Hate crime legislation in Northern Ireland

Independent Review

Executive Summary

EXECUTIVE SUMMARY

Background to the Review

1. In 2017, following calls for a review of hate crime legislation in Northern Ireland from a range of sources, a commitment was made by the then Minister of Justice, Claire Sugden MLA, to come back to the Assembly and confirm whether she intended to initiate a review of the legislative framework on hate crime. Whilst a response was not provided prior to the dissolution of the Assembly, a commitment to review hate crime legislation was included in the draft Programme for Government. On 6 June 2019, the *Department of Justice* announced the appointment of an independent review into hate crime legislation in Northern Ireland to be conducted by me and to write a report with recommendations for the Minister of Justice.

Scope of Review

2. The remit for the Review is set out in chapter 1 of the final report.

Acknowledgements

3. I have been supported by a small review team comprising of Noel Marsden, senior review manager, Ken Mack, senior information officer, Ciara McFall, Victoria Mullan and Zell Blake, office managers, and researchers Claire Milliken, Dr Arlene Robertson and Dr Katy Radford. Secretarial support was provided by Karen Caldwell.

4. I have been very fortunate in having such talented and dedicated people work with me on this review. Their professionalism, support and unstinting commitment, combined with their good sense and wisdom, made my task that much easier and I thank them for their support and encouragement throughout the review.

5. At the outset of the review, I invited a number of individuals to form a reference group to act as catalysts for developing new ideas and as a quality mechanism for the

review. This reference group was split into a Core Expert Group and a Key Stakeholder Group. These groups had a wide range of experience and expertise and worked tirelessly to assist me to complete the task.

6. In particular, I was fortunate in persuading a number of leading academics in this field from the United Kingdom and Ireland to join the Core Expert Group.

7. This group scrutinised and challenged emerging ideas to ensure that any recommendations would be robust and practicable. They gave their time freely and generously and made significant and creative suggestions throughout the whole process of the review.

8. I owe them my sincere thanks for their invaluable assistance.

9. Special thanks are also due to the members of the Key Stakeholder Group who provided valuable insights into all areas of the work.

10. I am particularly grateful to the victims of hate crime who willingly shared their experiences. Undoubtedly their 'voice' has helped form an important focus for many of the recommendations made in this review.

Public Consultation

11. At the outset I took seriously the importance of public consultation as an intrinsic and valuable part of the review. This included the assistance of members of the general public, as well as those who have a particular interest in the subject, whether as those engaged in the criminal justice system or other stakeholders. The importance of hearing from victims cannot be underestimated. They provided valuable understanding and lessons to be gained from their experiences that helped inform and shape the review.

12. A consultation paper was published in January 2020.

13. The questions set out in the consultation paper were of both an open and closed nature and invited the opinions, reflections and expressions of views from individuals and organisations interested in this important public debate.

14. In addition to the consultation paper, there was an online questionnaire dealing with the key issues. Responses to the consultation paper proved to be important and the online questionnaire attracted 799 responses.

15. In total, there were 247 responses to the consultation paper. This figure includes responses from 189 individuals and 58 organisations.

16. In the case of the online responses, inevitably many responses replicated the views of other responses. Nevertheless, careful consideration was given to all the responses, notwithstanding any duplication of opinions.

17. Careful consideration has also been given to the views of all respondents in the review and these have been taken account of in making my various recommendations.

18. During the time allowed for the consultation process, the review team organised a series of public outreach events throughout Northern Ireland. This proved successful and allowed members of the public to air their views and provide an input into the review.

19. Since the work of the review began in June 2019, the review team has also met or had discussions with a large number of organisations and individuals.

20. As a result, I have had the benefit of the widest range of informed opinion, expertise and knowledge. It is important to emphasise that meeting with victims of hate crime has been particularly important in understanding how they have been affected and what their aspirations are for reformed legislation.

Summary of Key Findings and Recommendations

Definition of Hate Crime – Chapter 3

21. There is no clear and universally accepted definition in law or related disciplines of the term “hate” or “hate crime”.

22. As well as being a legal concept, ‘hate crime’ is also a criminological concept referring to a group of crimes as defined by national criminal laws. It is not one particular offence.

23. In legal terms, the first element of a hate crime is an act that constitutes a crime under ordinary criminal law. This may be described as the base or basic offence. Such crimes can range from petty crimes to much more serious offences.

24. The second element of a hate crime is that the criminal act is committed with a particular motive or bias. It is this crucial element of bias that differentiates hate crimes from ordinary crimes. The bias motive is the perpetrator’s prejudice towards the victim.

25. The victim is selected because of their real or perceived connection, attachment, affiliation, support or membership of a protected group.

26. It is important to distinguish between criminal expressions of bigotry (hate speech) and the commission of criminal offences with a bias motive (hate crime). Hate speech offences are generally considered separate to and apart from hate crime laws.

27. A hate crime then is defined in the first instance as a base offence which is committed with a hate or bias element; where no non-hate equivalent of the offence exists on the statute book, then no hate crime can exist.

28. The great majority of organisational respondents to the consultation paper and the online survey agree that punishing hate crime more severely is justified. Specifically, 95% of organisational responses to the consultation paper agreed. On the other hand, 90% of individuals disagreed.

29. In the online survey, 58% of respondents agreed whilst 17% disagreed.

30. I recommend the following definition of Hate Crime:

Recommendation 1

A hate crime may be defined 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.

Scale of Hate Crime in NI – Chapter 4

31. The problems of hate crime and discrimination against various minority communities have been observed as a persistent and recurrent problem across Northern Ireland for the past two decades.

32. Beginning in 2016, the number of racist hate motivated incidents has overtaken sectarian motivated incidents so that by 2018/19 there were no fewer than 1124 racist hate motivated incidents as against 865 sectarian hate motivated incidents.

33. In 2018/19, racist hate abuse in Northern Ireland accounted for almost half of all reported occurrences with hate motivation, while sectarian abuse accounted for just over one third.

34. In the same period just over one in ten reports of hateful abuse were of a homophobic nature, whilst other occurrences, (disability, faith/religion and transphobic) combined, accounted for less than 10% of the total.

35. The most recent available figures updated to 30 June 2020 showed a welcome reduction of 6 fewer racist incidents and 78 fewer racist crimes recorded in the 12 months from July 2019 to June 2020.

36. However, transphobic incidents and crimes saw the largest increases across all hate motivation strands, with 29 more incidents and 26 more crimes in the same period. While disability incidents fell by 10, there were 8 more crimes. The number of sectarian incidents decreased by 13 and the number of sectarian crimes fell by 19.

37. Homophobic incidents and crimes rose by 18 and 15 respectively. Faith/religion incidents fell from 45 to 36 and crimes decreased from 23 to 15.

38. The overall figures can be misleading as they appear to indicate that racial and sectarian hate crimes are similar in frequency, but when one considers the statistics in relation to the proportion of the population from a black or multi-ethnic background, the reality becomes much more concerning. In practical terms, there is approximately a one in 31 chance of being the victim of a reported racial hate incident compared to

approximately one in 1777 chance of being a victim of a reported sectarian hate incident.

39. The prevalence of hate crime in Northern Ireland and its rise suggests that Northern Ireland's society as a whole needs to address the problem of hate crime in a holistic way. Improvements in the criminal law need to be supported by educative schemes and preventative strategies.

40. As a general expectation arising from the consultation process for this review, I would advocate that all education sectors in Northern Ireland need to address the problem of hate crime, as do private and public sectors of employment.

Current Law on Hate Crime in NI and a Proposed New Hate Crime Model – Chapters 5 and 6

41. At present, no specific offence of 'hate crime' exists in Northern Ireland.

42. The Criminal Justice (No. 2) (Northern Ireland) Order 2004 (the 2004 Order) was introduced to ensure that the perpetrators of offences aggravated by hostility received a higher sentence following conviction. This law enables a sentence to be increased where it is proven that the basic offence of which a person has been convicted was motivated by hostility against one of the currently protected characteristics (race, religion, sexual orientation or disability) or where the offender demonstrated hostility against one of those characteristics either at the time of committing the offence or immediately before or after it.

43. Aside from the stirring up offences referred to in part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order) and Section 37 of the Justice Act (Northern Ireland) 2011 (dealing with indecent or sectarian chanting at regulated

sports matches), provision for hate crime in Northern Ireland centres exclusively on the enhanced sentencing provisions of the 2004 Order.

44. In Scotland, the model allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. This approach does not involve the creation of new specific offences; rather, it involves an existing offence, such as an assault, being motivated by or demonstrating hostility in respect of one or more protected characteristics.

45. The current enhanced sentencing approach in Northern Ireland attracts a good deal of sharp criticism from respondents, with the great majority wishing to see significant changes in the law and the introduction of specific aggravated hate crime offences as in England and Wales or a statutory aggravation model similar to that employed in Scotland.

46. Nothing I have read or reviewed since the launch of the consultation paper in January 2020 has given me any assurance that this enhanced sentencing law is working any better now or is capable of being reformed. It is now some sixteen years since its introduction and it has been the subject of widespread criticism for many years. The review has received feedback from many stakeholders and respondents calling for its reform.

47. Arguably, one of the core issues for this Review is to decide whether or not it is better to tackle hate crime through an aggravated offence model.

48. I have concluded that an aggravated offence model, i.e. where a hate crime aggravation can be added to any offence and tried as such, is more appropriate than the enhanced sentencing model and has a much better chance of providing an effective approach for the justice system to address hate crime. It will encourage the

police to collect evidence of hate in all cases at an early stage – something that does not appear to happen under current arrangements. Among other advantages, it would also mean that the aggravation can appear on the defendant's record, but arguably also gives greater protection to the defendant as it requires the prosecution to prove the aggravation at the offence stage which fits well with the legal doctrine of fair labelling.

49. There is also a question of principle. If the element of 'hate' is left to the sentencing stage, the law seems to be treating the 'hate' element as another type of aggravation on a par with a number of other aggravating factors, such as vulnerability. However, by putting the 'hate' element into the offence stage, the legislature would be making it clear that the 'hate' element means that a different sort of wrong/harm has been caused by the defendant – one that cuts to the heart of our values as a progressive liberal society. I believe that that principle is seriously diluted in a sentencing only system.

50. I am particularly attracted to the Scottish model in terms of its simplicity and efficacy. It can deal with any offence, not just the limited suite of offences currently dealt with as aggravated offences for race and religion alone under the 1998 Act in England and Wales. The statutory aggravation provisions in Scotland do not create new offences.

51. In the current and further proposed Scottish provisions, there is a requirement on the sentencing court to state on conviction that the offence was aggravated in relation to the particular characteristic; to record the conviction in a way that shows that the offence was so aggravated; and to take the aggravation into account in determining the appropriate sentence. In addition, the sentencing court is required to state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of the reason for that difference, or otherwise, the reasons for there being no such difference. It is noted that in Scotland, charges can proceed with more than one statutory

aggravation – for example, in cases where the conduct in question is motivated by malice and ill will relating to both religion and disability.

52. In the light of what has been discussed above, and with very strong support overall from a significant number of respondents to the consultation paper in Northern Ireland, it is possible to make a number of recommendations as follows:

Recommendation 2

Statutory aggravations should be added to all existing offences in Northern Ireland following the model adopted in Scotland and become the core method of prosecuting hate crimes in Northern Ireland. This would mean that any criminal offence could be charged in its aggravated form.

Recommendation 3

If the recommendation at 2 is accepted and made into law, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary and should be repealed and replaced by suitably drafted consolidated hate crime provisions.

For the avoidance of doubt, those Articles of the 2004 Order providing for higher maximum sentences for certain criminal offences should be retained.

Recommendation 4

If the recommendations at 2 and 3 above are accepted, no increase in maximum sentences for any criminal offence is required.

Recommendation 5

While I am content to retain the notion of "hostility", I am satisfied that the introduction of a wider range of attitudes such as "bias, prejudice, bigotry and contempt" may well prove beneficial, particularly as there is no standard legal definition of "hostility".

Recommendation 6

I am persuaded that a variation of the 'by reason of' threshold should be added as a third threshold to supplement the current thresholds of (a) demonstration of hostility, and (b) motivation.

Recommendation 7

Adopting Section 28 of the Crime and Disorder Act 1998 as a starting point, its equivalent in Northern Ireland could read:

. . . Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this section if:

(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of one or more of (name the protected characteristic/s); or

(b) The offence is motivated (wholly or in significant part) by hostility bias, prejudice, bigotry or contempt towards members of (name the protected characteristic/s) based on their membership (or presumed membership) of that group/s; or

(c) The offence is committed (wholly or in significant part) by reason of hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of (one or more of the protected characteristic/s).

(d) However, if:

(i) the basic offence is proved but;

(ii) the aggravation is not proved, the offender's conviction is as if there was no reference to the aggravation and the conviction will be solely for the basic offence.

Recommendation 8

A consequential section to that described in Recommendation 7 should read:

<u>Consequences of Aggravation</u>

(1) When it is proved that the offence is so aggravated, the court must –

(i) State on conviction that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated by reference to one or more of the protected characteristics;

(ii) Record the conviction in a way that shows that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated, by reference to one or more of the protected characteristics;

(iii) In determining the appropriate sentence, treat the fact that the offence is so aggravated as an aggravating factor that increases the seriousness of the offence; and

(iv) In imposing sentence, state (a) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for the difference or (b) otherwise, the reasons for there being no such difference.

Protected Characteristics – Chapter 7

Discussion

53. In recommending new hate crime legislation for Northern Ireland, it is also necessary to address the categories of protected characteristics and the question of whether or not there is a need for additional categories of protected characteristics to

be added. The characteristics presently protected under the law in Northern Ireland are race, religion, sexual orientation and disability.

54. These protected characteristics are the most commonly protected in comparable jurisdictions and I have concluded that these current categories of protected characteristics should remain in the law of Northern Ireland.

Gender

55. The Terms of Reference for the Review ask it to consider, in particular, whether new categories of hate crime should be created for characteristics such as gender and any other characteristics, which are not currently covered.

56. Any informed analysis of gender and gender identity involves examining the wider spectrum of gender identities which include cis gender, transgender and non-binary gender identities.

57. None of the UK jurisdictions currently include gender per se under hate crime legislation

58. The inclusion of gender in any hate crime protected category is not straightforward. Gender continues to divide advocates of hate crime laws with some recognising the misogynistic nature of much sexual and domestic violence against women, but others express concern that gender will swamp other hate crime offences and argue that it is better addressed under criminal laws already developed for this purpose.

59. As also highlighted in the commentary on chapter 13, there is also evidence that women in particular – including politicians and others in high profile positions – are at significant risk of being targeted online. This has led to calls for legislators to

give serious consideration to the inclusion of gender as a protected characteristic for any online offences.

60. There was no clear consensus from the consultation responses on the question of whether gender and gender identity should be included as protected characteristics in Northern Ireland hate crime legislation. This is an important finding and underlines the challenges of legislating in this area.

61. Organisations were split in their views, with 55% 'for' and 45% 'against' the inclusion of gender and gender identity. In contrast, 92% of individuals were opposed to the inclusion of gender and gender identity.

62. In the online survey, 77% of respondents agreed that gender should be a protected characteristic, whilst 74% felt that transgender identity should be similarly protected.

63. A further complicating factor is that, particularly in the case of organisational respondents, some held differing views on the inclusion of gender and gender identity, while others focused heavily on misogyny in their comments. Even among those supportive of gender there were differing views on whether this should cover both men and women.

64. A recurring argument was that the inclusion of gender and gender identity as protected characteristics would pose a serious threat to freedom of speech and religious expression. This view was particularly prevalent among faith sector organisations and individual respondents. These respondents argued that the inclusion of the proposed characteristics would further undermine meaningful discussion and debate, and related to this, they expressed concerns about the potential criminalisation of the expression of religious beliefs and opinions.

65. I am satisfied that gender should be covered as a protected characteristic (rather than misogyny) and that it should be neutral in the sense that using the term sex/gender would also provide protection to men.

66. There were very significant differences between organisational responses and individual responses on the issue of whether or not transgender identity should be included as a protected characteristic.

67. 73% of organisations felt that it should, whereas 97% of individual responses argued that it should not.

68. I am satisfied that transgender identity requires protection. I note that it is already protected in Scotland and in England and Wales. I think it is important, where possible, to offer similar levels of protection to groups throughout the United Kingdom. I am also satisfied that variations in sex characteristics requires protection.

Age

69. Age is not a protected characteristic under the existing hate crime laws. Including it would protect all age groups, although one would imagine that the majority of such cases are likely to involve crimes against older people. Recommending older age as a characteristic would probably mean including an agreed age.

70. The majority of respondents to the review were opposed to the inclusion of age as a protected characteristic. On the other hand, 63% of respondents to the online survey agreed that age should be included as a protected characteristic.

71. The inclusion of age as a protected characteristic is likely to be controversial. However, having weighed up all the submissions received including the expert evidence submitted to the review, I consider that there is sufficient evidence of

hostility-based offences against the elderly to include age as a protected characteristic.

72. Although I have seen very little evidence to suggest that offences are being committed against young people because they are young people, it is of course possible that such behaviour does occur.

73. It is therefore preferable to adopt an approach where a protected characteristic of age generally is introduced rather than an elder specific protection.

Intersectionality

74. Intersectionality describes a situation where hate crime is experienced on more than one characteristic, for example, someone who is disabled and gay.

75. The consultation paper asked respondents whether or not they considered that intersectionality is an important factor to be taken into consideration in any new hate crime legislation. If the answer to that question was in the affirmative, it then asked for views on the best way to achieve this.

76. Not for the first time, there was a significant difference in opinion between individuals and organisations. 83% of organisations answered positively, as opposed to only 12% of individuals.

77. Among those respondents who indicated that intersectionality should be considered, it was felt that this was crucial to gaining a comprehensive understanding of the victim's experiences of hostility, prejudice and violence, and of the nuances of harm suffered.

78. Additionally, it was suggested that taking intersectionality into account in legal responses to hate crime would:

- Allow for greater visibility and understanding of the multiple factors motivating hostility;
- Reassure victims that their nuanced experience would be taken seriously by the judicial system, which, in turn, will encourage reporting; and
- Allow for specific harm on the grounds of two or more particular characteristics to be considered and addressed.

79. There is strong evidence to suggest that seeking to incorporate the notion of intersectionality into a new statutory aggravation model would create challenges in attempting to reflect more than one protected characteristic in prosecuting aggravated offences. For example, in England and Wales, if the prosecution has to deal with a case involving racial and religious hostility, this can create real difficulties.

80. The *Law Commission* provisionally suggests a novel approach to this by the inclusion of a provision allowing for the recognition of hostility based on "one or more characteristics". Thus, the characteristics could be specified in the charge or count on the indictment, but conviction would only require the jury to be satisfied that at least one had been met on the evidence given by the prosecution.

81. I agree with the approach of the *Law Commission* in England and Wales on this important issue.

82. My recommendations on characteristics are therefore as follows:

Recommendation 9

All current protected characteristics in Northern Ireland – race, religion, disability and sexual orientation should continue to receive protection under the proposed model set out in Recommendation 2, together with the new recommended protected characteristics of age, sex/gender and variations in sex characteristics.

For the avoidance of doubt, the protected characteristic of sex/gender includes transgender identity.

The protected characteristics will be protected for all purposes including any amended public order provisions.

Recommendation 10

Provision should be made for any future legislation to be framed in such a way as to allow any other protected characteristic to be added to the list of protected characteristics referred to in Recommendation 9 above by statutory instrument if sufficient evidence emerges to show such a group or groups are victims of hate crime or hate speech. The reasoning behind this recommendation is to allow suitable protection to be provided in the changing circumstances of the time.

Recommendation 11

Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences referred to in Recommendation 2.

Sectarianism – Chapter 8

83. Although the remit for this review does not explicitly reference sectarianism as requiring special attention, it does ask the review to consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.

84. The term 'sectarianism' does not have a precise legal meaning but is used frequently in everyday speech.

85. Sectarianism elicits differing responses from different groups in Northern Ireland, but there is a growing consensus in the community about attempting to address its causes and prevent it from continuing to act to undermine good relations in our society, bringing with it severe damage, loss of life and suffering.

86. Whilst most people claim to recognise it when they see it, defining and dealing with it in the criminal law has proved to be a much more difficult task.

87. Various definitions of sectarianism have been attempted, although none are enshrined in law. None of the possible definitions appear to be sufficiently clear to be easily adapted into a legislative formulation, capable of legal enforcement and appropriate prosecution. A common thread running through the literature on sectarianism is the presence of some form of 'hostility', which provides a building block towards consensus.

88. 75% of the organisations who responded to the consultation paper were in favour of there being a specific reference to the term 'sectarian' within any new hate crime legislation. Individual responses were different, with 65% of individuals disagreeing.

89. The current 'religious group' indicator does not adequately capture the meaning and impact of sectarianism, which extends beyond religion to include aspects of nationality and political identity.

90. Among those who were generally supportive of the expansion of the indicators, many agreed that the inclusion of 'political opinion' as an indicator was not appropriate. In particular, it was argued that this would risk capturing legitimate political speech and conflict with human rights obligations and freedom of speech, such as Article 10 of the European Convention on Human Rights.

91. It is useful to look at the experience of other relevant jurisdictions. The Working Group on defining sectarianism in Scots law in its final report of November 2018 noted that this is a complex issue. It argued that a single, intersectional, sectarian aggravator could have two key advantages for police and prosecutors. Firstly, it would streamline decision making where the accused's conduct immediately before, during or after the offence might arguably fall within racial or religious aggravations, where the hostility evinced is of a sectarian character. In addition, a single compound aggravator avoids the need for duplication where, for example, the accused's behaviour could arguably ground both the religious and a racial aggravator, observing that there is no reason in principle why a sectarian prejudice aggravator should be any more difficult to apply in practice than the existing aggravators based on religious and racial prejudice.

92. I agree with the Scottish Working Group that, although this is a complex issue, that is not a sufficient reason not to establish a workable legal definition. I am persuaded that the principle of fair labelling should apply so that criminal acts of prejudice can be named for what they are, whether that be anti-Catholicism; anti Protestantism; sectarianism or any other descriptor. Whilst I acknowledge concerns expressed by other communities, I believe that sectarianism in Northern Ireland should be specifically defined as an issue that exists between Christian communities in Northern Ireland at this time. I do not believe that enough is understood about sectarianism in relation to other communities in Northern Ireland to make the

application of ‘sectarianism’ to these communities meaningful in a legal or social sense.

93. I am clear that the crimes of this nature committed against such individuals, whether Catholic, Protestant or no religion, should be covered by new hate crime legislation and that the gaps in protection should be rectified.

94. I am satisfied, therefore, that the current legislative and policy construction in relation to sectarianism is not only complex, but also inconsistent and must be addressed.

95. After careful consideration, I therefore recommend as follows:

Recommendation 12

The findings of the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in Northern Ireland – subject to any necessary adjustments.

Recommendation 13

There should be a new statutory aggravation for sectarian prejudice. It is recommended that the introduction of the new offence of statutory aggravation for sectarian prejudice should be carefully monitored by the proposed Hate Crime Commissioner on an annual basis and provide an annual report to the Northern Ireland Assembly.

Stirring up offences – Chapter 9

96. The review's Terms of Reference includes the consideration of the implementation and operation of the current legislative framework for incitement offences, in particular, Part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order), and make recommendations for improvements.

97. Part III of the 1987 Order relates to 'stirring up hatred or arousing fear'.

98. Stirring up hatred is conduct which encourages others to hate a particular group. It is important to distinguish this concept from the definition of 'hate crime' discussed in the early part of this review. In a hate crime, the baseline conduct (or basic offence) is already criminal; it is the motive or demonstration of hostility that marks it out currently as a hate crime. However, a stirring up hatred offence may criminalise conduct which would not otherwise be criminal. These so-called 'stirring up' offences criminalise certain forms of hate speech and should be clearly distinguished from hate crime generally.

99. Hate speech has been defined as speech that "expresses, encourages, stirs up or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality and sexual orientation".

100. Historically, while Part III of the 1987 Order may be a key element in legislation pertaining to hate speech, it has been little used and there continues to be limited awareness of the law.

Freedom of expression

101. The law in Northern Ireland does not draw any distinction whatsoever between offences relating to racial hatred and other protected groups. All are treated equally under the current law.

102. In Northern Ireland, there are no express provisions protecting freedom of expression in relation to criticism of religious beliefs. Until recently, the same could be said in relation to there being no express provision protecting freedom of expression in relation to sexual orientation

103. The consultation paper asked respondents whether the term 'hatred' is the appropriate test use in the stirring up offences under the 1987 Order. Although the great majority of respondents did not consider the term 'hatred' as the appropriate test, there was little support for lowering the bar.

104. Although the term 'hatred' sets a very high bar for prosecution, I am satisfied that this is appropriate given the seriousness of such offences and the potential impact on freedom of speech if a lower threshold was employed.

105. Another key issue in considering the operation of the 1987 Order and making recommendations for improvements is whether Northern Ireland should amend legislation to add the equivalent to Sections 4, 4A and 5 of the Public Order Act 1986. Such provisions are not currently part of the law in Northern Ireland. The relevant parts of the Public Order Act 1986 are set out in more detail in chapter 9 of this report.

106. Section 4 creates an offence of using, distributing or displaying threatening or abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence would be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence would be used or it is likely that such violence would be provoked.

107. Section 4A differs from Section 4 in that, rather than a requirement for immediate violence, an offence under Section 4A is committed if there is an intention to cause harassment, alarm or distress and that harassment, alarm or distress is caused.

108. An offence under Section 5 is committed if threatening or abusive words or behaviour or disorderly conduct are used within the hearing or sight of a person likely to be caused harassment, alarm or distress.

109. There are no direct equivalents to these provisions within the current law of Northern Ireland.

110. The consultation paper asked respondents whether there is merit in adding equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 to the Public Order (Northern Ireland) Order 1987.

111. This question provoked remarkable disagreement between the responses from organisations and the responses from individuals. A strong majority of organisations (89%) supported the proposition whereas the ten individuals who responded all disagreed. Most of those who disagreed expressed concerns about freedom of speech being curtailed and legitimate criticism or opinion being interpreted as stirring up hatred.

112. The consultation paper noted that in relation to the use of words or behaviour or display of written material under Article 9(3) of the 1987 Order no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. I observed that it was unclear why stirring up hatred inside a building is considered acceptable and the same expression outside the building would be considered an offence.

113. At the time this defence was introduced, the Internet had not been developed. It is now available very widely and in most homes. If the dwelling defence is read literally, much that is posted online could fall into this category. Even if one was to enter into a legalistic discussion about how, in this time of smart phones, a defendant could realistically argue that he had no reason to believe that his words will be seen by a person outside a dwelling, it is clear that this offence is not ideally suited to the online era.

114. The consultation paper asked whether the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should be retained. Organisations were evenly split in their views whilst the great majority of individuals supported retaining the defence.

115. It is interesting to compare these answers (to question 32) with a virtually identical question (question 42) about the dwelling defence was asked in the context of online harm.

116. In answer to question 42, 76% of organisations agreed that the dwelling defence should be amended/removed, while 63% of individuals disagreed.

117. There was general consensus among respondents that the dwelling defence was outdated, redundant and particularly problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media. The dominant view among most respondents was that the dwelling defence should be removed.

118. The consultation paper then asked respondents whether or not there should be an explicit defence of 'private conversations' in stirring up legislation to uphold privacy protection. 100% of organisations who responded supported this proposition together with 83% of individuals.

119. The consultation paper sought the views of respondents on whether the requirement that the Director of Public Prosecutions (DPP) gives consent to any prosecutions taken under Part III of the 1987 Order is necessary and appropriate. There was widespread agreement that such a provision is necessary and appropriate. Some 78% of organisations and 69% of individuals agreed.

120. There was strong consensus among respondents that this was necessary to safeguard against potential misuse of the legislation. Specific concerns focused on freedom of speech and the need to ensure that individuals were sufficiently protected from prosecution of trivial or unfounded allegations.

121. The consultation paper also sought the views of respondents as to whether or not any new proposed additional characteristics or groups should also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987. 74% of organisations agreed with this proposition as compared to only 2% of individuals who agreed.

122. With a few exceptions, individual responses were similar (in a few cases identical) and they comprised a limited range of key points.

123. The consultation paper asked: should the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation be specifically added as defences to Part III of the Public Order (Northern Ireland) Order 1987? A strong majority (97%) of individuals were in favour, while organisations were relatively balanced in their views, with 48% and 52% answering ‘yes’ and ‘no’ respectively.

124. Further, it asked: should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the 1987 Order be retained in law or repealed?

125. Respondents' comments indicated that they strongly endorsed retention of the express defence of freedom of expression for same-sex marriage. This view was taken by the majority of individual respondents and some organisational respondents.

126. Finally, it asked: if there are to be offences dealing with the stirring up of hatred against protected groups, does there need to be any specific provision protecting freedom of expression? 56% of organisations agreed with this proposition as did all of the individual respondents.

127. No evidence has been brought to my attention of any miscarriages of justice in Northern Ireland in the 33 years since the passing of the 1987 Order, which would justify the assertion that the protection for freedom of expression in Northern Ireland is significantly more limited than in England and Wales, or that the risks of injustice are greater in Northern Ireland.

128. When the 1987 Order was passed into law, the Internet did not exist as we know it today. As things stand, there is no explicit legislative provision for online publication. The Internet now provides unprecedented means for people to communicate and connect, providing a platform for social and political discussion, analysis and comment. It has become a major platform for online hate speech.

129. Although the provisions of the 1987 Order were not designed or enacted with the Internet in mind, the courts have shown flexibility to accommodate material posted online. In terms of jurisdiction, it makes sense to clarify this issue by stating that any material downloadable in the United Kingdom is within the jurisdiction of the UK courts – including the courts of Northern Ireland.

Recommendation 14

The Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order Bill, should be amended to:

(a) **include all the current and proposed protected characteristics referred to in Recommendation 9;**

(b) **introduce articles equivalent to Sections 4, 4(a) and 5 (as amended) of the Public Order Act 1986 with the proviso that the dwelling defences in those sections be removed.**

(c) **repeal Article 8 (2);**

(d) **repeal the dwelling defence in Article 9 (3);**

(e) **include a specific defence for private conversations.**

(f) **the test of hatred for the stirring up offences should remain unchanged.**

(g) **all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions**

(h) **there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics. However,**

(I) **there should be formal statutory recognition of the importance of freedom of expression Article 10 rights and all other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, in particular, rights guaranteed under Articles 6, 8, 9 and 14**

(j) **the term 'publication' in article 10 should be amended to include 'posting' or 'uploading material online'.**

(k) **intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear:**

(1) **where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.**

(2) **where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:**

(i) the defendant's words or behaviour were threatening or abusive;

(ii) the defendant's words or behaviour were likely to stir up hatred or arouse fear;

(iii) the defendant knew or ought to have known that his words or behaviour were threatening or abusive; and

(iv) **the defendant knew or ought to have known that his words or behaviour were likely to stir up hatred or arouse fear.**

Removing Hate Expression from Public Space – Chapter 10

130. In this chapter, I address the question of the extent to which the law should regulate hate expression displayed in public places. This includes the question of the powers and duties of public authorities to remove sectarian and other hateful graffiti or items displayed on roadsides or other public property.

131. Section 75(2) of the Northern Ireland Act 1998 places a good relations duty on public authorities, which means that a public authority must have regard to the desirability of promoting good relations between persons of different religious beliefs, political opinion or racial groups when carrying out its functions.

132. Clearly, any public authority which tolerates incitement of hatred in its functions is not promoting good relations. This question of hate expression displayed in public places clearly intersects with any review of hate crime legislation in Northern Ireland.

133. There are a number of human rights treaty obligations entered into by the United Kingdom, which place positive duties on relevant public authorities to tackle hate expression, including the European Convention on Human Rights and Fundamental Freedoms (ECHR).

134. Under Section 32 of the Police (Northern Ireland) Act 2000 and common law, the *PSNI* have fundamental duties such as their duty to take steps to bring offenders to justice. They are also under a duty to prevent the commission of criminal offences.

135. There are also a number of specific powers vested in other public authorities. For example, *district councils* in Northern Ireland have powers to remove or obliterate graffiti detrimental to the amenity of any land in its district, or any placard or poster in its district that does not have planning permission.

136. Powers are also vested in the *Department for Infrastructure* under planning legislation to remove items and recover the cost of doing so for any unauthorised materials on lampposts or other street furniture.

137. The consultation paper sought responses as to whether any recommendation should be considered to clarify and strengthen the law to regulate duties to tackle hate expression in public space.

138. There was strong support for this idea among organisations – 88% percent of organisations agreed. This included a measure of agreement across the political spectrum.

139. Although support was considerably less prevalent among individuals – with 47% answering 'yes' – the overall approval for this idea was 67%.

140. A number of organisations expressed concern at what they saw as the relative lack of action to tackle this issue from public authorities.

141. It is only fair to observe that this area of the law sets many challenges for public bodies, including the *PSNI*. However, the overwhelming response to the consultation question on this issue should be respected. It is also obvious that there are political sensitivities in play on issues such as this.

Recommendation 15

There should be a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.

Restorative Justice - Chapter 11

142. As part of its remit, the review is asked to consider whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

143. Restorative justice has been defined as a process of independent, facilitated contact, which supports constructive dialogue between the victim and the person who has harmed arising from an offence or alleged offence.

144. The present position in Northern Ireland is that there is statutory provision for restorative justice for defendants who are under 18 years of age, primarily through the use of youth conferencing which is delivered at both a diversionary level (when recommended by the *PPS*), and as a court ordered disposal.

145. Numerous reviews and reports have all held this model of conferencing in high esteem. However, in terms of those defendants over 18, none of the existing legislative provisions apply.

146. If a model along the lines presently employed for youth justice is envisaged, legislation would be required as any emerging restorative justice approaches for adults would require a statutory disposal involving pre-court and court ordered sanctions. In this event, I noted in the consultation paper that a likely provider would be the *PBNI*, a statutory body which enjoys acceptance by, and the confidence of, all parts of the community in Northern Ireland. I envisaged that in such a scenario, the existing accredited community-based restorative justice bodies would act to complement the work of such an agency.

147. With regard to the consultation, in respect of asking whether restorative justice should be part of the criminal justice process in dealing with hate crime in Northern

Ireland, there was overwhelming support for this proposition – 90% – from organisations. There was also very strong support from individuals – 73% – for this proposition.

148. In respect of asking whether restorative justice schemes should be placed on a statutory footing, there was even stronger support from organisations and individuals. 94% of organisations and 79% of individuals agreed with this proposal.

149. One consultation question asked whether there should be a formal justice agency responsible for the delivery of adult restorative justice for hate crime. 95% of organisations and 62% of individuals agreed with this proposition.

150. Another question asked respondents to envisage what role could be played in the delivery of adult restorative justice for hate crime by the accredited community-based restorative justice organisations. A number of respondents noted the wealth of experience and expertise of accredited community-based restorative justice organisations, placing them in a strong position to contribute to the effective delivery of adult restorative justice for hate crime. One respondent argued that the involvement of such organisations was particularly important in the context of Northern Ireland, where levels of trust and confidence in the police and criminal justice system to tackle hate crime are generally low.

151. Respondents were also asked whether they considered diversion from prosecution as an appropriate method of dealing with low-level hate crimes, as per the practice in Scotland. There was considerable support for this proposition; 94% of organisations agreed, together with 71% of individuals. However, a degree of caution was urged. Some respondents suggested that victims should have the option to choose, while others thought that the decision to use diversion should be taken on a case-by-case basis.

152. Having examined the arguments carefully, I conclude that there is a very strong case for providing that restorative justice should be made an integral part of the criminal justice process in dealing with hate crime in Northern Ireland.

153. The acknowledged success of the provision for those who are under 18 encourages confidence that, with appropriate adjustments, the model operated by the *Youth Justice Agency* can be replicated for those who are over 18.

