimisation every five years.28 In 2014, victims reported that the incident they experienced was motivated by hate in 5 per cent of all cases (or 330,913 incidents) reported to the GSS. Race was the most commonly cited motivation for incidents perceived to be motivated by hate, identified by 51 per cent of victims. Sex was identified as a motivation by 26 per cent of victims, with smaller proportions identifying age (19 per cent), and religion (11 per cent)29.

Data published by Statistics Canada on police-reported hate crime also disaggregate by category of motivation. Data for police reported hate crime for the years 2014–2017 are as follows30:

<table>
<thead>
<tr>
<th>Type of motivation</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race or ethnicity</td>
<td>611</td>
<td>641</td>
<td>666</td>
<td>878</td>
</tr>
<tr>
<td>Religion</td>
<td>429</td>
<td>469</td>
<td>460</td>
<td>842</td>
</tr>
<tr>
<td>Sexual orientation</td>
<td>155</td>
<td>141</td>
<td>176</td>
<td>204</td>
</tr>
<tr>
<td>Language</td>
<td>12</td>
<td>18</td>
<td>13</td>
<td>23</td>
</tr>
<tr>
<td>Disability</td>
<td>10</td>
<td>8</td>
<td>11</td>
<td>10</td>
</tr>
<tr>
<td>Sex</td>
<td>22</td>
<td>12</td>
<td>24</td>
<td>32</td>
</tr>
<tr>
<td>Age</td>
<td>6</td>
<td>4</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Other similar factor</td>
<td>27</td>
<td>44</td>
<td>35</td>
<td>48</td>
</tr>
<tr>
<td>Unknown motivation</td>
<td>23</td>
<td>25</td>
<td>19</td>
<td>32</td>
</tr>
<tr>
<td>Total</td>
<td>1,295</td>
<td>1,352</td>
<td>1,409</td>
<td>2,073</td>
</tr>
</tbody>
</table>

While the figures for crimes committed against an individual on the basis of their “sex” are relatively low in 2014–2017, Lawrence et al note that in 2009, there were only five police-recorded cases of hate crime on the basis of “sex”, which amounted to “far less than 1% of police-reported hate crimes”.31 It is worth noting that police-recorded data on hate crimes motivated by sex in Canada include transphobic crimes.32 In terms of numbers, Armstrong states that from 2010 to 2013,

“31 hate crimes targeting transgender or asexual people were reported by police participating in the Uniform Crime Reporting Survey (version 2.1). Of these crimes, nearly half (15 incidents) occurred in 2017 alone.”33

---

27 A. Lawrence with J. Shugarman and D. Grech, _Hate as an Aggravating Factor in Sentencing in Canada_ (Department of Justice, 2009), p.17.
There are a limited number of reported cases in which the prosecution sought to aggravate the sentence on the basis that the offence was motivated by bias, prejudice or hate based on the sex of the victim. In *Lebevfre*, the defendant was convicted of sexual assault causing bodily harm, uttering death threats, and assault. The defendant and his co-accused kicked and punched a woman described by the court as a prostitute, whom the two men had engaged for services. Following the assault, the co-accused urinated on the victim and made death threats. The sentence was aggravated due to the particularly cruel nature of the offences, and the fact that the crime appeared to be motivated by hatred of women was an aggravating factor in the case.

In *Stevovic* the offender was convicted of uttering a threat to cause death or bodily harm. He approached a woman, and propositioned her by stating that he had some flavoured condoms, and asking if she wanted to try one, and then saying “Nice tits, I’d like to fuck you.” The victim did not respond and told the offender she was going to call the police. When she stated she had the police on the phone, he replied, “You’d better not be calling the police, or you’re dead”, and then said to her “I’m going to kill you after I rape you.” The sentencing court stated that during the trial, the offender made “disturbing comments in relation to the victim”. In considering whether the crime was motivated by a “bias, prejudice or hate based on sex” the judge was of the view that it was for three key reasons: first, the lack of acceptance of responsibility; second, his continued verbal aggression in relation to the victim in court; and third, there was no reason or motivation to explain his conduct other than his very negative views of females.

