

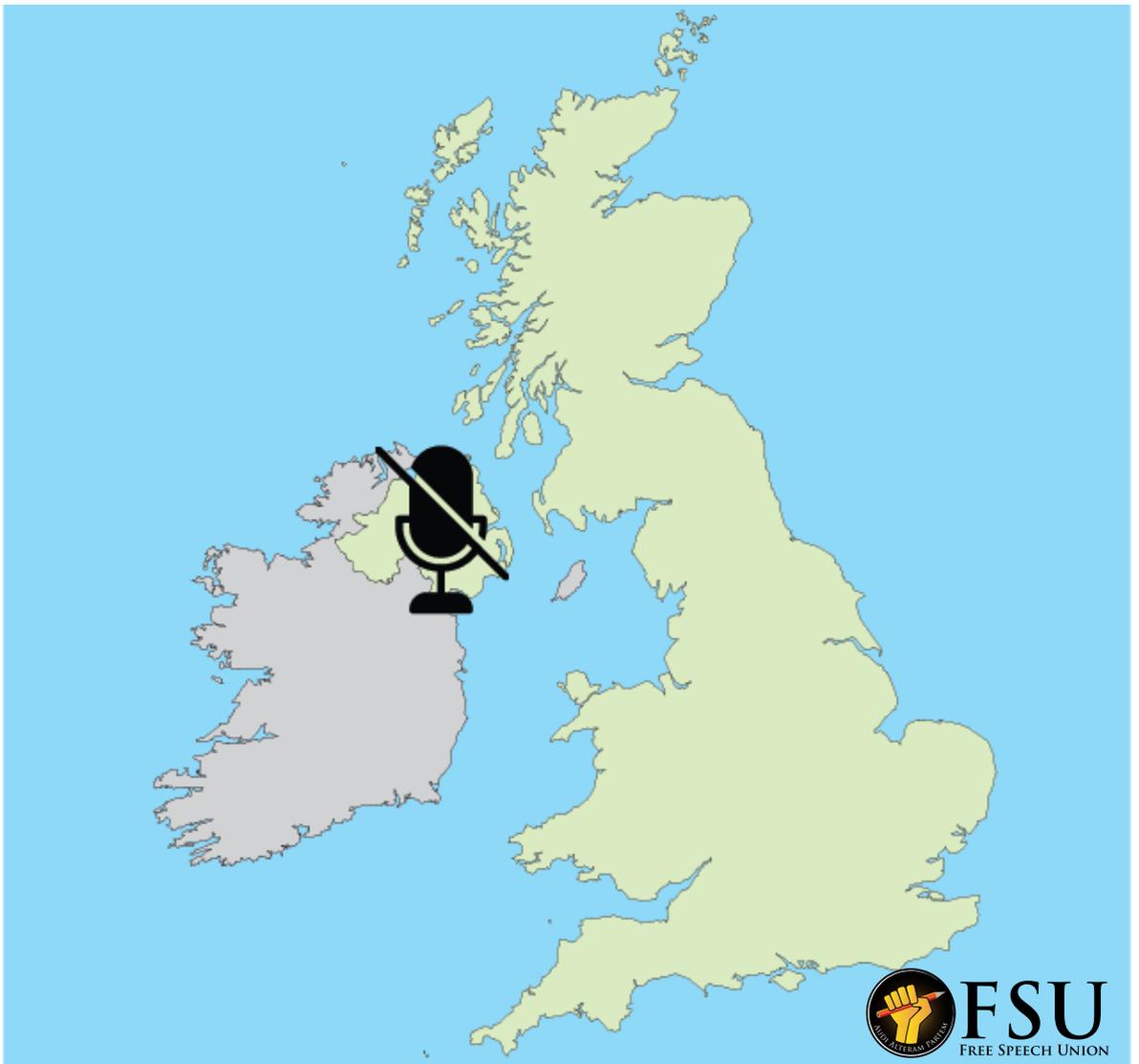
Free Speech Union briefing

Free Speech and Hate Crime Legislation in Northern Ireland

What do the people of Northern Ireland really think?

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Summary

New hate crime proposals for Northern Ireland

- In 2017, in response to concerns about hate crime in Northern Ireland ('NI'), the then justice minister initiated a review into reform of NI's hate crime laws. Judge Desmond Marrinan was appointed to lead the review in 2019 and his recommendations were published in 2020.¹
- The Review made a number of recommendations similar to those found in the Hate Crime and Public Order (Scotland) Act,² passed in March 2021 by the SNP government in Scotland, and the Law Commission's recommendations on reforming hate crime laws in England and Wales,³ published in September 2020.
- Marrinan's recommendations that have already been accepted include: bringing forward a Hate Crime and Public Order (Northern Ireland) Bill; applying a statutory aggravation model to all criminal offences, whereby any offence motivated by hostility towards protected groups is punished more severely; making sectarian prejudice a hate crime; including transgender identity as a protected characteristic; framing legislation to allow more groups to be added to the 'protected' list in future; providing recognition for 'intersectionality'; extending the 'stirring up hatred' offence so it applies to all the groups on the 'protected' list; and implementing the proposals in the UK government's Online Harms White Paper⁴ published in 2019, prohibiting online content that is 'legal but harmful'.⁵
- The NI Ministry of Justice is carrying out further consultations⁶ on other recommendations made by Judge Marrinan, including whether the 'dwelling defence' – protecting a person from prosecution for 'stirring up hatred' in their own home – should be replaced by a more limited 'private conversations' defence. Other issues to be consulted

1 Marrinan, D. 2020.

2 Hate Crime and Public Order (Scotland) Act 2021.

3 Law Commission. 2020.

4 HM Government. 2019.

5 Northern Ireland Department of Justice. 2021.

6 Northern Ireland Department of Justice. 2022b, p.8.

on include the possible addition of ‘misogyny’ and ‘transmisogyny’ as protected characteristics, the precise definition of ‘sectarian prejudice’, and whether victims of hate crime should have the right to exemption from cross examination in the same way that victims of sexual abuse currently do.⁷

- The Free Speech Union (“FSU”) commissioned independent opinion polling from LucidTalk to assess the opinion of the people of NI on issues relating to these proposals. Overall, the results suggest the people of NI are concerned that a Hate Crime and Public Order (NI) Act would have a chilling effect on free speech.

Polling

In March and April 2022, LucidTalk carried out some polling on some of the specific proposals made by the Marrinan Review, as well as the broader issues involved concerning freedom of speech. The findings include:

- 81% of respondents said they had not been a victim of a hate crime in the last 12 months.
- 14% said they thought hate crime had declined over the past 10 years and 35% said they thought it had remained about the same.
- 61% felt less free to express themselves than they were 10 years ago. Among those aged 25-64 – those born during, and living through, the Troubles – 64% said they felt less free.
- 63% believed that refusing to use a trans person’s preferred pronouns should not be a hate crime.
- 80% believed that any new hate crime legislation in NI should include robust free speech protections. Over half of the respondents were worried they would fall foul of the new laws.
- 81% agreed that people with opposing views should be able to engage in a full and frank exchange of views without being prosecuted for hate speech.
- Almost half felt the law should not be changed so that people can be prosecuted for stirring up hatred against a protected group even when intent cannot be proved.
- 63% believed that including sectarianism as a hate crime would

⁷ Ibid, p.18-19.

result in the police being bombarded with vexatious complaints about things their political opponents had said or done, thereby aggravating sectarian tensions. When asked whether making sectarianism a hate crime would increase or reduce sectarian violence, respondents were split, with 36% believing it would reduce violence and 25% believing it would increase it.

- 62% disagreed with the statement “people are too free to say what they think in Northern Ireland” and only 12% felt the government was doing a good job of protecting free speech.
- 79% felt some people being offended some of the time is a price worth paying for freedom of speech and two thirds felt freedom of speech today is hindered by political correctness.
- Asked whether they thought people being too easily offended is a problem in NI, only 10% said it wasn't a problem. 42% thought it was a minor problem and 44% thought it was a major problem.

What is the Marrinan Review?

In 2017, in response to the perception that hate crime in NI was increasing, then Justice Minister Claire Sudgeen initiated a review into NI's legislative framework on hate crime. In June 2019, the Department of Justice appointed Judge Desmond Marrinan to lead this review.⁸

Following a public consultation, the recommendations of the [Review](#) were published in December 2020 and included proposals for a Hate Crime and Public Order (NI) Bill.

What does the Review recommend?

The Marrinan Review's recommendations, published in November 2020 following a public consultation with individuals and organisations, can be divided into three categories: those which the NI Government has accepted without the need for further consultation;⁹ those which it consulted about in 'phase one,' which concluded in March 2022;¹⁰ and those it intends to consult about in future during 'phase two' of the consultation process.¹¹

8 Marrinan, D. 2020

9 Northern Ireland Department of Justice. 2021.

10 Northern Ireland Department of Justice. 2022a.

11 Northern Ireland Department of Justice. 2022b, p.18.

Of the 34 recommendations made by the Marrinan Review, the Ministry of Justice has accepted 23 either in part or in whole and decided that a further seven of them should not be included in a Hate Crime Bill.