154. Placing such provision on a statutory basis will help to ensure consistency in the application of restorative justice processes and enable the system to be completely victim led and victim focused.

Recommendation 16

There should be a new statutory scheme for restorative justice for over 18s, organised and delivered on lines similar to the Youth Justice Agency in Northern Ireland.

Recommendation 17

It is desirable that such a statutory restorative justice framework be established with the necessary financial funding.

Recommendation 18

The new statutory scheme for restorative justice should be independent of the Department of Justice.

Recommendation 19

As such a scheme will involve referrals from the Public Prosecution Service and the Courts, it is recommended that it should be run by a statutory agency such as the Probation Service for Northern Ireland.

Recommendation 20

The presently accredited restorative justice groups should continue to provide community support and support to the statutory agency, which would take the lead in any such collaboration.

Recommendation 21

There should be further consideration of the benefits of establishing a Centre of Excellence for Restorative Justice.

Recommendation 22

Diversion from prosecution is an appropriate method of dealing with low-level hate crimes. The model as per the practice in Scotland appears to offer an efficient and practical template.

Victims – Chapter 12

155. As mentioned in the introduction, the importance of victims lies at the centre of this review.

156. Hate crime in Northern Ireland is significantly under-reported. Although reporting figures have improved, this was from a low in 2010/2011 of just over 18% of those in Great Britain who experienced hate crime being prepared to report the matter to the police. There is no reason to suspect that patterns of reporting in Northern Ireland are now any better, meaning that a significant proportion of hate crime continues to remain unrecorded by the police.

157. The consultation paper sought the views of the public as to how high levels of underreporting might be improved.

158. Although I do not make any specific recommendation for legislative change to deal with this issue directly, I am satisfied that the introduction of better and more effective hate crime laws as a result of this review will instil new levels of confidence among victims and marginalised communities, and will encourage them to come forward and better trust the police and other actors in the criminal justice system with more confidence than up to now.

159. On a practical level, one theme became clear in the responses – the necessity to provide appropriate and effective support for victims and inform the training of those working with victims.

160. The *Hate Crime Advocacy Service (HCAS)*, which began its work in July 2013, is comprised of a hate crime advocacy co-ordinator based in *Victim Support NI*, and hate crime advocates based in host organisations – *Leonard Cheshire Disability*, the *Migrant Centre NI*, with two advocates based in Belfast and Foyle, and the *Rainbow Project* for LBGT victims.

161. The service was developed to provide victims of hate crime with access to specialist support tailored to their needs. Information and guidance is made available

through the service to help victims make decisions and choices to increase their safety and well-being.

162. It is clear to me that the work of *Victim Support NI* and the *HCAS* plays a vital role in increasing the engagement of victims of hate crime with the criminal justice system at all levels, and in helping victims to cope and deal with the effects of hate crime and support them through a very difficult process.

163. In the consultation a majority of organisations (89%) acknowledged that the service was valuable in supporting victims of hate crime through the criminal justice process, whilst 63% of individuals agreed, giving an overall percentage in support of 81%.

164. A majority (94%) of organisational respondents and 60% of individuals considered that the funding model for the service should be placed on a permanent basis, as opposed to the present annual rolling contract model, giving an overall approval percentage of 81%.

165. There was general agreement that the service requires further improvement, in order to improve levels of service and ensure more victims are supported through the criminal justice process.

166. A common suggestion was that improvement would only be obtained through the provision of a more sustainable model of funding. At the time of writing, my understanding is that a new funding model is under consideration by the *DoJ* and the *PSNI*.

167. This is a service which is vital for victims and it must be sustained on a permanent reliable basis. The precarious funding model and the uncertainty it creates is unacceptable and concerning.

168. Additional resources will be required, particularly if this work is expanded and the number of advocates increased to allow for a better geographical spread of services and the inclusion of new protected characteristics as recommended in this report.

169. The consultation paper asked two questions in relation to anonymity and restrictions on reporting:

(i) Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?

(ii) In what circumstances should a restriction on press reporting of the identity of the complainant in hate crime be permissible?

170. A substantial majority of the organisations which responded to this question considered that, in certain circumstances, the identity of a complainant in a hate crime case should not be published. The views of individuals who responded were evenly split.

171. Overall, a large majority of respondents (83%), considered that, in certain circumstances, press reporting of the identity of the complainant in a hate crime case should not be permitted.

172. I have serious concerns that many victims will be discouraged from giving evidence in cases where perpetrators (alleged or otherwise) choose to exercise a right to cross examine their victims in person. It is widely accepted that such cross

examination can cause the victim significant distress and can sometimes amount, on occasion quite deliberately, to a continuation of the abuse.

173. I believe there is a strong argument to put victims of hate crime on the same footing as domestic violence and sexual violence witnesses.

Recommendation 23

The work of the *Hate Crime Advocacy Service* should be expanded and placed on a permanent statutory footing to ensure a more sustainable funding model with specialised advocates appointed to support victims for all protected characteristics thus ensuring that the right to advocacy acknowledged in the Victims Charter is guaranteed.

For the avoidance of doubt, such specialised advocates should include a dedicated religious hate crime advocate who can also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variation of sex characteristics.

Recommendation 24

Complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens.

Protection for complainants in hate crime/hate speech criminal proceedings should be provided as follows:

(i) no person charged with any aggravated or stirring up offence may in any criminal proceedings cross-examine a witness who is the complainant either –

(a) in connection with that offence or

(b) in connection with any other offence with which that person is charged in the proceedings

Online hate speech – Chapter 13

174. Online harm may take many forms. Much of it is committed on social media and brings with it a '**public**' element which is quite distinct from off-line hate speech. This 'public' element needs to be distinguished from 'public order' which lies at the heart of some of the offences to be discussed below. The public element of online hate is about the potential for reputational damage or for public humiliation and embarrassment when comments appear on social media.

175. This is compounded by the fact that an attack carried out on the Internet is potentially **permanent** in nature, and can have an almost limitless **reach.** Whilst there is no doubt that off-line attacks can leave permanent scars and can cause immeasurable pain, the attacks themselves will usually be of a finite nature; and, once a perpetrator is caught, can be stopped.

176. However, the **permanency** and **reach** of the Internet can mean the online attacks never go away, even if a perpetrator is caught. This results in the victims of online hate being at risk of being exposed to the attack time and time again, thus rendering them re-victimised.

177. This demonstrates that the harm caused by online hate goes far beyond the impact of the words themselves. In some cases, damage can occur simply because the hateful material appears online.

178. Furthermore, there is increasing evidence that online attacks of this kind can have an impact on victims' ability to maintain a public presence on the Internet. There is evidence that victims of cyber hate change their online behaviour in order to avoid attacks. In an era when having a presence online is crucial – both for social and professional reasons – this is something that cannot be ignored; particularly, when we know that it is often minority groups that are most affected. There is also evidence that women in particular – including politicians – are at significant risk of being targeted online. This has led to calls for legislators to give serious consideration to the inclusion of sex/gender as a protected characteristic for any online offences.

179. There are strong and compelling arguments made by many respondents that online hate speech is a serious and growing problem which needs to be addressed.

180. The UK Government's 'Online Harms' White Paper, published in 2019, aims to go far beyond legislating for the notice and take-down process, and puts forward a proposed extensive regulatory regime that would put it at the forefront of online regulation worldwide.

181. It proposes:

- a new duty of care to be imposed on Internet companies which will require them to take reasonable steps to keep users safe, and prevent other persons being harmed as a direct consequence of activity on their services;
- Internet companies to be required to comply with this duty of care and compliance will be overseen by an independent regulator;
- The regulator to have a suite of powers to ensure compliance with the duty of care and will have punitive powers such as the imposition of fines;
- The regulator to set out codes of conduct which will outline to companies how they can satisfy the duty of care and will also set out the expectation of how complaints procedures will work and operate;
- There will also be various other aspects to the regulator's powers such as the power to request information about how a company's algorithm works; and
- broadly speaking, Internet companies to be required to remove material that is considered harmful.

182. The consultation paper asked '. . . **Should social media companies be compelled under legislation to remove offensive material posted online?'** There was strong support for this proposal from both organisations (86%) and individuals (71%).

183. It also asked respondents whether or not the term 'publication' in the 1987 Order should be amended to include 'posting or uploading material online'.

184. 100% of organisational respondents agreed that it should together with 79% of individual respondents giving an average response of 91% in favour.

185. Question 46 in the consultation paper posed the question of whether or not the Malicious Communications (Northern Ireland) Order 1988 should be adapted to deal with online behaviour?

186. There was widespread agreement with this proposal. All of the organisations which responded agreed together with 88% of individual respondents.

187. The approach that commanded most support was to update the legislation and make it applicable to contemporary society, particularly given the growth of the use of the Internet and social media.

188. The final question in the area of online harm raised in the consultation paper asked respondents:

Should online harm be part of a general law applying to hate crime?

189. There was strong support for the inclusion of online harm in the general law on hate crime both among organisations and individual respondents. 81% of organisations and 75% of individuals who responded agreed.

Recommendation 25

The proposals contained in the United Kingdom Government's 'Online Harms' White Paper (2019) should be implemented in full.

Given that legislation in this area is a reserved matter, the Assembly in Northern Ireland should consider whether or not to encourage implementation of these proposals by the Government of the United Kingdom, or, in the alternative, seek the agreement of the Secretary of State for Northern Ireland to allow the Assembly to enact appropriate legislation on this issue in Northern Ireland.

Recommendation 26

In terms of jurisdiction for dealing with online hate speech, the law should be clarified to confirm that any online material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the courts of Northern Ireland.

Recommendation 27

There should be a legal requirement on social media companies to ensure that potential users who wish to avail of their services must provide verifiable personal information before they are permitted to use those services.

As this recommendation involves legislating in respect of a reserved matter, see Recommendation 25 above.

Recommendation 28

There should be a mechanism by which the offending behaviour must be removed from the Internet by the offender, or through a court order imposed on the relevant social media company.

Recommendation 29

The PPS should make their prosecution guidelines for cases involving electronic communications public and disseminate them in an appropriate way.

Recommendation 30

Article 3 of the Malicious Communications (Northern Ireland) Order 1988 should be amended to explicitly bring within its ambit electronic communications. The word 'publication' should be amended to refer to 'posting' or 'uploading material online'.

Hate Crime Legislation Consolidation – Chapter 14

190. At present, hate crime legislation, such as it is, has developed in a piecemeal and uncoordinated way over many years.

191. The consultation paper asked respondents whether or not they believed that there would be benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation.

192. The responses to the consultation paper in Northern Ireland revealed very strong support for producing one consolidated piece of legislation in the area of hate crime/hate speech. 91% of organisations agreed with this proposal, together with 63% of individuals, giving an overall approval of 79%.

193. It was a generally held view that the current laws were considered to be outdated, under-utilised, and subject to significant gaps.

194. The opportunity to consider hate crime/hate speech offences in the round should include consideration of all relevant current statutes, including the Malicious Communications (Northern Ireland) Order 1988, Section 37(3) of the Justice Act 2011 and The Protection from Harassment (Northern Ireland) Order 1997.

195. I acknowledge that some legislation, such as the Communications Act 2003, deals with reserved matters and may not necessarily fall under the jurisdiction of the Assembly – at least without the consent of the Secretary of State for Northern Ireland.

Recommendation 31

All hate crime and hate speech law – including public order legislation, apart from law dealing with reserved matters – should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.

Legislative Scrutiny and Oversight – Chapter 15

196. There was unanimous support from respondents to the consultation paper that any new legislation on hate crime should be subject to post-legislative scrutiny.

197. I think a period of three years should give time to allow the legislation to bed in and be fully understood and put into practice by those involved in the criminal justice system.

198. One particular advantage of such scrutiny is that this may well facilitate the addition of certain new characteristics as protected groups if the evidence base is sufficient to demonstrate that targeted criminality has developed into serious social problems that serve to justify criminal proscription.

199. The establishment of a Hate Crime Commissioner for Northern Ireland might well complement the legislative reform options I have outlined in this Review and underscore the importance of hate crime and hate speech.

200. This would be to encourage good practice in the prevention, detection, investigation and prosecution of offences associated with hate crime, as well as the identification of victims and perpetrators of those offences.

201. Such a Commissioner might well also have an important role in keeping hate crime legislation under review.

202. Consideration could also be given to whether or not such a role would be full-time or part-time. A solution to the question of financial commitment might well be to provide for a Domestic Abuse/Hate Crime Commissioner whose responsibilities would straddle both areas of criminality.

Recommendation 32

There should be post-legislative scrutiny by the *Assembly* to monitor the effectiveness of any new legislation on hate crime and hate speech. It is recommended that such scrutiny should occur regularly at three-year intervals and, if possible, include an element of public consultation.

Recommendation 33

An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.

Recommendation 34

In the alternative, I recommend that the role of such a Commissioner could properly be shared and that, therefore, there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner. I believe this would work well because the remit for this post relates to specific criminal contexts which are not dissimilar.

203. Chapter 16 is the final chapter. It explores the role of sentencing guidance in dealing with hate crime/hate speech. It then examines the wider societal issue of challenging hatred and prejudice in Northern Ireland, focusing on the key role to be played by education and encouraging the next generation to respect difference and diversity in helping to build a shared and integrated society. Going forward, it is essential that society in Northern Ireland should recognize both collective and individual responsibility to prevent hatred and advance mutual understanding.

Desmond Marrinan

30 November 2020

Judge Desmond Marrinan was called to the Bar of Northern Ireland in 1972 and later to the Irish Bar. He specialised in criminal law, EC law and professional negligence until his appointment as a County Court judge in 2003. He served as such until 2018 dealing mostly with criminal trials in the Crown Court and continues to sit as a deputy County Court judge. From 2008 – 2011 he served as the Recorder of Londonderry. He was formerly the vice- chair of the Law reform Advisory Committee. From 1971 – 1978 he lectured in public law at the Queen's University of Belfast and latterly was an external examiner for the Institute of Professional Legal Studies at Queen's University Belfast. He presently serves as one of the Parole Commissioners for Northern Ireland.

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Hate crime legislation in Northern Ireland

Independent Review

Final Report

Volume 1

Introduction, Executive Summary
Chapters 1–7 Part 1

HATE CRIME LEGISLATION IN NORTHERN IRELAND

AN INDEPENDENT REVIEW

Final Report

The pleasure of hating like a poisonous mineral, eats into the heart of religion and turns it to ranking spleen and bigotry; it makes patriotism an excuse for carrying fire, pestilence and famine into other lands: it leaves to virtue nothing but the spirit of censoriousness, and a narrow, jealous inquisitorial watchfulness over the actions and motives of others.[1]

[1] *Hazlitt. W.(1823) reprinted (2004) On the pleasures of hating,*rev. edn.London:Penguin

Contents

VOLUME 4

Introduction

The consultation paper for this review was published on 8 January 2020.

In a foreword to that paper I noted that:

> The law in this area, as in other parts of the United Kingdom, has developed in a piecemeal way and this had led for calls for a review of hate crime legislation from a range of sources. . . . This review has been designed to be wide ranging and will explore various important options and ideas to improve and strengthen the law, if necessary, and render it effective to deal with criminal conduct motivated by hatred, malice, ill will or prejudice including hate crime and abuse which takes place online.[2]

[2] Desmond Marrinan, *Hate Crime Legislation in Northern Ireland: An Independent Review, Consultation Paper* (January 2020), p4.

Public consultation

At the outset I observed on the importance of public consultation as an intrinsic and valuable part of the review. This included the assistance of members of the general public, as well as those who have a particular interest in the subject, whether as those engaged in the criminal justice system or otherwise.

The review has broken new ground as this is the first attempt to consider the public's perspective on hate crime in Northern Ireland in a hate crime review.

It will be noted that the questions set out in the consultation paper were of both an open and closed nature and invited the opinions, reflections and expressions of views from individuals and organisations interested in this important public debate.

No one could have guessed at the launch of the consultation process that, within a few weeks, humanity worldwide would be struck by the spread of the Covid-19 virus pandemic which has caused catastrophic loss of life and economic damage.

One of the many unpleasant consequences of the pandemic has been an increase in hate speech. There is strong evidence from many countries that Covid-19 has exacerbated hate crime. In Austria, for example, there was an increase in online posts blaming refugees for the spread of the virus. In Finland, persons with disabilities were blamed in the context of the outbreak for taking healthcare resources that are needed to tackle the pandemic. People presumed to have an Asian background were blamed for beginning the pandemic and for spreading the virus. Wild rumours were spread giving rise to conspiracy theories about the alleged responsibility of Jewish, Chinese or American elites and creating new scapegoats such as the elderly or the sick.[3]

[3] European Parliament, *Hate Speech and Hate Crime in the EU and the Evaluation of Online Content Regulation Approaches* (Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, July 2020).

This kind of scapegoating during an epidemic is not new – during the medieval plague in Europe absurd allegations were spread about the Jewish community. This early example of hate speech led to the organisation of pogroms against Jewish people based on conspiracy theories.

Hate speech and hate crime have been steadily on the rise in Europe during the past decade. A recent study commissioned by the European Parliament observed that:

> Hate speech and hate crimes poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardising peaceful coexistence. They affect private lives, or in cases of violent bias crimes, even victims' life and limb. They stigmatise and terrify whole communities. They erode social cohesion, solidarity and trust between members of society. Hate speech blocks rational public debate without which no democracy can exist; it leads to an abuse of rights that endangers the rule of law.[4]

Despite the pandemic, there has been a significant response to the consultation paper as people coped with the consequences of the pandemic, including a lockdown in their lives, the tragic loss of loved ones, the closure of schools and the threat that the National Health Service would be overwhelmed.

The response from the public to the consultation paper was gratifying. In total, there were 247 responses to the paper. This figure involved responses from 189 individuals and 58 organisations. In addition to the consultation paper, there was an online questionnaire dealing with the key issues. This attracted 799 responses.

[4] Ibid, p13.

Careful consideration has been given to the views of all respondents in the review and these have been taken account of in making my recommendations.

As with all consultations, the views expressed by respondents are not always representative of the views of the wider public. Thus, the main focus in analysing the responses was to obtain a better understanding of the wide range of views expressed, rather than to undertake a numerical count of how many people held particular views. That said, the articulation of the wide range of views was thought-provoking at all stages, informative and, at times, inspirational.

During the time allowed for the consultation process, the review team organised a series of public outreach events throughout Northern Ireland, beginning with an event in Enniskillen in January 2020 and ending with an event in Craigavon in March 2020, shortly before lockdown. Other event locations included Dungannon, Ballymena, Belfast and Derry/Londonderry.[5]

The unprecedented difficulties created by the pandemic and the resulting lockdown meant that a number of stakeholders requested extensions of time well beyond the end of March 2020 and these extensions were granted to ensure the fullest possible engagement. The completion of the work of the review was delayed because of such considerations.

Since the work of the review began in June 2019, the review team has met or had discussions with a large number of organisations and individuals.[6]

[5] See list of public outreach events at appendix 1.

[6] See list of organisations at appendix 2.

As a result, I have had the benefit of the widest range of informed opinion, expertise and knowledge. Meeting with victims of hate crime has been particularly important in understanding how they have been affected and what their aspirations are for reformed legislation.

It is important to note that there have been a number of recent developments on hate crime.

In May 2018, Lord Bracadale published his report following an independent review of hate crime legislation in Scotland. This has led to the introduction of a Hate Crime Bill[7] before the Scottish parliament which is presently being discussed at the time of writing.

In an introduction to his final report Lord Bracadale observed:

> I recognise that not everybody will be happy with the recommendations that I make. Some may think that they fall short of their expectation; others may think that they go too far in interfering with the freedom of the individual and freedom of speech. But all can rest assured that their views have made a valuable contribution to what has been a wide-ranging review.[8]

Similarly, I anticipate that not all of my recommendations will attract universal support. However, I am content to give the same assurance to all those individuals and organisations who gave freely of their time and contributed so much to the work of this review. I take comfort from the fact that a significant majority of organisational respondents have favoured most of the recommendations I have made. I have not named all the respondents in this report but have striven to identify key areas of

[7] See https://beta.parliament.scot/bills/hate-crime-and-public-order-scotland-bill

[8] Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (May 2018), at (iii).

concern and disagreement and to give fair consideration to both majority and dissenting views.

It is important to set realistic expectations for the review. It is essential to recognise that the criminal law, no matter how well it might be drafted or enforced, will not on its own provide a solution to hate crimes and prevent their reoccurrence.

The general community has to take responsibility for addressing the causes and symptoms of hate crime - deep-seated and long-standing social tensions and attitudes also need to be addressed through other means.

One should be careful not to expect that the criminal law is a panacea for all the evils of society nor that it alone will resolve deeply seated social tensions and attitudes, but, as Lord Bracadale observed:

> Clearly defined hate crime legislation and well developed procedures in the criminal justice system to deal with it will increase awareness of hate crime and give victims more confidence that it will be taken seriously by the police, prosecutors and the courts . . . It can contribute to attitudinal change.[9]

The consultation paper ran to over 300 pages and contained a good deal of information and academic analysis on the issues.

With this in mind, I have sought to avoid duplication of information where possible and suggest to the reader that, in order to avoid unnecessary repetition, this final report and its recommendations should be read alongside the consultation paper.

[9] Ibid, at (ii).

The report is produced in 2 parts – Part 1 is my review of the issues and my recommendations for change.

Part 2 consists of:

(i) A paper containing the expert analysis of the 247 responses to the consultation paper prepared for the review by Dr Arlene Robertson, who was appointed as an independent analyst; and

(ii) A summary of the data from the 799 responses to the online Hate Crime Survey prepared by the *Northern Ireland Statistics and Research Agency*.

(iii) Appendices.

My hope is that this report will stimulate further debate and interest among legislators, stakeholders in the criminal justice system and the public in this important area of law, so that any changes in the law resulting from this review will ensure that Northern Ireland is equipped to deal with hate crime and hate speech in ways that are fair, just, effective and compliant with the obligations set by the European Convention on Human Rights and Fundamental Freedoms and other relevant international treaties.

The main finding of this review is that I have concluded that hate crime law in Northern Ireland, such as it is, is generally ineffective and requires urgent substantial reform including legislative changes.

My recommendations envisage change in approach to hate crime including the introduction of restorative justice for hate crime offenders.

Chapter 2 sets out a summary of the main recommendations.

There is also an Executive Summary.

Without such changes, I believe the law will continue to fail victims and society generally.

It will be a matter for the Minister of Justice to decide which, if any, of my recommendations to accept and propose to the Assembly.

Desmond Marrinan

30 November 2020

Judge Desmond Marrinan was called to the Bar of Northern Ireland in 1972 and later to the Irish Bar. He specialised in criminal law, EC law and professional negligence until his appointment as a County Court judge in 2003. He served as such until 2018 dealing mostly with criminal trials in the Crown Court and continues to sit as a deputy County Court judge. From 2008 – 2011 he served as the Recorder of Londonderry. He was formerly the vice- chair of the Law reform Advisory Committee. From 1971 – 1978 he lectured in public law at the Queen's University of Belfast and latterly was an external examiner for the Institute of Professional Legal Studies at Queen's University Belfast. He presently serves as one of the Parole Commissioners for Northern Ireland.

EXECUTIVE SUMMARY

Background to the Review

1. In 2017, following calls for a review of hate crime legislation in Northern Ireland from a range of sources, a commitment was made by the then Minister of Justice, Claire Sugden MLA, to come back to the Assembly and confirm whether she intended to initiate a review of the legislative framework on hate crime. Whilst a response was not provided prior to the dissolution of the Assembly, a commitment to review hate crime legislation was included in the draft Programme for Government. On 6 June 2019, the *Department of Justice* announced the appointment of an independent review into hate crime legislation in Northern Ireland to be conducted by me and to write a report with recommendations for the Minister of Justice.

Scope of Review

2. The remit for the Review is set out in chapter 1 of this final report.

Acknowledgements

3. I have been supported by a small review team comprising of Noel Marsden, senior review manager, Ken Mack, senior information officer, Ciara McFall, Victoria Mullan and Zell Blake, office managers, and researchers Claire Milliken, Dr Arlene Robertson and Dr Katy Radford. Secretarial support was provided by Karen Caldwell.

4. I have been very fortunate in having such talented and dedicated people work with me on this review. Their professionalism, support and unstinting commitment, combined with their good sense and wisdom, made my task that much easier and I thank them for their support and encouragement throughout the review.

5. At the outset of the review, I invited a number of individuals to form a reference group to act as catalysts for developing new ideas and as a quality mechanism for the review. This reference group was split into a Core Expert Group and a Key Stakeholder Group. These groups had a wide range of experience and expertise and worked tirelessly to assist me to complete the task.

6. In particular, I was fortunate in persuading a number of leading academics in this field from the United Kingdom and Ireland to join the Core Expert Group.

7. This group scrutinised and challenged emerging ideas to ensure that any recommendations would be robust and practicable. They gave their time freely and generously and made significant and creative suggestions throughout the whole process of the review.

8. I owe them my sincere thanks for their invaluable assistance.

9. Special thanks are also due to the members of the Key Stakeholder Group who provided valuable insights into all areas of the work.

10. I am particularly grateful to the victims of hate crime who willingly shared their experiences. Undoubtedly their 'voice' has helped form an important focus for many of the recommendations made in this review.

Public Consultation

11. At the outset I took seriously the importance of public consultation as an intrinsic and valuable part of the review. This included the assistance of members of the general public, as well as those who have a particular interest in the subject, whether as those engaged in the criminal justice system or other stakeholders. The importance of hearing from victims cannot be underestimated. They provided valuable

understanding and lessons to be gained from their experiences that helped inform and shape the review.

12. A consultation paper was published in January 2020.

13. The questions set out in the consultation paper were of both an open and closed nature and invited the opinions, reflections and expressions of views from individuals and organisations interested in this important public debate.

14. In addition to the consultation paper, there was an online questionnaire dealing with the key issues. Responses to the consultation paper proved to be important and the online questionnaire attracted 799 responses.

15. In total, there were 247 responses to the consultation paper. This figure includes responses from 189 individuals and 58 organisations.

16. In the case of the online responses, inevitably many responses replicated the views of other responses. Nevertheless, careful consideration was given to all the responses, notwithstanding any duplication of opinions.

17. Careful consideration has also been given to the views of all respondents in the review and these have been taken account of in making my various recommendations.

18. During the time allowed for the consultation process, the review team organised a series of public outreach events throughout Northern Ireland. This proved successful and allowed members of the public to air their views and provide an input into the review.

19. Since the work of the review began in June 2019, the review team has also met or had discussions with a large number of organisations and individuals.

20. As a result, I have had the benefit of the widest range of informed opinion, expertise and knowledge. It is important to emphasise that meeting with victims of hate crime has been particularly important in understanding how they have been affected and what their aspirations are for reformed legislation.

Summary of Key Findings and Recommendations

Definition of Hate Crime – Chapter 3

21. There is no clear and universally accepted definition in law or related disciplines of the term “hate” or “hate crime”.

22. As well as being a legal concept, ‘hate crime’ is also a criminological concept referring to a group of crimes as defined by national criminal laws. It is not one particular offence.

23. In legal terms, the first element of a hate crime is an act that constitutes a crime under ordinary criminal law. This may be described as the base or basic offence. Such crimes can range from petty crimes to much more serious offences.

24. The second element of a hate crime is that the criminal act is committed with a particular motive or bias. It is this crucial element of bias that differentiates hate crimes from ordinary crimes. The bias motive is the perpetrator’s prejudice towards the victim.

25. The victim is selected because of their real or perceived connection, attachment, affiliation, support or membership of a protected group.

26. It is important to distinguish between criminal expressions of bigotry (hate speech) and the commission of criminal offences with a bias motive (hate crime). Hate speech offences are generally considered separate to and apart from hate crime laws.

27. A hate crime then is defined in the first instance as a base offence which is committed with a hate or bias element; where no non-hate equivalent of the offence exists on the statute book, then no hate crime can exist.

28. The great majority of organisational respondents to the consultation paper and the online survey agree that punishing hate crime more severely is justified. Specifically, 95% of organisational responses to the consultation paper agreed. On the other hand, 90% of individuals disagreed.

29. In the online survey, 58% of respondents agreed whilst 17% disagreed.

30. I recommend the following definition of Hate Crime:

Recommendation 1

A hate crime may be defined 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.

Scale of Hate Crime in NI – Chapter 4

31. The problems of hate crime and discrimination against various minority communities have been observed as a persistent and recurrent problem across Northern Ireland for the past two decades.

32. Beginning in 2016, the number of racist hate motivated incidents has overtaken sectarian motivated incidents so that by 2018/19 there were no fewer than 1124 racist hate motivated incidents as against 865 sectarian hate motivated incidents.

33. In 2018/19, racist hate abuse in Northern Ireland accounted for almost half of all reported occurrences with hate motivation, while sectarian abuse accounted for just over one third.

34. In the same period just over one in ten reports of hateful abuse were of a homophobic nature, whilst other occurrences, (disability, faith/religion and transphobic) combined, accounted for less than 10% of the total.

35. The most recent available figures updated to 30 June 2020 showed a welcome reduction of 6 fewer racist incidents and 78 fewer racist crimes recorded in the 12 months from July 2019 to June 2020.

36. However, transphobic incidents and crimes saw the largest increases across all hate motivation strands, with 29 more incidents and 26 more crimes in the same period. While disability incidents fell by 10, there were 8 more crimes. The number of sectarian incidents decreased by 13 and the number of sectarian crimes fell by 19.

37. Homophobic incidents and crimes rose by 18 and 15 respectively. Faith/religion incidents fell from 45 to 36 and crimes decreased from 23 to 15.

38. The overall figures can be misleading as they appear to indicate that racial and sectarian hate crimes are similar in frequency, but when one considers the statistics in relation to the proportion of the population from a black or multi-ethnic background, the reality becomes much more concerning. In practical terms, there is approximately a one in 31 chance of being the victim of a reported racial hate incident compared to approximately one in 1777 chance of being a victim of a reported sectarian hate incident.

39. The prevalence of hate crime in Northern Ireland and its rise suggests that Northern Ireland's society as a whole needs to address the problem of hate crime in a holistic way. Improvements in the criminal law need to be supported by educative schemes and preventative strategies.

40. As a general expectation arising from the consultation process for this review, I would advocate that all education sectors in Northern Ireland need to address the problem of hate crime, as do private and public sectors of employment.

Current Law on Hate Crime in NI and a Proposed New Hate Crime Model – Chapters 5 and 6

41. At present, no specific offence of 'hate crime' exists in Northern Ireland.

42. The Criminal Justice (No. 2) (Northern Ireland) Order 2004 (the 2004 Order) was introduced to ensure that the perpetrators of offences aggravated by hostility received a higher sentence following conviction. This law enables a sentence to be increased where it is proven that the basic offence of which a person has been convicted was motivated by hostility against one of the currently protected characteristics (race, religion, sexual orientation or disability) or where the offender demonstrated hostility against one of those characteristics either at the time of committing the offence or immediately before or after it.

43. Aside from the stirring up offences referred to in part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order) and Section 37 of the Justice Act (Northern Ireland) 2011 (dealing with indecent or sectarian chanting at regulated sports matches), provision for hate crime in Northern Ireland centres exclusively on the enhanced sentencing provisions of the 2004 Order.

44. In Scotland, the model allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. This approach does not involve the creation of new specific offences; rather, it involves an existing offence, such as an assault, being motivated by or demonstrating hostility in respect of one or more protected characteristics.

45. The current enhanced sentencing approach in Northern Ireland attracts a good deal of sharp criticism from respondents, with the great majority wishing to see significant changes in the law and the introduction of specific aggravated hate crime offences as in England and Wales or a statutory aggravation model similar to that employed in Scotland.

46. Nothing I have read or reviewed since the launch of the consultation paper in January 2020 has given me any assurance that this enhanced sentencing law is working any better now or is capable of being reformed. It is now some sixteen years since its introduction and it has been the subject of widespread criticism for many years. The review has received feedback from many stakeholders and respondents calling for its reform.

47. Arguably, one of the core issues for this Review is to decide whether or not it is better to tackle hate crime through an aggravated offence model.

48. I have concluded that an aggravated offence model, i.e. where a hate crime aggravation can be added to any offence and tried as such, is more appropriate than the enhanced sentencing model and has a much better chance of providing an effective approach for the justice system to address hate crime. It will encourage the police to collect evidence of hate in all cases at an early stage – something that does not appear to happen under current arrangements. Among other advantages, it would also mean that the aggravation can appear on the defendant's record, but arguably also gives greater protection to the defendant as it requires the prosecution to prove the aggravation at the offence stage which fits well with the legal doctrine of fair labelling.

49. There is also a question of principle. If the element of 'hate' is left to the sentencing stage, the law seems to be treating the 'hate' element as another type of aggravation on a par with a number of other aggravating factors, such as vulnerability. However, by putting the 'hate' element into the offence stage, the legislature would be making it clear that the 'hate' element means that a different sort of wrong/harm has been caused by the defendant – one that cuts to the heart of our values as a progressive liberal society. I believe that that principle is seriously diluted in a sentencing only system.

50. I am particularly attracted to the Scottish model in terms of its simplicity and efficacy. It can deal with any offence, not just the limited suite of offences currently dealt with as aggravated offences for race and religion alone under the 1998 Act in England and Wales. The statutory aggravation provisions in Scotland do not create new offences.

51. In the current and further proposed Scottish provisions, there is a requirement on the sentencing court to state on conviction that the offence was aggravated in relation to the particular characteristic; to record the conviction in a way that shows that the offence was so aggravated; and to take the aggravation into account in determining the appropriate sentence. In addition, the sentencing court is required to

state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of the reason for that difference, or otherwise, the reasons for there being no such difference. It is noted that in Scotland, charges can proceed with more than one statutory aggravation – for example, in cases where the conduct in question is motivated by malice and ill will relating to both religion and disability.

52. In the light of what has been discussed above, and with very strong support overall from a significant number of respondents to the consultation paper in Northern Ireland, it is possible to make a number of recommendations as follows:

Recommendation 2

Statutory aggravations should be added to all existing offences in Northern Ireland following the model adopted in Scotland and become the core method of prosecuting hate crimes in Northern Ireland. This would mean that any criminal offence could be charged in its aggravated form.

Recommendation 3

If the recommendation at 2 is accepted and made into law, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary and should be repealed and replaced by suitably drafted consolidated hate crime provisions.

For the avoidance of doubt, those Articles of the 2004 Order providing for higher maximum sentences for certain criminal offences should be retained.

Recommendation 4

If the recommendations at 2 and 3 above are accepted, no increase in maximum sentences for any criminal offence is required.

Recommendation 5

While I am content to retain the notion of "hostility", I am satisfied that the introduction of a wider range of attitudes such as "bias, prejudice, bigotry and contempt" may well prove beneficial, particularly as there is no standard legal definition of "hostility".

Recommendation 6

I am persuaded that a variation of the 'by reason of' threshold should be added as a third threshold to supplement the current thresholds of (a) demonstration of hostility, and (b) motivation.

Recommendation 7

Adopting Section 28 of the Crime and Disorder Act 1998 as a starting point, its equivalent in Northern Ireland could read:

. . . Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this section if:

(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of one or more of (name the protected characteristic/s); or

(b) The offence is motivated (wholly or in significant part) by hostility bias, prejudice, bigotry or contempt towards members of (name the protected characteristic/s) based on their membership (or presumed membership) of that group/s; or

(c) The offence is committed (wholly or in significant part) by reason of hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of (one or more of the protected characteristic/s).

(d) However, if:

(i) the basic offence is proved but;

(ii) the aggravation is not proved, the offender's conviction is as if there was no reference to the aggravation and the conviction will be solely for the basic offence.