In *Jean* the offender had picked up the victim, who was described by the court as a prostitute, and drove her to a remote area. The victim asked the offender to drive back to the city, which he refused, and as he drove, he began to forcibly remove the victim’s clothing, calling her a “dirty whore”, telling her that he hated such people, and making threats to kill her. While driving, he forced her to perform oral sex on him, and also digitally penetrated her anus and vagina. When he stopped the vehicle, he demanded the victim remove all her clothes and get out of the car, after which he also exited the vehicle. She thought he was going to kill her, and tried to escape in the car, an escape which he foiled by breaking the window and pulling the victim out of the window by her neck and hair. She then escaped. In sentencing the offender, counsel for the prosecution argued that the sentence should be aggravated because it was “motivated by bias or prejudice, or hatred of, women”. The court responded:

“I am unable to find or infer such motivation here beyond a reasonable doubt or even on a balance of probabilities. Despite the fact that his three victims have been women. Perhaps his offences were driven by the wish to dominate

---

34 *Lebevfre* [1998] JQ no.985.
35 The original decision is in the French language, and here we rely on a summary of the case provided by the Dominion Report Service *Lefebvre* DRS 98-19316.
36 *Stevovic* [2007] BCPC 0264.
37 *Stevovic* [2007] BCPC 0264 at [5].
38 *Stevovic* [2007] BCPC 0264 at [7].
40 *Stevovic* [2007] BCPC 0264 at [33]–[35].
41 *Jean* [2008] BCCA 465.
42 *Jean* [2008] BCCA 465 at [5].
43 *Jean* [2007] Carswell BC 3525.
his victims, but that does not seem to be contemplated by the hate crime legislation relied on by Crown Counsel, and specifically s. 718.2(a)(i) of the Criminal Code.\textsuperscript{44}

While the case was appealed to the British Columbia Court of Appeal, this issue was not addressed by that court.

Similarly, in Smith\textsuperscript{45} the defendant was convicted of making, possessing, and distributing obscene material. The material in question was described by the court as follows:

“The content of the written and visual materials focuses on simulations of sexualized violence against women. The purpose, as set out by Donald Smith on one of the sites, is ‘to show beautiful women getting killed.’ Mr. Smith uses film and special effects enhanced by computer editing to make the visual materials. In them, women in a state of nudity or semi-nudity, are shot, stabbed, stalked, executed by bow and arrow, or shown in combat with swords and knives. In order to make these materials, he recruited models through newspaper advertisements in Winnipeg.

The impugned films fuse sex and violence. In them, the male assailant is portrayed as being competent and a successful individual who can silence women with his violence, leave them on sexual display, and walk away without consequence. The women in these films are easily manipulated, and in some instances, shown as being complicit in the violence. Because they are portrayed as ‘bad women’ by being sexually loose; or attempting to use their sexuality to control men, violence against them is portrayed as being justified.\textsuperscript{46}

The prosecution argued in the case that s.718.2 should apply, as the offences were, they argued, “motivated by bias, prejudice or hate towards women”.\textsuperscript{47} The sentencing court simply stated that it “was not satisfied there is evidence on this point”.\textsuperscript{48} Again, this case was appealed by the defendant—both to the Ontario Court of Appeal\textsuperscript{49} and the Supreme Court of Canada\textsuperscript{50}—but the question of the application of s.718.2 was not addressed in either court.\textsuperscript{51}

While the Canadian legislation is to be commended for including a broad range of protected characteristics, a number of lessons can be learned from the Canadian experience. First, in the context of the case law, it could be suggested that there is no consistency in the manner in which the “sex” ground is understood in the context of the aggravated provisions. While that may be true, this criticism is not particular to this category of offences and should be seen in the context of the small volume of reported cases on the application of the provisions generally across all categories. What both these issues speak to, we believe, is the importance of shared policies

\textsuperscript{44}Jean [2007] Carswell BC 3525 at [20]–[21]. Jean had previously pleaded guilty to two counts of indecent assault, two counts of unlawful confinement, one count of rape, and one count of gross indecency. Jean [2007] Carswell BC 3525 at [6].

\textsuperscript{45}Smith [2002] OJ No.5018.

\textsuperscript{46}Smith [2002] OJ No.5018 at [4]–[7].

