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*Winner of the Council of Europe Human Rights Prize*

## **Northern Ireland Affairs Committee: Inquiry into Hate Crime in Northern Ireland (March 2004)**

The Committee on the Administration of Justice (CAJ) has undertaken a number of projects relevant to the inquiry into hate crime now being initiated by the Northern Ireland Affairs Committee.

We have sent under separate cover the following publications and papers:

1985	Ways of Protecting Minority Rights in NI (and subsequent numerous publications relating to a Bill of Rights for NI and the protection this could afford to minorities)
1992	Racism in Northern Ireland
1993	<ul style="list-style-type: none"><li>❖ Combating Racism in Northern Ireland</li><li>❖ Combating Racist Harassment in Northern Ireland</li><li>❖ Submission to UN Committee on the Elimination of Racial Discrimination</li></ul>
1995	Harassment: It's Part of Life Here
1997	<ul style="list-style-type: none"><li>❖ The Misrule of Law</li><li>❖ Submission to UN Committee on the Elimination of Racial Discrimination</li><li>❖ Response to Draft Race Relations (NI) Order 1996</li></ul>
2001	Submission on A Single Equality Bill for Northern Ireland
2003	<ul style="list-style-type: none"><li>❖ Race crime and sectarian crime legislation in NI</li><li>❖ Response to "A Shared Future" consultation</li><li>❖ Response to consultation on domestic violence (there are elements in this which are relevant to broader questions of hate crime)</li></ul>

and CAJ's latest edition of the Civil Liberties Handbook (see in particular chapters 9, 11 and 14 especially page 292).

Of most immediate relevance to the current inquiry is the government's consultation regarding race and sectarian crime legislation (issued in November 2002), and CAJ's response (February 2003). The following submission will therefore draw extensively on that earlier paper. We are

currently preparing comments on the Criminal Justice (NI) Order 2004, the draft legislation arising from the government's consultation process.

To respond directly to the three questions posed by the Committee:

**1. The reasons for the reported increase in crimes and incidents motivated by hatred within and between the communities in Northern Ireland.**

While CAJ has no reason to doubt the suggestion that hate crime is on the increase, current record-keeping is far from satisfactory. This in turn makes any analysis of the problem of hate crime all the more difficult – still more so an analysis of the cause of any alleged increase in such crime.

There is currently some uncertainty regarding the gathering of statistics in this area because the police recording of hate crime is a relatively new phenomenon. CAJ believes that it would be extremely helpful if the NIAC explored initially what is the current situation in hate crime levels in Northern Ireland, and whether it can be independently verified if there has been an increase in incidents, or an increase in reporting, both or neither.

In 1997 the PSNI introduced the monitoring of race-hate crime for the first time. While it is clear that police statistics over the last few years indicate an increase in such crime, it is not clear if this is a rise in the level of such crimes, more routine reporting of such crimes to the police, or more consistent recording of such crimes by the police – or indeed all of these factors. A recent study of racist crime in Northern Ireland highlighted very interesting comparisons with England and Wales and seemed to suggest that the levels of racist crime are proportionately higher in Northern Ireland. If accurate, this would be a very worrying phenomenon, and one which CAJ thinks is not widely known, but is deserving of greater publicity.

Homophobic crime is beginning to be recorded and monitored and the question of data gathering was one of the key recommendations arising from a study into homophobic crime in 2003 (*An Acceptable Prejudice? Homophobic violence and harassment in NI*, Institute of Conflict Research, Neil Jarman and Alex Tennant, July 2003).

Perhaps surprisingly, the most common hate crime in Northern Ireland (sectarian motivated crime or incidents) has not been formally recorded or monitored to date, and the PSNI is only now consulting on definitions (see attached CAJ correspondence with the PSNI). The latter situation has been commented upon unfavourably by Her Majesty's Inspector of Constabulary on several occasions (HMIC's report in 1999-2000 reiterated his concern at the lack of such data). The NI Affairs Committee may want to ask the PSNI to comment on the latest developments to date in this regard.

Any serious programme to tackle hate crime must be based upon good statistical and other data, and it would therefore be helpful if the NI Affairs

Committee explored the plans that exist to fill the current lacunae of such data.