Recommendation 8

A consequential section to that described in Recommendation 7 should read:

<u>Consequences of Aggravation</u>

(1) When it is proved that the offence is so aggravated, the court must –

(i) State on conviction that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated by reference to one or more of the protected characteristics;

(ii) Record the conviction in a way that shows that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated, by reference to one or more of the protected characteristics;

(iii) In determining the appropriate sentence, treat the fact that the offence is so aggravated as an aggravating factor that increases the seriousness of the offence; and

(iv) In imposing sentence, state (a) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for the difference or (b) otherwise, the reasons for there being no such difference.

Protected Characteristics – Chapter 7

Discussion

53. In recommending new hate crime legislation for Northern Ireland, it is also necessary to address the categories of protected characteristics and the question of whether or not there is a need for additional categories of protected characteristics to

be added. The characteristics presently protected under the law in Northern Ireland are race, religion, sexual orientation and disability.

54. These protected characteristics are the most commonly protected in comparable jurisdictions and I have concluded that these current categories of protected characteristics should remain in the law of Northern Ireland.

Gender

55. The Terms of Reference for the Review ask it to consider, in particular, whether new categories of hate crime should be created for characteristics such as gender and any other characteristics, which are not currently covered.

56. Any informed analysis of gender and gender identity involves examining the wider spectrum of gender identities which include cis gender, transgender and non-binary gender identities.

57. None of the UK jurisdictions currently include gender per se under hate crime legislation

58. The inclusion of gender in any hate crime protected category is not straightforward. Gender continues to divide advocates of hate crime laws with some recognising the misogynistic nature of much sexual and domestic violence against women, but others express concern that gender will swamp other hate crime offences and argue that it is better addressed under criminal laws already developed for this purpose.

59. As also highlighted in the commentary on chapter 13, there is also evidence that women in particular – including politicians and others in high profile positions – are at significant risk of being targeted online. This has led to calls for legislators to

give serious consideration to the inclusion of gender as a protected characteristic for any online offences.

60. There was no clear consensus from the consultation responses on the question of whether gender and gender identity should be included as protected characteristics in Northern Ireland hate crime legislation. This is an important finding and underlines the challenges of legislating in this area.

61. Organisations were split in their views, with 55% 'for' and 45% 'against' the inclusion of gender and gender identity. In contrast, 92% of individuals were opposed to the inclusion of gender and gender identity.

62. In the online survey, 77% of respondents agreed that gender should be a protected characteristic, whilst 74% felt that transgender identity should be similarly protected.

63. A further complicating factor is that, particularly in the case of organisational respondents, some held differing views on the inclusion of gender and gender identity, while others focused heavily on misogyny in their comments. Even among those supportive of gender there were differing views on whether this should cover both men and women.

64. A recurring argument was that the inclusion of gender and gender identity as protected characteristics would pose a serious threat to freedom of speech and religious expression. This view was particularly prevalent among faith sector organisations and individual respondents. These respondents argued that the inclusion of the proposed characteristics would further undermine meaningful discussion and debate, and related to this, they expressed concerns about the potential criminalisation of the expression of religious beliefs and opinions.

65. I am satisfied that gender should be covered as a protected characteristic (rather than misogyny) and that it should be neutral in the sense that using the term sex/gender would also provide protection to men.

66. There were very significant differences between organisational responses and individual responses on the issue of whether or not transgender identity should be included as a protected characteristic.

67. 73% of organisations felt that it should, whereas 97% of individual responses argued that it should not.

68. I am satisfied that transgender identity requires protection. I note that it is already protected in Scotland and in England and Wales. I think it is important, where possible, to offer similar levels of protection to groups throughout the United Kingdom. I am also satisfied that variations in sex characteristics requires protection.

Age

69. Age is not a protected characteristic under the existing hate crime laws. Including it would protect all age groups, although one would imagine that the majority of such cases are likely to involve crimes against older people. Recommending older age as a characteristic would probably mean including an agreed age.

70. The majority of respondents to the review were opposed to the inclusion of age as a protected characteristic. On the other hand, 63% of respondents to the online survey agreed that age should be included as a protected characteristic.

71. The inclusion of age as a protected characteristic is likely to be controversial. However, having weighed up all the submissions received including the expert evidence submitted to the review, I consider that there is sufficient evidence of

hostility-based offences against the elderly to include age as a protected characteristic.

72. Although I have seen very little evidence to suggest that offences are being committed against young people because they are young people, it is of course possible that such behaviour does occur.

73. It is therefore preferable to adopt an approach where a protected characteristic of age generally is introduced rather than an elder specific protection.

Intersectionality

74. Intersectionality describes a situation where hate crime is experienced on more than one characteristic, for example, someone who is disabled and gay.

75. The consultation paper asked respondents whether or not they considered that intersectionality is an important factor to be taken into consideration in any new hate crime legislation. If the answer to that question was in the affirmative, it then asked for views on the best way to achieve this.

76. Not for the first time, there was a significant difference in opinion between individuals and organisations. 83% of organisations answered positively, as opposed to only 12% of individuals.

77. Among those respondents who indicated that intersectionality should be considered, it was felt that this was crucial to gaining a comprehensive understanding of the victim's experiences of hostility, prejudice and violence, and of the nuances of harm suffered.

78. Additionally, it was suggested that taking intersectionality into account in legal responses to hate crime would:

- Allow for greater visibility and understanding of the multiple factors motivating hostility;
- Reassure victims that their nuanced experience would be taken seriously by the judicial system, which, in turn, will encourage reporting; and
- Allow for specific harm on the grounds of two or more particular characteristics to be considered and addressed.

79. There is strong evidence to suggest that seeking to incorporate the notion of intersectionality into a new statutory aggravation model would create challenges in attempting to reflect more than one protected characteristic in prosecuting aggravated offences. For example, in England and Wales, if the prosecution has to deal with a case involving racial and religious hostility, this can create real difficulties.

80. The *Law Commission* provisionally suggests a novel approach to this by the inclusion of a provision allowing for the recognition of hostility based on "one or more characteristics". Thus, the characteristics could be specified in the charge or count on the indictment, but conviction would only require the jury to be satisfied that at least one had been met on the evidence given by the prosecution.

81. I agree with the approach of the *Law Commission* in England and Wales on this important issue.

82. My recommendations on characteristics are therefore as follows:

Recommendation 9

All current protected characteristics in Northern Ireland – race, religion, disability and sexual orientation should continue to receive protection under the proposed model set out in Recommendation 2, together with the new recommended protected characteristics of age, sex/gender and variations in sex characteristics.

For the avoidance of doubt, the protected characteristic of sex/gender includes transgender identity.

The protected characteristics will be protected for all purposes including any amended public order provisions.

Recommendation 10

Provision should be made for any future legislation to be framed in such a way as to allow any other protected characteristic to be added to the list of protected characteristics referred to in Recommendation 9 above by statutory instrument if sufficient evidence emerges to show such a group or groups are victims of hate crime or hate speech. The reasoning behind this recommendation is to allow suitable protection to be provided in the changing circumstances of the time.

Recommendation 11

Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences referred to in Recommendation 2.

Sectarianism – Chapter 8

83. Although the remit for this review does not explicitly reference sectarianism as requiring special attention, it does ask the review to consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.

84. The term 'sectarianism' does not have a precise legal meaning but is used frequently in everyday speech.

85. Sectarianism elicits differing responses from different groups in Northern Ireland, but there is a growing consensus in the community about attempting to address its causes and prevent it from continuing to act to undermine good relations in our society, bringing with it severe damage, loss of life and suffering.

86. Whilst most people claim to recognise it when they see it, defining and dealing with it in the criminal law has proved to be a much more difficult task.

87. Various definitions of sectarianism have been attempted, although none are enshrined in law. None of the possible definitions appear to be sufficiently clear to be easily adapted into a legislative formulation, capable of legal enforcement and appropriate prosecution. A common thread running through the literature on sectarianism is the presence of some form of 'hostility', which provides a building block towards consensus.

88. 75% of the organisations who responded to the consultation paper were in favour of there being a specific reference to the term 'sectarian' within any new hate crime legislation. Individual responses were different, with 65% of individuals disagreeing.

89. The current ‘religious group’ indicator does not adequately capture the meaning and impact of sectarianism, which extends beyond religion to include aspects of nationality and political identity.

90. Among those who were generally supportive of the expansion of the indicators, many agreed that the inclusion of ‘political opinion’ as an indicator was not appropriate. In particular, it was argued that this would risk capturing legitimate political speech and conflict with human rights obligations and freedom of speech, such as Article 10 of the European Convention on Human Rights.

91. It is useful to look at the experience of other relevant jurisdictions. The Working Group on defining sectarianism in Scots law in its final report of November 2018 noted that this is a complex issue. It argued that a single, intersectional, sectarian aggravator could have two key advantages for police and prosecutors. Firstly, it would streamline decision making where the accused’s conduct immediately before, during or after the offence might arguably fall within racial or religious aggravations, where the hostility evinced is of a sectarian character. In addition, a single compound aggravator avoids the need for duplication where, for example, the accused’s behaviour could arguably ground both the religious and a racial aggravator, observing that there is no reason in principle why a sectarian prejudice aggravator should be any more difficult to apply in practice than the existing aggravators based on religious and racial prejudice.

92. I agree with the Scottish Working Group that, although this is a complex issue, that is not a sufficient reason not to establish a workable legal definition. I am persuaded that the principle of fair labelling should apply so that criminal acts of prejudice can be named for what they are, whether that be anti-Catholicism; anti Protestantism; sectarianism or any other descriptor. Whilst I acknowledge concerns expressed by other communities, I believe that sectarianism in Northern Ireland should be specifically defined as an issue that exists between Christian communities in Northern Ireland at this time. I do not believe that enough is understood about sectarianism in relation to other communities in Northern Ireland to make the

application of ‘sectarianism’ to these communities meaningful in a legal or social sense.

93. I am clear that the crimes of this nature committed against such individuals, whether Catholic, Protestant or no religion, should be covered by new hate crime legislation and that the gaps in protection should be rectified.

94. I am satisfied, therefore, that the current legislative and policy construction in relation to sectarianism is not only complex, but also inconsistent and must be addressed.

95. After careful consideration, I therefore recommend as follows:

Recommendation 12

The findings of the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in Northern Ireland – subject to any necessary adjustments.

Recommendation 13

There should be a new statutory aggravation for sectarian prejudice. It is recommended that the introduction of the new offence of statutory aggravation for sectarian prejudice should be carefully monitored by the proposed Hate Crime Commissioner on an annual basis and provide an annual report to the Northern Ireland Assembly.

Stirring up offences – Chapter 9

96. The review's Terms of Reference includes the consideration of the implementation and operation of the current legislative framework for incitement offences, in particular, Part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order), and make recommendations for improvements.

97. Part III of the 1987 Order relates to 'stirring up hatred or arousing fear'.

98. Stirring up hatred is conduct which encourages others to hate a particular group. It is important to distinguish this concept from the definition of 'hate crime' discussed in the early part of this review. In a hate crime, the baseline conduct (or basic offence) is already criminal; it is the motive or demonstration of hostility that marks it out currently as a hate crime. However, a stirring up hatred offence may criminalise conduct which would not otherwise be criminal. These so-called 'stirring up' offences criminalise certain forms of hate speech and should be clearly distinguished from hate crime generally.

99. Hate speech has been defined as speech that "expresses, encourages, stirs up or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality and sexual orientation".

100. Historically, while Part III of the 1987 Order may be a key element in legislation pertaining to hate speech, it has been little used and there continues to be limited awareness of the law.

Freedom of expression

101. The law in Northern Ireland does not draw any distinction whatsoever between offences relating to racial hatred and other protected groups. All are treated equally under the current law.

102. In Northern Ireland, there are no express provisions protecting freedom of expression in relation to criticism of religious beliefs. Until recently, the same could be said in relation to there being no express provision protecting freedom of expression in relation to sexual orientation

103. The consultation paper asked respondents whether the term 'hatred' is the appropriate test use in the stirring up offences under the 1987 Order. Although the great majority of respondents did not consider the term 'hatred' as the appropriate test, there was little support for lowering the bar.

104. Although the term 'hatred' sets a very high bar for prosecution, I am satisfied that this is appropriate given the seriousness of such offences and the potential impact on freedom of speech if a lower threshold was employed.

105. Another key issue in considering the operation of the 1987 Order and making recommendations for improvements is whether Northern Ireland should amend legislation to add the equivalent to Sections 4, 4A and 5 of the Public Order Act 1986. Such provisions are not currently part of the law in Northern Ireland. The relevant parts of the Public Order Act 1986 are set out in more detail in chapter 9 of this report.

106. Section 4 creates an offence of using, distributing or displaying threatening or abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence would be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or

whereby that person is likely to believe that such violence would be used or it is likely that such violence would be provoked.

107. Section 4A differs from Section 4 in that, rather than a requirement for immediate violence, an offence under Section 4A is committed if there is an intention to cause harassment, alarm or distress and that harassment, alarm or distress is caused.

108. An offence under Section 5 is committed if threatening or abusive words or behaviour or disorderly conduct are used within the hearing or sight of a person likely to be caused harassment, alarm or distress.

109. There are no direct equivalents to these provisions within the current law of Northern Ireland.

110. The consultation paper asked respondents whether there is merit in adding equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 to the Public Order (Northern Ireland) Order 1987.

111. This question provoked remarkable disagreement between the responses from organisations and the responses from individuals. A strong majority of organisations (89%) supported the proposition whereas the ten individuals who responded all disagreed. Most of those who disagreed expressed concerns about freedom of speech being curtailed and legitimate criticism or opinion being interpreted as stirring up hatred.

112. The consultation paper noted that in relation to the use of words or behaviour or display of written material under Article 9(3) of the 1987 Order no offence is committed where the words or behaviour are used, or the written material is displayed,

by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. I observed that it was unclear why stirring up hatred inside a building is considered acceptable and the same expression outside the building would be considered an offence.

113. At the time this defence was introduced, the Internet had not been developed. It is now available very widely and in most homes. If the dwelling defence is read literally, much that is posted online could fall into this category. Even if one was to enter into a legalistic discussion about how, in this time of smart phones, a defendant could realistically argue that he had no reason to believe that his words will be seen by a person outside a dwelling, it is clear that this offence is not ideally suited to the online era.

114. The consultation paper asked whether the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should be retained. Organisations were evenly split in their views whilst the great majority of individuals supported retaining the defence.

115. It is interesting to compare these answers (to question 32) with a virtually identical question (question 42) about the dwelling defence was asked in the context of online harm.

116. In answer to question 42, 76% of organisations agreed that the dwelling defence should be amended/removed, while 63% of individuals disagreed.

117. There was general consensus among respondents that the dwelling defence was outdated, redundant and particularly problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media. The dominant view among most respondents was that the dwelling defence should be removed.

118. The consultation paper then asked respondents whether or not there should be an explicit defence of 'private conversations' in stirring up legislation to uphold privacy protection. 100% of organisations who responded supported this proposition together with 83% of individuals.

119. The consultation paper sought the views of respondents on whether the requirement that the Director of Public Prosecutions (DPP) gives consent to any prosecutions taken under Part III of the 1987 Order is necessary and appropriate. There was widespread agreement that such a provision is necessary and appropriate. Some 78% of organisations and 69% of individuals agreed.

120. There was strong consensus among respondents that this was necessary to safeguard against potential misuse of the legislation. Specific concerns focused on freedom of speech and the need to ensure that individuals were sufficiently protected from prosecution of trivial or unfounded allegations.

121. The consultation paper also sought the views of respondents as to whether or not any new proposed additional characteristics or groups should also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987. 74% of organisations agreed with this proposition as compared to only 2% of individuals who agreed.

122. With a few exceptions, individual responses were similar (in a few cases identical) and they comprised a limited range of key points.

123. The consultation paper asked: should the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation be specifically added as defences to Part III of the Public Order (Northern Ireland) Order 1987? A strong majority (97%) of individuals were in favour, while organisations were relatively balanced in their views, with 48% and 52% answering 'yes' and 'no' respectively.

124. Further, it asked: should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the 1987 Order be retained in law or repealed?

125. Respondents' comments indicated that they strongly endorsed retention of the express defence of freedom of expression for same-sex marriage. This view was taken by the majority of individual respondents and some organisational respondents.

126. Finally, it asked: if there are to be offences dealing with the stirring up of hatred against protected groups, does there need to be any specific provision protecting freedom of expression? 56% of organisations agreed with this proposition as did all of the individual respondents.

127. No evidence has been brought to my attention of any miscarriages of justice in Northern Ireland in the 33 years since the passing of the 1987 Order, which would justify the assertion that the protection for freedom of expression in Northern Ireland is significantly more limited than in England and Wales, or that the risks of injustice are greater in Northern Ireland.

128. When the 1987 Order was passed into law, the Internet did not exist as we know it today. As things stand, there is no explicit legislative provision for online publication. The Internet now provides unprecedented means for people to communicate and connect, providing a platform for social and political discussion, analysis and comment. It has become a major platform for online hate speech.

129. Although the provisions of the 1987 Order were not designed or enacted with the Internet in mind, the courts have shown flexibility to accommodate material posted online. In terms of jurisdiction, it makes sense to clarify this issue by stating that any material downloadable in the United Kingdom is within the jurisdiction of the UK courts – including the courts of Northern Ireland.

Recommendation 14

The Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order Bill, should be amended to:

(a) **include all the current and proposed protected characteristics referred to in Recommendation 9;**

(b) **introduce articles equivalent to Sections 4, 4(a) and 5 (as amended) of the Public Order Act 1986 with the proviso that the dwelling defences in those sections be removed.**

(c) **repeal Article 8 (2);**

(d) **repeal the dwelling defence in Article 9 (3);**

(e) **include a specific defence for private conversations.**

(f) **the test of hatred for the stirring up offences should remain unchanged.**

(g) **all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions**

(h) **there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics. However,**

(I) **there should be formal statutory recognition of the importance of freedom of expression Article 10 rights and all other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, in particular, rights guaranteed under Articles 6, 8, 9 and 14**

(j) **the term 'publication' in article 10 should be amended to include 'posting' or 'uploading material online'.**

(k) **intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear:**

(1) **where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.**

(2) **where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:**

(i) the defendant's words or behaviour were threatening or abusive;

(ii) the defendant's words or behaviour were likely to stir up hatred or arouse fear;

(iii) the defendant knew or ought to have known that his words or behaviour were threatening or abusive; and

(iv) **the defendant knew or ought to have known that his words or behaviour were likely to stir up hatred or arouse fear.**

Removing Hate Expression from Public Space – Chapter 10

130. In this chapter, I address the question of the extent to which the law should regulate hate expression displayed in public places. This includes the question of the powers and duties of public authorities to remove sectarian and other hateful graffiti or items displayed on roadsides or other public property.

131. Section 75(2) of the Northern Ireland Act 1998 places a good relations duty on public authorities, which means that a public authority must have regard to the desirability of promoting good relations between persons of different religious beliefs, political opinion or racial groups when carrying out its functions.

132. Clearly, any public authority which tolerates incitement of hatred in its functions is not promoting good relations. This question of hate expression displayed in public places clearly intersects with any review of hate crime legislation in Northern Ireland.

133. There are a number of human rights treaty obligations entered into by the United Kingdom, which place positive duties on relevant public authorities to tackle hate expression, including the European Convention on Human Rights and Fundamental Freedoms (ECHR).

134. Under Section 32 of the Police (Northern Ireland) Act 2000 and common law, the *PSNI* have fundamental duties such as their duty to take steps to bring offenders to justice. They are also under a duty to prevent the commission of criminal offences.

135. There are also a number of specific powers vested in other public authorities. For example, *district councils* in Northern Ireland have powers to remove or obliterate graffiti detrimental to the amenity of any land in its district, or any placard or poster in its district that does not have planning permission.

136. Powers are also vested in the *Department for Infrastructure* under planning legislation to remove items and recover the cost of doing so for any unauthorised materials on lampposts or other street furniture.

137. The consultation paper sought responses as to whether any recommendation should be considered to clarify and strengthen the law to regulate duties to tackle hate expression in public space.

138. There was strong support for this idea among organisations – 88% percent of organisations agreed. This included a measure of agreement across the political spectrum.

139. Although support was considerably less prevalent among individuals – with 47% answering 'yes' – the overall approval for this idea was 67%.

140. A number of organisations expressed concern at what they saw as the relative lack of action to tackle this issue from public authorities.

141. It is only fair to observe that this area of the law sets many challenges for public bodies, including the *PSNI*. However, the overwhelming response to the consultation question on this issue should be respected. It is also obvious that there are political sensitivities in play on issues such as this.

Recommendation 15

There should be a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.

Restorative Justice - Chapter 11

142. As part of its remit, the review is asked to consider whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

143. Restorative justice has been defined as a process of independent, facilitated contact, which supports constructive dialogue between the victim and the person who has harmed arising from an offence or alleged offence.

144. The present position in Northern Ireland is that there is statutory provision for restorative justice for defendants who are under 18 years of age, primarily through the use of youth conferencing which is delivered at both a diversionary level (when recommended by the *PPS*), and as a court ordered disposal.

145. Numerous reviews and reports have all held this model of conferencing in high esteem. However, in terms of those defendants over 18, none of the existing legislative provisions apply.

146. If a model along the lines presently employed for youth justice is envisaged, legislation would be required as any emerging restorative justice approaches for adults would require a statutory disposal involving pre-court and court ordered sanctions. In this event, I noted in the consultation paper that a likely provider would be the *PBNI*, a statutory body which enjoys acceptance by, and the confidence of, all parts of the community in Northern Ireland. I envisaged that in such a scenario, the existing accredited community-based restorative justice bodies would act to complement the work of such an agency.

147. With regard to the consultation, in respect of asking whether restorative justice should be part of the criminal justice process in dealing with hate crime in Northern

Ireland, there was overwhelming support for this proposition – 90% – from organisations. There was also very strong support from individuals – 73% – for this proposition.

148. In respect of asking whether restorative justice schemes should be placed on a statutory footing, there was even stronger support from organisations and individuals. 94% of organisations and 79% of individuals agreed with this proposal.

149. One consultation question asked whether there should be a formal justice agency responsible for the delivery of adult restorative justice for hate crime. 95% of organisations and 62% of individuals agreed with this proposition.

150. Another question asked respondents to envisage what role could be played in the delivery of adult restorative justice for hate crime by the accredited community-based restorative justice organisations. A number of respondents noted the wealth of experience and expertise of accredited community-based restorative justice organisations, placing them in a strong position to contribute to the effective delivery of adult restorative justice for hate crime. One respondent argued that the involvement of such organisations was particularly important in the context of Northern Ireland, where levels of trust and confidence in the police and criminal justice system to tackle hate crime are generally low.

151. Respondents were also asked whether they considered diversion from prosecution as an appropriate method of dealing with low-level hate crimes, as per the practice in Scotland. There was considerable support for this proposition; 94% of organisations agreed, together with 71% of individuals. However, a degree of caution was urged. Some respondents suggested that victims should have the option to choose, while others thought that the decision to use diversion should be taken on a case-by-case basis.

152. Having examined the arguments carefully, I conclude that there is a very strong case for providing that restorative justice should be made an integral part of the criminal justice process in dealing with hate crime in Northern Ireland.

153. The acknowledged success of the provision for those who are under 18 encourages confidence that, with appropriate adjustments, the model operated by the *Youth Justice Agency* can be replicated for those who are over 18.

154. Placing such provision on a statutory basis will help to ensure consistency in the application of restorative justice processes and enable the system to be completely victim led and victim focused.

Recommendation 16

There should be a new statutory scheme for restorative justice for over 18s, organised and delivered on lines similar to the Youth Justice Agency in Northern Ireland.

Recommendation 17

It is desirable that such a statutory restorative justice framework be established with the necessary financial funding.

Recommendation 18

The new statutory scheme for restorative justice should be independent of the Department of Justice.

Recommendation 19

As such a scheme will involve referrals from the Public Prosecution Service and the Courts, it is recommended that it should be run by a statutory agency such as the Probation Service for Northern Ireland.

Recommendation 20

The presently accredited restorative justice groups should continue to provide community support and support to the statutory agency, which would take the lead in any such collaboration.

Recommendation 21

There should be further consideration of the benefits of establishing a Centre of Excellence for Restorative Justice.

Recommendation 22

Diversion from prosecution is an appropriate method of dealing with low-level hate crimes. The model as per the practice in Scotland appears to offer an efficient and practical template.

Victims – Chapter 12

155. As mentioned in the introduction, the importance of victims lies at the centre of this review.

156. Hate crime in Northern Ireland is significantly under-reported. Although reporting figures have improved, this was from a low in 2010/2011 of just over 18% of those in Great Britain who experienced hate crime being prepared to report the matter to the police. There is no reason to suspect that patterns of reporting in Northern Ireland are now any better, meaning that a significant proportion of hate crime continues to remain unrecorded by the police.

157. The consultation paper sought the views of the public as to how high levels of under-reporting might be improved.

158. Although I do not make any specific recommendation for legislative change to deal with this issue directly, I am satisfied that the introduction of better and more effective hate crime laws as a result of this review will instil new levels of confidence among victims and marginalised communities, and will encourage them to come forward and better trust the police and other actors in the criminal justice system with more confidence than up to now.

159. On a practical level, one theme became clear in the responses – the necessity to provide appropriate and effective support for victims and inform the training of those working with victims.

160. The *Hate Crime Advocacy Service (HCAS)*, which began its work in July 2013, is comprised of a hate crime advocacy co-ordinator based in *Victim Support NI*, and hate crime advocates based in host organisations – *Leonard Cheshire Disability*, the *Migrant Centre NI*, with two advocates based in Belfast and Foyle, and the *Rainbow Project* for LBGT victims.

161. The service was developed to provide victims of hate crime with access to specialist support tailored to their needs. Information and guidance is made available through the service to help victims make decisions and choices to increase their safety and well-being.

162. It is clear to me that the work of *Victim Support NI* and the *HCAS* plays a vital role in increasing the engagement of victims of hate crime with the criminal justice system at all levels, and in helping victims to cope and deal with the effects of hate crime and support them through a very difficult process.

163. In the consultation a majority of organisations (89%) acknowledged that the service was valuable in supporting victims of hate crime through the criminal justice process, whilst 63% of individuals agreed, giving an overall percentage in support of 81%.

164. A majority (94%) of organisational respondents and 60% of individuals considered that the funding model for the service should be placed on a permanent basis, as opposed to the present annual rolling contract model, giving an overall approval percentage of 81%.

165. There was general agreement that the service requires further improvement, in order to improve levels of service and ensure more victims are supported through the criminal justice process.

166. A common suggestion was that improvement would only be obtained through the provision of a more sustainable model of funding. At the time of writing, my understanding is that a new funding model is under consideration by the *DoJ* and the *PSNI*.

167. This is a service which is vital for victims and it must be sustained on a permanent reliable basis. The precarious funding model and the uncertainty it creates is unacceptable and concerning.

168. Additional resources will be required, particularly if this work is expanded and the number of advocates increased to allow for a better geographical spread of services and the inclusion of new protected characteristics as recommended in this report.

169. The consultation paper asked two questions in relation to anonymity and restrictions on reporting:

(i) Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?

(ii) In what circumstances should a restriction on press reporting of the identity of the complainant in hate crime be permissible?

170. A substantial majority of the organisations which responded to this question considered that, in certain circumstances, the identity of a complainant in a hate crime case should not be published. The views of individuals who responded were evenly split.

171. Overall, a large majority of respondents (83%), considered that, in certain circumstances, press reporting of the identity of the complainant in a hate crime case should not be permitted.

172. I have serious concerns that many victims will be discouraged from giving evidence in cases where perpetrators (alleged or otherwise) choose to exercise a right to cross examine their victims in person. It is widely accepted that such cross examination can cause the victim significant distress and can sometimes amount, on occasion quite deliberately, to a continuation of the abuse.

173. I believe there is a strong argument to put victims of hate crime on the same footing as domestic violence and sexual violence witnesses.

Recommendation 23

The work of the *Hate Crime Advocacy Service* should be expanded and placed on a permanent statutory footing to ensure a more sustainable funding model with specialised advocates appointed to support victims for all protected characteristics thus ensuring that the right to advocacy acknowledged in the Victims Charter is guaranteed.

For the avoidance of doubt, such specialised advocates should include a dedicated religious hate crime advocate who can also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variation of sex characteristics.

Recommendation 24

Complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens.

Protection for complainants in hate crime/hate speech criminal proceedings should be provided as follows:

(i) no person charged with any aggravated or stirring up offence may in any criminal proceedings cross-examine a witness who is the complainant either –

(a) in connection with that offence or

(b) in connection with any other offence with which that person is charged in the proceedings

Online hate speech – Chapter 13

174. Online harm may take many forms. Much of it is committed on social media and brings with it a '**public**' element which is quite distinct from off-line hate speech. This 'public' element needs to be distinguished from 'public order' which lies at the heart of some of the offences to be discussed below. The public element of online hate is about the potential for reputational damage or for public humiliation and embarrassment when comments appear on social media.

175. This is compounded by the fact that an attack carried out on the Internet is potentially **permanent** in nature, and can have an almost limitless **reach.** Whilst there is no doubt that off-line attacks can leave permanent scars and can cause immeasurable pain, the attacks themselves will usually be of a finite nature; and, once a perpetrator is caught, can be stopped.

176. However, the **permanency** and **reach** of the Internet can mean the online attacks never go away, even if a perpetrator is caught. This results in the victims of online hate being at risk of being exposed to the attack time and time again, thus rendering them re-victimised.

177. This demonstrates that the harm caused by online hate goes far beyond the impact of the words themselves. In some cases, damage can occur simply because the hateful material appears online.

178. Furthermore, there is increasing evidence that online attacks of this kind can have an impact on victims' ability to maintain a public presence on the Internet. There is evidence that victims of cyber hate change their online behaviour in order to avoid attacks. In an era when having a presence online is crucial – both for social and professional reasons – this is something that cannot be ignored; particularly, when we know that it is often minority groups that are most affected. There is also evidence that women in particular – including politicians – are at significant risk of

being targeted online. This has led to calls for legislators to give serious consideration to the inclusion of sex/gender as a protected characteristic for any online offences.

179. There are strong and compelling arguments made by many respondents that online hate speech is a serious and growing problem which needs to be addressed.

180. The UK Government's 'Online Harms' White Paper, published in 2019, aims to go far beyond legislating for the notice and take-down process, and puts forward a proposed extensive regulatory regime that would put it at the forefront of online regulation worldwide.

181. It proposes:

- a new duty of care to be imposed on Internet companies which will require them to take reasonable steps to keep users safe, and prevent other persons being harmed as a direct consequence of activity on their services;
- Internet companies to be required to comply with this duty of care and compliance will be overseen by an independent regulator;
- The regulator to have a suite of powers to ensure compliance with the duty of care and will have punitive powers such as the imposition of fines;
- The regulator to set out codes of conduct which will outline to companies how they can satisfy the duty of care and will also set out the expectation of how complaints procedures will work and operate;
- There will also be various other aspects to the regulator's powers such as the power to request information about how a company's algorithm works; and
- broadly speaking, Internet companies to be required to remove material that is considered harmful.

182. The consultation paper asked '. . . **Should social media companies be compelled under legislation to remove offensive material posted online?'** There was strong support for this proposal from both organisations (86%) and individuals (71%).

183. It also asked respondents whether or not the term 'publication' in the 1987 Order should be amended to include 'posting or uploading material online'.

184. 100% of organisational respondents agreed that it should together with 79% of individual respondents giving an average response of 91% in favour.

185. Question 46 in the consultation paper posed the question of whether or not the Malicious Communications (Northern Ireland) Order 1988 should be adapted to deal with online behaviour?

186. There was widespread agreement with this proposal. All of the organisations which responded agreed together with 88% of individual respondents.

187. The approach that commanded most support was to update the legislation and make it applicable to contemporary society, particularly given the growth of the use of the Internet and social media.

188. The final question in the area of online harm raised in the consultation paper asked respondents:

Should online harm be part of a general law applying to hate crime?

189. There was strong support for the inclusion of online harm in the general law on hate crime both among organisations and individual respondents. 81% of organisations and 75% of individuals who responded agreed.

Recommendation 25

The proposals contained in the United Kingdom Government's 'Online Harms' White Paper (2019) should be implemented in full.

Given that legislation in this area is a reserved matter, the Assembly in Northern Ireland should consider whether or not to encourage implementation of these proposals by the Government of the United Kingdom, or, in the alternative, seek the agreement of the Secretary of State for Northern Ireland to allow the Assembly to enact appropriate legislation on this issue in Northern Ireland.

Recommendation 26

In terms of jurisdiction for dealing with online hate speech, the law should be clarified to confirm that any online material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the courts of Northern Ireland.

Recommendation 27

There should be a legal requirement on social media companies to ensure that potential users who wish to avail of their services must provide verifiable personal information before they are permitted to use those services.

As this recommendation involves legislating in respect of a reserved matter, see Recommendation 25 above.

Recommendation 28

There should be a mechanism by which the offending behaviour must be removed from the Internet by the offender, or through a court order imposed on the relevant social media company.

Recommendation 29

The PPS should make their prosecution guidelines for cases involving electronic communications public and disseminate them in an appropriate way.

Recommendation 30

Article 3 of the Malicious Communications (Northern Ireland) Order 1988 should be amended to explicitly bring within its ambit electronic communications. The word 'publication' should be amended to refer to 'posting' or 'uploading material online'.

Hate Crime Legislation Consolidation – Chapter 14

190. At present, hate crime legislation, such as it is, has developed in a piecemeal and uncoordinated way over many years.

191. The consultation paper asked respondents whether or not they believed that there would be benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation.

192. The responses to the consultation paper in Northern Ireland revealed very strong support for producing one consolidated piece of legislation in the area of hate crime/hate speech. 91% of organisations agreed with this proposal, together with 63% of individuals, giving an overall approval of 79%.

193. It was a generally held view that the current laws were considered to be outdated, under-utilised, and subject to significant gaps.

194. The opportunity to consider hate crime/hate speech offences in the round should include consideration of all relevant current statutes, including the Malicious Communications (Northern Ireland) Order 1988, Section 37(3) of the Justice Act 2011 and The Protection from Harassment (Northern Ireland) Order 1997.

195. I acknowledge that some legislation, such as the Communications Act 2003, deals with reserved matters and may not necessarily fall under the jurisdiction of the Assembly – at least without the consent of the Secretary of State for Northern Ireland.

Recommendation 31

All hate crime and hate speech law – including public order legislation, apart from law dealing with reserved matters – should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.

Legislative Scrutiny and Oversight – Chapter 15

196. There was unanimous support from respondents to the consultation paper that any new legislation on hate crime should be subject to post-legislative scrutiny.

197. I think a period of three years should give time to allow the legislation to bed in and be fully understood and put into practice by those involved in the criminal justice system.

198. One particular advantage of such scrutiny is that this may well facilitate the addition of certain new characteristics as protected groups if the evidence base is sufficient to demonstrate that targeted criminality has developed into serious social problems that serve to justify criminal proscription.

199. The establishment of a Hate Crime Commissioner for Northern Ireland might well complement the legislative reform options I have outlined in this Review and underscore the importance of hate crime and hate speech.

200. This would be to encourage good practice in the prevention, detection, investigation and prosecution of offences associated with hate crime, as well as the identification of victims and perpetrators of those offences.

201. Such a Commissioner might well also have an important role in keeping hate crime legislation under review.

202. Consideration could also be given to whether or not such a role would be full-time or part-time. A solution to the question of financial commitment might well be to provide for a Domestic Abuse/Hate Crime Commissioner whose responsibilities would straddle both areas of criminality.

Recommendation 32

There should be post-legislative scrutiny by the *Assembly* to monitor the effectiveness of any new legislation on hate crime and hate speech. It is recommended that such scrutiny should occur regularly at three-year intervals and, if possible, include an element of public consultation.