\textsuperscript{47}Smith [2002] OJ No.5018 at [24].

\textsuperscript{48}Smith [2002] OJ No.5018 at [24].

\textsuperscript{49}Smith [2012] OJ 5968.

\textsuperscript{50}Smith [2013] SCCA No.70.

\textsuperscript{51}The case of Lefebvre [1998] JQ No.985.
and training on the issue of hate crime across the criminal process, an issue we have highlighted in detail elsewhere.\textsuperscript{52} Equally as concerning is what can be considered relatively high rates of gender-related hate crime self-reported by the population through the General Social Survey, but relatively low rates of police reporting. Again, this is perhaps best considered in the context of low reporting rates across all characteristics.\textsuperscript{53}

The conflation of cisgender and transgender identities under the category of sex in police-recorded data, is also worth highlighting as conceptually commendable. However, for the purposes of designing interventions to address the needs of victims, from police training to the signposting of civil society supports, it is important to be able to disaggregate between misogynistic and transphobic crimes.\textsuperscript{54} This is most appropriately done at the point of police recording.

These issues are all worthy of consideration in the context of the UK law reform projects, particularly in a context where reporting rates for hate crime are relatively high. We will now go on to consider examples of how misogynistic crime is addressed through policing: one from England, and one from Ireland.

**Policing misogynistic hate crime**

**Nottinghamshire, England**

While legislation in England and Wales is relatively limited in terms of the scope of protected classes, various police forces have expanded their working definitions of hate crime to allow for recording of hate crime and incidents across a broader range of characteristics. Often in response to a local event, hate crime and incidents such as these will be tracked by officers and treated as hate crime to the point of prosecution.

For example, following a spate of attacks which left six sex workers/prostitutes dead between 2000 and 2005, police in Liverpool implemented what is now known as the “Merseyside model”.\textsuperscript{55} In 2006, Merseyside Police announced that all crimes against sex workers/prostitutes were to be treated as hate crimes. Ellison and Smith state that the decision, accompanied by the setting up of a special unit between the Merseyside Police and the Crown Prosecution Service, had “staggering” results.\textsuperscript{56} Ellison and Smith observe that, because of the financial and human resources dedicated to the investigation and prosecution of hate offences, “in 2010, the Merseyside Police had an 84 per cent conviction rate for those who committed violent acts towards sex workers and a 67 per cent conviction for rape”.\textsuperscript{57} In April 2013, the Greater Manchester Police announced that it would be recording attacks

\textsuperscript{53} Reporting rates in Canada compare very unfavourably to those in England and Wales, for example.
on members of “alternative subcultures” as hate crimes, following discussions with the Sophie Lancaster Foundation.58

Similarly, the Nottinghamshire Police started recording misogynistic hate crime in April 2016. The police service records misogyny as a hate crime, with its definition of “misogyny hate crime” being “incidents against women that are motivated by an attitude of a man towards a woman and includes behaviour targeted towards a woman by men simply because they are a woman”.59

There are no data published on the manner in which the definition has been operationalised, but a number of Freedom of Information requests have been submitted, and some of these responses have been made publicly available. From April to December 2016, there were 79 reports of misogynistic hate crimes and incidents made to Nottinghamshire police,60 31 of which were categorised as hate crime.61 These offences included harassment, kidnapping, possession of weapons and causing fear, alarm or distress.62 In their evaluation, Mullany and Trickett observe that from April 2016 to March 2018, 174 women reported such experiences, of which 73 were classified as hate crimes.63 They do not give figures for the number of arrests, or the number of cases in which charges were brought, but note that there was one conviction (though the crime for which the individual was prosecuted is not stated).64

It is useful to highlight the findings of the Mullany and Trickett report in relation to police perspectives on the issue.65 It should be said at the outset that the perceptions and experiences of the police in this context must be read in the context of their training on misogynistic hate crime, which was described by the authors as having served to “alienate the police and undermined the purpose of the training, making it less effective”.66 They found that the majority of the police officers who participated in focus groups as part of the research were dismissive of the policy, and were not in favour of its introduction. The authors state that there were three main reasons given by the police officers for this:

- The policy was not required, as the underlying offence could already be addressed using existing laws, and the police officers asserted that they were already dealing with these types of behaviours;
- Police officers queried the categorisation of the behaviours as hate crime because, first, they argued that the behaviours did not always

58 J. Garland and P. Hodkinson, “‘F**king Freak! What the Hell Do You Think You Look Like?’: Experiences of Targeted Victimization Among Goths and Developing Notions of Hate Crime” (2014) 54(4) British Journal of Criminology 613.
involve “hate” per se (demonstrating a narrow interpretation of the concept of hate crime); and second, they perceived that misogynistic behaviour, unlike homophobic, anti-religious, or racist crime, “was not really to do with hatred …”. 67

• The policy resulted in “net-widening”, as “a lot of the activities that were not crimes were being included”, 68 which resulted in officers seeing the policy as “another example of over-recording”, and “simply a ‘paper exercise’ that required another ‘box’ to be ticked.” 69

That said, Mullany and Trickett suggest that these views are out of keeping with the general population, who gave a clear public mandate supporting the policy. Indeed, their research is particularly interesting in the context of these findings. Those individuals from the general public who participated in the study were generally unaware of what the policy covered, and how to report a crime if it happened to them. However, once the policy was explained to focus groups and interview participants (including both men and women), they were very positive about it, and thought it should be rolled out nationally.

Ireland

In an Irish context, aside from the Prohibition of Incitement to Hatred Act 1989, there is no legislation in Ireland which addresses hate in any other context. As there is no hate legislation in an Irish context, misogynistic hate crime is addressed in the same manner as other manifestations of hate crime. Generally, Haynes et al, and Haynes and Schweppe, have detailed the manner in which hate crime is addressed in Ireland in the absence of legislation, highlighting the fact that it is poorly understood and addressed across the criminal justice process. 70 So routine is this fact that they refer to it as the “disappearing” of hate crime through the criminal justice process. 71

However, despite these legislative shortcomings, in 2002 An Garda Síochána began to record what they refer to as crimes with a “discriminatory motive”, recording such crimes under the categories of homophobia, antisemitism, sectarianism, racism and xenophobia. However, given the low levels of recording of hate crime, the Garda Inspectorate 2014 Crime Investigation Report recommended that An Garda Síochána ensure that all crimes containing elements of hate or discrimination were flagged on the police recording system, PULSE (Policing Using Leading Systems Effectively) and that An Garda Síochána create clear modus operandi features on PULSE that allow the accurate recording of the nine strands of the Diversity Strategy, namely: age, disability, family status, gender, sexual orientation, marital status, race, religious belief and membership of the Traveller Community. 72 In November 2015, in anticipation of the European Union Victims’ Directive establishing minimum standards on the rights, support and protection of victims of crime, a new way of recording crimes with a

“discriminatory motive” was introduced through a new iteration of PULSE, referred to as PULSE 6.8, which made changes to both the recording categories and the recording process. As part of PULSE 6.8, the five pre-existing recording categories (set out above) were replaced. In November 2015, An Garda Síochána began recording 11 categories of discriminatory motives which were generated to reflect the police service’s strands of diversity, in collaboration with the Garda Racial and Intercultural Diversity Office: “Ageism, anti-disability, anti-Muslim, anti-Roma, antisemitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia”.73 Thus, while there is no hate crime legislation, gardaí at least have the potential capacity for recording gender-related hate crime. These data are captured in the Victim Assessment screen, which also requires gardaí to indicate where the victim requires an individual needs assessment as a result of their status as a child, a person with a disability, a person with particular psychological needs, a repeat victim,74 or a victim of domestic violence. It is important to note at this point that the introduction of these new categories was not accompanied by any training, nor any policies to support their implementation.75

The number of crimes recorded as having a discriminatory motive increased dramatically following the introduction of this technical innovation: from 114 in 2014 to 308 in 201676:

<table>
<thead>
<tr>
<th>Category</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ageism</td>
<td>38</td>
</tr>
<tr>
<td>Anti-Disability</td>
<td>12</td>
</tr>
<tr>
<td>Anti-Muslim</td>
<td>13</td>
</tr>
<tr>
<td>Anti-Roma</td>
<td>60</td>
</tr>
<tr>
<td>Antisemitism</td>
<td>*</td>
</tr>
<tr>
<td>Anti-Traveller</td>
<td>25</td>
</tr>
<tr>
<td>Gender related</td>
<td>31</td>
</tr>
<tr>
<td>Homophobia</td>
<td>28</td>
</tr>
<tr>
<td>Racism</td>
<td>152</td>
</tr>
<tr>
<td>Sectarianism</td>
<td>*</td>
</tr>
<tr>
<td>Transphobia</td>
<td>*</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>308</td>
</tr>
</tbody>
</table>

Thus, the data suggest that there were 31 crimes recorded with a gender-related discriminatory motive in 2016. Unfortunately, we cannot make any claims as to what this means with respect to crimes recorded which were committed against victims because of their gender given the absence of a working definition of gender or transphobia, or indeed any Garda policy on the categories for the purposes of recording.

74 The Garda on the scene checks PULSE to ascertain whether the victim is a repeat victim.
In seeking to explore Garda practices and understandings of the new recording categories, Haynes and Schweppe probed Garda understandings of the “gender-related” recording category. They noted that in the absence of institutional definitions, “both police officers and call-takers had to rely on common sense understandings and individualised interpretations of the constructs referenced”. When officers were asked what their understanding of “gender related” was, they gave very different responses:

“I don’t know whether it comes down to transsexual?” (Garda)

“I presume it’s LGBT?” (Garda)

“… if you have a female present and there is abuse hurled at her.” (Garda)

“A crime against someone because a suspected offender doesn’t like a female or a male.” (Garda)

Thus, the 31 crimes committed with a “gender-related” motive are not necessarily misogynistic hate crimes. Nor are they necessarily an amalgam of misogynistic and transphobic crimes (transphobia is also named separately)—some officers presumed “gender-related” included not just transphobic, but also homophobic motivations.

**Considering policing models**

In their submission to the Bracadale Review, Barker and Jurasz suggest that whilst police recording of misogynistic incidents is a significant step forward, it unfortunately results “only in the recording of offences locally”. They argue:

“The labelling and ‘flagging’ of such incidents bears no correlation to the prosecution of crimes on a similar basis and indeed, this is impossible under hate crime laws in England and Wales, and Scotland, because gender is not a protected characteristic. As such, whilst police forces may be willing to record potential crimes as gender-based hate crimes, this is something which is legally unfounded and has no bearing on the judicial system, as the recording has no impact upon prosecution rates, nor the pursuit of prosecutions.”

Thus, while legislation itself may be silent on the issue, police services can in practice extend at least the operational definitions of hate crime to include otherwise unprotected characteristics. Instinctively, this approach seems progressive: it allows police forces to adapt definitions and allocate resources in response to local or regional manifestations of hostility. It also allows hate crime to be recognised across a broader range of characteristics than legislation prescribes, thus being more responsive to victim needs, acknowledging their experiences as victims of

---

hate crime. However, the potential disadvantages of police forces developing categories in the absence of legislative policy are highlighted by Mason et al who argue that it will either result in an overly narrow and prescriptive definition which will exclude “‘messy’ cases that do not fit a legal category even though they may cause public outrage”, or an over-inclusive range of categories, which “give precedence to victim perceptions and can exaggerate the nature and extent of the problem as well as [creating] unrealistic expectations”.82 Further, as the case moves through the criminal process, the offence cannot be prosecuted as a hate crime, no higher penalty is mandated on conviction, and the hate element will not be recorded on the criminal record of the offender.

We believe that both the Irish and the Nottingham experiences offer insights into a number of issues. First, in the absence of clear policies and supporting training for police officers, it is unlikely that gender-related hate crime, whether transphobic or misogynistic, will be properly recorded.83 In Nottinghamshire, the training was perceived to be ineffective, and the complete absence of any supporting policies or training in an Irish context led to members of the Irish police service having mixed understandings of the phenomena. We believe that training must incorporate clear policies which include definitions of the term, as well as policies on recording hate crime; that officers are trained on the policy; and that as part of their training, officers are sensitised to this manifestation of hate crime so they understand both its contexts and consequences. Second, a public awareness campaign must accompany the introduction of new policies, to support victims in accessing their rights. Whilst in Nottinghamshire there was a public campaign, many of the women who engaged in the Mullany and Trickett research were unaware of the existence of the policy. In Ireland, An Garda Síochána did not publicly announce the change in the recording process, leaving it to civil society organisations to disseminate information regarding the policy to the communities they represent.84 Victims must be informed of new policing policies and practices in order to access their rights in this context.

