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Winner of the Council of Europe Human Rights Prize

CAJ's response to the

"Race crime and sectarian crime legislation in Northern Ireland"

February 2003

Submission No. S.141
Price: £1.00

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"Race crime and sectarian crime legislation in Northern Ireland"

NIO consultation paper, November 2002

(February 2003)

Introduction

The Committee on the Administration of Justice (CAJ) is an independent non-governmental organisation which seeks to ensure the highest standards of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. Its areas of work are extensive and include prisons, policing, emergency laws, the criminal justice system, lethal force, children's rights, gender equality, racism, religious discrimination and advocacy for a Bill of Rights. The organisation has been awarded several international human rights prizes including the Council of Europe Human Rights Prize for its work on mainstreaming human rights concerns in the Good Friday/Belfast Agreement.

The following commentary is prepared in response to a government consultation paper that addresses the appropriate legislative framework for tackling race and sectarian crime in Northern Ireland. Accordingly, much of the focus of the following remarks relates to legislative change. It is important, therefore, at this early stage to emphasise a point made in the paper which is that legislation alone will obviously not solve the problem of hate crimes: instead, a whole programme of government action is required. Indeed, CAJ would argue that, without such a broad programme of action, legislation may simply raise false expectations among those who are most directly affected by hate crime. If this were to be the case, an important opportunity to address these very serious problems will have been lost.

Accordingly, we would urge government when considering hate-crime legislation, to assess its overall response to such crime. In particular, CAJ would urge the authorities to consider legislative change as part of a package that also addresses the need for:

- Human rights education that will 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 will 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.

Consultation paper

Current Legal Position

It is useful to see the comparisons between the current legislative situation in Northern Ireland and that pertaining in Great Britain. Some other relevant Northern Ireland legislation could usefully have been alluded to - eg Race Relations Order, Fair Employment and Treatment Order and codes thereto, the Human Rights Act etc. Moreover, it would have been useful to indicate what are thought to be the current weaknesses in Northern Ireland provisions. For example, though we have provisions that prohibit "arousing fear" and which outlaw religious grounds as well as racial for inciting hatred, there is no

examination of why these legislative provisions are currently rarely used. In recent months, we have had the terrible dispute around Holy Cross school, and fierce anti-Muslim sentiment expressed in Craigavon in the context of building a mosque. CAJ however is unaware of any of Northern Ireland's current anti-hate provisions being deployed in either situation. Is this because the law is flawed, or because the police and/or criminal justice system response to such crime is problematic? Whatever legislative changes are eventually pursued, they must be tested against concrete situations like these.

❑ Racial Incidents and Prejudice in Northern Ireland

Is it correct to say (para 3.1) that "there is evidence that racial prejudice and racially motivated crime in Northern Ireland…has increased at a significant rate"? Police statistics indicate that the reporting of such crime has risen significantly, but is there any independent data to suggest that the level of crime itself has risen? CAJ has no reason to believe that the claim that racial incidents have increased is inaccurate, but believes that it is important to assess the situation as carefully as possible so as to develop appropriate responses.

It seems to us particularly important to recognise that the level of racist crime, and the reporting of racist crime, are two distinct issues requiring independent study. There should be no complacent acceptance that reporting levels do in fact reflect the reality on the ground. In fact, studies in Britain suggest that there is a very serious under-reporting of racist incidents. If the same is true in Northern Ireland, does the recent increase in reporting levels reflect an increase in crime; is it instead disguising the fact that the rise in violence may have jumped even more dramatically than the figures suggest; or does it reflect that crimes are now being more reported or better recorded than previously?

We found the comparison with England and Wales very interesting, and it is obviously very worrying that the levels of racist crime appear to be proportionately higher in Northern Ireland. This fact is probably not widely known, and deserves more publicity in our view. Unfortunately, the statistics in Northern Ireland on racist crime are of fairly recent origin. Is this the case in England and Wales also, and are there longer-term patterns and trends available to us from those jurisdictions (or others) that would be useful for policy makers in Northern Ireland to study more closely?

❑ Consideration of the Crime and Disorder Act 1998

CAJ believes that the "law should be adequate to protect all vulnerable groups in society" (para 4.1), but also recognises that society may want to signal special concern over crimes which, by their very nature, affect particular groups. Indeed, human rights law places minority rights very much at the heart of its concerns because of the threat that can be posed to individuals,

groups, and the larger society, when people suffer simply on the basis of their skin colour, or their religion, or their political beliefs. If people are victims of a crime solely on the basis of the 'group' they belong to (or are perceived to belong to), then the impact of that crime goes well beyond the individual victim or their family, to adversely affect the wider group. Accordingly, we welcome in principle the need to develop a clear legislative framework to address different kinds of hate crime.