Recommendation 33

An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.

Recommendation 34

In the alternative, I recommend that the role of such a Commissioner could properly be shared and that, therefore, there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner. I believe this would work well because the remit for this post relates to specific criminal contexts which are not dissimilar.

203. Chapter 16 is the final chapter. It explores the role of sentencing guidance in dealing with hate crime/hate speech. It then examines the wider societal issue of challenging hatred and prejudice in Northern Ireland, focusing on the key role to be played by education and encouraging the next generation to respect difference and diversity in helping to build a shared and integrated society. Going forward, it is essential that society in Northern Ireland should recognize both collective and individual responsibility to prevent hatred and advance mutual understanding.

Chapter 1

Process and Methodology

CHAPTER 1

PROCESS AND METHODOLOGY

1.1 On 6 June 2019, I was appointed by the *Department of Justice* in Northern Ireland to conduct an independent review of hate crime legislation in Northern Ireland.

1.2 My appointment followed calls for a review of hate crime legislation. In his 2017 report on hate crime, the Chief Criminal Justice Inspector noted that the legislative approach to hate crime was not directly comparable across the United Kingdom. He suggested that a review of hate crime legislation in Northern Ireland would establish whether changes were required and his first strategic recommendation was that:

> The *Department of Justice* should as soon as possible conduct a review of the existing legislative response to hate crime to provide clarity. Any review should include consideration of the statutory aggravated offences model that already exists in England and Wales.[10]

Scope of Review

1.3 The remit for the review is in the following terms:

To consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will and prejudice, including hate crime and abuse which takes place online. In particular, the review will consider and provide recommendations on:

[10] Criminal Justice Inspection Northern Ireland*, Hate Crime: An Inspection of the Criminal Justice System's Response to Hate Crime in Northern Ireland* (December 2017) p9.

- a workable and agreed definition of what is a hate crime;
- whether the current enhanced sentencing approach is the most appropriate to take, and determine if there is an evidential basis to support the introduction of statutory aggravated offences;
- whether new categories of hate crime should be created for characteristics such as gender and any other characteristics (which are not currently covered);
- the implementation and operation of the current legislative framework for incitement offences, in particular Part III of the Public Order (Northern Ireland) Order 1987, and make recommendations for improvements;
- how any identified gaps, anomalies and inconsistencies can be addressed in any new legislative framework for Northern Ireland, ensuring this interacts effectively with other legislation guaranteeing human rights and equality;
- whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

The review will take cognisance of the *Department's* Review of Sentencing Policy and will ensure that it does not cut across any options planned for consultation in this regard.

Given that telecommunications legislation is a reserved matter, and the commitments made in the UK Government's recent response to the 14th Report from the *Home Affairs Select Committee* Session 2016–17: 'Hate crime: abuse, hate and extremism online'[11], the intention would be that the review would not

[11] House of Commons Northern Ireland Affairs Committee, *Hate Crime: Abuse, Hate and Extremism Online: Fourteenth Report of Session 2016 -17, HC 609* (London: 2017).

include consideration of any issues related to online hate crime that would duplicate this.[12]

Secretariat

1.4 I have been supported by a small review team comprising of Noel Marsden, senior review manager, Ken Mack, senior information officer, Ciara McFall, Victoria Mullan and Zell Blake, office managers, and researchers Claire Milliken, Dr Arlene Robertson and Dr Katy Radford. Secretarial support was provided by Karen Caldwell.

1.5 I have been very fortunate in having such talented and dedicated people work with me on this project. Their professionalism, support and unstinting commitment, combined with their good sense and wisdom, made my task that much easier and I thank them for their support and encouragement throughout the review.

Acknowledgements

1.6 At the outset of the review, I invited a number of individuals to form a reference group to act as catalysts for developing new ideas and as a quality mechanism for the review. This reference group was split into a Core Expert Group and a Key Stakeholder Group. These groups had a wide range of experience and expertise and worked tirelessly to assist me to complete the task.

1.7 In particular, I was fortunate in persuading a number of leading academics in this field from the United Kingdom and Ireland to join the Core Expert Group.

1.8 This group scrutinised and challenged emerging ideas to ensure that any recommendations would be robust and practicable. They gave their time freely and

[12] For the full terms of reference see appendix 5.

generously and made significant and creative suggestions throughout the whole process of the review. A good example of this support was an excellent briefing paper on online hate speech provided by Chara Bakalis which was of immense help in analysing this difficult and seemingly intractable subject.

1.9 I owe all of the members of the group my sincere thanks for their invaluable assistance and encouragement.

1.10 I acknowledge a particular debt of gratitude to Professor John McEldowney for his wise counsel on the myriad complex issues which arose especially during the important phase of reviewing the responses to the consultation paper.

1.11 The members of the Core Expert Group were:

- Chara Bakalis (Principal Lecturer in Law, *Oxford Brookes University*);
- Chief Superintendent Emma Bond MBE *(Police Service of Northern Ireland)*;
- Daniel Holder (Deputy Director, *Committee on the Administration of Justice*);
- David McDowell QC *(Bar of Northern Ireland)*;
- Dr Amanda Haynes (Senior Lecturer in Sociology, *University of Limerick*);
- Dr Jennifer Schweppe (Senior Lecturer in Law, *University of Limerick*);
- Dr Katie Taylor (Deputy Director, *Department of Justice*);
- Dr Kevin Brown (Senior Lecturer in Law, *Queen's University Belfast*);
- Dr Neil Jarman (Head of Policy and Research, *Peace Direct*);
- Dr Suzanne Whitten (Lecturer in Political Theory and Philosophy, *Queen's University Belfast*);
- Gabrielle Smyth *(Public Prosecution Service of Northern Ireland)*;

- Geraldine Hanna (Chief Executive Officer, *Victim Support Northern Ireland*);
- Michael Chambers BL *(Bar of Northern Ireland)*;
- Paul Giannasi OBE (Police Hate Crime Policy Lead, *National Police Chiefs' Council*);
- Professor John McEldowney (Professor of Law, *University of Warwick*); and
- Dr Hannah Bows (Assistant Professor in Criminal Law, *University of Durham*).

1.12 Special thanks are also due to the members of the Key Stakeholder Group who provided valuable insights into all areas of the work, but particularly into the experiences of victims of hate crime.

1.13 Details of the membership of this group may be found in Appendix 4.

1.14 In addition to the academics and others who have given their time and shared their expertise in these groups, I would like to thank Professor Mark Walters from the *University of Sussex* for his contribution to the work of the review. He has written many seminal papers in the area of hate crime and has led a number of academic studies, including the highly important 'Sussex Hate Crime Project': a five year research project conducted between 2013 and 2018. The Sussex Hate Crime Project Report[13] has been particularly important in helping to develop some of my thinking.

1.15 Professor Walters also met and corresponded with me on a number of occasions and has patiently answered my many queries. His forbearance is much appreciated.

[13] Mark A. Walters, Susann Wieditzka, Abenaa Owusu-Bempah and Kay Goodall*, Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017).

1.16 In similar vein, I would like to express my gratitude for the help and assistance of Lord Bracadale. His excellent analysis of hate crime legislation in Scotland was one of the first papers I read, returning to it many times during the process. Lord Bracadale kindly met and corresponded with me and I appreciate his insightful thinking.

1.17 In October 2018, the *Law Commission of England and Wales* was tasked with undertaking an extensive review into hate crime legislation, building on its recommendations from 2014. Its final report is scheduled for 2021. I have met and corresponded with lawyers from the *Law Commission* team and am grateful to them for sharing their preliminary thinking with me. In this regard, particular thanks is due to Martin Wimpole, a senior member of their legal team.

1.18 I am also grateful to Colm Murray-Cavanagh for his help in understanding the history of education in Ireland and to Siobhan Quigg of *Dalhousie University*, Canada for an excellent briefing paper co-written with Dr Jennifer Schweppe and Dr Amanda Haynes on hate crime legislation in New Zealand.

1.19 Finally, I express my deep gratitude to the more than 1000 individuals and organisations who responded to the consultation paper and the online questionnaire, and the other groups and individuals who have met or had discussions with the review team. Their contribution has been essential in enabling me to understand the key issues and priorities, not only of stakeholders in the criminal justice system, but for all interested members of the public.

1.20 As indicated, I met or had discussions with some 65 organisations and many victims, giving me a unique opportunity to talk with them and develop an appreciation of their particular experiences and concerns.[14]

Website

1.21 The Secretariat established a website, which can be accessed via the following link: https://www.hatecrimereviewni.org.uk.

1.22 This forum forms the hub for communication with the public.

Research materials

1.23 The review team has engaged in desktop research into a great deal of published material relating to hate crime and hate speech. We have liaised with officials and other administrations within the United Kingdom, New Zealand, Malta and the Republic of Ireland to ensure that the review considers relevant developments in those jurisdictions.

1.24 Among others, I have met with Lord Bracadale and Professor David Ormerod QC of the *Law Commission*. I have had the opportunity to discuss relevant issues with the incoming Criminal Law Commissioner, Professor Penny Lewis.

1.25 The review team has had the opportunity to review various key reports such as the *Law Commission*'s report into hate crime law in England and Wales in 2014[15] and

[14] See Appendix 2.

[15] Law Commission, *Hate crime: Should the Current Offences Be Extended?* No.348 (London: Her Majesty's Stationery Office, 2014).

Lord Bracadale's report into hate crime legislation in Scotland, published in May 2018[16].

Responses to the consultation paper and online survey

1.26 Special mention must be made of the sterling work done by Dr Arlene Robertson in compiling her expert analysis report of the 247 responses to my consultation paper. The findings set out in her document have been a key component in the compilation of my final report and deal with the many issues raised. There was consensus on a number of issues and themes and a lack of consensus on others. As in the Scottish review, many of the responses reflected strongly held views, particularly in relation to freedom of speech. These responses have informed my thinking and the recommendations I make.

1.27 The *Northern Ireland Statistics and Research Agency* (*NISRA*) also played an important role in the gathering of consultation data. They worked alongside my team in developing a separate shorter online survey of the key issues I wished to examine. The online consultation survey received a total of 799 responses to a number of key questions. *NISRA* produced an analysis report of their findings, which I have included in Part 2 of this report. I have taken this data into account in considering the recommendations made.

1.28 Reports on these sets of responses are in Part 2 of this final report. These are intended to give the public an understanding of the diversity of opinions that engaged in the consultation process and their importance to the review.

1.29 In looking at the responses to the consultation process and the online survey, it is important to bear in mind that the views of respondents are not necessarily representative of the views of the wider public or even all the institutions in Northern

[16] Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (May 2018).

Ireland. Careful consideration has been given to reading and assessing all the individual responses received by the review. In analysing the responses, the focus is not on identifying the number (or proportion) of respondents holding particular views, but rather on understanding the range of views expressed.

Chapter 2

List of Recommendations

CHAPTER 2

LIST OF RECOMMENDATIONS

Recommendation 1 (Definition – Chapter 3)

A hate crime may be defined 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.

Recommendation 2 (A new model hate crime for Northern Ireland – Chapters 5 and 6)

Statutory aggravations should be added to all existing offences in Northern Ireland following the model adopted in Scotland and become the core method of prosecuting hate crimes in Northern Ireland. This would mean that any criminal offence could be charged in its aggravated form.

Recommendation 3 (A new model hate crime - Chapters 5 and 6)

If the recommendation at 2 is accepted and made into law, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary and should be repealed and replaced by suitably drafted consolidated hate crime provisions.

For the avoidance of doubt, those Articles of the 2004 Order providing for higher maximum sentences for certain criminal offences should be retained.

Recommendation 4 (A new model hate crime - Chapters 5 and 6)

If the recommendations at 2 and 3 above are accepted, no increase in maximum sentences for any criminal offence is required.

Recommendation 5 (A new model hate crime - Chapters 5 and 6)

While I am content to retain the notion of 'hostility', I am satisfied that the introduction of a wider range of attitudes such as 'bias, prejudice, bigotry and contempt' may well prove beneficial, particularly as there is no standard legal definition of 'hostility'.

Recommendation 6 (A new model hate crime - Chapter 6)

I am persuaded that a variation of the 'by reason of' threshold should be added as a third threshold to supplement the current thresholds of (a) demonstration of hostility, and (b) motivation.

Recommendation 7 (A new model hate crime and protected characteristics – Chapters 5, 6 and 7)

Adopting Section 28 of the Crime and Disorder Act 1998 as a starting point, its equivalent in Northern Ireland could read:

. . . Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this Article if:

(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of one or more of (name the protected characteristic/s); or

(b) The offence is motivated (wholly or in significant part) by hostility bias, prejudice, bigotry or contempt towards members of (name the protected characteristic/s) based on their membership (or presumed membership) of that group/s; or

(c) The offence is committed (wholly or in significant part) by reason of hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of (one or more of the protected characteristic/s).

(d) However, if:

(i) the basic offence is proved but;

(ii) the aggravation is not proved, the offender's conviction is as if there was no reference to the aggravation and the conviction will be solely for the basic offence.

Recommendation 8 (A new hate crime model and protected characteristics – Chapters 5, 6 and 7)

Consequences of Aggravation

A consequential section to that described in Recommendation 7 should read:

(1) When it is proved that the offence is so aggravated, the court must –

(i) State on conviction that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated by reference to one or more of the protected characteristics;

(ii) Record the conviction in a way that shows that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated, by reference to one or more of the protected characteristics;

(iii) In determining the appropriate sentence, treat the fact that the offence is so aggravated as an aggravating factor that increases the seriousness of the offence; and

(iv) In imposing sentence, state (a) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for the difference or (b) otherwise, the reasons for there being no such difference.

Recommendation 9 (Protected characteristics – Chapter 7)

All current protected characteristics in Northern Ireland - race, religion, disability and sexual orientation - should continue to receive protection under the proposed model set out in Recommendation 2 above, together with the new recommended protected characteristics of age, sex/gender and variations in sex characteristics.

For the avoidance of doubt, the protected characteristic of sex/gender includes transgender identity.

The protected characteristics will be protected for all purposes including any amended public order provisions.

Recommendation 10 (Protected characteristics - Chapter 7)

Provision should be made for any future legislation to be framed in such a way so as to allow any other protected characteristic to be added to the list of protected characteristics referred to in Recommendation 9 above by statutory instrument if sufficient evidence emerges to show such a group or groups are victims of hate crime or hate speech. The reasoning behind this recommendation is to allow suitable protection to be provided in the changing circumstances of the time.

Recommendation 11 (Protected characteristics - Chapter 7)

Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences referred to in Recommendation 2 above.

Recommendation 12 (Sectarianism - Chapter 8)

The findings of the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in Northern Ireland – subject to any necessary adjustments.

Recommendation 13 (Sectarianism - Chapter 8)

There should be a new statutory aggravation for sectarian prejudice as set out in chapter 8 of this review. It is recommended that the introduction of the new offence of statutory aggravation for sectarian prejudice should be carefully monitored by the proposed Hate Crime Commissioner on an annual basis and provide an annual report to the Northern Ireland Assembly.

Recommendation 14 (Stirring up offences – Chapter 9)

The Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order (Northern Ireland) Bill, should be amended to:

(a) include all the current and proposed protected characteristics referred to in Recommendation 9;

(b) introduce articles equivalent to Sections 4, 4(a) and 5 (as amended) of the Public Order Act 1986 with the proviso that the dwelling defences in those sections be removed.

(c) repeal Article 8 (2);

(d) repeal the dwelling defence in Article 9 (3);

(e) include a specific defence for private conversations.

(f) the test of hatred for the stirring up offences should remain unchanged.

(g) all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions.

(h) there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics. However,

(I) there should be formal statutory recognition of the importance of freedom of expression Article 10 rights and all other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, in particular, rights guaranteed under Articles 6, 8, 9 and 14.

(j) the term 'publication' in article 10 should be amended to include 'posting' or 'uploading material online'.

(k) intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear:

(1) where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.

(2) where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:

(i) the defendant's words or behaviour were threatening or abusive;

(ii) the defendant's words or behaviour were likely to stir up hatred or arouse fear;

(iii) the defendant knew or ought to have known that his words or behaviour were threatening or abusive; and

(iv) the defendant knew or ought to have known that his words or behaviour were likely to stir up hatred or arouse fear.

Recommendation 15 (Removing Hate Expression from Public Space - Chapter 10)

There should be a clear and unambiguous statutory duty on relevant public authorities including *Councils*, the *Department for Infrastructure* and the *Northern Ireland Housing Executive*, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.

Recommendation 16 (Restorative justice – Chapter 11)

There should be a new statutory scheme for restorative justice for over 18s, organised and delivered on lines similar to the *Youth Justice Agency* in Northern Ireland.

Recommendation 17 (Restorative justice – Chapter 11)

It is desirable that such a statutory restorative justice framework be established with the necessary financial funding.

Recommendation 18 (Restorative justice – Chapter 11)

The new statutory scheme for restorative justice should be independent of the *Department of Justice*.

Recommendation 19 (Restorative justice – Chapter 11)

As such a scheme will involve referrals from the *Public Prosecution Service* and the *Courts*, it is recommended that it should be run by a statutory agency such as the *Probation Service for Northern Ireland*.

Recommendation 20 (Restorative justice – Chapter 11)

The presently accredited restorative justice groups should continue to provide community support and support to the statutory agency, which would take the lead in any such collaboration.

Recommendation 21 (Restorative justice – Chapter 11)

There should be further consideration of the benefits of establishing a Centre of Excellence for Restorative Justice.

Recommendation 22 (Restorative Justice – Chapter 11)

Diversion from prosecution is an appropriate method of dealing with low-level hate crimes. The model as per the practice in Scotland appears to offer an efficient and practical template.

Recommendation 23 (Victims – Chapter 12)

The work of the *Hate Crime Advocacy Service* should be expanded and placed on a permanent statutory footing to ensure a more sustainable funding model with specialised advocates appointed to support victims for all protected characteristics thus ensuring that the right to advocacy acknowledged in the Victim's Charter is guaranteed.

For the avoidance of doubt, such specialised advocates should include a dedicated religious hate crime advocate who can also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variation of sex characteristics.

Recommendation 24 (Victims – Chapter 12)

Complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens.

Protection for complainants in hate crime/hate speech criminal proceedings should be provided as follows:

(i) no person charged with any aggravated or stirring up offence may in any criminal proceedings cross-examine a witness who is the complainant either –

(a) in connection with that offence or

(b) in connection with any other offence with which that person is charged in the proceedings

Recommendation 25 (Online Hate Speech – Chapter 13)

The proposals contained in the United Kingdom Government's 'Online Harms' White Paper (2019) should be implemented in full.

Given that legislation in this area is a reserved matter, the Assembly in Northern Ireland should consider whether or not to encourage implementation of these proposals by the Government of the United Kingdom, or, in the alternative, seek the agreement of the Secretary of State for Northern Ireland to allow the Assembly to enact appropriate legislation on this issue in Northern Ireland.

Recommendation 26 (Online Hate Speech - Chapter 13)

In terms of jurisdiction for dealing with online hate speech, the law should be clarified to confirm that any online material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the courts of Northern Ireland.

Recommendation 27 (Online Hate Speech - Chapter 13)

There should be a legal requirement on social media companies to ensure that potential users who wish to avail of their services must provide verifiable personal information before they are permitted to use those services.

As this recommendation involves legislating in respect of a reserved matter, see Recommendation 25 above.

Recommendation 28 (Online Hate Speech - Chapter 13)

There should be a mechanism by which the offending behaviour must be removed from the Internet by the offender, or through a court order imposed on the relevant social media company.

Recommendation 29 (Online Hate Speech - Chapter 13)

The *PPS* should make their prosecution guidelines for cases involving electronic communications public and disseminate them in an appropriate way.

Recommendation 30 (Online Hate Speech - Chapter 13)

Article 3 of the Malicious Communications (Northern Ireland) Order 1988 should be amended to explicitly bring electronic communications within its ambit.

The word ‘publication’ should be amended to refer to ‘posting’ or ‘uploading material online’.

Recommendation 31 (Hate crime legislation - Chapter 14)

All hate crime and hate speech law – including public order legislation, apart from law dealing with reserved matters – should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.

Recommendation 32 (Legislative scrutiny and oversight - Chapter 15)

There should be post-legislative scrutiny by the Assembly to monitor the effectiveness of any new legislation on hate crime and hate speech. It is recommended that such scrutiny should occur regularly at three-year intervals and, if possible, include an element of public consultation.

Recommendation 33 (Legislative scrutiny and oversight - Chapter 15)

An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.

Recommendation 34 (Legislative scrutiny and oversight - Chapter 15)

In the alternative, I recommend that the role of such a Commissioner could properly be shared and that, therefore, there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner. I believe this would work well because the remit for this post relates to specific criminal contexts which are not dissimilar.

Chapter 3

Definition of Hate Crime and Justification for Punishing Hate Crime More Severely

CHAPTER 3

(1) DEFINITION OF HATE CRIME

(2) The JUSTIFICATION FOR PUNISHING HATE CRIME MORE SEVERELY

3.1 This chapter is in two parts. The first part attempts to define hate crime and explain how any definition has to be both practical and useful. The second part sets out the justification for punishing hate crime more severely than basic offences.

(1) A definition of Hate Crime and Hate Incidents

3.2 As noted in the consultation paper, there is no clear and universally accepted definition in law or related disciplines of the term hate or hate crime.

3.3 In his final report on hate crime in Scotland, Lord Bracadale observed that there was no single accepted definition of the term 'hate crime' and that different definitions may be produced for different purposes. He was content to use the following working definition:

> Offences which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim's identity should be treated differently from 'ordinary' crimes.[17]

[17]Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (May 2018) at (iv).

3.4 In the consultation paper, I used a working definition of a hate crime as:

> Acts of violence, hostility and intimidation directed towards people because of their identity or perceived difference.

3.5 Although this working definition received significant support, particularly from those who answered the online survey, it was thought by many respondents to be insufficient to describe the essence of the crime.

3.6 A number of groups, including influential women's groups, felt that the working definition in the consultation paper was inadequate.

3.7 For example, the *Women's Resource and Development Agency* believed that this definition would adequately cover what should be regarded as a hate crime only if it is supported by elements of the definition from Barbara Perry provided in Section 1.6 of the consultation paper. They suggested, therefore, that the definition of a hate crime should state that:

> Hate crimes are acts of violence, hostility and intimidation directed towards people because of their identity or perceived 'difference'. These acts are usually directed towards already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order.

3.8 Defining the crime is important with a suitable definition but it is only one element.

3.9 The *Presbyterian Church in Ireland*, whilst acknowledging that there are many advantages in seeking to define the term 'hate' and what might constitute a 'hate

crime', observed that creating a definition itself is not a panacea and suggested that the blunt instrument of the law is no substitute for the hard and challenging work of transforming hearts and minds.

3.10 As well as being a legal concept, 'hate crime' is also a criminological concept referring to a group of crimes as defined by national criminal laws. It is not one particular offence.

3.11 According to the *Organisation for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR)*, hate crimes are "criminal offences committed with a bias motive*".*[18] This is a widely recognised definition.

3.12 This simple definition illustrates the important point that the concept of 'hate' is not central to the commission of a hate crime. As Chakraborti and Garland comment:

> Most credible definitions are consistent in referring to broader notions such as prejudice, hostility or bias as key factors in the classification of a hate crime.[19]

3.13 Thus, in committing a crime, the perpetrator demonstrates hostility towards particular features of the victim's identity. This idea of 'particular features of the victim's identity' is expressed in terms of 'protected characteristics'.

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[18] Organisation for Security and Cooperation in Europe, Ministerial Council, *Decision No. 9/09: Combating Hate Crimes*, MC (17) Journal Number 2, (December 2009), p1.

[19] Neil Chakraborti and Jon Garland, *Hate Crime: Impact, Causes and Responses,* 2nd edition (London: Sage, 2015), p13.

3.14 A protected characteristic is a characteristic shared by a group. At the present time in Northern Ireland, the criminal law recognises the following protected characteristics: race, religion, sexual orientation, and disability.

3.15 In legal terms, the first element of a hate crime is an act that constitutes a crime under ordinary criminal law. This may be described as the base or basic offence. Such crimes can range from petty crimes to much more serious offences.

3.16 The second element of a hate crime is that the criminal act is committed with a particular motive or bias. It is this crucial element of bias that differentiates hate crimes from ordinary crimes. The bias motive is the perpetrator's prejudice towards the victim. The victim is selected because of their real or perceived connection, attachment, affiliation, support or membership of a protected group.

3.17 It is important to distinguish between criminal expressions of bigotry (hate speech) and the commission of criminal offences with a bias motive (hate crime).

3.18 Hate speech offences are generally considered separate to and apart from hate crime laws.

3.19 The human behaviour underlying hate speech is speech, usually without a base crime. However, there is a minority of hate speech acts where the speech itself is a criminal offence regardless of the perpetrator's motivation, such as, for example, incitement to violence.

3.20 Laws which criminalise the incitement of hatred are somewhat unusual for the purpose of criminal law. So, the Public Order (Northern Ireland) Order 1987 (the 1987 Order) is limited in its scope and prosecutions are taken infrequently.

3.21 A hate crime then is defined in the first instance as a base offence which is committed with a hate or bias element; where no non-hate equivalent of the offence exists on the statute book, then no hate crime can exist.

3.22 Careful consideration has been given to improving the definition of hate crime used in the consultation paper. In the light of responses received and an analysis of various proposals and ideas, I recommend the following working definition of a hate crime:

Recommendation 1

A hate crime may be defined 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.

3.23 Significantly, but not unsurprisingly, there is no statutory definition of a hate crime either in the law of England and Wales or in the law in Scotland.

3.24 The failure to define a term in law is often overlooked by many commentators but it is a fact of life that there are many terms, even those used in statutes, that do not have precise legal definitions. Often, this is because the facts of the case will be determined by the jury who are expected to use a reasonable interpretation of the meaning. While there are doubts and uncertainties over finding an ideal definition, it is clear that many commentators have set their expectations very clearly that the review should provide a definition, albeit one that may not satisfy everyone.

3.25 It might be useful to consider a definition by defining the thresholds indicating in what circumstances base offences may be aggravated so as to qualify for the description 'hate crimes'. Indeed, in law, what qualifies as an aggravated offence?

3.26 The law in England and Wales, i.e. the offences proscribed under Sections 28 to 32 of the Crime and Disorder Act 1998, are specific criminal offences aggravated by racial or religious hostility. These are more serious versions of pre-existing or 'base' or 'basic' offences. These aggravated offences have higher maximum sentences than their basic equivalents.

3.27 Section 28(1) of the Crime and Disorder Act 1998 provides that an offence is racially or religiously aggravated if:

(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or

(b) The offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

3.28 There are a limited number of offences which can be aggravated under this provision to include, for example, malicious wounding contrary to Section 20 of the Offences Against the Person Act 1861, assault occasioning actual bodily harm contrary to Section 47 of the same Act and various offences under the Public Order Act 1986.

3.29 A Hate Crime and Public Order (Scotland) Bill was introduced in the Scottish Parliament in April 2020.

3.30 Section 1 of that Bill deals with aggravation of offences by prejudice as follows:

(1) An offence is aggravated by prejudice if –

(a) Where there is a specific victim of the offence –

(i) at the time of committing the offence, or immediately before or after doing so, the offender evinces malice and ill-will towards the victim; and

(ii) the malice and ill-will is based on the victim's membership or presumed membership of a group defined by reference to a characteristic mentioned in subsection (2); or

(b) Whether or not there is a specific victim of the offence, the offence is motivated (wholly or partly) by malice and ill-will towards a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (2).

(2) The characteristics are –

(a) Age;

(b) Disability;

(c) Race, colour, nationality (including citizenship), or ethnic or national origins;

(d) Religion or, in the case of a social or cultural group, perceived religious affiliation;

(e) Sexual orientation;

(f) Transgender identity; and

(g) Variations in sex characteristics.

(3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(5) In this Section –

'membership', in relation to a group, includes association with members of that group,

'presumed' means presumed by the offender.

3.31 Unlike the position in England and Wales, where the specific aggravated offences are limited to a relatively small suite of offences, in Scotland any offence can be aggravated as described above.

3.32 Although there is considerable scope and room for debate as to what should be a working definition of a hate crime, what is much more important is drafting legislation which clearly sets out the circumstances in which the thresholds through which base offences may properly be prosecuted as aggravated hate crimes.

3.33 However hate crime is defined, it is vitally important to distinguish this concept from what has come to be called a 'hate incident'.

3.34 Following the racist murder of Stephen Lawrence in April 1993, the Macpherson Report was produced in 1999.[20] *The Metropolitan Police* were seriously criticised in that report and found not to understand the experiences of people who had been subjected to racism. This led to the police being required to record incidents they are called to but do not meet the criminal threshold. At the launch of the Macpherson Report, the *Independent* described it as "nothing less than a blueprint for the eradication of racism in the British criminal justice system".[21]

3.35 Lord Macpherson was scathing in defining institutional racism. He said:

> Institutional racism consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.[22]

[20] Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-I (February 1999), p6.

[21] "The Lawrence Report: Sir William Macpherson's Recommendations", Independent, 25 February 1999, https://www.independent.co.uk/news/the-lawrence-report-sir-william-macphersons-recommendations-1073018.html

[22] Macpherson, *The Stephen Lawrence Inquiry,* para. 46.25.

3.36 As a result, the *Association of Chief Police Officers* (*ACPO*) produced guidance[23] in 2005 relating to the distinction between hate incidents and hate crimes. This became an important reference document for police officers in England and Wales and Northern Ireland. According to this guidance, all hate crimes are hate incidents whereas some hate incidents may not constitute a criminal offence and, therefore, will not be recorded as a crime. This requirement for all hate incidents to be recorded by the police, even if they lack the requisite elements to be classified as a crime, widens the reach of the hate crime umbrella. Any hate incident, whether a *prima facie* 'crime' or not, must be recorded if it meets the threshold originally laid down by the Macpherson definition of a racist incident – namely, if it is perceived by the victim or any other person as having been motivated by prejudice or hate.

3.37 *The College of Policing* is the professional body whose purpose is to provide those working in policing with the skills and knowledge necessary for effective policing. In 2014 they produced the Hate Crime Operational Guidance (HCOG). This was an update to the 2005 *ACPO* Hate Crime Manual. It defined a hate incident in relation to a protected group as:

> Any non-crime incident which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on [e.g.] a person's race or perceived race.

3.38 A hate crime is defined as:

> Any criminal offence, which is perceived by the victim or any other person, as being motivated by a hostility or prejudice based on [e.g.] a person's race or perceived race.[24]

[23] Hate Crime Strategy and tactical advice. London: *College of Policing* (2005)

[24] College of Policing, *Hate Crime Operational Guidance* (Coventry: College of Policing Ltd, 2014), p3-4.

3.39 Thus, by distinguishing between incidents and crimes in such a manner:

> The *ACPO* guidelines highlighted an important difference between the two: while all hate crimes are hate incidents, some hate incidents may not constitute a criminal offence in themselves and therefore will not be recorded as a crime, but simply as incidents… It is important to note that all hate incidents should be recorded by the police even if they lack the requisite elements to be classified as a notable offence later in the criminal justice process.[25]

3.40 The difference is crucial – as Chakraborti and Garland observe:

> It is not a crime to harbour prejudiced attitudes nor is it a crime to hate: that prejudice or hate needs to be manifested through some form of behaviour or action before criminal justice agents can decide whether it constitutes a hate crime and deserves to be dealt with in accordance with the laws in place to punish the perpetrators of such crimes.[26]

3.41 Recently, in 2020 the practice of recording non-criminal hate incidents in the way suggested by the policy guidance was part of a legal challenge in *R (Miller) v College of Policing and Chief Constable of Humberside (2020) EWHC 225 (Admin)*.

3.42 The claim was twofold – firstly, alleging that the Hate Crime Operational Guidance for Police was in violation of Article 10 of the European Convention on Human Rights and common law and, secondly, that the manner in which the *Humberside Police* dealt with the complaint made to them, concerning what was

[25] Neil Chakaborti and John Garland, Hate crime: Impact, Causes and responses ,2nd ed., (London: Sage, 2015), p.152

[26] Neil Chakraborti and John Garland, *Hate Crime: Impact, Causes and Responses*, 2nd ed., (London: SAGE, 2015), p152.

alleged to be transphobic hate speech on *Twitter*, amounted to unlawful interference with the claimant's Article 10 and/or common law right to freedom of expression.

3.43 The judge, Mr Justice Knowles, rejected the claimant's broad-based challenge to the legality of the Hate Crime Operational Guidance under Article 10 of the Convention. He concluded that (a) the mere recording of a non-crime hate incident based on an individual's speech is not an interference with his or her rights under Article 10 (1); (b) but if it is, it is prescribed by law and done for two of the legitimate aims in Article 10(2); and (c) that HCOG does not give rise to an unacceptable risk of violation of Article 10(1) on the grounds of disproportionality. Furthermore, he held that it was not in breach of the common law.

3.44 On the second issue, the Court ruled that whilst the recording of the complaint as a non-hate crime incident was lawful, the police's treatment of the claimant thereafter disproportionately interfered with his right of freedom of expression, described as an essential component of democracy.

3.45 This finding raises an important point which underlines the necessity to recognise boundaries between what is acceptable under the law and what is not, taking into account the importance of freedom of expression.

3.46 The facts of the case that gave rise to the legal challenge in *Miller are* as follows*:*

> A police officer had visited Mr Miller's workplace in his capacity as a police officer and left a message requesting that the claimant contact him. There was a subsequent telephone exchange between them and the judge found that during that call the police constable misrepresented and/or exaggerated the effect that the claimant's tweets had had and the number of complaints the police had received – in fact, they only had received one. He found further that the police officer warned Mr Miller that if he 'escalated'

> matters then the police might take criminal action; he did not explain what escalation meant and that when the claimant complained about his treatment by the police, the police responded by again referring to escalation and possible criminal proceedings. The judge found that what the claimant wrote was lawful and said that Mr Miller's right to speak on transgender issues as part of an ongoing debate was extremely important for a number of reasons, but particularly because freedom of speech is intrinsically important. He ruled that there was no risk of Mr Miller committing an offence and that the complainant's 'emotional response' did not justify the police acting as they did towards the claimant. He ruled that the police had effectively granted the complainant a 'heckler's veto'.

3.47 In a well-publicised extract from his ruling the learned judge said:

> *There was not a shred of evidence that the claimant was at risk of committing a criminal offence. The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.*

3.48 In his introduction to his ruling, the judge cited George Orwell in his unpublished introduction to *Animal Farm* (1945) where the writer says:

> If liberty means anything at all, it means the right to tell people what they do not want to hear.

3.49 He also cited the seminal ruling of the European Court of Human Rights in *Handyside v United Kingdom (1979–80) 1 EHRR 737* which had considered an Article 10 challenge by Mr Handyside following his conviction for obscenity. In that case the court said at:

> *Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to (information) or (ideas) that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.*

3.50 The *Police Service of Northern Ireland* uses the same perception test as set out in the *College of Policing* Hate Crime Operational Guidance as described above.

3.51 This test is used solely in relation to hate crime and hate incidents and is not used, for example, in dealing with complaints of serious sexual violence. So, even in cases where the police come to the view that no crime has been committed, this information, that is, about perceived hate incidents, is kept for statistical and other purposes.

3.52 The rationale behind this is explained on the basis that incidents may be regarded as potential signal "crimes" and can often escalate in severity to crimes being committed. The police say they can be indicators of tensions and recording incidents enables them to be sighted so that they can start to problem solve to try and prevent escalation, which may involve partnership activity, policing response or otherwise. It is also done to help inform wider issues that the police use with partners to try to identify longer term thematic or geographical areas for attention.

3.53 Some of those who express the view that there is no justification for having hate crime legislation and that it simply creates an unjust hierarchy of victims, point to the

recording of hate incidents by the police and subsequent actions taken by the police on foot of same as having a chilling effect on freedom of expression.