Having considered the models in practice, we will now return to asking how such legislation can, or should, be framed.

Legislating against transphobic hate crime

Grattet and Jenness observe that there have been two “tiers” of categories of hate crime in the US. The first (or core) tier, they note, in 1988 “represented a legal response to the most visible, recognizable, and stereotypical kinds of discriminatory behaviour”, including crimes against individuals on the basis of their race, religion, colour and national origin.85 The so-called “second tier” of hate categories, emerging in the late 1990s, included sexual orientation, gender and disabilities. Utilising Grattet and Jenness’ model, the inclusion of gender identity and gender expression

---

is arguably part of a third wave of hate crime legislation, though curiously, across the UK, trans identities have been included in hate crime statute or policy in the absence of gender as more broadly understood. Thus, in the UK, it could be said that the second tier of categories included (some) trans identities, with gender understood in a broader context to be part of the third tier.

While we generally use the term “trans community” to include transgender, non-binary and gender fluid people, legislative definitions differ across jurisdictions, and the inclusion of the intersex community within the definition of the umbrella transgender term is seen by members of that community to be problematic. In England and Wales, Scotland, and Northern Ireland, trans people are protected either explicitly in legislation (as occurs in England and Wales though only in the context of sentence enhancements as opposed to aggravated offences, and Scotland), or through policing policies (as in Northern Ireland). However, the terminology utilised in the legislation is, we argue, problematic, and often exclusionary.

For example, in Scotland, the term “transgender identity” is defined in s.2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 as:

“(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or

b) any other gender identity that is not standard male or female gender identity.”

England and Wales utilises a dated, medicalised, and equally problematic definition of transgender in s.146 of the Criminal Justice Act 2003 where it defines the term as including:

“references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.”

To our minds, it is without question that these definitions require immediate amendment. The above definitions limit protection to those who choose to employ medical or surgical gender confirmation. Not all gender diverse people want or need to achieve conformity with society’s gender norms. To restrict redress for hostility towards difference on the basis of gender only to those who express the intention to conform, is arguably to use the protection of the law, and the threat of its removal, to enforce conformity. In this context, laws intended to serve as protection against hostility towards difference could be argued to manifest the same prejudice from which that hostility emerges: we would argue that the phrase “standard male or female gender identity” is an example of this.

In this context, the earlier Report of the Law Commission notes that whilst victim support, the Senior Judiciary, and Devon and Cornwall Police supported the retention of this definition, those representing trans and gender non-conforming individuals recommended that it be changed for two key reasons. First, they noted that the term excluded individuals who do not conform to so-called “standard gender identities”, and, as argued by Diverse Cymru, did not include

“cross-dressers, transvestites, genderqueer, third gender, and androgynous people”. The second reason highlighted was that the use of the medicalised term is inappropriate. In discussing these submissions, the Law Commission ultimately concluded in its 2014 report that the definition in s.146 should be retained and utilised for the aggravated offences provisions for three key reasons:

1) There should be no inconsistency between s.146 and the aggravated offences provisions;
2) Section 146 of the Act is non-exhaustive, and the courts may interpret it to apply to those who are not trans but are gender non-conforming;
3) While the definition does not cover intersex people, any hostility towards them will be addressed either because it will be framed as transphobic, and thus covered by a s.146-type definition; or it will be addressed through the general aggravating factor of hostility towards a minority group.

We would make the counter-arguments that first, if the definition in s.146 is problematic, it should be changed, rather than retained for the purposes of consistency. Second, whilst it may be true that the term could be interpreted non-exhaustively, it could equally not be interpreted in this manner. Third, whilst it is possible that hostility towards intersex people could be framed in a transphobic manner, it is also possible that it might not.