## **2. examine government measures to tackle prejudice and support the victims of such prejudice**

As CAJ indicated in its commentary on the consultation around race crime and sectarian crime legislation, there are many measures over and above legislative changes that government can promote to address issues of racism, sectarianism and homophobia. In our February 2003 paper, we urged the authorities to consider legislative change as simply part of a larger package of measures that would also address the need for:

- Human rights education that would encourage respect for diversity, equality of treatment, and tolerance.
- Measures to tackle institutional racism, sectarianism and homophobia, most particularly in the criminal justice and policing agencies.
- Training programmes that would assist the public sector (and again especially the criminal justice and policing agencies) to challenge racist, sectarian or homophobic practices and develop appropriate responses. In particular, specialised training in evidence-gathering in hate crimes, to ensure that any legislative changes result in successful court action.
- Improved representation of people from under-represented groups on public bodies, in senior positions within the public service, and in decision-making organs.
- Greater political commitment to the current positive duty placed on all public bodies to actively promote equality of opportunity and good relations regardless of race, religion, political opinion etc.
- Policy measures by public authorities explicitly aimed at countering racist and sectarian behaviour should also be explored – eg policies relating to housing, to graffiti, to the use of public spaces etc. should be assessed with a view to countering behaviour motivated by racial or sectarian bigotry.
- Improved research into the nature of hate-crimes and the main sites for such behaviour, as well as models of good practice in responding to such behaviour. In particular, it is vital to gather reliable data on the nature of racism and sectarianism in Northern Ireland, and on the level of these and other hate-crimes. CAJ has elsewhere noted the concerns of Her Majesty's Inspector of Constabulary at the delay in setting up systems allowing the police to record sectarian crime in Northern Ireland.

- More public education campaigns.
  - Effective response to the needs of victims – both within the formal criminal justice system and via support networks.
- 3. effectiveness of the law and proposed changes**

Again, we can quote directly from our February 2003 submission on hate crime legislation to the effect that CAJ believed that legislation should be introduced to allow for sentencing to address hate-crime motivation. We argued that it is better to separate out the alleged crime – murder, assault, etc. – from the alleged motivation of the criminal act. Thus, courts should first come to a finding of fact as to whether any criminal offence occurred. This first decision must be the primary one, regardless of the alleged motivation of the suspect. Dealing with motivation in the same process as dealing with the crime can confuse and undermine the finding of fact. As has been discovered in England, the merger of two concepts “offence” and a “racially aggravated” offence, has proved quite difficult to operationalise. In practice, the fusion of two quite different notions has meant that people clearly guilty of an offence escaped any punishment at all, since the racial aggravation element of the charge could not be sufficiently proven.

On the other hand, it is both a natural and proper part of the duty of sentencing for the judge or magistrate to weigh up any mitigating or exacerbating elements in the offence. The level of damage caused to the individual and – in the case of hate crime - the ‘group’ the individual was thought to ‘represent’, and indeed wider society, seem quite proper and necessary elements for the sentencer to bear in mind. Indeed, the sentencer is provided with a certain level of discretion precisely in order to gauge the penalty which is most appropriate to the nature of the crime and in determining this, they must examine all aggravating or mitigating elements of the offence.

CAJ did not support any of the other three legislative options on offer in the government paper (Race crime and sectarian crime legislation in Northern Ireland, NIO consultation paper, November 2002). One option would have allowed magistrates to find alternative verdicts. This might assist in the event that the “racial aggravation” element of a crime could not be proved, since it would allow the magistrate to set this element aside and still proceed to make an independent judgement on the offence itself. The real disadvantage of this option, however, is that it gives far too much discretion to the magistrate, and raises concerns about the due process rights of the defendant. In an attempt to protect and promote the rights of those who are the victims of hate crimes, it is vital that we not set aside the rights of the accused, who is innocent until proved guilty. Nor did we accept the option that legislation cover racially aggravated offences but no other hate crimes. The last option offered was to mirror the Crime and Disorder Act in England and Wales and create offences “aggravated by” sectarianism/racism or homophobia. The disadvantages of merging the offence and its motivation have been explored in great detail by the University of Cambridge study, which highlights a series of problems such as: definitions, evidential

problems in proving “motivation”, workload created by greater % of contested charges, low conviction rate.

As noted earlier, draft legislation is now in circulation (the Criminal Justice (NI) Order 2004), and CAJ will comment before the 9 April 2004 deadline.

There are, however, a number of additional legislative changes that could usefully be made and which we commented upon in our 2003 paper.