3.54 Whilst the ruling in *Miller* makes it clear that the recording of non-crime hate incidents serves legitimate purposes and is not disproportionate, the actions of the police thereafter in visiting his place of work and their subsequent statements in relation to the possibility of prosecution were a disproportionate interference with the claimant's right to freedom of expression because of their potential chilling effect. A spokesman for the Humberside police noted that:

> The mere recording of the incident by Humberside police as a hate incident has been ruled as not unlawful and in accordance with the *College of Policing* Guidance. Our actions in handling the incident were carried out in good faith but we note the comments of the judge and we will take learning from this incident moving forward.[27]

3.55 Deputy Chief Constable Bernie O'Reilly of the *College of Policing* has responded to the decision in the case as follows:

> Policing's position is clear – we want everyone to feel able to express opinions as passionately as they wish without breaking the law. . . . Hate incidents can be a precursor to these types of crimes and without recording them the police will begin to lose sight of what is happening in their communities – and potentially lose their confidence.[28]

3.56 He also added that advice to police forces was currently being revised.

[27] https://www.humberside.police.uk/news/judgement-high-court-judicial-review

[28] https://www.college.police.uk/News/College-news/Pages/Hate-crime-judicial-review-statement-February-2020.aspx

3.57 At the time of writing, Mr Miller has appealed against one aspect of the ruling, namely the *College of Policing* Guidance in the first finding above in his case. Permission has been granted for the case to proceed to the Supreme Court. The outcome of the Supreme Court's decision is awaited.

(2) Justification for punishing hate crime more severely than basic offences

3.58 The justification for punishing hate crime more severely than basic offences is analysed in detail in Chapter 1 Part 2 of the consultation paper (pages 20 to 25). In that paper, I have identified the three main arguments to justify additional punishment for hate crimes.

3.59 The first is the symbolic value of the law. The second is that criminal law penalises the harm caused and the third argues that hate crime law is punishing the greater culpability of the perpetrator. Some respondents and some writers in the academic literature argue that there is no justification for having hate crime legislation.

3.60 However, in most countries which uphold the rule of law, there is almost universal agreement among scholars and legislators that hate crime should be punished more severely than non-hate crime.

3.61 A recent policy study (July 2020) commissioned by the European Parliament noted that:

> Hate crimes have a considerably greater impact than ordinary crimes and affect victims, the victims' community and society as a whole. . . . Since the victims of hate crimes are often targeted for an immutable, unchangeable characteristic, or one that is the core of one's identity, the impact of the crime, the feeling of vulnerability, helplessness and hopelessness

> on the side of the direct victim may be especially grave. The act also has a severe impact on the wider community, the targeted group, which typically is a historically disadvantaged one, or a minority in the sense of a powerlessness. Hate crimes may well erode societal cohesion, reinforce social tensions, and trigger retaliation that results in a vicious circle of violence and counter violence. These special characteristics offer good enough reasons for addressing hate crimes differently than ordinary crimes, for example in the form of *sui generis* hate crime provisions incorporated into the criminal code or by making hate against the victims group a qualifying circumstance. [29]

3.62 Undoubtedly, there is considerable strength of feeling among those who oppose hate crime laws and who argue that additional punishment imposed in respect of breaches of such laws unfairly punishes individuals solely on the basis of their 'bad character' or 'beliefs'.

3.63 This argument can be refuted on the basis that what is being (additionally) punished is **not** character or belief, but rather the decision to **act** on that belief in criminal actions.

3.64 There is strong support for this approach, not least in the final report of Lord Bracadale in his Independent Review of Hate Crime Legislation in Scotland. He considered that there are three clear bases for justifying hate crime legislation: (a) the harm which hate crime causes; (b) the symbolic function which legislation fulfils; and (c) the practical benefits which flow from it.

3.65 On the question of harm he noted that he was satisfied on the basis of all the material available to his review that:

[29] European Parliament, *Hate speech and Hate Crime in the EU and the Evaluation of Online Content Regulation Approaches* (Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, July 2020), p23.

> Hate crimes are likely to cause harm which is additional to the harm caused by the underlying offence. . . . This involves harm both to the direct victim and to members of the group to which the victim belongs. Harm to the victim may include physical injury as well as mental distress leading to depression and anger or anxiety. It may have a social impact such as to change the behaviour of the individual to avoid further victimisation . . . It can also have an impact on wider society: it may undermine moral values; create a less tolerant society and may increase social unrest. If not challenged, behaviour of this kind may become accepted as the norm. I conclude that the nature and extent of the harm caused by hate crime is a particularly strong justification for having hate crime legislation.[30]

3.66 As regards the symbolic function of hate crime, Lord Bracadale noted that:

> Hate crime can fulfil a symbolic function in stating society's disapproval of the deliberate targeting of a member or members of a particular protected group. It is important to send a message to victims, offenders and wider society that hate crime behaviour will not be tolerated. While, of course, hate crime legislation on its own cannot change minds, it has the potential to contribute to long-term cultural change and the acceptance of diverse communities.

3.67 Finally, as regards practical benefits, he noted:

> Having specific hate crime legislation requires sentencers to take the aggravation into account in sentencing and the court to record the aggravation. This means that it will feature on the criminal record of the perpetrator and may be taken into account in the event of repeated offending. In addition, the maintenance of records provide statistical information

[30] Lord Bracadale, *Independent Review of Hate Crime legislation in Scotland: Final Report* (May 2018), p11.

> which gives an indication of the scale of the problem and allows the monitoring of trends.[31]

3.68 The terms of reference of the review include the following and do not contemplate the abolition of hate crimes or suggest that hate crimes are unnecessary:

> Hate crime violates the idea of equality between members of society. There is significant evidence which indicates that hate crimes have a pronounced impact on victims, as this type of crime is an attack on a personal attribute or group identity, such as one's ethnicity, disability, religion or sexuality. Hate crime can therefore have a particular and significant impact on victims' self-esteem and personal confidence. . . . It is also recognised that the repercussions of this type of crime extend beyond the direct victim, by signalling that members of certain groups are not acceptable or not worthy of equal respect. In societies which are already showing manifestations of division, intolerance hate crime can further exacerbate tensions and undermine community cohesion.

3.69 It is clear that some respondents object to hate crime per se. There is little support for their views across a wide spectrum of society who responded to the review.

3.70 In England and Wales, the *Crown Prosecution Service* has explained why hate crime requires a serious criminal justice response in the form of more severe punishment:

> The devastating impact of hate crimes on, not only the individual, but also on communities and wider society, demands a robust response and the opportunity to apply for a sentence uplift, to send the clear message that those who target people because of their race,

[31] Ibid, p11.

> religion, sexual orientation, transgender identity or disability should expect to receive a higher sentence.[32]

3.71 I observe that the great majority of organisational respondents to the consultation paper and the online survey agree that punishing hate crime more severely is justified. Specifically, 95% of organisational responses to the consultation paper agreed. On the other hand, 90% of individuals disagreed.

In the online survey, 58% of respondents agreed whilst 17% disagreed.

3.72 The conclusions reached by Lord Bracadale and the *Crown Prosecution Service* for England and Wales are persuasive.

[32] The Crown Prosecution Service (CPS), "Conditional Cautioning: Adults – DPP Guidance", (updated 01 November 2019) https://www.cps.gov.uk/legal-guidance/conditional-cautioning-adults-dpp-guidance#:~:text=This%20Guidance%20defines%20the%20circumstances,to%20an%20abuse%20of%20process

Chapter 4

The Scale of Hate Crime in Northern Ireland

CHAPTER 4

THE SCALE OF HATE CRIME IN NORTHERN IRELAND

4.1 The scale and future trends of hate crime in Northern Ireland falls to be considered in this chapter. In that context, it will be possible to consider sectarianism, stirring up offences and hate expression in public spaces in the chapters which follow.

4.2 It is important to set these key issues in perspective by considering the level of hate crime and current trends in Northern Ireland.

4.3 In its most recent report on hate crime in December 2017, the *Criminal Justice Inspection Northern Ireland* (*CJINI*) reported that:

> In Northern Ireland during 2016 there were over eight hate incidents reported to the police every single day. These equated to almost six recorded hate crimes. When population is considered, this figure is higher than the equivalent rate in England and Wales. Hate incidents are greatly under-reported so the true rate of incidents perpetrated against people because they are perceived to be different in some way is much higher.[33]

4.4 These figures need to be considered given the likelihood that hate crimes are underreported.

4.5 Although it is difficult to access reliable figures for the scale of under-reporting in Northern Ireland, academic research in England and Wales considers that the extent of under-reporting there for hate crime could be as high as 80% (see e.g. Chakraborti and Garland op. cit. chapter 3 above, footnotes 9 and 25 infra) – there is

[33] Criminal Justice Inspection Northern Ireland, *Hate Crime: An Inspection of the Criminal Justice System's Response to Hate crime in Northern Ireland* (December 2017) p7.

no reason to suppose the situation is any better in Northern Ireland and it may be significantly greater, depending on such variables as community trust in authority and policing or the seriousness of the offence.

4.6 This is not a new phenomenon – as long ago as 2004, the *House of Commons Northern Ireland Affairs Committee* took evidence showing that hate crime was a growing problem in Northern Ireland and, as outlined below, there is a worrying trend in the long term growth of race incidents in Northern Ireland.

4.7 In 2005, this *Committee* concluded:

> We have no illusions that hate crime will be dispelled overnight. However, if Northern Ireland is to establish a fully normal society these despicable and brutal attacks must cease. It is up to the Government, the churches, the institutions of civil society and every single individual in their daily lives, to take collective responsibility for ensuring that these appalling activities are eradicated by all means possible.[34]

4.8 Whilst it is gratifying that there has been a reduction overall for all reported hate crime/incidents in recent years from a high in 2014, a disturbing new trend has been observed.

4.9 Beginning in 2016, the number of racist hate motivated incidents has overtaken sectarian motivated incidents so that by 2018/19 there were no fewer than 1124 racist hate motivated incidents as against 865 sectarian hate motivated incidents.[35]

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[34] House of Commons Northern Ireland Affairs Committee, *The Challenge of Diversity: Hate Crime in Northern Ireland: Ninth Report of Session 2004-05, Vol 1, HC 548-1* (London: The Stationery Office Ltd, 2005) p6.

[35] Police Service of Northern Ireland, *Trends in Hate Motivated Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2018/19* (Belfast: PSNI Statistics Branch, 2019).

4.10 The most recent figures produced by the *Police Service of Northern Ireland* – updated to 30 June 2020 – showed a drop in racist hate motivated incidents for the year 2019/2020 to 890. This was still higher than the comparable figures for sectarian hate motivated incidents which fell slightly to 879.[36]

4.11 The *Northern Ireland Executive* in its Race Equality Strategy 2015–2025 identified the link between sectarianism and racism. The Strategy also concluded:

> We must bear in mind, however, that racism in our society is shaped by sectarianism and while there is much to learn from other jurisdictions about addressing racism, the context of racism here is different to that in Great Britain or the Republic of Ireland. The conflict here has created patterns and attitudes – such as residential segregation and heightened territorial awareness – that now impact upon minority ethnic communities. We acknowledge the link between sectarianism and racism and that we cannot hope to tackle one without the other.[37]

4.12 The issue of hate crime and discrimination against individuals of Muslim background in Belfast resulted in the commissioning of an independent academic report by *Belfast City Council* which was presented to the *Council* and agreed by it in September 2019.[38]

4.13 This report noted that some individuals within the city had made newcomers to the city scapegoats and blamed them for diminished opportunity and that this had been

[36] Police Service of Northern Ireland, *Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Update to 30 June 2020* (Belfast: PSNI Statistics Branch, 2020). https://www.psni.police.uk/inside-psni/Statistics/hate-motivation-statistics/

[37] The Office of the First Minister and Deputy First Minister, *Racial Equality Strategy 2015 – 2025 (*Belfast: OFMDFM, 2015) p11, para 1.28.

[38] Lucas, O, Wilson, R, and Jarman, N. *A Different Difference: Hate Crime and Discrimination Towards Individuals of Muslim Background in Belfast* (Belfast: Institute for Conflict Research, 2019).

compounded by stereotypes transmitted via traditional and social media associating Muslims with terrorism.

4.14 The research found that the most extensive form of discriminatory treatment experienced by people from a Muslim background involved forms of verbal abuse, often while they were in shared public spaces around the city. Women wearing forms of dress that outwardly identify them as Muslim were singled out for expressions of hateful hostility.

4.15 Among a number of findings, the report noted that the extent of the abuse and hostility visited on Muslims in Belfast could well have had a significant impact on victims by limiting their presence in the public sphere.[39] It may also hasten the stigmatisation of communities, fostering fear and poor community relations.

4.16 It might also be inferred that creating fear within a community makes the community feel particularly vulnerable with corresponding increases in mental health illness.

4.17 The report noted the weaknesses in the operation of the Criminal Justice (No. 2) (Northern Ireland) Order 2004, a topic discussed in detail in chapter 5 of this report and in greater detail in chapter 6 of the Consultation paper.

4.18 The research also drew attention to the potential for restorative justice, a subject considered in depth in chapter 11 of this review, noting that most victims – at least for lower level abuse – were less interested in retribution than in the education and reintegration of offenders. It concluded by noting that the problems of hate crime and discrimination against various minority communities have been observed as a

[39] Ibid, p31.

persistent and recurrent problem across Northern Ireland for the past two decades and endorsed the view of *CJINI* in 2017, which commented:

> Whilst criminal justice agencies rightly take the lead in dealing with hate crime, a more holistic approach will be required to deliver the societal change necessary to combat the underlying causes.[40]

This underlines the need for there to be programmes of education to address the problem of hate crime and further its prevention.

4.19 In 2018/19, racist hate abuse in Northern Ireland accounted for almost half of all reported occurrences with hate motivation, while sectarian abuse accounted for just over one third.

4.20 In the same period, just over one in ten reports of hateful abuse were of a homophobic nature, whilst other occurrences (disability, faith/religion and transphobic) combined accounted for less than 10% of the total.[41]

4.21 The most recent available figures updated to 30 June 2020 showed a welcome reduction of 206 fewer racist incidents and 78 fewer racist crimes recorded in the 12 months from July 2019 to June 2020.[42]

4.22 However, transphobic incidents and crimes saw the largest increases across all hate motivation strands, with 29 more incidents and 26 more crimes in the same period. While disability incidents fell by 10, there were 8 more crimes. The number of sectarian incidents decreased by 13 and the number of sectarian crimes fell by 19.

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[40] CJINI, *Hate Crime* p22.
[41] Police Service of Northern Ireland, *Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Update to 30 June 2019* (Belfast: PSNI Statistics Branch, 2019)
[42] Police Service of Northern Ireland, *Incidents and Crimes* (2020).

4.23 Homophobic incidents and crimes rose by 18 and 15 respectively. Faith/religion incidents fell from 45 to 36 and crimes decreased from 23 to 15.[43]

4.24 These figures might be treated with a degree of caution. Lockdown measures in relation to Covid-19 were introduced on 23 March 2020. As public health restrictions were eased in June 2020, the number of hate motivated incidents and crimes exceeded levels for June 2019.[44]

4.25 Although the number of sectarian incidents and crimes has shown a gradual decline over the last 10 years, it remains a significant problem 22 years on from the Good Friday agreement.

4.26 The overall figures can be misleading as they appear to indicate that racial and sectarian hate crimes are similar in frequency, but when one considers the statistics in relation to the proportion of the population from a black or multi-ethnic background, the reality becomes much more concerning.

4.27 In practical terms, there is approximately a one in 31 chance of being the victim of a reported racial hate incident compared to approximately one in 1777 chance of being a victim of a reported sectarian hate incident.

4.28 The so-called 'peace walls' built between 1969 and 1999, most usually within the Belfast area, remain and are still considered necessary by some of those who live in close proximity to them, creating a sense of personal safety and property security. Such peace walls are an interim expediency. Long term, good community relations are essential for the future good of society in Northern Ireland and the continued existence of such walls leaves no doubt as to the desirability of building good community relations.

[43] Ibid.
[44] Police Service of Northern Ireland, *Incidents and Crimes* (2020).

4.29 The numbers actually increased since the 1998 Agreement, with 18 of the 27 barriers in Belfast being enhanced in order to curb perceived tensions. This improvement in the reduction of sectarian hate incidents and crimes may simply illustrate that the targets of hate have changed.

4.30 In 2007, *CJINI* noted that these are:

> Worrying signs that groups such as ethnic minorities, homosexuals and the disabled becoming the new scapegoats on whom those so inclined are now exercising their aggression.[45]

4.31 Almost a hundred years on from the creation of the State in 1921, sectarianism continues to cast a baleful shadow over the people of Northern Ireland. Sectarianism and proposals to deal with it in legislation are discussed in Chapter 8 of this paper.

4.32 In 2019, the *All-Party Parliamentary Group* in the House of Commons *(APPG)* on hate crime noted in their report describing the current position in England and Wales:

> The situation is getting worse . . . due to large numbers of hate crimes not being reported to third-party services or the police, the true profile of hate crime in the United Kingdom is akin to an iceberg, with the majority hidden from view.[46]

4.33 The *APPG* noted that the sharp increase in hate crime could not be attributed to increased rates of reporting alone and pointed clearly to the Internet as a key

[45] Criminal Justice Inspection Northern Ireland, *Hate Crime in Northern Ireland: a Thematic Inspection of the Management of Hate Crime by the Criminal Justice System in Northern Ireland* (2007) vii.
[46] All Party Parliamentary Group on Hate Crime, *How Do We Build Community Cohesion When Hate Crime Is On The Rise?* (2019) p11.

breeding ground for hate crimes and acts of hate speech. It was observed that there had not been quick enough realisation of the links between online attacks and 'real-world' incidents such as the murder of the MP Jo Cox in June 2016.

4.34 The group observed:

> It is clear to this enquiry that hate crimes are often intersectional; victims are attacked because of their multiple identities. This is supported by evidence submitted to the *APPG* on hate crime that says how LGBT plus people who are disabled or persons of colour are more likely to fall victim to hate crimes than LGBT plus people who are not, or that the majority of Islamophobic attacks are carried out by men against women (although sex is not currently a protected characteristic for hate crimes).
> There is a strong level of support for the use of restorative justice as a tool against hate crime offences. It has been shown to have support amongst victims, both for their own sakes but also from the perspective of improving offenders' views and reducing reoffending rates. Whilst it has its limitations, the apparent absence of restorative techniques for hate crimes should be addressed by government with additional funding made available if needed. There is a role for charities and community organisations to play here as well, as trained mediators and facilitators in this process, particularly if there is low trust in local police forces.[47]

Do these observations apply to Northern Ireland?

4.35 These recommendations may well be thought to be of direct relevance to the problems posed by hate crime and hate speech in Northern Ireland. The issues around intersectionality and restorative justice are addressed in detail in this paper at chapters 7 and 11 respectively.

[47] Ibid, p56.

4.36 In Chapter 16 of the consultation paper, the review discussed a number of problems faced by victims of hate crime. A number of real-life examples (anonymised) of the experiences of Muslim women and children living in the North Down area were provided. These accounts are distressing and poignant. The perspective of victims is too often overlooked in discussions about hate crime.

4.37 The Muslim community in Northern Ireland, while still a tiny fraction of the overall population, has grown over the last 25 years and plays an important role in all aspects of life in the community.

4.38 As evidenced by the report commissioned by *Belfast City Council* in 2018[48], a good deal of attention has been focused on the problems faced by this community.

4.39 However, whilst such attention is right and proper, it is sometimes forgotten that there are other important minority groups who continue to suffer from racist and religious hate incidents and crimes.

4.40 The Jewish community may be taken as an example of such a minority group.

4.41 Historically, this community in Northern Ireland has made a significant contribution in many walks of life over the last hundred years, especially in the professions, the arts and the economic life of the country. Sadly, this community has declined greatly in numbers and confidence very significantly over the years, as evidenced by the response to the consultation paper by the *Executive Council of the Belfast Jewish Community*.

[48] Lucas, O., Wilson, R. and Jarman, N. *a different difference: hate crime and discrimination towards individuals of Muslim background in Belfast.* Belfast: *Institute for Conflict Research* (2018)

4.42 The response describes a disturbing level of anti-Semitic speech, hate incidents and crimes including the desecration of Jewish graves in Belfast City Cemetery some years ago.

4.43 The so-called 'cancel culture' described later in this review under the heading of the stirring up offences has been practised against Jewish people in Northern Ireland, preventing visiting lecturers from Israel speaking at events at *Queen's University Belfast*.

4.44 It is concerning to read of the widespread concern within the Jewish community in relation to the normalisation and sometimes unchallenged nature of expressions of anti-Semitic sentiment in Northern Ireland.

4.45 It is argued that such sentiment has made members of this community reluctant to report anti-Semitic incidents to the police for a number of reasons, including a desire to minimise publicity around anti-Semitic speech, incidents and crimes due to fears and concerns of attracting additional negative attention to those who are vulnerable and already at risk. The commonplace practice of flying Israeli and Palestinian flags in loyalist and republican communities can often be conflated in public discourse in social and traditional media with anti-Semitism.

4.46 Whilst there is publicity regarding sectarian attacks on Orange halls, Ancient Order of Hibernian halls, churches and church halls of both Catholic and Protestant denominations, it is perhaps less well-known that properties associated with Jewish heritage, culture and religion including the synagogue in Belfast have been attacked.

4.47 It has been particularly concerning to learn that despite the dreadful suffering of this European community at the hands of the Nazis in World War II, Nazi memorabilia can be found on sale at auctions in Northern Ireland.

4.48 The practice of buying and selling such items has been either banned or restricted to educational purchasers in France, Germany and Austria for some time, but there is no legislation dealing with this practice in the United Kingdom although it is understood that many auction houses refuse to facilitate such transactions. In Germany, such trading carries a maximum three-year prison sentence.

4.49 Apart from the obvious deep offence this causes to the community, such behaviour arguably perpetuates hostility towards Jewish people.

4.50 Such trading may not fall squarely within the scope of a review of hate crime law per se and, as such, I do not feel that it lies within the remit of this review to make a formal recommendation for the abolition of such a practice in any revised hate crime legislation. However, I respectfully suggest that it is a matter which should be properly discussed and debated in society and at the Assembly, to discover whether people here are content to allow this trade to continue or follow the example of Germany and other European countries.

4.51 Whilst it is perfectly reasonable for collectors to acquire military memorabilia, it is surely beyond the pale to trade in symbols of genocidal hate such as the swastika flag or the deaths head insignia of the Schutzstaffel (SS).

4.52 Some may regard this as a matter of taste – or bad taste - and that there are obvious reasons why Germany, Austria, and the former Vichy government of France should feel a particular sense of guilt and shame over the sale of such items.

4.53 Others may argue that if we can ban the sale of ivory for conservation reasons, we can ban the sale of symbols of hate in acknowledgement of the suffering of so many innocent souls.

Conclusions and analysis

4.54 The prevalence of hate crime in Northern Ireland suggests that Northern Ireland needs to address the problem of hate crime in a holistic way. Improvements in the criminal law need to be supported by educative schemes and preventative strategies. All education sectors in Northern Ireland need to address the problem of hate crime as do private and public sectors of employment.

Chapter 5

Current Northern Ireland Law on Hate Crime

CHAPTER 5

CURRENT NORTHERN IRELAND LAW ON HATE CRIME

5.1 This chapter provides an analysis of the current law in Northern Ireland on hate crime. A detailed account is available in the consultation paper in chapters 3, 4 and 5.

5.2 In 2017, the *Northern Ireland Policing Board* (*NIPB*) noted that:

> The term 'hate crime' appears routinely in government policy and is used frequently in public discourse but is often applied inconsistently. Confusion often arises from the fact that there is, in fact, no specific criminal offence for 'hate crime' in Northern Ireland and no simple legal definition of it.[49]

5.3 This observation is correct. No specific offence of 'hate crime' exists.

5.4 The Criminal Justice (No. 2) (Northern Ireland) Order 2004 (the 2004 Order) was introduced to ensure that the perpetrators of offences aggravated by hostility received a higher sentence following conviction. This law enables a sentence to be increased where it is proven that the basic offence of which a person has been convicted was motivated by hostility against one of the currently protected characteristics (race, religion, sexual orientation or disability) or where the offender demonstrated hostility against one of those characteristics either at the time of committing the offence or immediately before or after it.

[49] Northern Ireland Policing Board, *Thematic Review of Policing Race Hate Crime* (Belfast, 2017), p9.

5.5 Aside from the stirring up offences referred to in part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order) and Section 37 of the Justice Act (Northern Ireland) 2011 (dealing with indecent or sectarian chanting at regulated sports matches), provision for hate crime in Northern Ireland centres exclusively on the enhanced sentencing provisions of the 2004 Order.

5.6 So, while in England and Wales, there are a suite of specific criminal law offences of racially or religiously aggravated assault, these offences do not currently exist in Northern Ireland.

5.7 Similarly, in Scotland, the model allows any existing offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. This approach does not involve the creation of new specific offences; rather, it involves an existing offence, such as an assault, being motivated by or demonstrating hostility in respect of one or more protected characteristics.

5.8 In Chapters 2, 3 and 4 of the consultation paper, I set out the history and development of current Northern Ireland law on hate crime, the scale of hate crime in Northern Ireland and the provisions relating to enhanced sentencing and other associated legislation.

5.9 Similarly, in Chapter 5 of that paper, I set out the legislative framework for hate crime in England and Wales.

5.10 It is unnecessary to replicate the discussion found in the consultation paper.

5.11 Having dealt with the issues of a workable and agreed definition of what a hate crime is and the justifications for punishing hate crime more severely, I move to the

question of whether or not the current enhanced sentencing approach reflected in the 2004 Order is the most appropriate to take, and determine if there is an evidential basis to support the introduction of statutory aggravated offences either on the England and Wales model or on the Scottish model.

5.12 This is a question which has attracted a good deal of comment from respondents to the consultation paper.

5.13 In short, the current enhanced sentencing approach attracts a good deal of sharp criticism from respondents, with the great majority wishing to see significant changes in the law and the introduction of specific aggravated hate crime offences as in England and Wales or a statutory aggravation model similar to that employed in Scotland.

5.14 The most persuasive criticism of the enhanced sentencing model in the 2004 Order comes from academics. For example, in 2017, Dr Robbie McVeigh described the current arrangements in Northern Ireland as follows:

> For all the rhetoric around the concept, there is no legislation outlawing hate crime; there are no perpetrators of hate crime; there is no data recording hate crime: in effect, there is no such thing as hate crime in Northern Ireland. There is only the 2004 'offences aggravated by hostility' legislation which is rarely operationalised by the criminal justice system and results in no perpetrators in prison.
>
> Put simply, current legislation and practice does not work. The legislation does not frame racist violence appropriately; the police do not police it appropriately; the *PPS* does not process it appropriately; the courts do not penalise it appropriately and the official statistics do not record it appropriately. While all the activity on 'hate crime' sends out the message that hate – however loosely constructed – is a bad thing, it is not something that results in anyone being charged or convicted in Northern Ireland. This is what might be

> termed the construction of 'perpetrator – less crime'. If ever a paradigmatic example of the 'collective failure' of the criminal justice system and racist violence were needed, here it is.[50]

5.15 Successive inspections by the *Criminal Justice Inspection Northern Ireland* (*CJINI*) have noted that the legislative approach to hate crime was not directly comparable across the United Kingdom but noted the shortcomings of the law in Northern Ireland.

5.16 In his most recent report in 2017, the Chief Criminal Justice Inspector called for a review such as this and specifically suggested that any review should include consideration of the statutory aggravated offences model that already exists in England and Wales.

5.17 The operation of the 2004 Order is discussed in some detail in Chapter 6 of the consultation paper.

5.18 Numerous concerns have been expressed from various sources on the operation of the 2004 Order, a cornerstone of the current Northern Ireland law. There are questions about the reliability of statistical information, as recorded by the *Northern Ireland Courts and Tribunals Service* (*NICTS*).

5.19 Among these difficult questions, concerns have arisen as to why so many cases considered by a prosecutor to have involved hate crime aggravated by hostility against a protected characteristic were not so prosecuted in Court.

[50] Robbie McVeigh, "Hate and the State: Northern Ireland, Sectarian Violence and 'Perpetrator-less Crime'" in *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland*, edited by Amanda Haynes, Jennifer Schweppe, and Seamus Taylor (London: Palgrave MacMillan, 2017), p408.

5.20 There is an absence of transparency and no clear criteria as to why some cases are proceeded with and others are not and explanations are not easy to find.

5.21 The absence of transparency raises serious issues for major actors in the criminal justice system including the *NICTS*, the *Public Prosecution Service* (*PPS*) and the judiciary – particularly at the level of the Crown Court.

5.22 Nothing I have read or reviewed since the launch of the consultation paper in January 2020 has given me any assurance that this enhanced sentencing law is working any better now or is capable of being reformed. It is now some sixteen years since its introduction and it has been the subject of widespread criticism for many years without such criticism being addressed.

5.23 It is noted that, as long ago as 2013, the *Northern Ireland Human Rights Commission* (*NIHRC*) reported that:

> The use of enhanced sentencing in practice demonstrated a stark contrast to how criminal justice agency staff viewed its purpose. Only in exceptional cases could interviewees point to successful examples. Generally, criminal justice agencies staff had either never heard of the 2004 Order being imposed, had no awareness of its use, or did not see evidence of its implementation in their experience. This led to the wider perception that enhanced sentencing and the 2004 Order were not being used. The statistics depicted a stark contrast between detected racist crimes and convictions with an enhanced sentence for racial aggravation.[51]

[51] Northern Ireland Human Rights Commission, *Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland* (2013), p56.

Consultation responses: the current Northern Ireland law on hate crime.

5.24 In its response to the current review, the *NIHRC* observes that:

> Since the publication of the *NIHRC* racist hate crime report, the situation has not improved and the enhanced sentencing model continues to be limited in practice and its impact as effective, proportionate and persuasive sanction remains unfulfilled.

5.25 In its response, *Victim Support NI*, a major charity providing practical and emotional support to persons affected by crime across Northern Ireland, noted that:

> We acknowledge that there have been a number of challenges associated with the enhanced sentencing model, including issues with its application and recording of hate crimes and incidents as a consequence. Despite numerous reviews of the law and its application, from *CJINI* and *NIHRC* among others, these shortcomings have not been rectified and the law remains unfit for purpose in its current manifestation. We are therefore convinced that the enhanced sentencing model should be replaced with a model that acknowledges the hate element of the crime throughout the trial and entire criminal justice process, not just at sentencing . . . we agree that an aggravated offences model as opposed to an enhanced sentencing model would have the greatest potential to address hate crime because they provide for a system wide response to the criminalisation of hate element crimes in a manner which enhanced sentencing alone does not.

5.26 *The Church of Ireland Church and Society Commission* noted the many drawbacks of the 2004 Order, both in terms of transparency and fair labelling. It argued that it:

> would feel that adopting something like the Scottish model, which acts to elegantly modify an existing 'basic' crime with a hate-based aggravation that is reflected in how the case is investigated by police, argued at trial, and sentenced would be a more appropriate core to hate crime legislation and prosecution.
>
> The primary advantage of this model over the English and Welsh legislation . . . is that rather than setting out specific individual hate crime 'versions' of a selection of 'basic' crimes, it instead provides a more concise and understandable hate crime framework by allowing the aggravation of any offence by the relevant statutory aggravation. Such a model also opens the door to introducing a separate aggravation, which could be similarly instituted, to provide for crimes perpetrated against or exploiting vulnerable individuals.

5.27 Among criminal justice stakeholders, the *Probation Board for Northern Ireland* (*PBNI*) believed that the statutory aggravation model should be introduced instead of the enhanced sentencing model. It noted what it described as numerous problems with using the enhanced sentencing model, such as the risk that hate crime is not recorded accurately by the courts and it is missed. It concluded:

> There is evidence that current hate crime statistics aren't reliable, there have been queries on the quality and accuracy of information recorded, there is also evidence that the enhanced sentencing model hasn't been used when it should have been, and a view that it doesn't work in practice.

5.28 The *Police Service of Northern Ireland* (*PSNI*) did not think that the enhanced sentencing model should continue to be the core method of prosecuting hate crimes in Northern Ireland. It noted:

> Research contained within this consultation paper found the criminal justice system largely 'filters out'

> relevant evidential factors that might otherwise have secured enhanced sentencing of the offender.

5.29 It favoured the introduction of a statutory aggravation model.

5.30 The *Law Society of Northern Ireland* felt that the 2004 Order should continue to be the core method of prosecuting hate crime. In its response, it said:

> The Society supports the enhanced sentencing model set out in the 2004 order but believes that greater awareness and training for prosecutors and court staff – and all criminal justice agencies – may be required to enable prosecutions to be brought before a judge with identified aggravating factors, clearly set out in the facts and evidence, judges should clearly state the factors that impacted on their decision and this should be accurately recorded.

5.31 On the other hand, the *Bar of Northern Ireland* did not feel confident that the 2004 Order should continue to be the core method of prosecuting hate crimes in Northern Ireland. It noted that:

> The 2004 Order requires sufficient evidence to be adduced before the court that the offence was aggravated by hostility and also places requirements on the court when it is considering the seriousness of an offence. However, our practitioners observe that at present this does not always work effectively in practice and that not all relevant cases from the *PPS* are always being marked prominently to indicate to the prosecutor at court that there is evidence that the offence has been aggravated by hostility . . . We understand that the *PPS* now receives an automatic prompt on their recently introduced tablet unit system to remind the prosecutor to alert the judge that the particular offence was motivated by hostility which may improve this issue . . . Whilst the *Bar* generally takes the view that it is best to rationalise and improve

> existing sentencing provisions wherever possible before moving directly to the creation of a new model legislation, we acknowledge that there is a need to consider an alternative approach in Northern Ireland in order to promote greater consistency in the prosecution of hate crimes . . . We take the view that the statutory aggravation model used in England, Wales and Scotland should be introduced in Northern Ireland as this has the greatest potential to address hate crime by providing for a system wide response to the criminalisation of the hate element of crimes in a manner which the enhanced sentencing alone does not . . . There is also the issue of how this should be followed through with proper record keeping of the offence and the sentence.
>
> The *Bar* considers that the statutory aggravation model used in England, Wales and Scotland should be introduced instead of the enhanced sentencing model.

5.32 A very detailed submission on this issue was made by the *Public Prosecution Service* of Northern Ireland (*PPS*).

5.33 It acknowledged that the current provisions under the 2004 Order are not being used to any significant extent in Northern Ireland and are poorly understood.

5.34 It accepted that difficulties with the current system, included:

(a) Cases have not been routinely opened at court as being aggravated by hostility;

(b) Poor recording practices;

(c) Sentences not being enhanced in appropriate cases; and

(d) The absence of any mechanism for recording a criminal record that a sentence was aggravated by hostility.