By contrast, rather than utilise restrictive and dated language, in Canada, as we have seen, legislation was amended in 2017 to include “gender identity and gender expression”, and in New Zealand, s.9(1)(h) of the Sentencing Act 2002 includes “gender identity” as a protected characteristic in hate crime legislation. The District of Columbia, Hawaii, and Nevada include gender identity and gender expression in their legislation. This language is also reflected in recent EU developments, perhaps most relevantly in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, also referred to as “the Victims’ Directive” which includes “gender, gender expression, gender identity, and sexual orientation” in its Preamble as suggested protected characteristics. The Irish Criminal Justice (Victims of Crime) Act 2017 which gave effect to the Directive adopts this approach, naming “gender, gender identity and gender expression” in s.15(2)(d) amongst those personal characteristics which should be taken into account by police officers when assessing whether a victim has special protection needs.

We believe that any legislation which seeks to protect the rights of victims should, at the very least, utilise terms which are accepted by the community, are up to date in terms of discourses, and are compliant with human rights principles, both in terms of the principle of equality but also the principle of legality. This is particularly true for members of the trans community, who have a problematic

87 Law Commission, Hate Crime: Should the Current Laws Be Extended? (TSO, 2014), Law Com No. 348, Cm.8865 p.166.
and distrustful relationship with the police. For these reasons, in including trans identities in legislation, we would argue that the terms “gender identity and gender expression” should be included in the legislation. We now move to asking how this can best be achieved.

**Gender, gender identity and gender expression**

We believe that where the terms “gender identity or gender expression” are used, legislation presumptively includes crimes committed against cisgender individuals. In contrast, Brown notes that in a New Zealand context, the Head of the Justice and Electoral Committee, referring to the question as to whether “gender identity” includes cisgender, contended:

“… that the term gender identity encompasses the category of gender. This broader characterisation apparently covers ‘all those who are seen as belonging to a particular group with common gender characteristics, whether they are men, women, intersex, transgender or transsexual. This choice of the phrase gender identity does not appear to have attracted much discussion, if any at all, in submission on the Bill, in Parliament or at the Select Committee stage. Even so, the majority of the Members involved appear to have assumed that this wide interpretation of gender identity is obvious.’”

Despite this assertion, Brown argues that the term gender identity does not include cisgender individuals, contending that the term identity somehow signifies a matter of a “person’s choice”, on which basis she distinguishes between trans and cisgender persons. However, as we have argued, gender identity is not the exclusive domain of non-conforming people: everyone has a gender identity. Thus, if the terms “gender identity and gender expression” are included in legislation, in a context which did not explicitly include gender as a standalone characteristic, cisgender individuals would be presumptively protected by that legislation.

Accepting that by being inclusive of the trans community in legislation, we are also including cisgender individuals, we then must ask what the most appropriate language is to use when legislating. Some legislatures, in including gender identity and gender expression, have also explicitly included gender as a standalone characteristic. In asking whether “gender” should be explicitly included as a protected ground in a legislative context which includes “gender identity and gender expression”, from a practical perspective, Brown observes that “[o]bscuring gender from view [in legislation] puts gender-based hate crime at risk of going unrecognised by New Zealand police, lawyers and courts”. Here, she seems to erroneously exclude transphobia from the construct of gender-based hate crime. Taking her argument at face value, we accept that the courts could interpret gender identity, inaccurately, as applying to only those individuals who are

---


non-conforming. However, accommodating the misperception that only gender non-conforming people have a gender identity, by including “gender” alongside the terms “gender identity and gender expression”, carries the risk of serving as a legislative reinforcement of this problematic cisnormative assumption.

We are of the view that gender should be included as a protected ground. Our reasons for arguing this position are, however, very different to those of Brown. Gender-related hate crime may be triggered by the offender’s rejection of the victim's stated gender identity, or by the offender’s appraisal of the victim’s appearance or deportment as inappropriate to their assigned sex. Hate crimes may also occur where existing hierarchies of gender legitimise the offender’s perception that either ciswomen or trans victims are inferior or deficient. Perry tells us that hate crimes are also triggered when “boundaries are threatened, when subordinate groups seek to redefine their place”, in this context, where an offender perceives that cisgender people (of either gender), or trans people, behave in ways that are perceived as contrary to traditional gender roles or threatening to existing gender hierarchies. The concept of gender encapsulates, not only a person’s felt relationship to gender, but also all the stereotypes, expectations and relations of power to which we are subject in a gendered society. Thus, gender is arguably inclusive of a wider range of hate motivations. It is our belief that including “gender” as a protected characteristic in hate crime legislation is the most effective means of enabling the criminal justice system to respond comprehensively to manifestations of transphobia, misogyny, and misandry.