Among the accepted recommendations are:

- The NI Assembly should bring forward a Hate Crime and Public Order (NI) Bill much like the Hate Crime and Public Order (Scotland) Bill.
- All the currently protected characteristics – race, religion, disability and sexual orientation – should continue to receive protection in the Bill, meaning crimes motivated by hostility towards people who possess those characteristics will continue to be punished more severely.
- Any criminal offence motivated by ‘sectarian prejudice’ should be designated a hate crime and punished more severely.
- ‘Transgender identity’ should be included as a protected characteristic, meaning crimes motivated by hostility towards transgender people should be punished more severely.
- The Hate Crime Bill should be framed in such a way as to allow more protected groups – for example goths and members of other subcultures – to be added if evidence emerges showing they are victims of crimes motivated by hostility towards them due to their membership of those groups
- The new Hate Crime Bill should recognise the importance of ‘intersectionality’, meaning that a hate crime can be motivated by hostility towards a person’s possession of more than one protected characteristic.
- All the new protected groups should be included in the ‘stirring up’ provisions of the Bill, meaning it will be a criminal offence to stir up hatred against anyone with a protected characteristic, not just race, religion, disability and sexual orientation.
- Northern Ireland should implement all the proposals in the Online Harms White Paper published by the UK government in 2019, including prohibiting online content that is ‘legal but harmful’.¹²

In addition to accepting the above recommendations of the Marrinan Review and including them in a Hate Crime Bill, the Ministry of Justice is

12 Northern Ireland Department of Justice. 2021.

carrying out a further two-part consultation about whether other things should be included in the Bill. 'Phase one' of this further consultation has now closed.¹³ The FSU's full submission to the Consultation on Hate Crime Legislation in Northern Ireland is available in Appendix B of this document. Proposals consulted on in 'phase one' included:

- *Not* including an explicit definition of 'hate crime' in the Hate Crime Bill but instead adopting Judge Marrinan's definition for working purposes. Judge Marrinan defined a hate crime as a criminal act perpetrated against individuals or communities with protected characteristics based on the perpetrator's 'hostility, bias, prejudice, bigotry or contempt' against the actual or perceived status of the victim or victims. The Ministry of Justice proposes that if a perpetrator is motivated by 'bias, prejudice, bigotry or contempt' against a victim or victims, that should be accepted as an indicator that they're motivated by 'hostility' but not constitute proof that they are.
- Defining 'sectarianism' so it encompasses the following elements:
 - membership (or presumed membership) of a Roman Catholic or Protestant denominational group;
 - membership (or presumed membership) of a social or cultural group with a perceived Roman Catholic or Protestant denominational affiliation; or
 - membership (or presumed membership) of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins.
- Scrapping the 'dwelling defence', whereby a person cannot be prosecuted for stirring up hatred against a protected group in their home if they had no reason to believe the words or behaviour used – or the written material displayed – would be heard or seen by a person outside their home. The Ministry of Justice continues to recommend doing away with this defence even though 86% of individual respondents to the initial Marrinan Review thought it should be retained.
- Replacing the 'dwelling defence' with a 'private conversations' defence.
- Disallowing persons charged with a hate crime from cross examining their accuser in person. Rather, the victims of hate crimes would be given the same protection from cross examination currently given to

13 Northern Ireland Department of Justice. 2022a.

victims of sexual violence.

The Ministry of Justice is planning to consult about a number of other things to be included in the Hate Crime Bill in 'phase two', such as:

- Including age, sex/gender and variations in gender characteristics as protected characteristics, with the category of sex/gender to include transgender identity. Ninety-two per cent of individual respondents to the Marrinan Review consultation were opposed to sex/gender becoming a protected characteristic.
- Alternatively, making 'misogyny' and 'transmisogyny' aggravating factors at sentencing or stand-alone crimes in themselves. Under these proposals, a person could be guilty of the new offence of 'transmisogyny' if they express the belief that transwomen should not be accommodated in women's prisons or allowed to compete against biological women in women's sports.¹⁴

14 Northern Ireland Department of Justice. 2022b, p.18-19.

Discussion

Are the recommendations justified?

This justification for the new Bill rests almost entirely on the claim that hate crime is increasing in Northern Ireland and that legislation is the best way to address this. But surely it is necessary to define what 'hate crime' actually is before attempting to gauge its extent and impact? The Report explicitly fails to do this, stating: "There is no clear and universally accepted definition in law or related disciplines of the term 'hate' or 'hate crime'."¹⁵ This is at least an honest admission that there is no consensus over the meaning of abstract, subjective concepts like 'hate', yet, mystifyingly, the Report continually refers to the apparent growth and under-reporting of a crime it cannot define.¹⁶

In fact, it is not clear that the claim that hate crime is rising in Northern Ireland can be straightforwardly evidenced in the way the Report assumes. An increase in officially recorded 'hate crime' does not necessarily mean that individuals are experiencing increased levels of hatred and prejudice in their day to day lives. The Crime Survey of England and Wales (CSEW) surveys a very large sample of individuals about their experiences of crime, capturing data that may not have been officially reported to police. It therefore provides a more granular view of people's actual experiences of crime than official police data. In 2018 David Goodheart compared CSEW data with officially recorded police hate crime statistics and found that individual CSEW respondents reported a *decrease* in experiences of hate crime at the same time that official police records of hate crime increased. This mismatch is likely due to the *increased* seriousness with which the police treat reports of hate crime, but it is not evidence that individuals are experiencing rising levels of hatred in their day to day lives. Writing for Policy Exchange Goodheart stated:

it is important to point out that the figures just published do not signify an actual increase in incidents of hate... reports are rising, because there is more encouragement to do so and the police take

¹⁵ Marrinan, D. 2020, p.4.

¹⁶ See for example: Marrinan, D. 2020, pages 6, 36, 105, 185 and 197.

it far more seriously than they used to, but actual numbers are almost certainly falling.¹⁷

Police data from England and Wales often adds more mud to the water by conflating 'hate crimes' with 'hate incidents'. Civitas Research Fellow Ben Cobby notes that this renders hate crime statistics "highly dubious". Whereas "normal standards of evidence apply" for the prosecution and conviction of *criminal* incidents with a hate element, the same threshold does not apply for the recording of hate *incidents*, which rely entirely on the perception of the victim with no requirement for objective evidence. This means that, for example, a racially motivated assault (hate *crime*) and a social media post that misgenders a trans person (hate *incident*) will be treated for statistical purposes as examples of the same thing, despite the difference in degree of severity. As Cobby writes:

anyone can report anything (or nothing) as a hate incident. You can even report it anonymously. Yet it will be reported and reflected in the statistics.¹⁸

Hate crime data from the Police Service of Northern Ireland (PSNI) and the Northern Ireland Statistics and Research Agency (NISRA) *does* distinguish between 'hate crimes' and 'hate incidents'. But this data does not directly support the Marrinan Review's claim that hate crime legislation is necessary because hate crime is rising in Northern Ireland. The PSNI's

17 Goodheart, D. and Norrie, R. 2018.

18 Cobby, B. 2019.

own data¹⁹ shows racist and homophobic incidents and crimes *declining* in the period directly leading up to the Justice Minister’s announcement in 2017.²⁰ According to the same statistics, sectarian motivated incidents and crimes have been in decline since 2014/15, while faith/religiously motivated incidents have steadily decreased since 2017/18.²¹ Although recorded instances of transphobic hate *incidents* increased between 2019/20 and 2020/21, the rate of actual transphobic hate *crime* remained the same.²² Goodheart’s finding that a rise in incident reporting can be attributed to greater public and police awareness, rather than an actual increase in discrete individual experiences of ‘hate’, is a plausible explanation for this rise in transphobic hate incidents. Moreover, the number of reported transphobic hate incidents declined from 71 to 65 in the past year. Admittedly, the number of transphobic hate crimes increased, but from a low base and not by very much – from 36 to 42 between 2020/21 and 2021/22.²³

Statistics gathered by the Public Prosecution Service for Northern Ireland

19 Police Service of Northern Ireland and Northern Ireland Statistics and Research Agency. 2021.

The most recent hate crime trend report released by the Police Service of Northern Ireland (PSNI) and the Northern Ireland Statistics and Research Agency (NISRA) defines hate crime as:

any criminal offence which is perceived, by the victim or any other person, to be motivated by hostility or prejudice towards someone based on a personal characteristic. PSNI also use the principles of this definition to record non-crime hate incidents.

The PSNI monitors six protected strands: race, homophobia, sectarianism, faith/religion (non-sectarian), disability and transphobia. Its approach is victim oriented and based on subjective perception. The trend report states:

evidence is not the test when reporting a hate incident; when an incident or crime has been reported to police by the victim or by any other person and they perceive it as being motivated by prejudice or hate, it will be recorded and investigated as a hate incident or crime. The perception of the victim, or any other person, is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime. Perception-based recording refers to the perception of the victim, or any other person.

20 Ibid. 2021, p. 7.

21 Ibid. 2021, p.8.

22 Ibid. 2021, p.9.

23 Police Service of Northern Ireland and Northern Ireland Statistics and Research Agency. 2022

(PPSNI)²⁴ lend further weight to the argument that hate incidents and crimes are declining without the need for new legislation. The PPSNI receive files on criminal incidents from the police and is responsible for deciding which cases will go forward to prosecution. The PPSNI reported a decrease in hate crime files received from police in 2020/2021, with a reduction in files received relating to racial and sectarian crimes compared to the previous reporting period.²⁵ Also in 2020/2021, the PPSNI chose not to prosecute 40% of the hate crime cases it received, stating that “the vast majority (97.2%) did not pass the evidential test”.²⁶

One claim the Marrinan Review makes exemplifies the methodological problems inherent in assembling evidence that hate crimes are increasing. The Review claims that there has been an alarming growth of online hate speech, particularly directed at women.²⁷ This claim is based on research by Amnesty International’s *Troll Patrol* project (2018), which found that 7.1% of tweets sent to women were ‘problematic’ or ‘abusive’.²⁸ But the categories of ‘abusive’ or ‘problematic’ are defined in the report as containing such wildly divergent types of content that the results are rendered meaningless when presented as a single data set. For instance, while ‘abusive’ content includes serious threats of sexual violence, ‘problematic’ content can be as mild as a female Twitter user being told to “shut up”. The Amnesty report does not support the Review’s claim that online hate speech directed at women is increasing because it draws a false equivalence between criminal threats, on the one hand, and speech that may be hurtful and offensive but is not obviously motivated by hate on the other.