5.35 In light of this, the *PPS* acknowledged the desire for change and improvement in order to achieve this and recommended that legislative reform was required. It noted the advantages and disadvantages of the aggravated offence model set out in the consultation document and argued that this model:

> Is arguably a clearer and more powerful indication to defendants and the wider public of a specific approach to hate crime intended to mark society's condemnation and determination to address it. There is transparency right from the beginning of the process in relation to the aggravated nature of the alleged offending and one can see how this could lead to more effective investigations where the relevant proofs are identified and sought at an early stage. A conviction for an aggravated offence would be easily identified from a criminal record . . . If these offences were to be introduced, it will be important to ensure that the legislative amendment was in place to allow courts in Northern Ireland to convict of the lesser offence, regardless of whether it was indictable or not. . . . At the heart of Scottish hate crime legislation is a model that allows any existing offence to be aggravated by hostility in respect of any of the protected characteristics. The aggravation is specified in the instrument of complaint and (crucially) there is provision for a verdict of guilty on the non-aggravated version of the offence. The model does not involve the creation of new offences. . . . Further, the consequences of conviction of an offence with a statutory aggravation are that the aggravation will be recorded and taken into account when sentencing; all parties are aware from the outset that an offence is aggravated by hostility; statistics can be more easily maintained and trends identified and monitored; and the aggravation will appear in the criminal record of the individual. This means that, if the person commits a further offence, the earlier aggravated conviction may be taken into account.
>
> *PPS* have had an opportunity to view an example of how the instrument of complaint is marked in Scotland. It is considered that the flexibility that this approach offers is very attractive and a similar framework should be adopted in this jurisdiction where the prosecution are alleging that an offence is aggravated by hostility. Adopting such an approach would also resolve most of

> the practical difficulties around, for example, recording which undermined efforts to operate the current provisions effectively.
>
> It is important to note that discussions have recently taken place across the wider criminal justice system in relation to domestic abuse cases. Agreement has been reached that the Scottish model is to be adopted as the preferred approach for managing the aggravator in domestic abuse cases. *PPS* consider that it is important that the process for managing the aggravator in domestic abuse cases is the same for dealing with hate crime cases. This is to promote operational effectiveness and consistency across the criminal justice system, and to aid public understanding of the criminal justice approach in what is a complex area of work.
>
> Whilst England and Wales use both aggravated offences and enhanced sentencing provisions, if the Scottish model would be adopted in this jurisdiction, it is not felt that both sets of provisions would be required.

5.36 Dr Jennifer Schweppe notes that:

> It is difficult to argue with McVeigh's argument that, to be effective, hate crime legislation must be both operational and effective: the enhanced sentencing model in Northern Ireland, he suggests, is incapable of being either.[52]

5.37 In initial consultations in respect of the *Law Commission*'s current hate crime review, particularly amongst disabled and LGBT groups, it became clear that:

> Within England and Wales enhanced sentencing is seen as a less powerful and less effective approach to

[52] Jennifer Schweppe, "Legislating Against Hate Crime: Considering International Frameworks for an Irish Context", (PhD Thesis, Trinity College Dublin, School of Law, 2019) (under embargo).

> tackling hate crime compared with aggravated offences.[53]

5.38 Another concern observed by the *Law Commission* in relation to the enhanced sentencing provisions under the Criminal Justice Act 2003 is that by not requiring proof of hostility as an element of the offence, police and prosecutors are less motivated to gather the necessary evidence, and build the case around the hostility aspect of the offending. They noted that:

> Victims and support organisations told us that, as a result, evidence of hostility can either be neglected altogether, or presented as somewhat of an afterthought, rather than as a central part of the case.[54]

5.39 At present, the *Law Commission* appear minded to retain the enhanced sentencing provisions under the Criminal Justice Act 2003 (the 2003 Act) which apply to hostility on the grounds of race, religion, sexual orientation, disability and transgender identity, together with the aggravated offence model under the Crime and Disorder Act 1998 (the 1998 Act) dealing with aggravated offences involving racial and religious hostility.

5.40 However, at time of writing, the *Law Commission* had not finalised its proposals.

5.41 The legislative framework for hate crime in England and Wales is discussed in Chapter 5 of the consultation paper and is not replicated here.

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[53] Law Commission, *Hate Crime Laws: A Consultation Paper*, Consultation Paper 250 (23 September 2020) para 17.37, p422.
[54] Ibid, para 17.42

5.42 Detailed consideration of the operation of the 1998 and 2003 Acts – including the recommendations of the *Law Commission* in its earlier 2014 report and the Scottish model - can be found in Chapter 7 of the consultation paper.

5.43 There has been a significant shift in the attitude of the *Law Commission* towards aggravated offences under the 1998 Act. In its recent consultation paper published in September 2020, the *Law Commission* notes – at paragraph 16.31 –

> Though in our 2014 review we concluded that the strengthened enhanced sentencing system would be a preferable approach to hate crime laws, our pre-consultation discussions have led us to the view that we should not lightly abandon the current aggravated offences regime. Consultees saw this mechanism as a core component of hate crime laws. Indeed, stakeholder groups not already protected by aggravated offences – specifically LGBT and disability stakeholders – want these mechanisms to cover their characteristic, rather than see these additional protections removed altogether.[55]

5.44 An even stronger statement is made at paragraph 16.32 of the same consultation paper:

> Aggravated offences are among the most powerful forms of condemnation of hatred in England and Wales, and have now been in place for more than two decades. We are reluctant to undo this mechanism, which has become well established, and accounts for nearly half of all hate crime prosecutions. Our concern is that to remove these offences, and rely only on sentencing enhancement within existing maximum penalties, would be to reduce the force of law currently available in respect of two key characteristic groups: race and religion. We consider such a rollback of existing protections to be problematic, particularly as

[55] Ibid, para 16.31.

> one of the key purposes of hate crime laws is to signal the unacceptability of this conduct.[56]

Analysis

5.45 In the consultation paper I observed that a core issue, arguably **the** core issue for this Review, is to decide whether or not it is better to tackle hate crime through an aggravated offence model – and, if so, which model – or through an enhanced sentencing regime.

5.46 In England and Wales the matter is complicated by the fact that they have been operating both models side-by-side for different purposes and for different protected characteristics for many years. This historical context makes it difficult or more difficult to consider abandoning one model in favour of the other.

5.47 In Northern Ireland, legislators begin with a relatively clean sheet in that the **only** model currently in operation here is the enhanced sentencing model under the 2004 Order.

5.48 In the light of everything that has been discussed above, and with very strong support overall from a significant majority of respondents to the consultation paper in Northern Ireland, I firmly recommend moving from the failed enhanced sentencing model under the 2004 Order to an aggravated offences model.

5.49 There is strong and growing evidence from the experience in England and Wales and in Scotland that the aggravated offences model produces a more effective

[56] Ibid, para 16.32.

response by the criminal justice process, as compared to those offences where the hate element is addressed only at sentencing.

5.50 I would go so far as to say that an aggravated offence model is the **only** means by which it can be consistently ensured that the hate element of a crime will be effectively addressed.

5.51 In his Independent Review of Hate Crime Legislation in Scotland Final Report, Lord Bracadale examined how effectively the current statutory aggravations operate. The Scottish approach to statutory aggravations allows any offence to be aggravated by one of the statutory aggravations. The Crown will libel the aggravation on the indictment or, in the case of a summary prosecution, specify it in the complaint. Where the jury or, in the case of a summary prosecution, the court, is satisfied the offence is proved but not satisfied that the aggravation has been proved, they may return a verdict of guilty under deletion of the reference to the aggravation. In other words, they may convict of the basic offence.[57]

5.52 At the core of the current scheme of hate crime legislation in Scotland is the model that allows **any** offence to be aggravated by prejudice in respect of one or more of the protected characteristics of race, religion, disability, sexual orientation and transgender identity.

5.53 This approach does **not** involve the creation of new offences: rather, it involves an existing offence, such as an assault, being motivated by or demonstrating hostility in respect of one or more protected characteristics. As Lord Bracadale notes:

[57] For further details of the historical development of the aggravations in Scotland see the comparative analysis of hate crime legislation prepared by professors Chalmers and Leverick in their academic report: Chalmers J and Leverick F (2017) *A Comparative Analysis of Hate Crime Legislation: a Report to the Hate Crime Legislation Review,* Edinburgh: Scottish Government.

> Where a person is convicted of an offence with a statutory aggravation in respect of a protected characteristic a number of consequences follow. First, the aggravation will be recorded and taken into account in sentencing. Secondly, the maintenance of records allow statistics to be kept and trends identified and monitored. Thirdly, and importantly, the aggravation will appear on the criminal record of the individual. This means that, if the person commits a further offence, the earlier aggravated conviction may be taken into account.
>
> Over the years since their introduction these provisions have been extensively used. Having express provisions requires the police (and wider criminal justice system) to be aware of the need to take potential identity hostility into account when investigating crime. Records have been maintained and annual statistics have been published. From the totality of the information available to the review I am satisfied that this approach has worked reasonably well and I recommend that the scheme of statutory aggravations should be retained and developed to form a basis of a clear and comprehensible scheme of hate crime legislation.[58]

5.54 The first recommendation in Lord Bracadale's final report was that statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland. Evidence taken by him from the *Crown Office and Procurator Fiscal Service* (*COPFS*) indicated that the prosecutors considered that the use of statutory aggravations was an effective means of prosecuting hate crime. The *COPFS* publish annual statistics in relation to prosecutions in respect of each of the protected characteristics. Setting aside those who were opposed to any form of hate crime legislation, the witnesses, organisations and consultees to the Scots hate crime review tended to favour the use of statutory aggravations.

[58] Lord Bracadale, *Independent Review of Hate Crime Legislation in Scotland: Final Report* (May 2018), paras 3.3 – 3.4, p14.

5.55 In response to Lord Bracadale's review, the Scottish Government carried out their own consultation with a view to introducing legislation. In April 2020, the Hate Crime and Public Order (Scotland) Bill was introduced in the Scottish Parliament.

5.56 The Government's consultation explored whether the statutory aggravation model should continue to be the core approach to the prosecution of hate crime. It is clear that most of the organisations who have an interest in this field in Scotland supported this approach.[59]

5.57 The first clause in the new Hate Crime and Public Order (Scotland) Bill 2020 retains the model of aggravation of offences by prejudice and is set out in detail in Chapter 3.

5.58 In Chapter 9 of the consultation paper – entitled ***'Towards a New Hate Crime Law for Northern Ireland'*** - I set out further arguments as to whether or not it is better to tackle hate crime through an aggravated offence model, or through an enhanced sentencing regime.

5.59 **I have concluded that an aggravated offence model is more appropriate and has a much better chance of providing an effective approach for the justice system to deal with hate crime. It will encourage the police to collect evidence of hate in all cases in an early stage – something that does not appear to happen under current arrangements. Among other advantages, it would also mean that the aggravation can appear on the defendant's record, but also gives greater protection to the defendant as it requires the prosecution to prove the**

[59] Ibid, p14. See results of the Scottish government consultation at https://www.gov.scot/publications/consultation-amending-scottish-hate-crime-legislation-analysis-responses/

aggravation at the trial of offence stage which fits well with the legal doctrine of fair labelling.

5.60 There is also a question of principle. If the element of 'hate' is left to the sentencing stage, the law seems to be treating the 'hate' element as another type of aggravation on a par with a number of other aggravating factors, such as vulnerability. However, by putting the 'hate' element into the trial of offence stage, the legislature would be making it clear that the 'hate' element means that a different sort of wrong/harm has been caused by the defendant – one that cuts to the heart of our values as a progressive liberal society. I believe that that principle is seriously diluted in a sentencing only system.

5.61 In Chapter 9 of the consultation paper, I examined the aggravated offences model in England and Wales and explored its strengths and weaknesses. I looked for ways in which it could be improved and strengthened and cross-referenced it with the statutory aggravation model which has been used in Scotland for many years.

5.62 I am particularly attracted to the Scottish model in terms of its simplicity and efficacy. It can deal with any offence, not just the limited suite of offences currently dealt with as aggravated offences for race and religion alone under the 1998 Act. The statutory aggravation provisions in Scotland do not create new offences.

5.63 As indicated above, the various statutory aggravation provisions in Scotland – now likely to be replaced and simplified in the current Bill under consideration by the Scottish Parliament – follow a similar pattern. In each case the provision contemplates an offence libelled on an indictment or specified in a summary complaint. The offences are aggravated by prejudice relating to the relevant characteristic if one of two alternative thresholds has been met.

5.64 The first threshold is that, if at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim of the offence malice and ill-will relating to the characteristic or presumed (by the offender) characteristic of the victim.

5.65 The second threshold is that the offence was motivated (wholly or partly) by malice and ill-will towards a person presumed to have a particular characteristic.

5.66 In the current and proposed Scottish provisions there is a requirement on the sentencing court to state on conviction that the offence was aggravated in relation to the particular characteristic; to record the conviction in a way that shows that the offence was so aggravated; and to take the aggravation into account in determining the appropriate sentence. In addition, the sentencing court is required to state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of the reason for that difference, or otherwise, the reasons for there being no such difference. It is noted that in Scotland charges can proceed with more than one statutory aggravation – for example, in cases where the conduct in question is motivated by malice and ill will relating to both religion and disability.

5.67 The aggravated offences model in England and Wales under the 1998 Act has been set out in Chapter 7 of the consultation paper where I also discuss its strengths and weaknesses – see in particular Chapter 7.13–7.24 inclusive.

5.68 Since the *Law Commission*'s report in 2014, academic research has noted that the 1998 Act provisions are considered to be the cornerstone of the legal framework and are now generally well understood by most practitioners including judges.[60]

[60] Mark A. Walters et al., *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017)

5.69 Problems with the 1998 Act remain, the most obvious of which is that the aggravated offences provisions **only** cover race and religion meaning that hostility based on other protected characteristics such as disability, sexual orientation or transgender identity can only be addressed at sentencing stage in England at the present time.

5.70 In his seminal work from 2017, Professor Mark Walters and his colleagues from *Sussex University* suggested the bold option of combining the aggravated offences provisions under the 1998 Act with the enhanced sentencing provisions under the 2003 Act into a single Act that would aggravate **any** offence where there is sufficient evidence of hostility.[61]

5.71 This, if accepted, would bring the approach in England and Wales very much in line with the position in Scotland where the statutory aggravation is in relation to each of the currently five protected characteristics that can attach to any offence. The Scottish approach also ensures that the aggravation is stated on conviction and recorded accurately.

5.72 Walters et al considered that the main question that would arise were all crimes to have a potential aggravated version is whether new sentencing maxima would be required for every criminal offence on the statute book.

5.73 Whatever the difficulties in England and Wales, it is not believed this concern would create a particular difficulty in Northern Ireland.

5.74 It will be recalled that, although the aggravated offences model was not introduced in Northern Ireland in the 2004 Order, penalties were increased in line with the range of offences specified in the 1998 Act. So, for example, the maximum

[61] Ibid.

sentence for an offence under Section 20 of the Offences Against the Person Act 1861 was increased from five years to seven years. The maximum sentence for many more even more serious charges such as murder, attempted murder, manslaughter and an offence under Section 18 of the Offences Against the Person Act 1861 is already life imprisonment.

5.75 At paragraph 9.28 of the consultation paper I pointed out that, in any new measure, some of the wording in the 2004 Order could be relevant in that if the offence was found to be aggravated by hostility the court 'shall' treat that fact as an aggravating factor – that is to say, a factor that increases the seriousness of the offence – and shall state in open court that the offence was so aggravated. I observed:

> To further ensure transparency in the sentencing process any new law might well include provisions similar to Section 96(5) of the 1998 Act insofar as it applies to Scotland. Not only would the court state on conviction that the offence was aggravated, record the conviction in a way that shows that the offence was aggravated, take the aggravation into account in determining the appropriate sentence, but also state, where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or otherwise, the reasons for there being no such difference. This last provision would cater for situations where there were exceptional mitigating circumstances.

Further recommendations

5.76 After careful consideration of the responses to the consultation paper, I am reinforced in my view that such reforms would greatly simplify and strengthen the law in Northern Ireland in a way that has not yet been possible, remove the vexed questions associated with the unloved sentencing provisions, and ensure that identity-based hostilities are included as part of the basic offence in the criminal law.

5.77 I therefore recommend:

Recommendation 2

Statutory aggravations should be added to all existing offences in Northern Ireland following the model adopted in Scotland and become the core method of prosecuting hate crimes in Northern Ireland. This would mean that any criminal offence could be charged in its aggravated form.

5.78 If this option for law reform is accepted, the enhanced sentencing provisions in the 2004 Order would no longer be required and could be repealed. However, in doing so, it will be necessary to ensure that those provisions in the 2004 Order providing for higher maximum sentences for certain criminal offences are retained.

5.79 If this approach is adopted, the new proposed hate crime law for Northern Ireland would be seen to address most, if not all, of the concerns that have arisen around the operation of the 2004 Order.

5.80 Such a decision in itself would not deal with all of the concerns around aggravated offences.

5.81 The next chapter will consider how these issues are best dealt with, including the important question of consideration of the appropriate thresholds for proving the aggravation of prejudice.

Chapter 6

A New Hate Crime Model for Northern Ireland

CHAPTER 6

A NEW HATE CRIME MODEL FOR NORTHERN IRELAND

6.1 As outlined in the previous chapters, the case for reform of the existing hate crime law in Northern Ireland is highly persuasive. In chapter 6, I address how a new hate crime model for Northern Ireland might take shape.

6.2 In chapter 5, I recommended moving from the current enhanced sentencing model under the 2004 Order to an aggravated offences model.

6.3 In this chapter, it is proposed to examine in more depth the aggravated offences model from England and Wales; to explore its strengths and weaknesses to see in what way it could be improved and strengthened; to cross-reference it with the statutory aggravation model which has been used in Scotland for many years; and to test the argument that such an aggravated offences model in Northern Ireland is the only means by which it can be consistently ensured that the hate element of the crime will be addressed effectively.

6.4 When the *House of Commons Northern Ireland Affairs Committee* came to consider the draft Criminal Justice (Northern Ireland) Northern Ireland Order 2004, they noted that the legislative approach adopted by the Government in the draft Order for Northern Ireland was substantially different from the existing law applying to England and Wales.[62]

[62] House of Commons Northern Ireland Affairs Committee, *Hate Crime: the Draft Criminal Justice (Northern Ireland) Order 2004*: *Fifth Report of Session 2003–04* (HC615) (London, 2014) p4, para 7.

6.5 In that jurisdiction, Sections 28-32 of the Crime and Disorder Act 1998 (CDA 1998) made provision for new specific stand-alone racially motivated offences, attracting higher maximum penalties than non-racially motivated counterpart offences.

6.6 As the Committee explained:

> The Government decided largely for legal 'technical reasons' not to apply the 1998 Act to Northern Ireland. (p4, para.7)

6.7 The consultation paper published in November 2002 by the *Northern Ireland Office* on this issue said:

> It was decided during the passage of the *Crime and Disorder Act 1998* not to extend these [hate crime]) provisions to Northern Ireland. This was largely because of the technical difficulties of doing so which made it impossible either to extend directly the provisions in their entirety or introduce them by negative resolution procedure.[63]

6.8 At the time of that consultation in 2002, the Government considered that the enhanced sentencing model would be:

> the most effective of the options and the easiest to apply.[64]

[63] Northern Ireland Office, *Race Crime and Sectarian Crime Legislation in Northern Ireland: a Consultation Paper* (Belfast: NIO, 2002) p7, para 2.5.

[64] Ibid, para 4.

6.9 In 2004, the Committee noted:

> Though we cannot prejudge the likely success of the Government's sentence based approach, we hope that it will signal that there is to be no tolerance of 'hate crime' offences . . . We are convinced that strong laws and effective police enforcement measures against hate crime are required to send the strongest possible signal that such activity is completely unacceptable and will not be tolerated.[65]

6.10 As has been demonstrated in Chapter 6 of the consultation paper, and in many of the responses thereto, the 2004 Order has neither proved effective nor easy to apply. Most now agree that the Northern Ireland law found in the 2004 Order has not worked in the best interests of victims or defendants. In short, it has been proven to be not fit for purpose.

6.11 It is clear that introduction of aggravated offences is likely to have a much greater potential to address hate crime effectively, providing for a system wide response to the criminalisation of the hate element of crimes.

6.12 Although in hindsight it is regrettable that the Crime and Disorder Act 1998 (CDA) was not extended to Northern Ireland, there may well be advantages in starting afresh, taking on board the learning around the advantages and disadvantages of other models.

[65] House of Commons, *Hate Crime* (HC615), p5.

England and Wales

6.13 In England and Wales under Sections 28 to 32 of the CDA 1998, only a limited suite of specific criminal offences (various forms of assault, criminal damage, public order offences, harassment and stalking) are included in the list of those offences which can be aggravated by racial or religious hostility. These are set out in law as more serious versions of pre-existing or 'basic' offences.

6.14 They have higher maximum sentences than the basic offences and are recorded on an offender's criminal record as racially or religiously aggravated. They are referred to as RRAOs (racially or religiously aggravated offences) to distinguish them from other offences where hostility based on a personal characteristic is treated as an aggravating factor at sentencing.

6.15 Section 28 of the CDA 1998 states:

(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if –

(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or

(b) The offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

6.16 Legislation in England and Wales does not currently provide for specific offences where hostility is demonstrated towards, for example, a victim's sexual orientation, gender identity or disability. To cater for all other kinds of criminal offences other than the specific criminal offences dealt with under Sections 28 to 32 of the CDA 1998 (the aggravated offences), there are also sentencing provisions in Sections 145 and 146 of the Criminal Justice Act 2003 (CJA 2003) which state that a judge must

take into account an aggravating feature as regards the penalty of a defendant convicted of a crime aggravated by racial, religious, sexual orientation, disability or transgender hostility. The CJA 2003 mirrors very closely the enhanced sentencing provisions under the 2004 Order in Northern Ireland. These two sections (Sections 145 and 146 of the CJA 2003) replicate the wording of Section 28 in regard to hostilities that motivate an offender or are demonstrated during the commission of the offence.

6.17 Section146 (3) of the CJA 2003 also states:

The court –

(a) Must treat the fact that the offence was committed in any of those circumstances as an aggravating factor; and

(b) Must state in open court that the offence was committed in such circumstances.

6.18 This means that where evidence proves identity-based hostility, the court is obliged to give effect to this as an aggravating factor during sentencing and openly state that this is the case.

6.19 Unlike the provisions in the CDA 1998, both Sections 145 and 146 apply to **any** criminal offence and are applicable at sentencing stage only. Consequently, only those offences covered by the CDA 1998 can properly be classified in criminal law as 'aggravated offences' (for example, 'racially aggravated assault'), while those covered by the sentencing provisions will be recorded in law as the basic offence (e.g. an assault).

6.20 A major theme that has emerged from reviews of both the case law and academic research in England and Wales is that, unlike the CDA 1998, the CJA 2003 provisions are not being consistently applied in court. This finding largely echoes

concerns raised by respondents to the *Law Commission's* consultation on hate crime as reflected in its report in 2014.

6.21 As noted in the consultation paper for this present review (para 9.18, page 134):

> Further serious concerns have been raised regarding lack of awareness about the enhanced sentencing provisions among key legal professionals despite the law having been in force since 2005. This was especially apparent amongst defence counsel and within sections of the judiciary in England and Wales. In many ways these concerns mirror similar concerns which have been expressed repeatedly as regards the enhanced sentencing provisions in Northern Ireland.

6.22 The most obvious weakness in the CDA 1998 is that it only protects race and religion, meaning that hostility based on other protected characteristics such as disability, sexual orientation and transgender identity can still only be addressed at sentencing.

6.23 The other major weakness is that the law applies only to a limited suite of offences and not to any offence as is the position in Scotland.

6.24 So, for example, the most serious offence involving personal injury covered by the CDA 1998 is Section 20 of 1861 Act.

6.25 The much more serious Section 18 offence (wounding or causing grievous bodily harm with intent) was omitted from the legislation. The reason was explained by the Home Office Minister during the passage of the Bill as follows:

> Where the basic offence already carries a maximum sentence of life imprisonment as under Section 18 of the offences against the Person Act 1861, the racially aggravated offence is not in practical terms required as a sentence cannot be increased. In other words, there is nothing to be gained if there is no increase in sentence and placing the additional burden on the *Crown Prosecution Service* to meet the racially aggravated test. For that reason we have not included murder and manslaughter in the list of offences.[66]

6.26 In 2013, Professor Richard Taylor concluded that the racially aggravated offences created by the CDA 1998 were based on a rather arbitrary selection of underlying crimes and proved difficult to interpret and apply for a number of reasons.

6.27 Referring to the explanation given for omitting the most serious offences from the CDA 1998, he observed:

> This approach is not entirely unproblematic as it suggests that the only reason for enacting the specific offences is to increase the available sentence, ignoring arguably at least equally powerful considerations of denunciation which would justify the creation of specific offences. Furthermore, it creates some unfortunate anomalies and practical problems to do with alternative verdicts and charging practice.
>
> If there is evidence both of racial aggravation and of the specific intent to cause GBH required under Section 18, prosecution under Section 18 will be appropriate, but if the jury are not in the event persuaded of the intent to cause GBH, only a normal Section 20 charge will be automatically available as an alternative verdict, even though the racial aggravation element is very clear. The prosecution in order to avoid this may, and probably should, include the racially aggravated Section 20 offence in the indictment, but this may give the wrong signals to the accused that the

[66] Alun Michael, Home Office Minister of State, Hansard (HC) 12 May 1998, Standing Committee, column 325.

> prosecution are willing to accept a plea to the racially aggravated Section 20 (maximum sentence 7 years) where there is in fact good evidence of a serious Section 18 offence plus racial aggravation also to be taken into account at the sentencing stage (for which the sentence may in principle be anything up to life). It may also confuse a jury who will have to be told that they can ignore the racial aggravation in deciding whether the more serious Section 18 offence is made out but have to consider it in relation to Section 20 where, however, there was no need to be satisfied of the intent to cause GBH. [67]

6.28 A more logically structured arrangement would have been to enact a racially aggravated version of Section 18, as well as Section 20, so that these anomalies and practical problems could have been eliminated.

6.29 One of the primary advantages of having aggravated offences, as compared to the enhanced sentencing model, is that aggravated offences carry a unique descriptor. As the *Law Commission* observed in its 2014 report:

> The aggravated label is designed to carry and communicate a stigma which 'stings' more deeply than the mere fact of conviction for the basic offence even with an enhanced sentence.[68]

6.30 In this context, the *Law Commission* highlighted in its 2014 paper the fact that, with aggravated offences, the label attached to the offender's criminal record. They argued that the offence can also be seen as:

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[67] Richard Taylor, 'The Role of Aggravated Offences in Combating Hate Crime – 15 years after the CDA 1998 – time for a change?' *Contemporary Issues in Law*, Vol 13, Issue 1 (2014) p76-92.

[68] Law Commission, *Hate Crime: the Case for Extending the Existing Offences*, Consultation Paper No. 213 (2014) p68, para 3.29.

> giving recognition to the particular seriousness of hate crime, the greater culpability of its perpetrators and the greater harm it can cause.[69]

6.31 Although the *Law Commission* initially appeared in favour of extending the offences under the CDA 1998 beyond racial or religious groups, it took a more cautious view in its final report, ultimately suggesting that a wider review of the aggravated offences was necessary. That wider review is now ongoing in England and Wales.

6.32 As highlighted in the submission from the *Public Prosecution Service of Northern Ireland*, the Scottish approach would appear to be much simpler and free from many of the difficulties and anomalies that have beset the model in England and Wales.

Scotland

6.33 As indicated above, the Scottish approach to statutory aggravations allows **any** offence to be aggravated by one of the statutory aggravations.

6.34 The Crown will "libel" the aggravation on the indictment or, in the case of a summary prosecution, specify it in the complaint. So, where the jury, or in the case of a summary prosecution, the court, is satisfied that the offence is proved but not satisfied that the aggravation has been proved, they may return a verdict of guilty under deletion of the reference to the aggravation – in other words, they may convict of the basic offence.

[69] Law Commission, *Hate crime: should the current offences be extended?* No 348 (London, 2014) p96, para 4.65.

6.35 If the Scots model is adopted in Northern Ireland there would be no need to create new offences – any new law would simply provide that an existing offence, such as an assault, could be prosecuted as aggravated if there is evidence of the offence being motivated by or demonstrating hostility in respect of one or more protected characteristics.

6.36 Adopting the Scots model or certain aspects of it, would avoid the anomalies and practical problems identified by Professor Taylor.

6.37 The next major issue to confront in designing a workable law of aggravation of offences is to examine the current thresholds for proving the aggravation of prejudice and consider whether or not these thresholds are adequate or should be expanded or changed in some other way.

6.38 The thresholds for England and Wales are set out in Section 28 of the CDA 1998.

This reads:

> *(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if –*
>
> *(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or*
>
> *(b) The offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.*

6.39 This is very similar to the test in Scotland – a test which is unchanged in Clause 1 of the new Hate Crime and Public Order (Scotland) Bill introduced in April 2020 in the Scottish Parliament.

That test reads:

> *Aggravation of offences by prejudice*
>
> *(1) an offence is aggravated by prejudice if –*
>
> *(a) where there is a specific victim of the offence –*
>
> *(i) at the time of committing the offence, or immediately before or after doing so, the offender evinces malice and ill will towards the victim, and*
>
> *(ii) the malice and ill will is based on the victim's membership or presumed membership of a group defined by reference to a characteristic mentioned in subsection (2), or*
>
> *(b) whether or not there is a specific victim of the offence, the offence is motivated (wholly or partly by malice and ill will towards a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (2).*

6.40 The characteristics set out in subsection (2) are the protected characteristics including some of the new characteristics recommended by Lord Bracadale.

Hostility

6.41 It will be noted that the term 'hostility' is used in the CDA 1998 for England and Wales, whereas the term 'evincing malice and ill will' is used in Scotland. During the passage of the 1998 Bill, the Lord Advocate explained that the two phrases were intended to have the same effect, but, on balance, the phrase 'evincing malice and ill-

will' was chosen because it had an historical place in Scottish criminal law and was familiar to the Scottish courts. Lord Bracadale's review found strong evidence about the confusion which surrounds the concept of hate crime and the level of behaviour that constitutes a hate crime in the eyes of the law. He noted that confusion makes it less likely that people will report or challenge their experience. He concluded that these considerations make it important for the legislation to be as clear as possible for those who may be affected by it, whether as victims or potential offenders, and took the view that to a layperson a phrase such as 'demonstrating hostility' is more easily understood than 'evincing malice and ill-will'.

6.42 He therefore recommended that the term 'hostility' should replace the term 'malice and ill-will' in any future Scots legislation, pointing out that he was not suggesting that there should be any change in the meaning of the legal definition of the thresholds.

6.43 However, the Scottish Government did not accept this particular recommendation and the Scots term 'malice and ill-will' is proposed in the draft Bill.

6.44 In 2014, the *Law Commission* noted that 'hostility' is not defined in the CDA 1998 and that there is no standard legal definition. It stated that:

> The ordinary dictionary definition of 'hostile' includes being 'unfriendly', 'adverse' or 'antagonistic'. It may also include spite, contempt or dislike. Ultimately, it will be a matter for the tribunals of fact to decide whether a defendant has demonstrated, or been motivated by, hostility.[70]

[70] Ibid, p19.

6.45 Although undefined in the CDA 1998, *'hostility'* is commonly understood in the context of hate crime as "a degree of animosity that is akin to being unfriendly, adverse or antagonistic and more than mere prejudice".[71]

6.46 It is clearly a lower threshold than 'hatred'. Evidence of hostility includes the language and conduct of the offender. Extrinsic evidence about other circumstances and the offender's activity outside of the offence can also be acceptable, such as the offender's membership of a white supremacist group.[72]

6.47 However, it should be noted that the police interview cannot be admitted into evidence in the context of the demonstration model for the purposes of establishing hostility – see *Parry v DPP (2004) EWHC 3112 (Admin).*

6.48 The case of *R v Dent (2015) EWCA 2095* is also relevant on this issue. In this case the defendant attacked his victim and shortly afterwards referred to the victim using a racial slur. In that latter decision, the court stated:

> The demonstration of racial hostility had occurred in the immediate context of the offence. The judge however said that in his view this was not a racially motivated murder. It was a murder in anger, immediately after which hostility was demonstrated to the victim based on his race.

6.49 The introduction of a wider range of attitudes such as 'bias, prejudice or contempt', may well prove beneficial, particularly as there is no standard legal

[71] Gail Mason and Kristin McIntosh, 'Hate crime sentencing laws in Australia and New Zealand: is there a difference'*, New Zealand Law Review* (2014) p658.

[72] Ibid, referring to cases where the offender was a member of a white supremacist group.

definition of 'hostility'. Such a change might also be seen as fair labelling and providing more certainty in understanding the nature of this species of offending.

6.50 Experience has shown that it is often very difficult to show motivation or demonstration of hostility in cases involving disabled people. This is an issue to which I will return but, for the moment, I would argue that introducing the attitude of 'contempt' might go some way to address this important problem.

6.51 There are also problems associated with defining and dealing with sectarianism – considered in Chapter 13 of the consultation paper. However, such problems may be alleviated somewhat by widening the range of attitudes further to include the concept of 'bigotry'. I return to this difficult issue in Chapter 8 of this paper.

6.52 In its recent consultation paper for the current review of hate crime in England and Wales, the *Law Commission* revisited the concept of 'hostility'. This is because of concerns raised by disability rights advocates and some academics that, compared with crime experienced by other protected groups, the presence of 'hostility' is often less apparent or much more difficult to prove in cases involving disabled victims. The *Law Commission* notes:

> This is partly because negative attitudes towards disabled people are often characterised by derision, contempt, and a perception that they are easy targets. While overt hostility towards disabled people does occur, it is perhaps less prevalent than with other forms of prejudice such as racism and homophobia.[73]

[73] Law Commission, *Hate Crime Laws,* p348, para 15.40.

6.53 The *Law Commission* acknowledged this serious problem with the current thresholds and considered whether further legal guidance could be provided as to how the term 'hostility' should be interpreted. It suggests:

> Hate crime laws might specify that evidence that indicates a hostile motivation on the part of the defendant may include conduct indicating "contempt, derision or disregard for the rights of people with the protected characteristics". . . .
>
> For example, the false befriending and subsequent financial exploitation of an intellectually disabled person might be characterised as 'hostile' in that it was motivated by a fundamental contempt for intellectually disabled people. This may be so, even though the defendant displayed no aggression or even outward dislike of disabled people. Rather, the jury would be invited to determine whether their conduct demonstrated a 'hostility' towards people with a disability through a contempt and disregard for their personhood.
>
> Such an approach constitutes a less radical shift in the nature of hate crime laws away from the current approach. The basis for the hate crime label would still be framed in terms of animus towards the characteristic group; but it would be an animus more broadly understood as including a fundamental disregard for the rights of the targeted group.
>
> However, even with careful direction we have doubts whether such a subtle shift in the interpretation of 'hostility' would significantly influence the outcome of cases in a way that would meaningfully benefit disabled victims. In the more than fifteen years in which 'hostility' has been the applicable test in respect of disability hate crime, the consistent concern has been that the criminal exploitation and abuse of disabled people is not understood as 'hostile' in too many cases. The *Sussex University* Report authors reached a similar conclusion: "Despite a myriad of criminal justice enquiries, *CPS* guidance, research reports, and the lobbying efforts by disability groups, it is clear that judges and many enforcement agencies refuse to comprehend discriminatory selection of disabled victims as evidence of hostility. It is likely that this is due to the word 'hostility' itself. Scholarly discussions

> that aim to illustrate how targeting perceived vulnerability can also amount to a form of identity-based hostility are unlikely to be applied in practice".
>
> If the term 'hostility' were to remain the key test, our provisional view is that there would not be a significant shift in attitudes towards disability hate crime and prosecution levels would remain low.[74]

6.54 The *Law Commission* also considered whether the word 'prejudice' might be added to the range of attitudes to expand or better explain the concept of 'hostility'. It noted that the definition of 'prejudice' in the Oxford English Dictionary includes "unreasoned dislike, hostility, or antagonism towards, or discrimination against, race, sex, or other class of people". Whilst 'hostility' is part of this definition, it includes lower threshold concepts such as 'discrimination'.

6.55 The *Law Commission* observed – at paragraph 15.91 of its consultation paper:

> We consider that a prejudice-based test would likely capture more of the exploitative and prejudice-based criminal conduct that disabled victims disproportionately experience. In particular, in some cases of acquisitive crime or sexual exploitation of disabled people, prejudice towards the victim's disability may have influenced the defendant's assessment that the victim's disability made them less likely to resist.