Another reason to include “gender” as a protected ground in legislation is that it ensures that legislation is consistent across the protected characteristics. We do not name only a sub-set of the protected ground in relation to any other characteristic. Section 28(4) of the Crime and Disorder Act 1998, for example, defines “racial group” as a group “defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”. Similarly, gender identity and expression are dimensions of gender. There is no legal or policy reason to adopt a different approach in the context of gender than we do to other protected characteristics. For this reason, we also argue that while legislation should name “gender” as a protected ground, that it should be defined—either in the interpretation section of the legislation, or in the section itself—as being inclusive of gender identity and gender expression.

In reaching the position for which we advocate in this article, that is naming gender as a protected ground, and defining it as inclusive of gender identity and gender expression, we have struggled to balance the risks we perceive in explicitly naming gender identity and gender expression against the risks we know omitting them entails. We advocate for the mainstreaming of trans rights, and we are

---

93 There is just one relevant case from the Court of Appeal Criminal Division of England and Wales which mentions the term gender identity, Yarlett, though it is not helpful in answering this question. Here, the sentencing judge considered the sexual assault in question to be of a higher culpability under the sentencing guidelines because it was motivated by or demonstrated hostility to the victim by virtue of his gender identity or presumed gender identity. The Court of Appeal Criminal Division did not discuss this, but simply (and correctly) noted that the offence was a “category A culpability because the offence was motivated by hostility to the victim based on his sexual orientation.” Yarlett [2018] EWCA Crim 1033 at [23].


concerned that any legislative construction that continues to treat trans identities as somehow outside of the concept of gender—as naming the three as separate categories might do—sets back that cause. On the other hand, we know that the popular understanding of gender is limited to the categories of man and woman, and that these are interpreted as cisgender identities. Only naming gender in the legislation might be interpreted as excluding people who identify as trans or non-binary.

Thus, we believe that our solution—which is that hate crime legislation should name gender as a protected characteristic, and inclusively and explicitly define gender as including gender identity and gender expression—is a solution which addresses all these concerns, and ensures that legislation is consistent across protected characteristics in legislation.

Conclusion

Determining which personal characteristics deserve protection under hate crime legislation is perhaps one of the thorniest legal, policy, and philosophical questions which face hate crime scholars and law reform bodies alike. At the outset, it is important to note that we believe that, whatever legislative model is introduced, the same range of protected characteristics should apply across the system, in legislation and in police practices: there should be no hierarchy of victims in hate crime legislation, as exists in, for example, England and Wales currently.

The question as to whether “gender” should be included as a protected characteristic, has been interpreted as asking whether misogynistic hate crime should be addressed under hate crime legislation. We have re-framed that question. Asserting that both misogynistic and transphobic crime should be addressed in hate crime laws—and indeed, there have been no sensible arguments put forward that they should not be protected in some manner—we have considered how best to protect people of all gender identities from bias crimes emanating from their relationship to gender. We have clarified that, as each of us has a felt relationship to gender, whether that relationship is normative or not, we all have a gender identity.96 Thus, the targeting of a victim on the basis of their identity as a ciswoman, cisman, or trans person, is addressed by the concept of gender identity. Gender identity is a dimension or sub-category of the larger concept of gender, which is inclusive of wider-ranging sources of bias motivations, and therefore offers the most inclusive grounds for protection. However, popular misunderstanding of gender as binary, the historically difficult relationship between trans people and the criminal justice system, and global threats to the rights and protections won by trans people, leads us to advocate for a pragmatic solution which will be inclusive of the range of biases associated with misogyny and transphobia, while guarding against the wilful or unconscious exclusion of trans people from protection.

96 We intend here to be inclusive of a gender identity wherein a person’s sense of identity is absent of a felt gender.