This failure of the Amnesty report to distinguish statistically between degrees of severity when compiling data on online ‘hate speech’ echoes

24 Public Prosecution Service for Northern Ireland. 2022.

The Public Prosecution Service for Northern Ireland defines hate crime as:
a general term used to describe offences which are motivated by hostility or bias on the basis of race, religion (including sectarianism), sexual orientation, transgender or disability. There is no legal definition of hate crime but it is generally accepted as being ‘any incident which constitutes a criminal offence perceived by the victim, or any other person, to be motivated by prejudice or hate towards a person’s race, religion, sexual orientation or disability.

A hate crime is committed if the victim perceives that an incident was motivated by prejudice or hatred towards them based on one or more of their protected characteristics:

Even if there is no direct evidence to prove that it is a hate crime, it is the victim’s perception that matters for present purposes.

25 Public Prosecution Service for Northern Ireland. 2021, p.7.

26 Ibid. 2021, p. 8.

27 Marrinan, D. 2020, p. 187.

28 Amnesty International and Element AI. 2018.

the conflation of hate *crimes* (subject to a legal test of objective evidence) and hate *incidents* (based purely on subjective perception) seen in the English and Welsh hate crime data. In the absence of robust data evidencing the claim that hate crime is increasing in Northern Ireland, the FSU would question whether a new Hate Crime Bill is needed. The Review is unable to define hate crime and the dubious validity and subjective nature of hate crime statistics raise serious questions about what conclusions can legitimately be drawn from the 'hate crime' data.

Implications for Free Speech

Because the Hate Crime and Public Order (Scotland) Act²⁹ passed by the SNP government in March 2021 is so similar to the legislation proposed in NI, it is helpful to examine the concerns about free speech that arose in public debate about the Scottish Act. The Marrinan Review makes 90 references to Lord Bracadale, who carried out the equivalent review in Scotland and the Scottish Bill has clearly inspired the NI Bill. As a result, many of the concerns about that Scottish Bill also apply to Marrinan's recommendations. The Marrinan recommendations are also similar to those proposed by the Law Commission of England and Wales,³⁰ which have been criticised extensively by the Free Speech Union [elsewhere](#). The FSU concluded that the Law Commissions proposals could be described as "the Scottish Hate Crime Bill on steroids", but Marrinan's proposals go further still.³¹

Critics of the Scottish Bill were particularly concerned that increasing the number of 'stirring up' offences which, in effect, create new 'hate speech' crimes, would have a chilling effect on free speech and public debate over such issues as gender identity and sex-based women's rights. Concerns came from a diverse range of sources, including religious leaders, secular activists, journalists, lawyers, politicians, the police and the judiciary, as well as campaign groups such as Free to Disagree. These concerns included:

- That the Bible could be banned on the grounds that some Christian teachings – on marriage, for instance – would be classified as 'hate speech' under the new law;
- That a person who refuses to use a trans person's preferred gender

29 Hate Crime and Public Order (Scotland) Act 2021.

30 Law Commission. 2020.

31 Tylecote, R. 2020.

pronouns because they believe that sex is binary and immutable could be prosecuted for 'hate speech';

- That a person who expresses the view that transwomen should not be accommodated in women's prisons or be allowed to compete against biological women in women's sports could be prosecuted for 'hate speech';
- That actors, theatre producers, theatre directors and playwrights could be prosecuted for 'hate speech' because of hateful words spoken by characters in plays, e.g. *Hamlet*;
- That bookshops could be prosecuted for selling books that contain 'hate speech', e.g. the *Society for Cutting Up Men Manifesto* by Valerie Solanos;
- That newspapers and journalists could be at risk of prosecution for reporting 'hate speech' and would play it safe by not reporting things that might be regarded as politically incorrect or offensive;
- That the definition of 'hate speech' in the new law was vague, subjective and open-ended, meaning it could be weaponised by political activists to censor opponents;
- That the removal of the 'dwelling defence', whereby you cannot be prosecuted for stirring up hatred in the privacy of your own home, could lead to children being asked to testify against their parents in criminal prosecutions, causing an unwarranted interference in private and family life.³²

Describing the motivation behind the Scottish Hate Crime Bill, then-Justice Minister Humza Yousaf gave voice to a key justification now being used to curtail freedom of speech in NI. This is the claim that legislating against hate crime will reduce harm to the vulnerable and make society more 'inclusive' and 'respectful'. Yousaf stated:

we all have a responsibility to challenge prejudice in order to ensure Scotland is the inclusive and respectful society we want it to be... Stirring up of hatred can contribute to a social atmosphere in which discrimination is accepted as normal. By creating robust laws for the justice system, parliament will send a strong message to victims, perpetrators, communities and to wider society that offences

motivated by prejudice will be treated seriously and will not be tolerated.³³

But this relies on an account of freedom of expression that views exposure to unpalatable speech as a form of harm comparable to physical injury. Underpinning all these recent proposals is the belief that hatred can best be eliminated, not through robust and open debate, but through legislation limiting freedom of expression; that inclusion and respect can be achieved by suppressing unpalatable or offensive speech. This is by no means a universally accepted view and fails to account for the many social goods that arise when people engage in a full and frank exchange of views in a vibrant public sphere.

An alternative view holds that an environment in which people are less able to express themselves, where it is easier to make vexatious accusations against political opponents, is more, not less, febrile – that prohibiting so-called ‘hate speech’ will be counterproductive, aggravating sectarian or political tensions. In a society as politically divided as NI, Marrinan’s recommendation that legislation limit the expression of views regarded as ‘legal but harmful’ has the potential to heighten tensions, not least because each side will accuse the other of applying the law to silence them. That’s unlikely to strengthen the already fragile trust between Nationalist and Unionist groups in NI and could endanger the peace process. The alternative view is that speech is not something to be feared, and that freedom of expression in fact makes society more resilient. As John Stuart Mill wrote:³⁴

The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

History teaches us that censoring hateful speech does not have the intended effect of reducing harm to vulnerable people or, as Yousaf’s above comments imply, of creating a more inclusive society. On the contrary, Jacob Mchangama notes in his book *Free Speech: A Global*

33 BBC. 2020a.

34 John Stuart Mill. 1859/2015, p.19.

History from Socrates to Social Media that censorship by the Weimar Republic of antisemitic and other hateful speech, which was intended to stop the Nazis attracting political support, did nothing to prevent their rise to power. On the contrary, it enabled them to cast themselves as martyrs.³⁵ As Mchangama points out,³⁶ black American anti-slavery campaigners like Fredrick Douglass recognised freedom from censorship as essential to the *reduction* of harm to the vulnerable and the oppressed:

Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist. That, of all rights, is the dread of tyrants... Thrones, dominions, principalities, and powers, founded in injustice and wrong, are sure to tremble, if men are allowed to reason of righteousness, temperance, and of a judgement to come in their presence. Slavery cannot tolerate free speech. Five years of its exercise would banish the auction block and break every chain in the South.³⁷

Professor Andrew Tettenborn of the FSU Advisory Council expands on Douglass's view that freedom of speech holds the powerful to account. He said that the Marrinan proposals:

show a desire to sanitise the public sphere of discourse; an instinct to control and monitor what appears on it as closely as the state can get away with; and a dark mistrust of what ordinary people might get up to if allowed to say what they like.

These recommendations would have a chilling effect on free speech, even if vexatious accusations do not result in prosecutions. The right to freedom of expression is not taken seriously by the Review, just as it wasn't in the Hate Crime and Public Order (Scotland) Act, with the free speech protections it offers being the bare minimum – limited to those enshrined in international conventions. As Tettenborn writes of the NI Bill, "Individual freedom to demonstrate what one thinks plays the part merely of a slightly tiresome constraint imposed on us by international practice."³⁸

People who hold hateful views that are suppressed by law do not cease to hold those views because they're legally proscribed. Instead, their

35 Mchangama, J. 2022, p.3.

36 Ibid. 2022, p. 240-241.

37 Douglass, F. cited in Lash, K. 2019.

38 Tettenborn, A. 2020.

opportunity to have their views challenged, to change their minds through participation in free discourse, is dangerously limited. Sunshine, not censorship, is the best disinfectant.

The Review's recommendations defy public opinion

In the initial consultation carried out about Marrinan's recommendations, responses were received from both the public and a range of organisations. However, the Review showed a clear preference for the views of organisations, consistently adopting recommendations that were opposed by individual members of the public but endorsed by activist organisations and lobby groups. Some points of divergence include:

- Asked whether new protected characteristics should be included in the 'stirring up' provisions of Part III of the Public Order (Northern Ireland) Order 1987, 74% of organisations agreed compared to just 2% of individuals.³⁹
- Asked whether defences of freedom of expression in the Public Order Act 1986 for religion and sexual orientation should be added as defences to Part III of the Public Order (Northern Ireland) Order 1987, 97% of individuals were in favour compared to 52% of organisations which were not. Asked whether 'stirring up' offences should have a specific provision protecting freedom of expression, all individual respondents agreed, while 56% of organisations disagreed.⁴⁰
- 95% of organisations who responded to the consultation agreed that punishing hate crime more severely is justified, while 90% of individuals disagreed.⁴¹
- Asked whether gender identity should become a protected characteristic, 55% of organisations were in favour, but 92% of individuals were opposed. Seventy-three per cent of organisations felt transgender identity should be protected, yet 97% of individuals believed it should not.⁴²
- Asked whether intersectionality was an important factor for consideration in new hate crime legislation, 83% of organisations agreed compared to just 12% of individuals.⁴³

39 Marrinan, D. 2020, p. 27.

40 Ibid. 2020, p. 27-28.

41 Ibid. 2020, p. 5.

42 Ibid. 2020, p. 15-16.

43 Ibid. 2020, p. 17.

- Asked whether there should be a specific reference to the term 'sectarian' in new hate crime legislation, 75% of organisations were in favour, but 65% of individuals were against.⁴⁴

This clear divergence between the views of individuals and organisations suggests a disconnect between the general public and groups that claim to be speaking on behalf of different 'communities' in the public square. The Review makes no attempt to confront this divergence, nor does it explain its decision to endorse the views of lobby groups instead of the clear preference for liberty and freedom of expression shown by the individual respondents. Arguably, this is further evidence that this kind of legislation is partly motivated by a fear of allowing the democratic majority to freely express their views.