6.56 Respondents to the consultation paper were asked whether or not they believed that the term 'hostility' should be defined or not, and did they consider that this term should be expanded to include other terms such as 'bias, prejudice, bigotry or contempt'. 68% of organisational respondents agreed that 'hostility' should be expanded in this way. However, only 18% of individual respondents agreed. (Question 30).

[74] Ibid, paras 15.75 -15.82.

6.57 Another question that arises is to consider whether or not the current thresholds employed in the CDA 1998 are appropriate for any proposed new law in Northern Ireland.

6.58 This issue is explored in depth in Chapter 10 of the consultation paper where the analysis may be examined.

6.59 Key aspects of this discussion include the fact that the motivation part of the legal test under Section 28(1)(b) of the CDA 1998 has proved particularly difficult to evidence rendering this part of the Act almost impotent in addressing aggravated features.

6.60 The vast majority of prosecutions are taken under subsection 28(1)(a) of the CDA 1998. Under this limb, the prosecution must prove the demonstration of hostility, but no subjective intent and motivation is required - it is an objective test. When this test was introduced in 1998, the UK Government described it as 'more realistic' than proving motivation.

Examining comparative examples

6.61 The demonstration test is not without its critics, with some academic writers arguing that the demonstration threshold is too low. The Australian hate crime expert Gail Mason argues that the imposition of a harsher penalty in cases where prejudice is a 'trivial' factor should be avoided, and that in determining liability, courts should ask "whether prejudice makes a substantial difference to the offender's motive".[75]

[75] Mason and McIntosh, 'Hate Crime', p678.

6.62 In his report, Lord Bracadale rejected the criticism that the demonstration threshold was too low, arguing that requiring a threshold of motivation in every case would exclude many cases which would appropriately be marked as hate crimes. He noted:

> The threshold of evincing malice and ill-will, or demonstrating hostility, may well catch words uttered 'in the heat of the moment'. But that should be no excuse. This threshold does not require a court or jury to make a judgement about the accused's character generally; what is significant is the fact of what has been said (or otherwise evinced) and the potential impact that has on the victim and the wider group who share the relevant protected characteristic. It is worth remembering here that this is not just a question of a person demonstrating hostility or using bad language towards another. The underlying conduct must amount to an offence. The significance of the demonstration of hostility is that it highlights the context of that offending behaviour. The impact of a particular remark or action has to be taken into account: it upsets people in a direct way and targets the core identity of the individual or group. It is vital to send the message that this will not be tolerated and shrugged off as 'mere banter'. To do that risks undermining the principles of equality and respect.[76]

6.63 I share the view Lord Bracadale reached in his conclusions and observations.

6.64 In its consultation paper, the *Law Commission* cites this conclusion with approval noting:

> We do not consider that a compelling case has been made to roll back the 'demonstration' limb of the test. While some forms of hate crime will naturally be worse than others, both the motivation by and demonstration of hostility on the basis of a protected characteristic should be sufficient to constitute a hate crime. . . .

[76] Lord Bracadale, *Independent Review,* p16, para 3.8.

> There is still scope within a finding of hate crime for the sentencing judge or magistrates to distinguish between different degrees of wrongfulness.[77]

6.65 The final report produced by Walters, Wiedlitza, Owusu-Bempah and Goodall on *Hate crime and the legal process – options for law reform*. (2017) University of Sussex, proposed a new test for proving aggravation. This is the discriminatory selection test. This test would replace the current motivation of hostility test set out in Section 28(1)(b) of the CDA 1998. This proposal is designed to acknowledge that the motivation test is rarely, if ever, used and where it is applied (most frequently in disability hate crime cases) it is very often unsuccessful.

6.66 Walters et al argue that the main issue with proving motivation is that many 'hate crime' cases involve the selection of a victim based on the victim's perceived vulnerability, which is intrinsically linked to that individual's presumed 'difference'. He argues that the targeting of individuals who are 'different', based on the perception that these individuals' 'difference' makes them innately weak or an easy target, is a form of prejudice and hostility in and of itself. He suggests that, despite many criminal justice reports and academic studies explaining that this is the case, legal practitioners and jurors continue to reject such cases as providing insufficient evidence of 'hostility'.

6.67 This discriminatory selection test is followed in several US States, including Maine, Virginia, Louisiana and Illinois. There are also examples of this model being used in various European countries. In France, for example, the Penal Code provides that the penalties incurred for a felony or misdemeanour may be increased when the offence is committed **because of** the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion[78].

[77] Law Commission, *Hate Crime Laws,* p357, para 15.37.
[78] Article 132/76(1) French Penal Code

6.68 The *Law Commission* has considered the discriminatory selection model in its recent consultation paper. It notes:

> There are strong arguments – particularly in the context of disability hate crime – that favour broadening the applicable test to allow for discriminatory selection. Some of these arguments are principled – that discriminatory selection is, at its core, a form of hatred or hostility, because it amounts to an attack upon the identity of the victim and those that share the targeted identity characteristic. Others are more pragmatic – in particular that it is currently so hard to prove motivation in hate crime, and that consistent with the approach to the 'demonstration' limb, the law should lower the legal threshold to better recognise the real harm that is caused by the discriminatory selection and targeting of certain characteristic groups.[79]

6.69 However, it strikes a note of caution on the issue pointing out that these arguments are open to criticism:

> The label of 'hate crime' implies a degree of conscious animus towards the targeted characteristic. If the law treats all forms of targeting as 'hate', there is a risk that the importance of the label 'hate crime' could be undermined. Similarly, adopting an expansive definition of hate crime to recognise the harm caused to targeted victim groups risks overly condemning certain offenders as 'bigots', when their conduct, while unacceptable, might be more fairly categorised as cynical or opportunistic, and this can be reflected in the sentence as an aggravating feature.[80]

6.70 The *Law Commission* has yet to reach a provisional view of whether or not to recommend adoption of the discriminatory selection model.

[79] Law Commission, *Hate Crime Laws*, p365, para 15.70.
[80] Ibid, p365, para 15.71.

6.71 New Zealand also has an enhanced sentencing model.

6.72 Section 9(1)(h) of the Sentencing Act 2002 is the primary legal mechanism for addressing hate crime in New Zealand. It allows judges to consider hostility as an aggravating factor in sentencing where the offence is partly or wholly committed because of hostility towards a group of persons who have an enduring common characteristic, such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability, and the hostility is because of the common characteristic, and that the offender believed that the victim had that characteristic.

6.73 The court must accept, beyond a reasonable doubt, that the offence was partly or wholly committed because of hostility towards a group of persons who have an enduring common characteristic. In explicitly including partial motive, this section applies where even if prejudice was not the offender's sole motive. Somewhat curiously, the words '*because of*' have been interpreted by scholars as equivalent to a motive requirement. It would appear that the courts in New Zealand infer motive based on a holistic view of all the evidence or admissions by the offender. The '*because of*' test requires an enquiry into why the offender committed the offence. Sometimes the court can infer this from direct admissions by the offender. However, in most cases the court will look at the variety of factors, including the offender's language, the level of violence, associations and the location where the offence occurred. For example, the court has relied on the offender's online comments as evidence of hostility – at least in part. Courts may also look to past conduct to infer that there is hostility present.

6.74 Professor Walters' proposal to replace the ' motivation test' by a 'by reason of' or 'discriminatory selection' test, together with retaining the 'demonstration' test, was considered very carefully by Lord Bracadale in his report. He notes that he was initially attracted to the idea for the reasons discussed above, but ultimately decided not to recommend it. He observed that:

> The principal difficulty with defining hate crime around vulnerability is that the message conveyed by labelling the crime as a hate crime becomes diluted and the category of hate crime 'loses its special symbolic power'.[81]

6.75 Walters does not disagree with Lord Bracadale's fears but observes:

> The 'by reason of' test does not include any reference to vulnerability but instead relies on the decision by the offender to select the victim based on their protected characteristic. The importance of perceived vulnerability and difference is that it helps us to understand why selecting people with certain characteristics should be included in hate crime legislation – however, it does not make up the test for inclusion.[82]

6.76 In conclusion, Walters argues that the introduction of the 'by reason' test would be unlikely to significantly extend the scope of the criminal law. Rather, its aim would be to provide greater flexibility for prosecutors to pursue certain forms of prejudice based crimes, which the current motivation test fails to achieve. Under his proposal, Section 28(1)(a) of the CDA 1998 – or its replacement in any new Hate Crime Act – should be maintained as currently prescribed. This would mean that the majority of hate crime cases would continue to fall within Section 28(1)(a), which is, and would remain, an important tool when tackling most hate crimes where outward manifestation of hostility has been expressed.

6.77 Clearly, all models of hate crime legislation will have limitations. If the aim is to find a combination of models that provides for the most effective application of hate

[81] Lord Bracadale, *Independent Review,* p20, para 3.22.

[82] Walters. M, Owasa - Bempah, Abenaa and Wiedlitzka, S (2018) Hate Crime and the "justice gap": the case for law reform, Criminal Law Review 12. Pp 961-986

crime laws, then the discriminatory selection model should be seriously considered. The proven difficulties regarding disability hate crime are of great concern. These cases throw up some of the most debasing and degrading violence used persistently against disabled people, but which are then frequently conceptualised as offences where someone is taking advantage of another's vulnerability. What remains clear in these cases is that the victims disability is the main reason they were targeted – the problem is not that identity is an issue, but rather whether someone is motivated by 'hostility' towards that identity characteristic. Hence the problem with the motivation test is not just its use of the word 'motive' but the use of the word 'hostility'.

6.78 The 'by reason' test removes both out of the equation. As noted in the consultation paper, it may be argued that the 'by reason' test may be problematic if the protected characteristics are extended to include gender. This test may potentially be too broad for gender and may include all cases of domestic or sexual violence. To avoid this unintended consequence it may be better to consider a mixed group selection and animus model which might read that, "The offender selected the victim by reason of a bias towards the victims 'group identity'" – or some variant of those words.

6.79 Arguably, this will allow a broader group selection test to be used and would remove the need for 'hostility' and, instead, include only cases where there is some element of bias towards the victim because of their identity.

6.80 Dr Jennifer Schweppe is broadly sympathetic to the reasoning behind the proposal to introduce a discriminatory selection model but notes:

> I would argue that, rather than address the issue by adopting a new test which is unworkable in practice, the issues which are quite rightly observed by Walters et al would more properly be addressed by expanding the definition of 'hate' beyond the traditional 'bias,

> hostility or prejudice' to include reference to 'contempt'. I am not persuaded by Lord Bracadale's assertion that the inclusion of crimes which seek to capitalise on the vulnerability of a particular group (in particular disabled people) in the category of hate crime dilutes the concept: rather, I believe that such crimes should be considered hate crime as the offender clearly sees the victim as 'other', and there is a dehumanising aspect to their behaviour. However, rather than address this in the manner proposed by Walters et al, I would suggest that rather than limiting the definition, as the legislation in question does, to 'hate and hostility', including a wider range of attitudes, such as prejudice is preferable. By including 'contempt' to address disability hate crime, the problems identified by Walters et al might more easily be addressed, without widening the net of criminality for all offenders to address this particular type of offending.
>
> The question as to which model should be utilised to address hate crime is a core consideration in framing legislation. The question remains, should the statutory provision be limited only to those individuals whose behaviour can be clearly observed as being motivated by hatred, or should it be so broad as to include those individuals who commit a crime using language they consider descriptive but which is in fact objectively offensive. Ultimately, as Burney asks, it is difficult to see how far the criminal law should go in exerting a 'corrective influence on dissonant social relations.' This question is core to determining the legislative approach to be taken.[83]

Consultation responses: a new hate crime model for Northern Ireland

6.81 The responses to the consultation paper echoed the disagreements referred to earlier.

6.82 On the one hand, there was considerable support for introducing the 'by reason of' threshold – although the support was qualified. For example, the *Northern Ireland*

[83] Schweppe, *Legislating Against Hate Crime,* Considering International Frameworks for an Irish Context (*Trinity College Dublin)* – Phd thesis. P220 (under embargo)

Human Rights Commission in its response recommended that hate crime law should include such a threshold:

> [T]o ensure that the laws reflect the harm done to victims and their communities through being targeted by reason of an immutable characteristic or fundamental aspect of their identity.

It added this important rider:

> Consideration should be given to making sure that the adoption of this test is not so broad that it becomes ineffective, particularly in the context of gender. The Commission recommends that a form of words, such as that suggested by paragraph 10.20 of the consultation document, is included to ensure that gender can be and is adopted as a protected characteristic, if the 'by reason of' threshold is applied.

6.83 *The Equality Commission for Northern Ireland* strongly supported including this additional threshold. In arguing that hate crime legislation should be amended to follow the statutory aggravation model as is currently in Great Britain, it considered that there are cogent reasons in support of the hate crime legislation providing protection against offences committed against and targeted at equality groups covered by the hate crime legislation, not only due to hostility, but 'by reason of' their membership of a particular equality group. It pointed out that its recommendation was consistent with the recommendations of the Great Britain Parliamentary Inquiry into online abuse and the experience of disabled people which stated:

> To ensure that the law applies where a victim had been selected because they were disabled, we recommended abolishing the need to prove that hate crime against disabled people is motivated by hostility. It should be enough to prove that an offence was

> committed 'by reason of' their disability… In hate crime against disabled people, hostility and perception of vulnerability often go hand in hand. It is not always clear whether a person was targeted because they were vulnerable (or perceived vulnerable) or whether they were targeted because of hatred or hostility.[84]

6.84 *The Equality Commission for Northern Ireland* added:

> We consider the introduction of such a threshold will send a clear message that such crimes are unacceptable. It will also recognise the impact of such crimes on particular equality groups, including older people and disabled people, who were targeted not due to hostility, but because of an equality characteristic. It could also lead to better recording of such crimes, and, as it will be recorded on a criminal record, it will allow a judge to take it into account when considering repeat offenders.

6.85 On the other hand, the *Democratic Unionist Party* did not support the immediate introduction of a third threshold arguing that:

> Weaknesses in the interpretation and application of the current threshold should be urgently clarified before any new provision is progressed. 'Hostility' as a concept is in need of clarification or amendment in order to ensure juries and judges understand what quantifies hate crime and prevent indirectly or unintentional violation of freedom of expression, thought, conscience and religion under articles 9 and 10 of the European Convention on Human Rights. Malice may be a more appropriate term and enact a higher but fairer threshold.

[84] House of Commons Petitions Committee, *Online abuse and the experience of disabled people,* First Report of Session 2017-19, HC759 (2019).

6.86 Although it supported the introduction of an aggravated offence model and the augmentation of the concept of 'hostility' to include bias, prejudice or contempt, the *Committee on the Administration of Justice* did not support the mooted third threshold, arguing that it moved away from the purpose of hate crimes legislation. It suggested that vulnerability can and should be dealt with by alternate provisions for sentencing that take into account the vulnerability of the victim.

6.87 The *Public Prosecution Service* took a similar line seeing force in Lord Bracadale's conclusion that the addition of a 'by reason of' test has the potential to dilute the concept of hate crime, causing it to lose some of its symbolic power. It noted that proof of the 'reason' for any crime, like proof of motivation, may be difficult, and argued that it was unlikely that any such change to the legislation would see any significant increase in its use.

6.88 In its submission, the *Bar of Northern Ireland* questioned the rationale for expanding the current thresholds of demonstration of hostility and motivation, as per Section 28 of the CDA 1998 – if Northern Ireland follows the statutory aggravation model. It argued that there was no evidence presented in the consultation paper to suggest that this was necessary, or that it would extend the scope of the criminal law, and submitted that it might be helpful to postpone any consideration of such a change until the *Law Commission* had reported. On the other hand, it saw benefit in the introduction of a wider range of attributes such as 'bias, prejudice or contempt' as there was no standard legal definition of 'hostility'. It noted that such a change might also be seen as fair labelling and providing more certainty in understanding the nature of this species of offending.

6.89 The *Law Society of Northern Ireland* gave the proposal to add a third threshold a guarded welcome noting that:

> The current requirement for hostility necessitates an analysis of the attitude, motivation and intent of the

> offender. A demonstration of hostility is a high threshold and may well miss many offences against vulnerable persons.
>
> However, the perceived flexibility that might be achieved by the introduction of a third category may bring other difficulties and may unintentionally include domestic or sexual violence cases. Consideration needs to be given to this prospect and suitable safeguards implemented.

6.90 Women's groups expressed mixed views on the question of adding the third 'by reason of' threshold. *The Northern Ireland Women's European Platform* is a membership organisation of Women's NGOs in Northern Ireland. It strongly supports the introduction of the third threshold. It notes that it:

> [U]nderstands hate crime as motivated by power structures and deep set beliefs and attitudes about a population group, and therefore perpetrators in many cases target victims by reason of their membership of that group, rather than specifically targeting an individual. An example of this is misogynistic crime and harassment aimed at women in the street; women are targeted due to their gender, rather than any individual attribute. *NIWEP* also believes that the introduction of such a threshold would enable successful conviction in cases that previously have been dismissed, due to the specificity of thresholds (a) and (b). With regard to the concern noted that the 'by reason of' threshold might be too broad in relation to gender and potentially be seen as encompassing all cases of domestic violence . . . The view of *NIWEP* is that domestic violence cases can be specifically identified as falling outside hate crime legislation without risk of diluting either body of legislation.

6.91 It supported the addition of a third threshold rather than the replacement of the motivation threshold.

6.92 The initial response of the *Women's Policy Group NI* was similar.

6.93 However, it wrote to the review team in October 2020 indicating that it had changed its position. In its revised submission, it argued that:

> We do not believe the thresholds above should also include the 'by reason of' threshold. The demonstration test of section 28 (1) is complex; and we believe the introduction of this threshold would broaden the legislation and potentially make it weaker. We do not support this change as it moves away from the purpose of hate crimes legislation.

6.94 *The Women's Resource and Development Agency* initially supported the change but wrote to the review team in October 2020 revising its position and supporting the final position of the *Women's Policy Group NI*.

6.95 *The Women's Aid Federation, Northern Ireland* largely supported the addition of a third threshold. It is the lead voluntary organisation in Northern Ireland addressing domestic and sexual violence and providing services for women and children.

6.96 The *Church of Ireland Church and Society Commission* argued that the third threshold should be added or the motivation threshold should be replaced. It agreed that the motivation threshold is unreasonably difficult to prove in practice and that this damages the effectiveness of the CDA 1998 as a result.

6.97 It notes that a 'by reason of' threshold or a mixed group selection and animus models would be appropriate to include. It felt that it was most appropriate to replace the motivation threshold, arguing that it was rarely used and removing it might be the best option so as to keep the legislation as clear and simple as possible and to avoid leaving it as a 'trap' which less experienced prosecutors might wade into.

6.98 *TransgenderNI* supported the introduction of a third threshold in addition to the existing thresholds under the CDA 1998 arguing that this would strengthen hate crime provisions without impeding the ability of prosecutors to relate hate motivation to specific demonstrations of hostility where appropriate.

6.99 It observed:

> The current thresholds fail to recognise or account for unconscious bias and the victimisation of individuals based on the perceived 'weakness' of them and their identity/protected characteristic. For instance, a transgender sex worker may be victimised by an individual who is aware of the issues this group has in reporting hate crime to the police; this would be covered under the 'by reason of' threshold, however, there would need to be a slur used or other hostility demonstrated for it to be covered by the existing thresholds. . . . The selection of the victim-based on their identity or perceived 'deviance' from said social order is a form of hostility in itself which is inadequately addressed by hate crime provisions across the UK.
>
> While there are concerns that the 'by reason of' threshold broadens the scope of hate crime legislation too much, we would posit that the State should be better equipped to address the scale of unconscious bias in our society, with the discrimination and violence that comes with that, if this threshold were included. It would help ensure that fewer incidents fall through the cracks of flawed regulations, and if applied effectively, may restore trust in hate crime reporting mechanisms.

6.100 Some 90% of organisational responses to the consultation paper believe there is a need to introduce a statutory aggravation model of hate crime similar to that existing in Scotland and England and Wales.

6.101 The majority of respondents indicated a preference for the introduction of the statutory aggravation model to replace the enhanced sentencing model focusing on

perceived weaknesses of the enhanced sentencing model as discussed above and the perceived benefits of the statutory aggravation model.

6.102 On the question of adding an additional threshold, it is clear from the responses to the consultation paper that the majority of respondents (both individuals and organisations) were supportive of an additional threshold.

6.103 In reaching an assessment of the differing approaches, I have given special consideration to what is most suitable for Northern Ireland, with particular regard to these responses. I have concluded that there is a strong – arguably overwhelming – case for the introduction of statutory aggravations as comprising existing basic offences where the statutory aggravation reflects identity hostility.

6.104 A statutory aggravation could apply to **any** offence and thereby allow any criminal offence to be aggravated – in my view, this would be a significant improvement to the current situation in England and Wales under the CDA 1998.

6.105 In recommending this, I am essentially following the Scots model which has been shown to be a straightforward and effective way to mark out hate crime.

6.106 I therefore recommend (following on from recommendation 2 in chapter 5):

Recommendation 3

If the recommendation at 2 is accepted and made into law, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary and should be repealed and replaced by suitably drafted consolidated hate crime provisions.

For the avoidance of doubt, those Articles of the 2004 Order providing for higher maximum sentences for certain criminal offences should be retained.

6.107 In this regard, it is noted that 83% of organisational respondents were of the view that the 2004 Order should not continue to be the core method of prosecuting hate crimes in Northern Ireland. When one adds individuals to the mix, the total percentage in favour of repealing the 2004 Order was 72%.

6.108 In the online survey, almost 60% of respondents felt that the law should be the same as in England and Wales, while 74% agreed that the law should be the same as in Scotland.

6.109 Thus, the majority of respondents indicated a preference for the introduction of the statutory aggravation model instead of the enhanced sentencing model. Answers focused on two main themes; the perceived weaknesses of the enhanced sentencing model and the perceived benefits of the statutory aggravation model as discussed above and in the consultation paper.

6.110 In view of the fact that many of the most relevant offences had maximum sentences increased by the 2004 Order, no increase in maximum sentences for any criminal offence would be required, with the possible exception of the communications offences discussed in chapter 13.

6.111 I therefore recommend:

Recommendation 4

If the recommendations at 2 and 3 above are accepted, no increase in maximum sentences for any criminal offence is required.

6.112 I am of the view that the structure of Section 28(1) of the CDA 1998 can be used as the basis for building a statutory aggravation model, incorporating aspects of the Scots model where appropriate and reflecting academic criticism of the current model.

6.113 Recommendations 7 and 8 in chapter 2 above set out a possible template for such a model offence.

6.114 I also recommend:

Recommendation 5

While I am content to retain the notion of 'hostility', I am satisfied that the introduction of a wider range of attitudes such as 'bias, prejudice, bigotry or contempt', may well prove beneficial, particularly as there is no standard legal definition of 'hostility'.

6.115 I believe that such a change will also be seen as fair labelling and as providing more certainty in understanding the nature of the species of offending.

6.116 After considerable thought, I also make the following recommendation:

Recommendation 6

I am persuaded that a variation of the 'by reason of' threshold should be added as a third threshold to supplement the current thresholds of (a) demonstration of hostility, and (b) motivation.

6.117 In view of the reservations expressed by distinguished lawyers such as Lord Bracadale, I hesitated before coming to this recommendation but I believe, inter alia, that the current thresholds under the CDA 1998 are seriously failing disability victims and that not to recognise and address this serious issue would be to continue to fail such victims in Northern Ireland.

6.118 So, a draft clause in any new Hate Crime Bill in Northern Ireland could read as per the recommendation below:

Recommendation 7

Adopting Section 28 of the Crime and Disorder Act 1998 as a starting point, its equivalent in Northern Ireland could read:

. . . Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this Article if:

(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of one or more of (name the protected characteristic/s); or

(b) The offence is motivated (wholly or in significant part) by hostility bias, prejudice, bigotry or contempt towards members of (name the protected characteristic/s) based on their membership (or presumed membership) of that group/s; or

(c) The offence is committed (wholly or in significant part) by reason of hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of (one or more of the protected characteristic/s).

(d) However, if:

(i) the basic offence is proved but;

(ii) the aggravation is not proved, the offender's conviction is as if there was no reference to the aggravation and the conviction will be solely for the basic offence.

6.119 I believe that the proposed subsection (d) is important to make it clear what the situation would be in the event that the jury – or district judge – was not satisfied that the aggravation had been proven beyond reasonable doubt but was satisfied that the basic offence had been committed. This follows the logic of the proposed Section 15(5)(a) of the Domestic Abuse and Family Proceedings Bill (Northern Ireland) 2020.

6.120 It has been argued that the 'by reason' test may be problematic if the protected characteristics are extended to include gender. This test may potentially be too broad for gender and may include all cases of domestic or sexual violence. To avoid this unintended consequence, it may be better to consider a mixed group selection and animus model, which might read "The offender selected the victim by reason of hostility, bias, prejudice, bigotry or contempt towards the victims 'group identity.'" – or some variant of those words.

6.121 Alternatively, any new legislation could make it clear that certain classes of offence, such as domestic violence, were excluded from the reach of the legislation.

6.122 Arguably, this would allow a broader group selection test to be used and would remove the need for 'hostility' and, instead, include only cases where there is some element of bias, prejudice bigotry or contempt towards the victim because of their identity.

6.123 It would be vitally important to provide a consequential section to that described above - in this respect I recommend as follows:

Recommendation 8

A consequential section to that described in Recommendation 7 should read:

<u>Consequences of Aggravation</u>

(2) When it is proved that the offence is so aggravated, the court must –

(i) State on conviction that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated by reference to one or more of the protected characteristics;

(ii) Record the conviction in a way that shows that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated, by reference to one or more of the protected characteristics;

(iii) In determining the appropriate sentence, treat the fact that the offence is so aggravated as an aggravating factor that increases the seriousness of the offence; and

(iv) In imposing sentence, state (a) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for the difference or (b) otherwise, the reasons for there being no such difference.

6.124 This proposed section follows closely on current Scots law and the proposed Clause 2 in the current Hate Crime and Public Order (Scotland Bill) 2020.

6.125 Questions on these proposed consequences were asked in the consultation paper. When respondents were asked whether or not the court should state on conviction that the offence was aggravated, 88% of respondents agreed that it should. A number of respondents argued that it was of particular importance to victims that the court state on conviction that the offence was aggravated, thus providing reassurance to victims that the hate motivation and its impact was both acknowledged and considered important by the courts.

6.126 A further question asked respondents whether or not the court should record the conviction in a way that shows that the offence was aggravated.

6.127 Overall, 84% of respondents agreed with this proposition. It was felt that such a requirement would have important effects both in terms of potential perpetrators and re-offending. It was further argued by some respondents that such a requirement would provide reassurance to victims that the hate element was being taken seriously by the courts and would contribute to improve monitoring of trends and statistics on hate crime.

6.128 80% of respondents agreed that the court should take the aggravation into account in determining the appropriate sentence.

6.129 Question 25 (Part One) asked respondents:

> In dealing with an aggravated offence, should the court state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of the reasons for that difference?

6.130 91% of organisational responses and 78% of individual responses agreed with this proposal.

6.131 91% of those who answered the online survey agreed that the court should explain how the aggravation has affected the sentence imposed.

6.132 Among reasons given in favour of the proposal, it was argued that such a requirement was essential for clarity, transparency and to ensure the effective implementation of the statutory aggravation model. Some respondents felt that it would help to address problems with the current hate crime legislation, particularly the issues of underutilisation and under-reporting.

6.133 Amongst a small group of organisations who disagreed, the *Bar of Northern Ireland* argued that a detailed explanation from the judge was unnecessary and could detract from other aspects of the legal process. It noted:

> It is the experience of the *Bar* that the judiciary do treat hostility as an aggravating factor when sentencing and state this in open court. As stated above, the judiciary conduct a careful and weighted assessment of aggravating and mitigating factors when assessing the starting point of a sentence. However, we take the view that to indicate precisely how the hostility affected the sentence could disturb this careful assessment.

6.134 Question 25 (Part 2) asked respondents should the court, in dealing with an aggravated offence, otherwise state the reasons for there being no difference in sentence.

6.135 Such a situation might well occur, for example, where there were exceptional mitigating circumstances.

6.136 Overall, 87% of respondents agreed that, in dealing with an aggravated offence the court should otherwise state the reasons for there being no such difference. In the online survey, 82% of those who responded agreed that the court should explain the reasons for there being no difference in sentencing as a result of the aggravation.

6.137 There was a strong consensus that this was essential for transparency in decision-making. Respondents argued that this was particularly important for victims to ensure understanding, 'closure' and to promote confidence in the justice system.

6.138 There is a subtle but important difference between the proposed requirement at Section 2, (iv) above and similar proposals in the Domestic Abuse and Family Proceedings (Northern Ireland) Bill 2020, presently under consideration by the Assembly.

6.139 In that Bill, in dealing with the requirements on the court following a conviction of an aggravated offence when the victim is under 18 years of age at the time of the behaviour constituting the offence, the proposed Section 8(d) reads:

> (d) In imposing sentence, **explain** how the fact that the offence is so aggravated affects the sentence imposed. [my emphasis]

6.140 Under this proposal, the judge is required **only** to give an explanation but not required to state what the sentence would have been without the aggravation.

6.141 Sentencing Guidelines in England and Wales are equally prescriptive on this issue. In that jurisdiction, the judge should say publicly what the appropriate sentence would have been without the aggravation.[85]

[85] see the judgement in R v Kelly and Donnelly (2001) 2 |Criminal Appeal Reports (S) 73 CA.

6.142 In his review of hate crime legislation in Scotland, Lord Bracadale recommended that the requirement to state the difference in sentence to reflect any aggravation was considered overcomplicated and not to serve a clear purpose. It was argued that while the sentencer could still give any details considered relevant, this should not be required in legislation. He recommended that there should no longer be a requirement to state the extent to which the sentence imposed is different from that which would have been imposed in the absence of aggravation.

6.143 However, after further consultation, the *Scottish Government* decided not to accept this recommendation. It argued:

> It is apparent that if the court decides that no increase in the sentence is appropriate as a result of the aggravation then this may lead to disappointment and possibly even disillusionment on the part of the victim, the victim's family and the wider community. However, if this step was removed, the *Scottish Government* consider that this could result in even more disappointment due to the fact that no explanation by the court would be necessary as to why the sentence was not increased. Therefore, by retaining this step the *Scottish Government* believe the process would, in general terms, be more transparent and would lead to a better understanding of sentencing decisions.
>
> If this step is retained and the sentence is increased, the reasons for such an increase will continue to be set out by the court which will lead to greater transparency in sentencing decisions and send a clear message to perpetrators and the wider community that the courts view such behaviour as unacceptable and hopefully act as a deterrent.
>
> The *Scottish Government's* view is that the requirement to state in open court the extent, if any, that the sentence has been increased does actually serve a clear purpose and is important in sending a clear message that such crimes are taken seriously by the courts, makes sentencing decisions more

transparent and can be helpful in supporting victims of crimes.[86]

6.144 The majority of respondents who offered a definite view to this question in the consultation paper issued by the *Scottish Government* agreed with the *Government's* proposal to retain the requirement to state in open court the enhancement, if any, of the sentence.

6.145 The proposed model on this issue for the Domestic Violence and Family Proceedings (Northern Ireland) Bill 2020 essentially follows the recommendation of Lord Bracadale, arguing that requiring the court to **explain** how the sentence was affected rather than **requiring** it to state the amount by which the sentence has been adjusted avoids a number of concerns raised in the Scottish review and ensures that the court makes public that it has factored the aggravation into the sentence calculation.

6.146 Although it is normally desirable in the interests of consistency for similar tests to feature in criminal legislation, I am persuaded by the arguments of the *Scottish Government* and the consensus of opinion from respondents to the consultation process that the court should be required to state the amount by which the sentence has been adjusted where the aggravation is proved.

6.147 It is accepted that such a prescriptive process is unusual but not unique.

[86] The Scottish Parliament, *Hate Crime and Public Order (Scotland) Bill*, Policy Memorandum, SP Bill 67–PM 1 Session 5 (2020) paras 100 to 105. https://beta.parliament.scot/bills/hate-crime-and-public-order-scotland-bill

6.148 Article 24(5) of the Criminal Justice (NI) Order 1996, in relation to the making of Custody Probation Orders, provides that:

> *A court which makes a Custody Probation Order **shall** state the term of the custodial sentence it would have passed under Article 20 if the offender had not consented to the Order. [my emphasis]*

Chapter 7(1)

Protected Groups – Should Additional Characteristics be Added? Part 1

CHAPTER 7

PROTECTED GROUPS – SHOULD ADDITIONAL CHARACTERISTICS BE ADDED?

Part 1 - The basis for selection of protected characteristics including discussion of sex/gender.

7.1 In recommending new hate crime legislation for Northern Ireland, it is also necessary to address the categories of protected characteristics and the question of whether or not there is a need for additional categories of protected characteristics to be added.

7.2 The characteristics presently protected under the law in Northern Ireland are race, religion, sexual orientation and disability.

7.3 Article 2 of the 2004 Order provides that where an offence was aggravated by hostility, the court shall treat that as an aggravating factor in sentencing, which increases the seriousness of the offence, and must state in open court that that is the case. The offence is aggravated by hostility if the hostility is based on membership of a racial group, a religious group, sexual orientation group or disability of the victim.

7.4 The 2004 Order provides that the definition of 'racial group' is to have the same meaning as that used in the Race Relations (Northern Ireland) Order 1997 (the 1997 Order). In that legislation, racial group as defined in Article 5(1) as:

> *A group of persons defined by reference to colour, race, national or ethnic or national origins*.

7.5 Article 5(3) of the 1997 Order explicitly states that the definition includes the Irish traveller community and excludes a group of persons defined by reference to religious belief or political opinion.

7.6 Article 2(5) of the 2004 Order sets out the other relevant definitions:

- *'disability' means any physical or mental impairment;*
- *'religious group' means a group of persons defined by reference to religious belief or lack of religious belief;*
- *'sexual orientation group' means a group of persons defined by reference to sexual orientation.*

7.7 These protected characteristics are generally accepted and are the most commonly protected in comparable jurisdictions. I have concluded that the current categories of protected characteristics should remain in the law of Northern Ireland. The terms of reference for the review ask it to consider, in particular, whether new categories of hate crime should be created for characteristics such as gender and any other characteristics which are not currently covered.

Addition of any new protected characteristics: key issues for consideration

7.8 Outside of the core groups of protected characteristics such as race, national origin, ethnicity and religion there is a general lack of consensus internationally as to which characteristics should be protected under hate crime law. The answer very much depends on the culture of the society and public attitudes at a given moment in time.

7.9 The *Organisation for Security and Cooperation in Europe (OSCE)* identifies "gender, age, mental or physical disability and sexual orientation" as characteristics that are quite frequently protected throughout its 57 member states[87].

7.10 As indicated in Chapter 8 of the consultation paper, it is difficult to determine which groups should be protected. One academic member of the Core Expert Group, Dr Jennifer Schweppe, has argued that:

> By singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection – legal protection which has an enormous impact on the offender during the sentencing stage. When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind.[88]

7.11 The other obvious difficulty is that extending legislation to a wide range of new characteristics means creating so many different priorities that nothing is truly a priority and runs the risk of undermining the purpose of having hate crime provisions in the first place. As Chakraborti says:

> Whether because of greater resources, a more powerful voice, public support for their cause or a more established history of stigma and discrimination, campaigners working to support certain strands of hate crime victim will invariably be able to lobby policymakers harder than other potential claim makers.

[87] OSCE Office for Democratic institutions and Human rights *Hate Crime Laws: a practical guide*: Poland: OSCE ODIHR (2009)

[88] Jennifer Schweppe, 'Defining Characteristics and Politicising Victims: A Legal Perspective', *Journal of Hate Studies,* 10:1 (2012) p178.