1. The Public Order (NI) Order 1987 should be brought more in line with its British equivalent by incorporating section 5 (1) of the 1986 Act which outlaws “threatening verbal abuse and behaviour” and outlaws threatening, abusive or insulting behaviour “within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby”. (see para 2.2 of the government consultation paper)
2. The Protection from Harassment (NI) Order 1997 creates several offences of harassment and includes reference to racial harassment but does not refer to sectarian harassment. This should be amended accordingly.

CAJ has also long campaigned for a Bill of Rights for Northern Ireland and, in the last few years, for a single piece of legislation to counter discrimination and promote equality – a Single Equality Bill for Northern Ireland. Both of these initiatives go much further than addressing issues specific to hate crime, but clearly a society-wide debate around the protection of rights, and documents that lay down principles of equality and human dignity, would make a major contribution to creating a fairer society, in which hate crime is less likely to occur or to be accepted.

The Council of Europe has issued a booklet providing a series of excellent recommendations relating to comprehensive national legislation to combat racism and discrimination.<sup>1</sup> CAJ would recommend that the Northern Ireland Affairs Committee study this material closely with a view to determining additional improvements to be made to the legislative framework over and above the recommendations in this commentary.

However, this section of CAJ’s commentary on legislative responses to hate crime cannot conclude without emphasising the vital importance of enforcement. There is little value in amending or complementing current legislation with additional protections if these provisions are then left unused or under-used on the statute book. The experience to date has been very troubling in this regard. For example, on the statute books already, Northern Ireland has the Protection of the Person and Property Act (NI) 1969, which is extremely broad in its provisions. Amongst other provisions, it makes it an offence if a person “unlawfully causes, by force, threats or menaces or in any way whatsoever, any other person..... to do or refrain from doing any act” (section 1). Similarly, article 9 of the Public Order (NI)

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<sup>1</sup> European Commission Against Racism and Intolerance – General Policy Recommendation no.7 – on National Legislation to combat racism and racial discrimination, adopted by the Council of Europe on 13 December 2002 (February 2003).

Order 1987 makes it an offence to use or display threatening, abusive or insulting words or behaviour, with intent to stir up hatred or fear of a section of the Northern Ireland community, or where such fear or hatred is likely to be stirred up. Yet, while the incidents appear to abound in which people are forced to do or refrain from doing things due to force, threats or menaces, and where such fear or hatred appear is likely to be so stirred up, the number of people charged, and found guilty, under this provision is again very small.

Some of the reasons for this experience of non-enforcement are due to problems of definition (see earlier debates around Crime and Disorder Act).

Alternatively, problems of non-enforcement can lie in the reluctance on the part of some victims of hate crime to come forward and seek official help, given their fear that this may only lead to further opprobrium being suffered by their 'group'. The EU race equality directive<sup>2</sup> establishes some protection for individuals facing discrimination by stating that "associations, organisations or other legal entities...may engage, either on behalf of or in support of the complainant, with his or her approval, in any judicial and/or administrative procedures". Consideration should be given by the authorities to this provision and to other ways in which protection could be afforded to victims of hate crime, so that they willingly come forward to work with the police and the criminal justice system to ensure that the law is effectively enforced.

Yet other concerns about non-enforcement relate to the unwillingness or inability of the criminal justice agencies to gather appropriate evidence and pursue it. We commend to your attention important concerns raised in this regard by the NI Council for Ethnic Minorities. Institutional racism and sectarianism is often a matter of what is not done, and not only what is done. The real test of anti-hate crime legislation will be more reporting and recording of hate crime and more successful prosecutions, with a view to making such criminal behaviour increasingly unacceptable.

## **Conclusion**

The state has a range of duties under international human rights to ensure equality, prevent discrimination, and afford security of the person. This positive duty requires a range of legislative and other measures.

CAJ urges the Northern Ireland Affairs Committee to recommend to government that they introduce strong anti-hate crime legislation, that supplementary legislative measures be introduced alongside this specific hate crime legislation, and that steps to be taken to ensure more effective enforcement. Training, and education should be provided to the police and all criminal justice agencies to ensure that the legislative changes actually impact on the ground. The problem, however, lies not only with the criminal

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<sup>2</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

justice agencies, since these by definition come into play when a crime has been committed. A range of initiatives must be taken by the state and some of these have been highlighted at the outset of this paper. If legislative changes are not part of a much bigger project, hate crime will continue to be a major problem for Northern Ireland.