44 Ibid. 2020, p. 20.

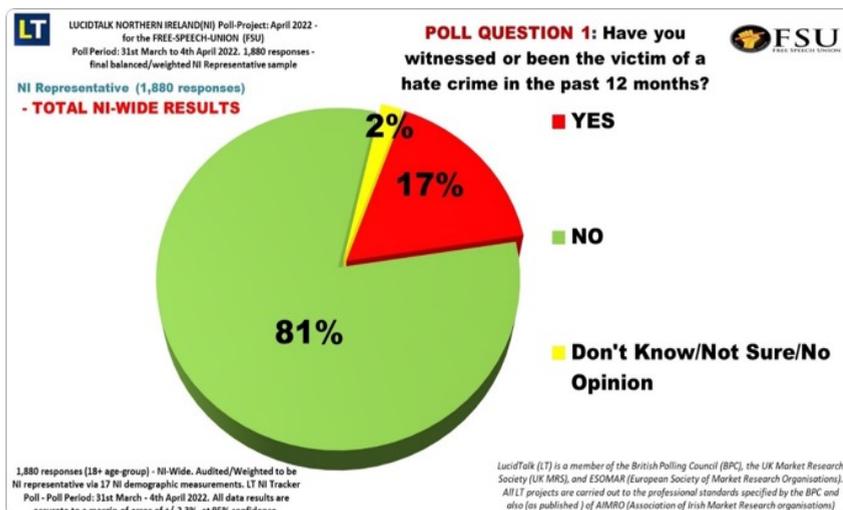
Analysis of Independent Polling: The Public Supports Freedom of Speech and Opposes Further Censorship

Independent opinion polling suggests the public do not support the proposed Hate Crime and Public Order Bill

The Free Speech Union wanted to find out what the people of NI think about the issues raised by this legislation. Independent polling was conducted by LucidTalk between 31st March and 4th April, soliciting the public's opinion on specific proposals in addition to the broader issues. The findings are summarised below. The methodology and full data can be found in Appendix A and C of this document respectively.

Experiences and perceptions of hate crime in Northern Ireland

Eighty-one per cent of respondents said they had not been the victim of a hate crime in the last 12 months. Eighteen-to-twenty-four-year-olds were most likely to say they had been the victim of a hate crime (32%) compared to only 7% of the over-65s.



Asked whether hate crime had increased, decreased or stayed the same over the past 10 years, 51% thought it had increased, 35% thought it had stayed the same and 10% thought it had decreased. Green, Alliance, and Sinn Fein voters were most likely to believe it had increased, with 68% of Green voters, 65% of Alliance voters, and 62% of Sinn Fein voters saying hate crime had increased. By comparison, Unionist voters overall thought that hate crime had 'only' increased by 36% - this being the score for both DUP and UUP voters. Forty-five per cent of DUP voters, and 49% of UUP voters thought 'Hate Crime' had stayed the same over the past 10 years.

Aggravated offences⁴⁵

Respondents were asked whether they thought crimes motivated by hatred of a victim's race, religion, sexual orientation, disability, age, gender, transgender identity, misogyny, transmisogyny, or sectarianism should be more severely punished. Sixty-six per cent of respondents said such crimes should be punished more severely, compared to 21% who said they shouldn't. By party affiliation, support was strongest amongst the Alliance party (83%), Greens (82%), SDLP (80%) and Sinn Fein (85%) compared with 'only' 44% of DUP voters and 48% of UUP voters. Interestingly, non-voters at NI elections also showed strong support for this at 76%. Overall there was also greater support among Nationalists and Catholics compared to Protestants.

Hate crime and free speech

Respondents were asked whether they agreed or disagreed with a series of statements relating to freedom of speech.

1) 'Refusing to use a trans person's preferred gender pronouns should be a hate crime'

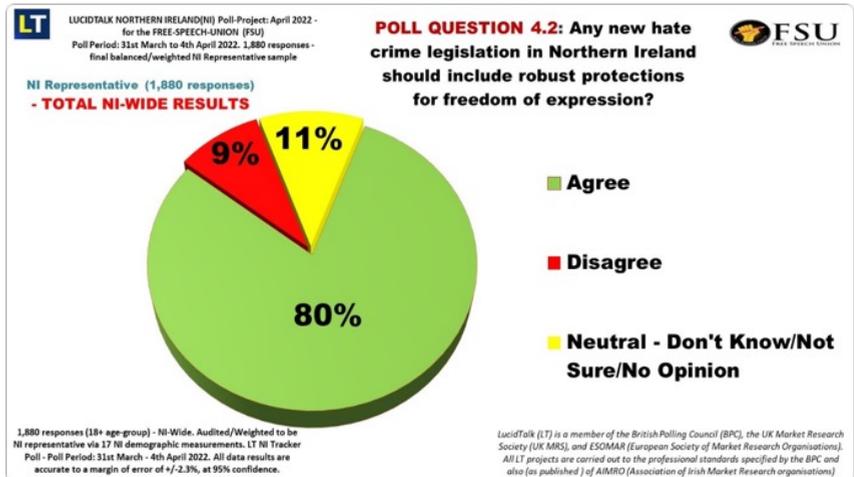
Sixty-three per cent of respondents believed refusing to use someone's preferred pronouns should not be a hate crime, compared to only 22% who thought it should. Support was highest among the young, with 38% of 18–24-year-olds thinking it *should* be a hate crime. Only 3% of DUP and 9% of UUP voters agreed, compared with 25% of Alliance Party voters

⁴⁵ 'Aggravated offences' are crimes motivated by or demonstrating hostility towards a victim because of their perceived identity. It is important to note that aggravated offences would be considered a crime even in the absence of an aggravating factor. A 'hate crime' is technically a criminal offence which is considered to have been 'aggravated' by the prejudiced motivations of the perpetrator.

and 60% of Green voters who agreed. 38% of Sinn Fein voters agreed.

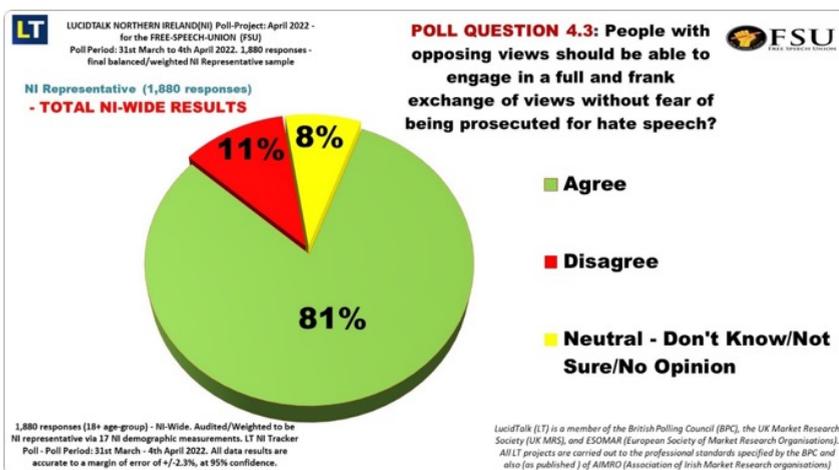
2) 'Any new hate crime legislation in Northern Ireland should include robust protections for freedom of expression'

A significant majority agreed, with 80% of all respondents supporting the statement, and only 9% disagreeing. Disagreement was highest among Green voters (25%).



3) 'People with opposing views should be able to engage in a full and frank exchange of views without fear of being prosecuted for hate speech'

Eighty-one per cent of respondents agreed with this statement and only 11% disagreed, with agreement high among all age groups. Ninety-five per cent of DUP voters supported this statement, compared with 'only' 62% of Green Party voters, and 77% of Alliance Party voters.



4) 'The law should be changed so people can be prosecuted for stirring up hatred against a protected group even when it cannot be proven that they intended to do so'

Respondents were split on this statement, with 48% disagreeing and 35% agreeing. The most notable difference was between DUP voters (78% disagreement) and Sinn Fein voters (30% disagreement), and Green voters (19% disagreement). Among those who identified as strongly Nationalist, 52% agreed with the statement, compared to 74% disagreeing among those who identified as strongly Unionist. A similar split was identified between Catholics (47% agreement) and Protestants (15% agreement), and among Remainers (48% agreement) and Leavers (12% agreement).

5) 'If sectarianism becomes a hate crime in NI that will be exploited by both sides who will bombard the police with complaints about things their opponents have said or done'

Sixty-three per cent agreed that criminalising 'sectarianism' would result in the police being bombarded with complaints about political/religious opponents, with only 26% believing it wouldn't. This was uniformly reflected across age ranges and geographical location. Only among Green voters was there any significant disagreement.