In England and Wales, the Crime and Disorder Act was introduced in 1998 specifically to this end but, as the paper records, a number of practical problems have arisen in the course of its few years of operation. In some situations, these problems (of interpretation, or of appropriate evidence gathering) have led to people guilty of serious racially aggravated offences being charged with lesser offences, successfully plea-bargaining to eliminate the racial element of the charge, or even escaping punishment entirely. This is clearly an unsatisfactory state of affairs, and in determining the way forward for Northern Ireland, it is obviously important to learn from the English and Welsh experience to date.

Options for Legislative Change in Northern Ireland

We comment later on additional legislative changes that we believe are called for, but of the four options provided in this consultation paper, CAJ believes that <u>option one</u> is the best option for legislative change in Northern Ireland ie the government should legislate in respect of sentencing.

CAJ believes 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 does not however believe that the fact that the sentencer has discretion in determining an appropriate penalty obviates any necessity to clarify the law with regard to sentencing in racially aggravated offences. While it is the case that sentencing guidelines in Northern Ireland already require sentencers to treat racial or sectarian motivation as an aggravating factor, there are some problems with this. Firstly, the sentencing guidelines are not widely known to people who are not criminal justice experts. The existence of such guidelines would, accordingly, have little or no potential deterrent effect. For the same reason, the guidelines alone would not reassure members of 'target' groups that society is particularly affronted by racial or sectarian hate crimes.

Secondly, a clear statutory obligation on the sentencer to treat racial aggravation as making any offence more serious, would ensure more public accountability in this important domain. Police gathering of evidence; prosecution and defence deployment of arguments; and the rendition of sentencing reasons in open court, would all be positively influenced by the creation of a statutory obligation to consider racial or sectarian motivation as an aggravating factor.

❑ Other legislative options on offer

CAJ thinks none of the other three options proposed in the consultation paper is acceptable.

Option two would allow 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 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.

Option three is to legislate to create racially aggravated offences only but to disregard sectarian crime. This is unacceptable since the level of sectarian hate crime is extremely high in Northern Ireland, and needs urgent addressing. An initiative which addresses hate crime by way of legislative change, but ignores sectarian hate crime, gives entirely the wrong impression to society at large.

Option four is to legislate to create both racially aggravated offences and offences aggravated by sectarianism. This is the approach essentially taken in the Crime and Disorder Act in England and Wales. Some of the disadvantages of this option were commented on above and they have been explored in great detail by the University of Cambridge study into the

operation of the Act to date (see para 4.3 for reference). The problems highlighted include - definitions, evidential problems in proving "motivation", workload created by greater % of contested charges, low conviction rate**.**

Additional legislative measures

CAJ believes that in addition to pursuing option one (making statutory provision for sentencing for sectarian and racially motivated offences) a number of other specific legislative measures are required.

1. The consultation relates to racial and sectarian hate crime, but CAJ believes that there would be an advantage in including homophobia as an additional hate crime category which sentencing should consider as an aggravating factor. These three issues share a common "group" dimension, in that an individual is being victimised because of their real or perceived link to a broader (hated) group.

2. Legislation should be drafted in such a way to allow sentencers to exceed maximum sentences where this is necessary to allow for the sectarian or racial element to be taken into account in those offences where the maximum sentence is being imposed. Guidelines will of course have to establish the appropriate parameters for imposing additional penalties of this kind.

3. 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 consultation paper)

4. The Protection from Harassment (NI) Order 1997 creates several new offences of harassment and includes reference to racial harassment but does not refer to sectarian harassment. This should be amended accordingly**.**

The Council of Europe has just issued (February 2003) a booklet providing a series of excellent recommendations relating to comprehensive national legislation to combat racism and discrimination.[1] CAJ would recommend that the Northern Ireland Office 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.

[1] 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).

However, this section of our 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 un-used or under-used on the statute book. The experience to date has been very troubling in this regard:

a. The Protection of the Person and Property Act (NI) dates from 1969 and is extremely broad in its provisions: for example, it is 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). But to quote from CAJ's civil liberties handbook "as so often, the impact of the section depends greatly on the prosecution policies of the police and the Director of Public Prosecutions" (3rd edition, p.159). The number of people charged under this provision and those found guilty are few in number.

b. Article 9 of the Public Order (NI) 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. While the incidents where such fear or hatred appear likely to be so stirred up appear numerous, 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).

Some of the reasons for non-enforcement may lie in the reluctance on the part of some victims of hate crime to come forward and seek official help, given their understandable fear that this may only lead to further opprobrium being suffered by their 'group'. The EU race equality directive[2] 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.

Other concerns about non-enforcement relate to the unwillingness or inability of the criminal justice agencies to gather appropriate evidence and pursue it. 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.

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

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 has urged here that strong anti-hate crime legislation be introduced for Northern Ireland, that supplementary legislative measures be introduced alongside this specific legislation, and that enforcement be carried out effectively. 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 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.

February 2003