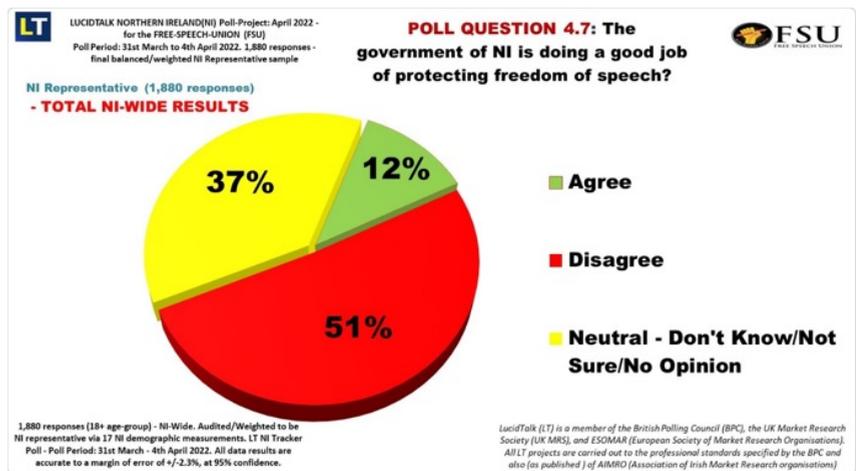
6) 'People are too free to say what they think in Northern Ireland'

Only 25% of respondents thought people in Northern Ireland are too

free to say what they think, and this was uniform across age ranges. Overall, 62% of respondents disagreed with the statement that people are too free to say what they think.

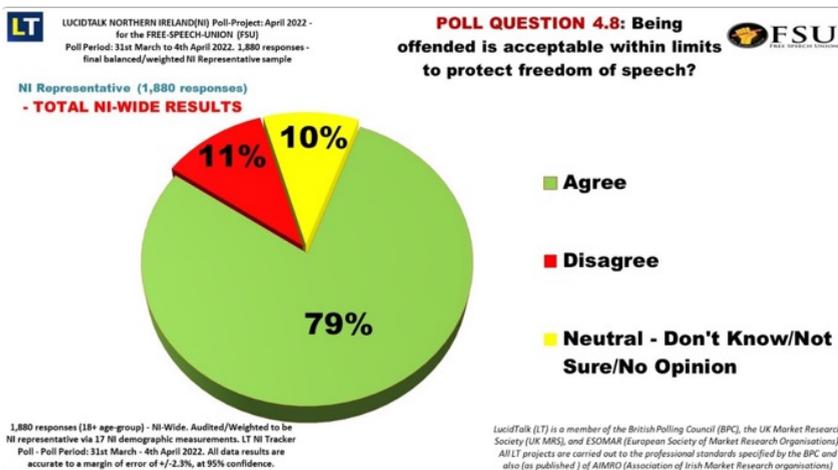
7) 'The government in Northern Ireland is doing a good job of protecting freedom of speech'

Only 12% of respondents agreed that the government is doing a good job of protecting free speech.



8) 'Being offended is acceptable within limits to protect freedom of speech'

79% agreed that some people being offended is a price worth paying for freedom of speech. Support for this statement was high across all age groups and regardless of political affiliation.



9) 'I worry that I could get into trouble because of the new hate speech laws by saying something which is misinterpreted'

Over half of respondents (54%) worry that they would fall foul of new hate crime laws. This concern was highest among the over-65s (60%). Concern was also elevated among DUP supporters (83%), 65% of UUP voters. Among those who identify as strongly Unionist (81%) compared to those who identify as strongly Nationalist (32%). Protestants are also more concerned (79%) compared to Catholic respondents (43%), and Leavers (79%) more than Remainers (35%).

10) 'Freedom of speech is hindered today by political correctness'

Sixty-five per cent of respondents agreed that freedom of speech is hindered by political correctness, with support for this statement increasing across age groups from 55% among 18–24-year-olds to 68% among the over-65s. Ninety-seven per cent of DUP voters and 87% of UUP voters agreed, compared to only 12% of Green voters and 46% of Alliance party voters. Ninety-five per cent of those who identified as strongly Unionist agreed, compared to just 42% of those who identified as strongly Nationalist.

Sectarianism

Policing speech is not a proportionate or effective way to reduce sectarian tensions, particularly in a polarised country like NI with a history of sectarian conflict where the peace process depends upon each side displaying

tolerance and forbearance towards their opponents. A free and frank exchange of views is an essential part of reducing these tensions and the FSU's objection to the NI Hate Crime Bill rests in large part on the belief that it will make it harder, not easier, for public disagreements to end in compromise. In the hands of political activists on both sides, legal prohibitions on sectarian 'hate speech' can be weaponised to suppress the speech of their opponents, leaving both sides feeling more sinned against than sinning and exacerbating tensions. Unfortunately, the experience of the police in England and Wales of dealing with reports of 'hate incidents' suggests that the authorities are ill equipped to filter out vexatious complaints – we estimate that close to a quarter of a million 'non crime hate incidents' have been recorded in England and Wales since 2014,⁴⁶ suggesting the police have spent hundreds of thousands of hours investigating 'hate incidents' that have turned out not to be crimes. Commenting on the Miller v College of Policing ruling in 2021, senior judge Dame Victoria Sharp remarked of the College of Policing guidance on recording 'non crime hate incidents':

There is nothing in the guidance about excluding irrational complaints, including those where there is no evidence of hostility and little, if anything, to address the chilling effect which this may have on the legitimate exercise of freedom of expression.⁴⁷

On the whole, respondents to the FSU poll were inclined to agree with this assessment. Asked whether they felt that making sectarianism a hate crime would result in the police being bombarded by vexatious complaints by activists about things their political opponents had said or done, 63% of all respondents agreed that it would.

Disaggregating the polling data according to the political beliefs of respondents makes it easy to see why over half of those surveyed hold this view. The polling results reveal profound disagreement between DUP and Sinn Fein voters, not just on issues like gender identity legislation, which might be expected to divide opinion along party-political lines, but also on the definition, prevalence and severity of hate crime and the appropriate scope of legislative measures to address it.

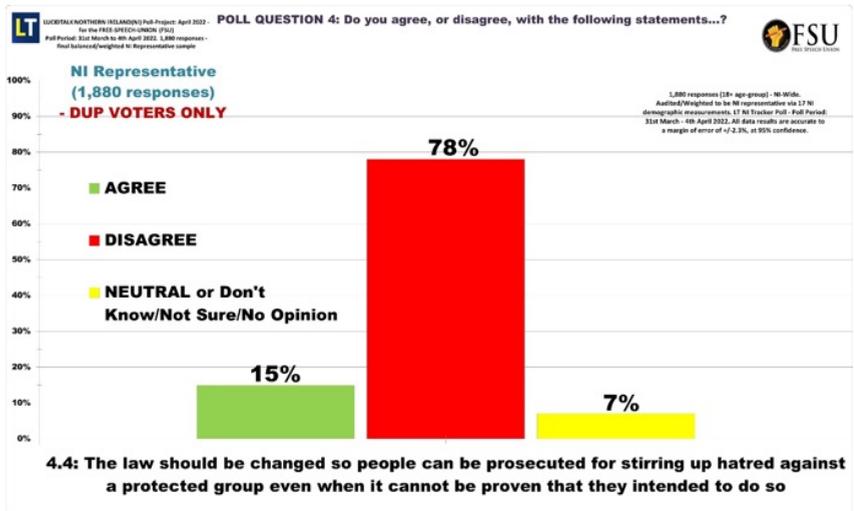
For example, more SF than DUP voters reported they had witnessed or been the victim of a hate crime in the past 12 months. Similarly, more SF

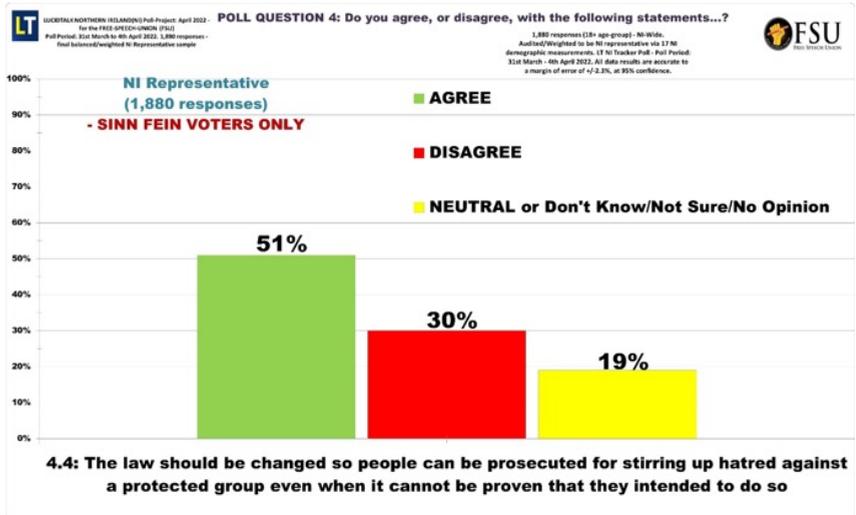
⁴⁶ Lyons, I. et al. 2020.

⁴⁷ Sharp, V. 2021 cited in BBC. 2021.

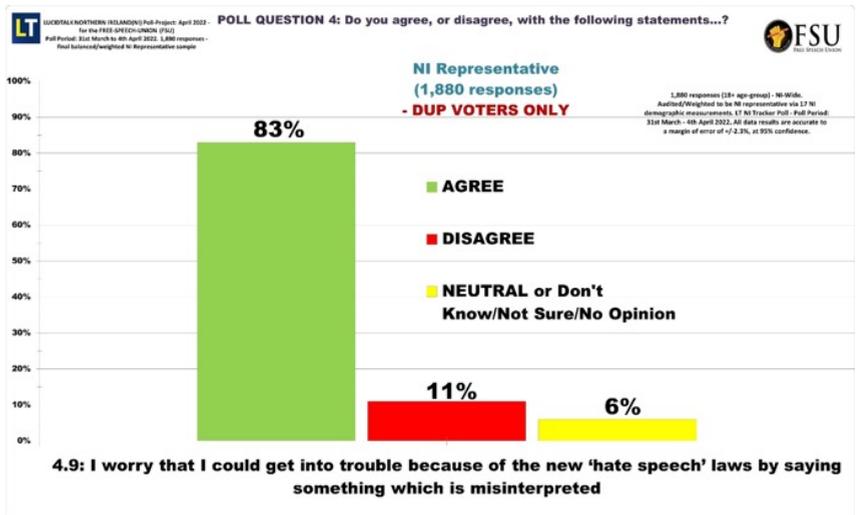
than DUP voters believed that hate crime had increased over the last 10 years. This suggests that SF voters are more likely to adopt an expansive definition of what constitutes a hate crime and are more likely to perceive it as increasing over time compared to DUP voters. The inability of the Marrinan Review to define ‘hate crime’ therefore appears to reflect a broader lack of public consensus in NI about what ‘hate crime’ actually is. Lack of public consensus is hardly the ideal context for policy making in the best of circumstances, but in the politically febrile atmosphere of NI legislators risk creating a war of definitions between political factions, as DUP and SF voters belabour the police with complaints about ‘hate speech’ seeking to have their political opponents investigated and prosecuted.

The fact that SF voters are more supportive of the Hate Crime Bill than DUP voters and believe hate crime is more of a problem in NI, suggests Nationalists will be more likely to complain about the ‘sectarianism’ of their political opponents than Unionists. According to our polling, 85% of SF voters supported more severe punishment for crimes motivated by hatred of a victim’s protected characteristics, compared to only 44% of DUP voters. Just 15% of DUP voters believed the law should be changed so people can be prosecuted for stirring up hatred without evidence of intent, compared to 51% of SF voters.





While 91% of DUP voters wanted robust free speech protections to be included in any new hate crime legislation, the figure was only 72% for SF voters. Interestingly, despite supporting harsher penalties, lower evidence thresholds and fewer free speech protections for the prosecution of hate crime, SF voters appear less concerned about falling foul of the legislation themselves: only 35% of SF voters said they were worried about getting into trouble for saying something which was misinterpreted as 'hate speech', compared to 83% of DUP voters.



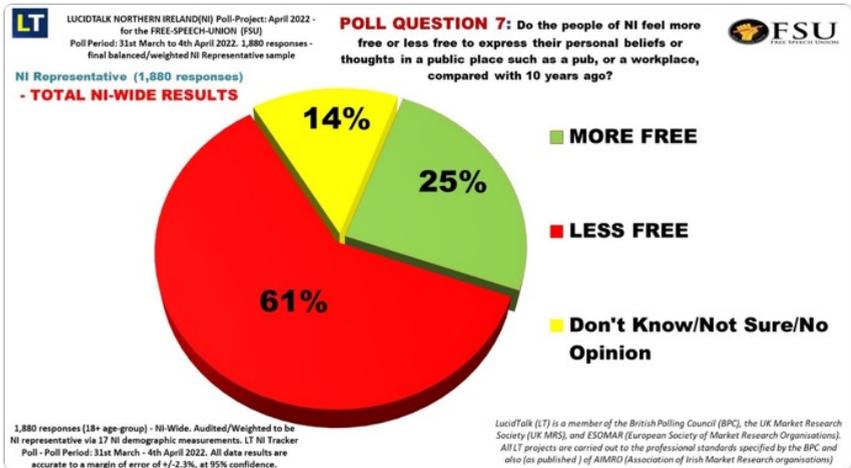
The figure of 83% represents an acute level of anxiety on the part of DUP voters about exercising their right to free speech. Furthermore, 90% of DUP respondents felt that they were less free to express their personal beliefs than they were 10 years ago, compared to just 43% of SF voters.

Policy makers must have special regard for these findings going forward, particularly in light of SF's success in the Stormont Assembly election in May 2022. These results indicate that supporters of the second largest political party in NI – the DUP – are concerned that a Hate Crime and Public Order (NI) Bill will penalise them for expressing their political views much more severely than it will penalise their opponents. Legislators must ask themselves whether it is advisable to further exacerbate sectarian tensions by passing legislation that will leave one side in the conflict between Unionists and Nationalists feeling particularly aggrieved. Far from reducing sectarian tensions, this Bill is likely to add fuel to the fire.

Views on free speech

Asked whether people being too easily offended is a major problem, a minor problem, or not a problem at all, 44% of all respondents felt people being too easily offended was a major problem, and 42% felt it was a *minor* problem. Only 10% believed it was not a problem at all. These findings suggest broad public agreement that subjective claims of personal 'offence' are a problem in NI. This consensus holds fairly uniformly across age groups and political affiliations. While 64% of Greens identified too easily taking offence as a minor problem and 76% of DUP voters as a major problem, there was agreement that offence culture is problematic.

Asked whether the people of NI feel more or less free to express their personal beliefs or thoughts in a public place than they did 10 years ago, 61% of respondents said they felt less free.



This response was highest among the 25-64 age range, i.e., those born during and living through the Troubles felt less free to express themselves than any other age group. Ninety per cent of DUP voters and 78% of UUP voters felt less free to express themselves than 10 years ago. The Greens (37% more free versus 34% less free) and Sinn Fein voters (43% versus 40%) were split – as were Alliance party voters who were 44% who said they felt ‘less free’, with 36% who said they felt ‘more free’. Unionists were more likely than Nationalists to feel less free to express themselves, as were Protestants, with 86% saying they felt less free to express themselves in public than they did 10 years ago.

Conclusion

The proposals of the Marrinan Review are open to the same criticisms as earlier legislation restricting free speech, such as the Hate Crime and Public Order (Scotland) Act,⁴⁸ and the Law Commission's recent proposals on overhauling hate crime law in England and Wales.⁴⁹ By its own admission, the Review is unable to define the problem it claims to be addressing and the data used to evidence the extent and seriousness of that problem is unreliable. The primary justification for this legislation, that 'hate crime' is on the rise in NI, does not stand up to scrutiny. Legislation which cannot clearly define the problem it is intended to solve, or provide evidence for the existence of that problem, is bound to create more difficulties than it addresses. Increasing the number of 'stirring up' offences, and criminalising expressions of 'sectarian prejudice', will harm public debate and risk inflaming existing political tensions in NI by creating a censorious atmosphere that empowers the easily offended and facilitates vexatious complaints. That, in turn, may endanger the peace process. The proposals do not take seriously the primacy of the right to freedom of speech in democratic societies or recognise its importance as the chief mechanism by which political division, bigotry and intolerance are addressed without recourse to violence.

Our opinion polls show that the people of NI take their right to freedom of expression very seriously. The vast majority believe any new hate crime legislation should include robust free speech protections and that people should be able to engage in full and frank discussions without fear of being prosecuted for 'hate speech'. Over half of those polled fear their speech will be misinterpreted and criminalised under the new laws. The people of NI do not support the creation of new speech crimes, like making it a hate crime to 'misgender' a trans person. Only 38% believe the law should be changed so that people can be prosecuted for 'stirring up hatred' without intent, with 48% disagreeing. A majority believe that making 'sectarian prejudice' a hate crime in NI will result in the police being bombarded with vexatious complaints by political antagonists, and a significant minority

48 Hate Crime and Public Order (Scotland) Act 2021.

49 Law Commission. 2020.

fear the proposed legislation will inflame sectarian violence.

Most damningly, just 12% of people believe the authorities in NI are doing a good job of protecting freedom of speech. And why would they, when the Marrinan Review and the resulting recommendations evidence such a clear disregard for the views of the public? It is important to remember the preference shown by the NI government for the views of unaccountable lobby groups over those of individual citizens when considering the response to the initial consultation. The general public clearly do not agree with the lobby groups claiming to represent them, as our poll demonstrates.

On the whole, the people of NI are willing to accept being offended as a price worth paying to protect freedom of speech. They believe freedom of speech is being hampered by political correctness and feel less free to express themselves than they were 10 years ago. It is to be hoped that the new government in NI will recognise the value their citizens rightly place on freedom of speech.

Bibliography

Amnesty International and Element AI. 2018. 'Troll Patrol Findings: Using Crowdsourcing, Data Science and Machine Learning to Measure Violence and Abuse against Women on Twitter.' Available [here](#). (Accessed on 06.05.2022)

BBC. 2020a. 'New "stirring up" hate crime legislation put forward.' Available [here](#). (Accessed on 06.05.2022)

BBC. 2020b. 'Free speech row over new hate crime bill in Scotland.' Available [here](#). (Accessed on 13.05.2022)

BBC. 2021. 'Harry Miller: Legal victory after alleged transphobic tweets.' Available [here](#). (Accessed on 16.05.2022)

Cobley, B. 2019. 'Is Surging Hate Crime in the UK Overcooked?' *Quillette*. Available [here](#). (Accessed on 06.05.2022)

Douglass, F. cited in Lash, K. 2019. 'Fredrick Douglass's "Plea for Freedom of Speech in Boston".' *Law and Liberty*. Available [here](#). (Accessed on 06.05.2022)

Goodheart, D. and Norrie, R. 2018. 'Surprisingly good news in the hate crime figures.' Policy Exchange. Available [here](#). (Accessed on 06.05.2022)

Hate Crime and Public Order (Scotland) Act 2021. Available [here](#). (Accessed on 06.05.2022)

Hewitt, R. 2022. 'Public urged to help combat rising hate crime attacks in Northern Ireland.' *Belfast Telegraph*. Available [here](#). (Accessed on 06.05.2022)

HM Government. 2019. 'Online Harms White Paper.' Available [here](#). (Accessed on 06.05.2022)

Law Commission. 2020. 'Hate crime laws – A consultation paper.' Available

[here](#). (Accessed on 06.05.2022)

Lyons, I. et al. 2020. 'Police record 120,000 "non-crime" hate incidents that may stop accused getting jobs.' *The Times*. Available [here](#). (Accessed on 16.05.2022)

Marrinan, D. 2020. 'Hate crime legislation in Northern Ireland – Independent Review'. Available [here](#). (Accessed on 06.05.2022)

Mchangama, J. 2022. 'Free Speech – A Global History from Socrates to Social Media.' Basic Books London. (p.3)

Mill, J.S. 1859/2015. 'On Liberty, Utilitarianism and Other Essays.' Oxford World's Classics.

Northern Ireland Department of Justice. 2020. 'Long welcomes completion of review into hate crime legislation'. Available [here](#). (Accessed on 06.05.2022)

Northern Ireland Department of Justice. 2021. 'Annex A – review of hate crime legislation table of recommendations'. Available [here](#). (Accessed on 06.05.2022)

Northern Ireland Department of Justice. 2022a. 'Consultation on Hate Crime Legislation in Northern Ireland.' Available [here](#). (Accessed on 06.05.2022)

Northern Ireland Department of Justice. 2022b. 'Improving the effectiveness of Hate Crime Legislation in Northern Ireland A Public Consultation and Call for Views.' Available [here](#). (Accessed on 12.05.2022)

Police Service of Northern Ireland and Northern Ireland Statistics and Research Agency. 2021. 'Trends in Hate Motivated Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2020/21.' Available [here](#). (Accessed on 06.05.2022)

Police Service of Northern Ireland and Northern Ireland Statistics and Research Agency. 2022. 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland.' Available [here](#). (Accessed on 22.05.2022)

Public Prosecution Service for Northern Ireland. 2021. 'Statistical Bulletin: Cases Involving Hate Crime 2020/21'. Available [here](#). (Accessed on 06.05.2022)

Public Prosecution Service for Northern Ireland. 2022. 'Crime types: Hate Crime'. Available [here](#). (Accessed on 06.05.2022)

Tettenborn, A. 2020. 'Free speech in under threat in Northern Ireland.' *The Critic*. Available [here](#). (Accessed on 06.05.2022)

Tylecote, R. 2020. 'The Law Commission would make Mohammed cartoons illegal: Ten reasons to throw out the Law Commission's Anti-Free Speech Proposals.' The Free Speech Union. Available [here](#). (Accessed on 06.05.2022)

Appendix A

Polling Methodology

Polling was carried out by Belfast based polling and market research company LucidTalk. LucidTalk is regulated by the British Polling Council, the primary organisation that sets professional polling and market research standards in the UK.

The project was carried out online for a period of four days from 31st March to 4th April 2022. The project targeted the established Northern Ireland (NI) LucidTalk online Opinion Panel (13,816 members) which is balanced by gender, age-group, area of residence, and community background, in order to be demographically representative of Northern Ireland. 2,062 full responses were received.

A data auditing process was carried out to ensure all completed poll-surveys were genuine 'one-person, one-vote' responses, along with a preliminary weighting to obtain a NI balanced sample, and this resulted in 1,880 responses being considered and verified as the base data-set (unweighted). In order to produce a robust and accurate NI representative sample, this base data-set of 1,880 responses was then weighted by gender, community background and additional demographic measurements to reflect the demographic composition of Northern Ireland resulting in the weighted data tables and weighted results set composing the final results. These are the 1,880 weighted responses presented in this report. All data results produced are accurate to a margin of error of +/-2.3%, at 95% confidence.

Please note that all surveys and polls may be subject to sources of error, including, but not limited to sampling error, coverage error, and measurement error. All reported margins of sampling error include the computed design effects for weighting.

Appendix B

Full FSU Submission to the Consultation on Hate Crime Legislation in Northern Ireland

Question 1

Do you agree / disagree that the threshold for Hate Crime legislation should be of a sufficient high level when criminalising a person for their behaviours/attitudes leading to hate motivated offences and which results in an increased sentence from the basic offence?

Agree (subject to the below).

Comments

As a mass-membership public interest body standing up for the speech rights of its members, the Free Speech Union's (FSU) interest in hate crime aggravation is limited to cases where it affects freedom of speech.

The FSU does not support the aggravation model, which singles out particular groups for additional legal protections and thereby corrodes the principle of equality before the law. For example, if a person is guilty of an offence under s.19 of the Public Order (Northern Ireland) Order 1987 – using threatening words likely to cause a breach of the peace – then we see it as invidious that an offence should be aggravated if based on the victim's race or religion, but not if based on other characteristics such as the victim's social class or favourite football club. The effect of the offence on the victim and on social cohesion is the same.

If the aggravation model is pursued, we are strongly of the view that the threshold should be a high one.

Question 2

Do you agree / disagree that the current threshold of hostility is maintained in legislation as that threshold?

Agree, subject to the below.

Comments

As outlined in our previous answer, we dispute the validity of the aggravation model. But if the model it followed, we agree that the threshold should be hostility.

Question 3

Do you agree / disagree that the attitudes of bias, prejudice, bigotry and contempt, as suggested by Judge Marrinan, could be included as indicators of hate in subsequent guidance in support of new legislative changes in a Hate Crime Bill?

Disagree.

Comments

It does not bode well for the clarity of the proposed legislation that there is already a predicted need for supporting guidance on the basic definitions of the terms it uses. In this case in particular, we are very unhappy with the idea of official or semi-official statutory guidance on the meaning of a criminal statute. Our reasons are as follows:

(1) Citizens have a right to know where they stand. It is by no means clear that, for example, in ordinary English 'bias' is the same as 'hostility' and would be understood as such by the average citizen. If the statute says 'hostility' the defendant has the right to have it interpreted by a court of law without interventions from other official sources as to what it should mean.

(2) Guidance seeking to bring legal objectivity to the considerably subjective meaning of a term like 'hate' by making reference to the equally subjective term 'bias' would require its own sub-set of guidance to clarify common misconceptions about 'bias' as a concept. This is just one demonstration of the potential for endless proliferation of official guidance when legislation is framed around imprecise concepts like 'hate'. An entire industry has been built around the misplaced idea that it is possible to measure the extent of a person's 'bias' against specific groups. 'Implicit' or 'unconscious' bias tests have been repeatedly shown to be scientifically doubtful, but the conviction that 'bias' is an objectively measurable psychological

condition at the level of the individual persists. It would be surprising if the inclusion of 'bias' in the guidance did not give rise to attempts to have the tendentious science of unconscious bias testing made admissible as evidence in a court of law.

(3) The mainland definition of hate crime as 'any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice' against individuals based on their having one or more protected characteristic has already been shown to suffer from a lack of definitional clarity. In addition to giving rise to numerous vexatious complaints by members of the public seeking to suppress lawful speech they find disagreeable, hate crime legislation is also over invoked and misused by police and prosecutors, creating an atmosphere in which freedom of speech is chilled by fear of official sanction. It would be most unfortunate to see these trends recreated in the Northern Irish context in connection with hate crime aggravation.

Question 4

Do you agree / disagree that a third 'by reason of' threshold should not be added to the current thresholds in legislation, which are demonstration of hostility and motivated by hostility?

No view.

Question 5

In supporting the understanding of a statutory sectarian aggravator in hate crime law, do you agree / disagree that 'sectarian' should be defined in law?

Neither Agree nor Disagree (see below).

Comments

As outlined above, the FSU opposes the principle of providing additional legal protections to named groups in law. We therefore do not support the existence of a statutory sectarian aggravator in hate crime law.

Returning to our example of an offence under s.19 of the Public Order (Northern Ireland) Order 1987, we see no reason why the crime of using threatening words likely to cause a breach of the peace should be prosecuted differently against two defendants, one of whom was motivated by 'sectarian' hatred, the other of whom was motivated by hatred because

the victim disagrees with him about a political or social issue.

Having said this, if, in our view misguidedly, sectarianism were included, it would need to be clearly defined in law.

Question 6

In supporting a statutory sectarian definition, in relation to hate crime law, do you agree / disagree that the definition should include the following elements?

- **membership (or presumed membership) of a Roman Catholic or Protestant denominational group;**
- **social or cultural group with a perceived Roman Catholic or Protestant denominational affiliation; or**
- **membership (or presumed membership) of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins.**

Disagree.

Comments

If, contrary to our arguments above, sectarianism becomes an aggravating factor in law, we would make the following comments:

(1) There can be no reason to limit the definition of sectarianism to Protestantism and Catholicism. If two people are prosecuted under the Public Order (Northern Ireland) Order, a Protestant who shouts “Kill the Pope” and a militant Muslim who shouts “Kill the crusaders,” there is no possible justification for punishing one more severely than the other.

(2) Shoehorning Irish/British nationality into the definition of sectarianism unnecessarily duplicates the existing racial and national origins provisions. Furthermore, we see no reason why a nationalist should face an increased sentence for a public order offence if they direct threatening speech against a speaker or politician as, for example, a ‘representative of the murderous British state’.

Question 7

The suggested definition of sectarianism does not include political opinion. Do you agree / disagree that political opinion should be

excluded?

Agree.

Comments

Any suggestion that public order offences could be aggravated if they included political vituperation should be seen as utterly unacceptable. This would be a profoundly serious attack on freedom of political speech with virtually unlimited potential for abuse.

Question 8

Are there any other elements that you believe would assist defining sectarianism in the context of Northern Ireland's history? If yes, please include details.

No view.

Question 9

Whilst Judge Marrinan has suggested that a sectarian aggravator should be created and defined in a Northern Ireland and Christian context, do you consider any future changes to the hate crime legislation should include future proofing to include different denominations from non-Christian religions/faiths should evidence emerge to show this was required?

No.

Comments

Extensions of criminal law, or of what aggravates criminal offences, are likely to be controversial and should therefore always undergo full scrutiny in the Assembly. As a matter of simple democratic principle, allowing such an extension to be made by ministerial fiat would be dangerous and undemocratic.

In addition, 'future proofing' implies the anticipated need to expand the legislation before it has even been passed, raising legitimate questions about whether it has been adequately formulated in the first instance. The anticipated proliferation of protected groups, crimes against whom will be prosecuted as aggravated offences, is also an indictment of the identitarianism underlying the proposed legislation. Rather than seeking

to provide additional legal protections to more and more 'protected' groups, lawmakers in Northern Ireland should adhere to the universalist principle of equality before the law, thereby ensuring that justice is meted out *regardless* of the characteristics of the victims of crime.

Question 10

Given the prevalence of online communications that now exist within private dwellings, but have a reach outside those private dwellings, do you agree that the dwelling defence is no longer fit for purpose?

No.

Comments

(1) The home has an emotional place in everyone's life which the law should recognise and respect. Conduct within the home, especially with regard to speech, is rightly treated differently from behaviour in the public sphere.

(2) The private conversations exception would not cover everything that happens in the home. We suspect that a meeting of a group of friends, a club or society inside someone's home, or a meeting summoned by a householder over matters of local concern, perhaps with councillors, police or politicians present, is unlikely to be classified as 'private' and therefore protected by the new 'private conversations' defence. Yet in neither case should those present feel the chilling effect on their speech which would result from a threat that an opinion expressed might be reported by someone present, including possibly by children under encouragement from a teacher or social worker, thus making them potentially liable to go to prison for expressing it. This is entirely separate from matters such as conspiracy or incitement to crime, where what is being penalised is not so much expression of opinion inside the private sphere as intended criminal conduct outside it.

(3) The dwelling exception has not in our view been shown to be past its sell-by date by online technology. If a person posts something in a public forum from their home, the dwelling defence does not apply, since they have reason to think that at least some people will access it other than from the home in question or another home. If a statement is shared between a closed group who do access it from their homes, in our view hate speech legislation should not apply to it.

(4) The example sometimes given of hate speech expressed in a gathering at a stately home is far-fetched and should not be used to remove the exception wholesale.

Question 11

Do you agree that repealing the dwelling defence and replacing it with a specific defence for private conversations would balance the need to protect individuals or groups of persons from accusations of stirring up offences, along with the need to

ensure freedom of expression and debate of matters which are not, of themselves, threatening, abusive or insulting?

No.

Comments

As outlined in our previous answer, we do not support the removal of the dwelling defence.

However, we would wholeheartedly support the addition of a private conversations defence, which should specifically include conversations on messaging services and email. There is something Orwellian about the idea that two people carrying on a conversation in a public place – or indeed a private place other than a dwelling – could be overheard, reported and prosecuted for the opinions expressed, however loathsome those opinions might be. We see no reason why both defences should not exist side by side. Both serve different interests; both, in our view, are justified.

Question 12

If a specific defence for private conversations was introduced, should consideration be given to defining the term “private conversations”?

Yes.

Comments

Leaving the term undefined would create a need for case-law defining it and result in people being dragged through the courts because it was not clear at the outset precisely what conduct was being criminalized. This is a recurring problem with the legislation as currently framed: its vagueness and reliance on unacceptably imprecise terminology will place a responsibility

on citizens to take protracted and life altering legal action in order to secure a level of clarity that should have been the goal of policy makers at the outset.

Question 13

If you agree that consideration should be given to defining the term “private conversations”, have you any proposals on the criteria for the concept of private conversations?

Yes.

Proposed Criteria: A conversation should be regarded as private in law if it would be clear to a reasonable person that the words or statement were intended only for the eyes or ears of the person to whom they were addressed. As above, it should include conversations on messaging services and email.

Question 14

Under the current arrangements, decisions on whether or not to prosecute stirring up offences can be taken by or with the consent of the DPP (meaning that a prosecutor who has a delegated authority to initiate proceedings can do so without the need to seek the Director’s personal consent). Do you agree this arrangement is an adequate safeguard in the consideration of stirring up offences by the Public Prosecution Service?

No.

Comments

Hate speech is a very sensitive area and if decisions to prosecute were delegable they would in our view be taken in a mechanical, box-ticking manner. We see it as a very salutary protection that the DPP should decide personally on such matters and recommend that HHJ Marrinan’s proposal to this effect be adopted.

Question 15

Do you agree that all decisions on whether or not to prosecute stirring up offences do not necessitate being taken personally by the Director of Public Prosecution?

No.

Comments

We refer you to our answer to Question 14.

Question 16

The criminal justice system currently provides the opportunity for victims of hate crime to apply for special measures in that an application can currently be made by PPS to explain that a victim of hate crime is in fear/intimidated and requires special measures. Do you agree/disagree that these current provisions are sufficient for hate crime victims?

No comment.

Question 17

Do you agree/disagree that hate crime victims in criminal proceedings, involving the proposed aggravated offences or stirring up offences, should automatically be eligible

for consideration of special measures when giving evidence?

No comment.

Question 18

Do you agree/disagree that victims in hate crime criminal proceedings involving the proposed aggravated offences or stirring up offences, would benefit from protection from cross examination where the alleged perpetrators choose to exercise a right to cross examine their victims in person?

Disagree, subject to our comments below.

Comments

We are opposed to this proposal as regards the stirring-up offences for the following reasons:

(1) Who is the victim in a stirring-up offence? Is it the complainant, any member of the protected group who chooses to give evidence, or someone else? In our view this issue alone makes the proposal unworkable.

(2) Any limitation of the right of a defendant to conduct their own defence,

rather than be forced to rely on a highly-regulated lawyer who may decline to run the defence in a particular way due to professional obligations or a duty to the court, is highly undesirable in our view. We do not agree that there is a proper parallel here between the stirring-up offences and, for example, sexual offences where the peculiar trauma of the victim and the relationship involved may justify the exceptional restriction of defendant's rights. As regards the stirring-up offences, we see no more reason to restrict the defendant's right to cross-examine than in cases of robbery or assault.

Question 19

Do you agree/disagree that automatic eligibility to protection from cross examination by the alleged perpetrator would support reporting of hate crime by victims?

Neither agree nor disagree (see below).

Comments

Cross-examination is a traumatic process at the best of times and it may be that crimes are more likely to be reported if the complainant is assured of not being cross-examined. But this argument applies to all crimes. As outlined above, we do not regard the stirring-up offences as sufficiently unusual to warrant the exceptional restriction of a defendant's right to cross examine by analogy with the rule on sexual offences.

Question 20

Do you agree/disagree that there is a potential detriment for abuse to the criminal justice system if the defendant is unable to cross examine the hate crime victim?

Agree.

Comments

We refer you to our previous answers. The point is in our view, obvious in light of the high number of vexatious complaints made against lawful speech under legislation penalising subjective concepts such as 'hate.'

Question 21

Of the options outlined as proposals for addressing violence against

women and girls, which is your preferred option, if any (please tick one):

- **Sex/Gender as a protected characteristic**
- **Misogyny (and transmisogyny) as a statutory aggravating factor**
- **Misogyny (and transmisogyny) as a stand-alone crime/specific offence**
- **No recognition of sex/gender for the purposes of aggravated offences and enhanced sentencing**
- **Other X**

Comments

(1) It follows from our general opposition to the aggravation model in cases concerning speech that we also oppose any addition to the list of protected characteristics.

(2) Regarding stirring-up offences, we are opposed to the addition of sex/gender as a protected characteristic, not least because it threatens to criminalise, or at least make it troublesome and risky to distribute, works of literature such as *Moi, les hommes, je les déteste* by Pauline Harmange. We do not agree with the England and Wales Law Commission that this kind of legislation is necessary in order to discourage a tiny minority of incels from holding noxious views about women and girls. Silencing unpalatable speech does not change the unpalatable ideas that give rise to it. In fact, these ideas can only be challenged by *more* speech. Sunlight, not censorship, is the best disinfectant.

Question 22

Many of the issues surrounding misogyny are closely linked to sexual offences and domestic abuse. If misogyny is considered for inclusion as a hate crime statutory aggravator, do you agree/disagree that domestic abuse and sexual offences be excluded?

No comment.

Question 23

Whilst evidence demonstrates the disproportionate experience of females, if misogyny is considered for inclusion in hate crime law,

to ensure fairness in legislation, do you agree/disagree an act of misandry should also be considered to recognise the experience of male victims?

Neither agree nor disagree (see below).

Comments

As outlined above, the FSU opposes the inclusion of new categories of criminal aggravation such as misogyny. We refer you to our earlier comments on the desirability of the universalist principle of equality before the law. If an action has reached the threshold of a criminal offence, the inner sentiment that motivated the perpetrator is basically irrelevant to the administration of justice and is deducible only by an act of subjective mindreading. Justice should be administered according to the evidence of an individual's actions, not according to an intangible and unproveable assessment of their ideological motivations.

However, if the category of misogyny is to be included it is only fair that misandry is also recognised.

Appendix C

Full Findings of FSU Opinion Polling on Hate Crime Legislation and Freedom of Speech in Northern Ireland

Full data tables from the poll available on [request](#).



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