> It is that capacity to 'shout louder' that can sometimes influence who receives protection from hate crime laws and who does not, meaning that some victims of hate crime may not receive the recognition they expect or deserve.[89]

7.12 However, whilst I acknowledge that issue, it is necessary to consider on its merits inclusion of any characteristic if a sufficient justification is proven.

7.13 In the consultation paper I noted that, in embarking on this exercise, it is wise to remember that it is a process fraught with difficulty, requiring difficult judgements to be made regarding the inclusion or not of a particular group.

Academic analysis

7.14 There is a large body of academic literature that helpfully informs the general debate about how to consider protected characteristics. Haynes and Schweppe argue that perhaps the only thing that can be said with any degree of certainty regarding protected characteristics in hate crime legislation is that there is no agreement or consistency in how we determine whether a characteristic is protected or not. They observe that:

> Each approach has value, and is attractive. Mutability, for example, is a neat, pragmatic solution which . . . allows us to clearly delineate which characteristics ought to be included or not. Requiring an evidence base to determine protected groups is also a compelling suggestion, but the absence of evidence in this context does not mean the absence of a problem, given the groups involved. There is no means by which a test can be developed which can operate definitively and across cultural and legal contexts to determine

[89] Neil Chakraborti, 'Framing the Boundaries of Hate Crime', in *The Routledge International Handbook on Hate Crime,* eds Nathan Hall *et al*.,(Oxon: Routledge, 2015) p17.

> which characteristics are protected by hate crime legislation. However that does not mean that the solution is to take a haphazard approach to determining in/exclusion…In the first instance, any such legislation must conform with core human rights principles…. When considering whether a particular characteristic is to be protected or included in hate crime legislation, it must first conform with the principles of equality and certainty. If it does not pass this initial test . . . it cannot be included. For example, 'political opinion' is so vague as to be prohibitively uncertain and could not be included in legislation.[90]

7.15 A number of authors, including Walters, have suggested that an evidence base is an essential prerequisite in considering what further groups should be protected. This would require the legislature to consider whether there is sufficient evidence of hate (or as I have recommended earlier, hostility, bias, prejudice, bigotry or contempt).

7.16 Walters and his colleagues advise that the law "must not be forward-looking in preventing harms that we think might occur sometime in the future".[91] They accept that there need not be a long history of hate and hostility against a group of individuals, but it will be important that there is evidence to show that certain groups are being subjected to sustained forms of targeted victimisation. As they say:

> Evidence of prolific types of targeted abuse may well mean that certain new characteristics are added immediately to the criminal law (after a review was conducted by the legislature), or it may mean groups are added in a piecemeal way over longer periods of time as and when certain types of targeted violence develop into serious social problems that serves to justify additional criminal proscription.[92]

[90] Amanda Haynes and Jennifer Schweppe, Frameworks for determining protected characteristics in hate crime legislation (University of Limerick 2020)p39.
[91] Walters *et al*., Hate Crime and the legal process. Options for law reform. Final report. October 2017. p210.
[92] Ibid, p210.

7.17 Such an approach would allow for the gradual development of a framework which is adaptable to emerging or newly recognised forms of 'hate crimes', such as crimes against homeless people or alternative subcultures.

7.18 Mason and Dyer warn, however, that if this approach was applied as sole qualification in the context of the criminal law, it could result in child sex offenders being deserving of protection also, which they argue is an untenable outcome.[93] In this context, it would be important for the legislature to decide whether or not any proposed characteristic is worthy of respect in a democratic society, and compatible with human dignity and the fundamental rights of others.

7.19 As noted in the consultation paper (para 8.12):

> The Scots academic report also gave consideration to including a residual category in Scottish hate crime legislation as some other jurisdictions do (including Canada, New South Wales and New Zealand). This would mean that the list of protected groups is not closed and has the advantage that the courts could respond to societal changes or other unforeseen circumstances. The disadvantage of such an approach is that it can lead to unanticipated and unwanted consequences.

However, as Chalmers and Leverick, comment:

> This is evident from New South Wales, where the fact that the list of protected groups is not exhaustive has allowed the courts to extend hate crime provisions to offenders motivated by hostility towards paedophiles, a troubling outcome given the expressive value that hate crime laws have of signalling society's respect for the groups that are protected. It is perhaps instructive in

[93] Gill Mason and Andrew Dyer, A Negation of Australia's fundamental Values: Sentencing Prejudiced Crime. *Melbourne University Law Review,* 36:3 (2013) p872-917.

this regard that *the New South Wales Law Commission* has recommended amending the law so that the list of protected groups becomes a closed list without a residual category.[94]
It is noted that in a federal system the courts have such a judicial role – this may not be the best way forward – a legislative framework is surely the issue, not the expansion of judicial discretion.

7.20 Another academic member of the *Core Expert Group,* Chara Bakalis, argues that utilising those characteristics already present in anti-discrimination legislation would provide a normative basis for hate crime legislation.[95]

7.21 She does not advocate a mindless adoption of equality protections in the criminal law in the context of hate crime legislation; rather, she requires a further stage which assesses whether the group named **requires** the extra protection afforded by the criminal law. Such an exercise should be governed, she observes, by the principle of minimum criminalisation; this would result in legislation with a relatively limited number of characteristics being protected.

7.22 However, like Mason and Dyer, she argues that an open or inclusive approach is not attractive and that her approach would not necessarily result in unequal protection to victims if the operational and expressive functions of hate crime legislation were decoupled.

7.23 Clearly, if there is **no** evidence that a group is in need of protection, that group should not be included in hate crime legislation. The justification for inclusion should be based on a 'need for protection' criterion.

[94] Chalmers and Leverick, *A Comparative Analysis,* p67.

[95] Chara Bakalis, 'The Victims of Hate Crime and the Principles of the Criminal Law', *Legal Studies,* 37:4 (2017) p718-738.

7.24 There is a danger, however, in over reliance on complaints data, including police recorded crime data. As Haynes and Schweppe observe:

> Complaints data is recognised as having limited utility in determining issues such as prevalence. We know that police recorded hate crime data is limited by a range of factors including the categories that the police agency recognises for recording purposes, as well as low rates of reporting. Experience suggests that a low number of cases may also be associated with the existence of obstacles in access to justice, reflecting, for example, difficulties in obtaining necessary evidence or a belief on the part of the victims that the justice system does not provide for a meaningful remedy. (ibid. pn 90).

Whilst this is true, data is a basis for consideration, not a definitive test of necessity.

7.25 Having reviewed the academic arguments, I find myself in general agreement with the principle that if a characteristic is subject to civil law protection under the Equality Act 2010 in England and Wales, then it is justifiable in principle to extend this protection through the criminal law, though it may not be appropriate or necessary in practice in all cases. Notwithstanding that the Equality Act 2010 does not apply to Northern Ireland, it sets a benchmark for equality and, on that basis, I believe that the explanation based on equality provides justification for the selection of further protected groups.

7.26 Bakalis observes:

> Equality is able to explain why hatred of certain groups is punished more severely than other motives: the hostility demonstrated to certain groups is more blameworthy because it undermines the equality enterprise. An explanation based on equality is able to show why hatred of specified groups causes a different type of harm to society than that of the underlying offence: the harm is the damage to equality that results

> from hateful behaviour. In this way, equality is the underlying rationale for hate crimes and can serve as a doctrinal justification for the criminalisation of hatred.[96]

7.27 I have concluded that equality principles provide an important influence in deciding whether or not to recommend any further protected characteristics within hate crime law.

Analysis of different characteristics as categories for possible inclusion as protected categories.

Gender

7.28 The review is specifically asked to look at gender as a potential new protected characteristic.

7.29 The *UK Government* defines gender as:

> A social construction relating to behaviours and attributes based on labels of masculinity and femininity; gender identity is a personal internal perception of oneself and so the gender category someone identifies with may not match the sex they were assigned at birth. Where an individual may see themselves as a man, a woman, as having no gender, or as having a non-binary gender – where people identify somewhere on a spectrum between man and woman.[97]

[96] ibid. fn 8 p 734.

[97] Office for National Statistics, '*What is the difference between sex and gender? Exploring the difference between sex and gender, looking at concepts that are important to the sustainable development goals'* (21 February 2019).

7.30 In chapter 8 of the consultation paper, I observed that there has been intense debate in many other countries as to whether it is necessary to include gender and gender identity as separate protected characteristics when it comes to hate crime legislation.

7.31 If it is agreed that gender should become a protected characteristic, it may be prudent, in the interests of clarity and for the avoidance of any doubt, to have the two characteristics specifically referred to in any reformed legislation. Any informed analysis of gender and gender identity involves examining the wider spectrum of gender identities which includes cisgender, transgender and non-binary gender identities.

7.32 Including gender as a protected characteristic would provide protection to all genders. The vast majority of cases raise the question of affording criminal law protection to females.

7.33 Research published by the *Fawcett Society* in 2019 using official data sources found that there were 67,000 crimes based on gender in that year – 57,000 of which were targeted at women.[98]

7.34 In England and Wales and in Scotland, but not currently in Northern Ireland, transgender identity is protected in one way or another. None of the UK jurisdictions currently include gender per se under hate crime legislation.

7.35 The inclusion of gender in any hate crime protected category is not straightforward. Gender continues to divide advocates of hate crime laws with some recognising the misogynistic nature of much sexual and domestic violence against

[98] https://www.fawcettsociety.org.uk/news/new-fawcett-data-reveals-gender-is-most-common-cause-of-hate-crime-for-women

women, but others express concern that gender will swamp other hate crime offences and argue that it is better addressed under criminal laws already developed for this purpose. The inclusion of gender does not appear to be a settled view in public opinion.

7.36 Recently, the Independent review of hate crime legislation in Scotland recommended the inclusion of gender under Scottish crime legislation. Lord Bracadale stated:

> I am persuaded that there are patterns of offending which relate particularly to the victim's gender and which should be addressed through legislation which might be seen as falling under the hate crime umbrella.[99]

7.37 Lord Bracadale was persuaded to include gender because of the increased prevalence of online abuse targeted at women and increased cultural intolerance of sexual harassment. He hoped that categorising such behaviour as hate crime might achieve the following results:

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

(2) It would recognise the additional harm caused to the individuals involved and others who identify with them;

(3) It would have a symbolic value – giving security to community and 'send a message'; and

(4) It would allow for record-keeping, the collection of data, and a targeted response to offenders.[100]

[99] Lord Bracadale, *Independent Review,* p37, para 4.28.
[100] *Ibid, para 4.35.*

7.38 For various reasons, discussed later[101], the *Scottish Government* rejected Lord Bracadale's recommendation, but it did not disagree with the evidential basis for making the recommendation.

Other jurisdictions

7.39 Provisions for sex or gender hatred/prejudice offences are found in Canada; South Africa (draft Bill); and the following states of the United States of America: District of Columbia, Ohio, Maine, Vermont, West Virginia, Louisiana and Maryland.

Arguments in favour of gender and gender identity

7.40 In the consultation paper – at paragraph 8.20 – I noted a number of arguments that had been put forward in favour of including gender and gender identity. These were:

(a) Criminal harassment and abuse of women is frequently motivated or includes hostility based on their gender;

(b) Gender hostility crimes create wider societal damage; it is important that this is recognised by the criminal law;

(c) Adding gender and gender identity to the hate crime legislative provisions would communicate an important message that gender-based hate and associated offending is not tolerated by our society;

(d) Adding gender and gender identity would mean that there would be less of a focus on the 'sexual' motivations of offenders and more of a focus on the gendered prejudices that are frequently causal to crimes such as harassment, sexual assault and rape.

[101] paragraph 7.114 et seq.

Arguments against the inclusion of gender as a protected characteristic

7.41 Among arguments that have been raised against gender and gender identity are the following:

(a) Gender (including men) means that everyone would now be covered by hate crime legislation; therefore, it ceases to be about protecting disadvantaged or vulnerable groups, arguably diluting its function and symbolic significance;

(b) That in practice such provision blurs the distinction between sexism and misogyny, which risks causing a downgrading of the seriousness of misogynistic violence;

(c) Creating a separate offence of misogynistic harassment is a preferable way forward.

Online hate speech (see also Chapter 13)

7.42 There has been an alarming growth of hate speech online, much of which is directed at women. It is been estimated that an abusive or problematic tweet is sent to a female politician every 30 seconds.[102]

7.43 An investigation carried out by the *Belfast Telegraph* into the experiences of female MLAs in Northern Ireland and reported in the edition of 21 September 2020, noted the following:

[102] Amnesty International, *Troll Patrol Project* (2018). https://decoders.amnesty.org/projects/troll-patrol/findings.

- 70% of female MLAs have had sexist remarks made to their face by men;
- 75% of them have experienced sexism on social media;
- 26% of them said they had been sexually harassed during their political career at either Council or Assembly level.

7.44 A total of 27 of Northern Ireland's 32 female MLAs took part in the survey conducted by the newspaper's political editor, Suzanne Breen.

7.45 The '**Viewpoint**' leader in the paper on the same date noted: "Unsurprisingly perhaps, social media seems to lie at the heart of the problem, and 78% of the female MLAs surveyed said they had experienced sexism or harassment online. However, the fact is not new that social media is a toxic swamp, female politicians are not the trolls' only target….

….The only answer to this culture of impunity, whether among male politicians or keyboard warriors in their back bedrooms is a zero-tolerant approach to sexism and sexual harassment."

7.46 In its consultation paper of September 2020, the *Law Commission* noted that the extent of violent, sexist and sexualised abuse directed at women via social media platforms such as Twitter has been widely documented.[103] An enquiry carried out by the *Women and Equalities Committee of the House of Commons* in 2018 concluded that "sexual harassment affects the lives of nearly every woman in the UK".[104]

7.47 It is clear that, as the *Law Commission* has pointed out, women are disproportionately the victims of certain types of criminal offences including harassment and violent and sexualised abuse on social media platforms.

[103] Law Commission, *Hate Crime Laws,* p240.
[104] House of Commons Women and Equalities Committee, *Sexual harassment in the workplace: Fifth Report of Session 2017-2019* (HC 725) (25 July 2018) p14, para 28.

7.48 As the *Law Commission* noted in 2020:

> There is overwhelming evidence that women are disproportionately targeted for certain crimes. There is also evidence, testimony and some theoretical arguments to suggest that women are victimised in these ways because of prejudice and/or hostility towards their sex or gender.[105]

7.49 There appears to be little evidence to suggest that men are routinely targeted because of hostility and/or prejudice towards the fact that they are men.

7.50 It is true that online abuse is directed at men as well as women, but it appears to manifest itself particularly in relation to women because of prejudice towards their sex or gender.

7.51 In his review, Lord Bracadale found reliable evidence to demonstrate that *th*ere is a very significant problem of abuse (both online and off-line), assault and harassment which is directed at women for a reason related to their gender and which could and should be dealt with more effectively by the criminal law than is at present.

7.52 In light of this, a number of submissions made to the Scots review of hate crime, to the current review by the *Law Commission* for England and Wales, and to this review, have suggested that the focus should be on women either by using the word misogyny or other specific terms.

Consultation responses on: gender and gender identity

7.53 It is perhaps not surprising that there was no clear consensus from the consultation responses on the question of whether gender and gender identity should

[105] *Law Commission*, *Hate Crime Laws,* para 12.77.

be included as protected characteristics in Northern Ireland hate crime legislation. This was an important finding from analysis of the responses and underlines the challenges of legislating in this area.

7.54 Organisations were split in their views, with 55% 'for' and 45% 'against' the inclusion of gender and gender identity. In contrast, 92% of individuals were opposed to the inclusion of gender and gender identity.

7.55 In the online survey, 77% of respondents agreed that gender should be protected characteristic, whilst 74% felt that transgender identity should be similarly protected.

7.56 It is important to note that some respondents indicated in the narrative comments that they have differing views regarding the inclusion of gender and gender identity. For example, some who were supportive of gender did not agree that gender identity should be included as a protected characteristic.

7.57 Unhappily, the question was asked in a way that did not give respondents the opportunity to distinguish clearly between gender and gender identity. As a result the quantitative results should be read with a degree of caution.

7.58 In the case of organisational respondents, some held differing views on the inclusion of gender and gender identity, while others focused heavily on misogyny in their comments. Even among those supportive of gender there were differing views on whether this should cover both men and women.

7.59 Those who supported inclusion of gender and/or gender identity generally mentioned the arguments highlighted at paragraph 8.20 in the consultation paper and argued further:

- the inclusion of gender and gender identity is necessary to tackle misogyny and transphobia. There is a clear evidence base indicating that women and trans people are subjected to hate and hostility on these grounds, and more must be done to protect and support victims;

- their inclusion will avoid the creation of a 'hierarchy' of equality grounds and afford protection under the law to all equality groups who experience hate crime and were granted protection under the law;

- their inclusion is consistent with the legislative approach taken to other equality grounds, including disability, race, sexual orientation and religion;

- their inclusion is consistent with legislative approaches in other jurisdictions. For example, a number of other European countries have included gender and gender identity as categories of hate crime. Thirteen EU member states include gender identity as a protected ground and hate crime legislation in all other parts of the UK covers trans-phobic hate crime. It was also noted that the Scottish review (2018) has recommended the creation of a new statutory aggravation based on gender hostility[106], while a review (2018) of sex discrimination laws across the UK has recommended that misogyny should be legally introduced as a hate crime[107];

- among respondents who indicated general support for the inclusion of gender, there were mixed views regarding the inclusion of gender identity as a protected characteristic. Those who endorsed the inclusion of gender identity indicated this would provide protection to minority/vulnerable groups and, in particular, would provide a means of tackling transphobia; and

- those who are opposed to the inclusion of gender identity but supportive of gender – including *TransgenderNI* and women's sector organisations – pointed out that gender and gender identity were synonymous in meaning. They argued that the inclusion of both terms could create confusion in the application of the law and, at worst, may be taken to imply that trans people "have something less than a gender" (*TransgenderNI*).

[106] Lord Bracadale, *Hate Crime*, 2018.

[107] Fawcett Society, *Sex Discrimination Law Review*, (January 2018).

7.60 Several organisational respondents were of the view that there is a substantial evidence base verifying the prevalence of gender-based hate crimes, including online abuse, targeted specifically at women. In view of this, some called for the incorporation of the term 'misogyny' into the definition of gender. They offered a number of reasons for this including that:

- it would help to clarify the intention of the legislation and safeguard against it being used subversively, as might be the case for the inclusion of gender alone;
- it would allow for recognition of the perpetrator's motivation, and accurate recording of the frequency and severity of crimes motivated by hatred of women;
- it would help to address the 'normalisation' of misogynistic hate crime and, related to this, encourage reporting of such crimes; and
- to name misogyny as a hate crime would reinforce its seriousness with potential deterrent effects.

7.61 Some argued that the broad definition of gender was appropriate to ensure protection is afforded to all who are potentially vulnerable. The *Rainbow Project* stated:

> We believe that a broad and expansive characteristic of gender and sex should be included as a protected characteristic which include; sex, gender, gender identity and gender expression to include as many vulnerable people as possible.

7.62 A few respondents endorsed the inclusion of both men and women in the definition of gender. The *Equality Commission NI* recommended that:

> Hate crime legislation should equally protect both men and women. If a man or woman has been subject to a crime due to hostility or prejudice due to their gender, then this scenario should be protected within the legal framework . . . We recommend protections under the

> hate crime legislation for individuals who are presumed to have a characteristic, or who have an association with an individual with that particular identity, should also be extended to the grounds of age, gender, gender identity and intersex.

7.63 The *National Police Chiefs Council* argued that:

> It should be 'sex' rather than 'gender' as transgender is separately included and should be 'sex' rather than 'misogyny' because I believe that hate crime has its validity in society as a way of upholding human rights and not primarily to protect restricted groups. In other words the provision should apply both to men and women or males and females.

7.64 A number of respondents shared the view that the addition of gender was imperative to address misogyny specifically, but recommended this should be done through the indicator of sex, which it was noted is the relevant protected category in current anti-discrimination law.

7.65 Those respondents who were opposed to the inclusion of gender and gender identity as protected characteristics in Northern Ireland hate crime legislation offered a number of reasons.

7.66 A recurring argument was that the inclusion of gender and gender identity as protected characteristics would pose a serious threat to freedom of speech and religious expression. This view was particularly prevalent among faith sector organisations and individual respondents. These respondents argued that the inclusion of the proposed characteristics would further undermine meaningful discussion and debate, and related to this, they expressed concerns about the potential criminalisation of the expression of religious beliefs and opinions.

7.67 Arguments from religious groups expressed concerns that if gender was a protected category, this might jeopardise religious freedom of expression. In their submission to the review, the *Public Morals Committee of the Evangelical Presbyterian Church* argued that to include gender and gender identity as protected characteristics:

> [T]akes away the right of individuals to have their own thoughts and beliefs of what is gender, and what is gender identity, Bible believing Christians are bound in conscience to what God says, to make these issues a matter of 'hate' criminalises our beliefs and our religion.

7.68 Freedom of speech is an important concern for the review and is considered in detail later in this report. It is essential that the importance of upholding the protection for freedom of speech guaranteed by the European Convention on Human Rights and Fundamental Freedoms is fully understood and articulated.

7.69 That said, it is important to underline the fact that the inclusion of any particular protected characteristic does not of itself threaten freedom of expression.

7.70 The proposed model for aggravation of offences, essentially following the Scottish model, is about the use of the criminal law and this requires a basic criminal offence to have been committed. There can be no question of policing people's thoughts and beliefs. That truly would be Orwellian. It is **only** when thoughts and beliefs are translated into criminal activity that the law is justified in intervening.

7.71 Some respondents who opposed the inclusion of gender and gender identity as protected characteristics suggested that the inclusion of gender would have the counter-productive effect of diluting the overall protection afforded by hate crime legislation and, consequently, diminish its original function to protect vulnerable/minority groups.

7.72 Although most respondents within this group did not distinguish between gender and gender identity, the *Christian Institute* specified that their opposition was on the basis that "gender or gender identity would cover transgender identity". The *Christian Institute* drew attention to what was perceived as a significant debate and policy shifts at UK level around "transgenderism, as well as ongoing investigations concerning police handling of allegations of transgender hate crimes".

7.73 As such, it was suggested that these matters must be resolved prior to undertaking any steps to protect transgender within hate crime law.

7.74 One would hope that the clear ruling in the Miller case, *R(Miller) v College of Policing and Chief Constable of Humberside (2020) EWHC 225 (Admin),* discussed in full in chapter 3, regarding the checks and balance on police powers in handling hate incident complaints, will go a long way to allay such concerns.

Transgender identity

7.75 The consultation paper asked whether or not transgender identity should be included as a protected characteristic and hate crime legislation.

7.76 The current position in Northern Ireland is that transgender identity is not protected. It is protected one way or another in Scotland and in England and Wales, it having been accepted for some time in those jurisdictions that this is a particularly vulnerable group. Trans-phobic hate crime has been recognised as one of the monitored strands of hate crime by police forces in England and Wales since 2008.

7.77 The *PSNI* have carried out similar monitoring since 2011, even though transgender is not a currently protected characteristic. Although the volume of reported trans-phobic hate crime is relatively low, transgender issues and

trans people have become far more visible recently. Under-reporting is a particularly serious problem as trans-victims appear reluctant to engage with the criminal justice system.[108]

7.78 The *PSNI* provide quarterly figures noting incidents and crimes with a hate motivation in Northern Ireland.

7.79 In an update to 30 June 2020, this publication noted that trans-phobic incidents and crimes with a hate motivation saw the largest increases across all hate motivation strands, with 29 more incidents and 26 more crimes.[109]

7.80 According to official statistics in England and Wales, police recorded hate crime based on transgender identity rose by 37% to 2333 in 2018/19.[110]

7.81 It has been argued that if gender is to become a protected characteristic, this term should include transgender identity. A statute could simply list gender as a protected characteristic on the assumption that it would include transgender identity. Alternatively, any new law could be worded to specify that gender is inclusive of transgender identity.

7.82 There were very significant differences in opinion between organisational responses and individual responses on the issue of whether or not transgender identity should be included as a protected characteristic.

[108] Chakraborti and Garland, 'Hate Crime', p66.
[109] PSNI, *Incidents and Crimes, (*2020).
[110] Home Office, *Hate Crime*, England and Wales, 2018/2019 (15 October 2019). PSNI, *Incidents and Crimes, (*2020).

7.83 73% of organisations felt that it should, whereas 97% of individual responses argued that it should not.

7.84 Among organisational respondents there was widespread support for inclusion.

7.85 The *Public Prosecution Service* argued that:

> The evidence base is present to include transgender within the list of protected characteristics. The *PPS* have undertaken significant work with the LGBTQ community in recent months and the feedback at public engagement events and from key stakeholders is that a significant amount of trans-phobic motivated hate crime is going unreported to police. This covers a wide spectrum of offending, ranging from verbal abuse to physical assault.

7.86 The *Law Society of Northern Ireland* noted:

> Transgender relates to a particularly vulnerable group. Transgender issues and transgender persons are much more visible now. Hate crime based on this identity has increased during 2018 and 2019 according to reporting statistics. Transgender might be included as a separate protected characteristic under hate crime legislation in this jurisdiction.

7.87 Furthermore, it was argued that although trans-phobic hate crimes were recorded by the *PSNI*, in cases that proceed through the criminal justice system, the hate motivation is often dropped or misreported as sexual orientation due to the fact that transgender identity is not currently a protected characteristic. This in turn is said to lead to a lack of confidence among transgender people about how complaints will be dealt with, leading to negative impacts on levels of reporting.

Analysis

7.88 Supporters of inclusion observed that this was necessary to bring legislation in Northern Ireland into line with all other countries in the United Kingdom.

7.89 Respondents also highlighted the importance of an appropriate up-to-date definition of transgender which should be reflective of international standards. This is an issue raised in the consultation paper at paragraphs 8.33 to 8.35.

7.90 It will be recalled that in Scotland the term 'transgender identity' is defined in Section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 as:

> *(a) Transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender; or*
>
> *(b) Any other gender identity that is not standard male or female gender identity.*

7.91 In England and Wales, Section 146 of the Criminal Justice Act 2003 defines transgender identity as including:

> *References to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender re-assignment.*

7.92 These definitions have attracted significant criticism. For example, Schweppe and Haynes comment:

> To our minds, it is without question that these definitions require immediate amendment. The above definitions limit protection to those who choose to employ medical or surgical gender confirmation. Not all gender diverse people want or need to achieve conformity with society's gender norms. To restrict

> redress for hostility towards difference on the basis of gender only to those who intend to rectify the difference, or present as such, is arguably to use the protection of the law, and the threat of its removal, to enforce conformity. [111]

7.93 In the Hate Crime and Public Order (Scotland) Bill 2020, currently before the Scottish Parliament, clause 14(7) defines transgender identity as follows:

7.94 A person is a member of a group defined by reference to transgender identity if the person is: –

(a) a female to male transgender person,

(b) a male to female transgender person,

(c) a non-binary person,

(d) a person who cross-dresses.

Consultation responses: transgender identity

7.95 A number of respondents took the view that transgender identity should be included within the broader category of gender and gender identity arguing that this was perceived as more 'future proof' and the most up-to-date approach.

7.96 There was almost universal opposition to the inclusion of transgender identity as a protected characteristic among individual respondents. A significant proportion – 27% – of organisations also expressed their opposition. As noted above, 74% of respondents to the online survey agreed that transgender identity should be included as a protected characteristic.

[111] Jennifer Schweppe and Amanda Haynes, 'You can't have one without the other: "gender" in hate crime legislation', *Criminal Law Review* (2020) p162.

7.97 Respondents who took this view made a number of common arguments. These were centred on freedom of speech and religious expression, equal protection for all under the law, and in a few cases, repudiation of 'transgenderism'. Organisational respondents who opposed inclusion were mainly faith groups.

7.98 So, for example the *Evangelical Protestant Society* argued:

> We strongly oppose these proposals, for their incorporation would merely further threaten freedom of expression.

7.99 The *Evangelical Presbyterian Church Public Morals Committee* stated that:

> Bible believing Christians believe that God has made humanity as male and female only. Transgender is outside of God's goodwill for the world, and to seek to protect something that is anti-God in our view, is not good for our society.

Intersex

7.100 The term 'intersex' is generally applied to people who are born with variations of sex characteristics. On the question of whether or not intersex status should be included as a protected characteristic, 71% of organisations supported this, whereas 89% of individuals opposed it. 70% of respondents to the online survey agreed that intersex status should be included as a protected characteristic.

7.101 Intersex status is not a protected characteristic under the current hate crime legislation in Northern Ireland.

7.102 The term 'intersex' is generally applied to people who are born with variations of sex characteristics. The *United Nations Office of the High Commissioner for Human Rights* uses the following definition:

> Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit the typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.[112]

7.103 Lord Bracadale's review recommended that intersex be treated as a separate category rather than a subcategory of transgender identity under any reformed hate crime legislation. Although it is uncommon to see intersex listed as a protected characteristic in comparative hate crime legislation, a 2017 Scottish study on levels of hate crime against the LGBTI community found that 77% of a relatively small sample of intersex respondents had been a target of hate crime.[113]

Consultation responses: intersex

7.104 Those in favour of the inclusion of intersex status as a protected characteristic argued that this was important in order to provide parity for victims and recognition of the specific harm of hate crime on grounds of being intersex.

7.105 However, there were some differing opinions. *TransgenderNI* argued that:

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[112] United Nations Office of the High Commissioner for Human Rights, 'Fact Sheet: Intersex'. https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf

[113] Hannah Pearson and Dr Jasna Magic, *Scottish LGBTI Hate Crime Report 2017,* (Equality Network, 2017).

> Trans and intersex communities are overlapping and interconnected but still maintain distinct identities, experiences and needs. Many intersex people would not identify themselves as transgender, and it is important therefore to be able to capture the nuanced and diverse experiences of inter-phobia in hate crime law.

7.106 *Victim Support NI* stressed the importance of distinguishing between transgender and intersex identities noting that:

> Intersex people should be covered separately, as this is not the same thing as trans or non-binary identity, and the law should be clear and factually accurate in this regard. While it may be rarer for such types of hate crime to exist, this is nonetheless a vulnerable group who are often marginalised within society, and therefore it would be prudent to legislate for those circumstances where hate is directed at intersex folks on the grounds of their identity.

7.107 The majority of those who opposed the inclusion of intersex status as a protected characteristic were individual respondents. Many of these were opposed to hate crime legislation generally as well as opposed to the category of intersex. Many respondents focused on the importance of freedom of speech as well as equal treatment for all under the law.

7.108 For example, one individual commented:

> Selecting certain characteristics as being more entitled to special treatment under the law is discriminatory. All people are entitled to respect and equal treatment – thus creating special categories is not giving equal respect or treatment under the law. Such legislation restricts freedom of speech which is a fundamental right.

Discussion and analysis

7.109 There is very strong evidence, supported by strong academic argument, to suggest that women are victimised and disproportionately targeted for certain crimes including abuse (both online and off-line), assault and harassment directed at them because of prejudice and/or hostility towards their sex or gender.

7.110 Writing in the *Times* (26 September 2020), the columnist Janice Turner noted that femicides in the United Kingdom are recorded at the rate of around 150 per year. The number never drops. She notes:

> This grim recitation should be a call to arms, but has become a rollcall... Men kill their wives and girlfriends across the world. It's sad but normal. What can you do?
>
> So, what if such killings were officially classified as misogynist hate crimes, along with sexual assaults, rape and domestic violence? It might be instructive for society if this staggering tower of misogyny – 1.6 million women experiencing domestic abuse in 2019 alone – was starkly visible.
>
> *Nottingham Police* classified misogynist hate crimes as those 'targeted at women by men simply because they are women' . . .

Turner concludes her powerful piece with these words:

> Until recently, I'd have opposed misogyny becoming a hate crime on the grounds that there was too much of it. Would police have time to do anything else? But look into the lives of any of those 150 dead women, read about the unreported incidents which foretold their deaths. Then tell me, if making your battered, bleeding girlfriend lick up paint isn't a hate crime, what is?

7.111 These arguments reflect the findings of Lord Bracadale and his recommendation that there should be a new statutory aggravation based on gender hostility.

7.112 However, a number of women's organisations are strongly opposed to this approach, calling for the development of a stand-alone offence for misogynistic harassment.

7.113 This would arguably have the benefit of using the symbolic power of the criminal law to clearly label offending behaviour as such. However, one difficulty is setting out the parameters of such an offence. A second difficulty is that such an offence would overlap with existing offences and therefore could cause confusion for practitioners and tend towards inconsistent handling of similar cases.

7.114 On this difficult issue, Lord Bracadale noted:

> Although I agree that the essence of the conduct which we are seeking to cover is usually against women, it is not inconceivable that there could be hostility against a man (or non-binary person) based on their gender. I have some concern that an approach which focused only on hostility towards women would risk stereotyping (all) men as perpetrators and (all) women as victims, which I do not consider to be an accurate or helpful message. The human rights-based approach suggests that having a consistent approach which is capable of applying in equivalent cases, regardless of the sex of the victim, is better. . . . It is important to be clear here that it is not just a question of the identity of the victim: there must also be evidence of hostility based on gender. Having a provision which is capable of applying to everyone and not just to women should help to reinforce that point.[114]

[114] Lord Bracadale, *Independent Review,* para 4.43.

7.115 The concerns raised by a number of women's organisations in Scotland have led to the *Scottish Government* declining to follow Lord Bracadale's proposal to include gender as a protected characteristic.

7.116 The *Scottish Government* have made a commitment, in principle, to developing a stand-alone offence on misogyny and established a working group to consider how the criminal law deals with misogynistic harassment.

7.117 The Hate Crime and Public Order (Scotland) Bill contains an enabling clause providing that Scottish ministers may by regulations add the characteristic of sex to the list of protected characteristics (see clause 15).

7.118 Whilst I believe there may well be merit in examining the idea of a stand-alone offence involving misogynistic harassment, I feel that victims, and women in particular, would be ill-served by the substantial delay occasioned by such an exercise. Such a stand-alone offence is likely to be the subject of protracted delay and possible disagreement.

7.119 A strong case has been made for offering the protection of the criminal law on the ground of sex/gender and this opportunity may be lost for many years if it is not grasped as a result of this review. That said, going forward in the future it might well be possible for a stand-alone offence of misogyny to be introduced.

7.120 I am likeminded with Lord Bracadale that any such protection should be gender neutral for the reasons set out above.

7.121 In that context, it is relevant to mention that the Domestic Abuse and Family Proceedings Bill (2020) (Northern Ireland), presently under consideration by the Assembly, is gender neutral even though it is perceived that most domestic abuse is

perpetrated by males. A similar point can be made in relation to the proposed legislation in Northern Ireland to deal with stalking.

Terminology: gender or sex?

7.122 In this section, the next important question is to resolve the adoption of appropriate terminology. In his final report, Lord Bracadale used the term gender rather than sex on the grounds that that is the term used by most organisations and consultation respondents.

7.123 In its recent consultation paper, the *Law Commission for England and Wales* suggested that both terms can be used. It notes:

> The term sex is more restrictive than gender – sex does not also incorporate gender. If a trans-woman were targeted for misogynistic criminal conduct, she might not be captured by sex-based protection, but would be by gender-based protection. Gender is more inclusive than sex, indeed it encompasses sex; a person's biological sex is one means by which they might define their gender.
>
> If we were to decide between gender or sex, our provisional view is that the more inclusive term of gender, as opposed to sex, would better capture a wider range of victim experience. This is consistent with the Bracadale review in Scotland, which recommended a statutory aggravation in Scotland on the basis of "gender" rather than "sex".
>
> However it might not be necessary to decide between gender or sex – for example, the law could use "sex or gender". This will accommodate victims who feel they have been targeted based on their sex characteristics, whilst also including those whose gender identity is not necessarily tied to their biological sex.[115]

[115] Law Commission, *Hate Crime Laws*, paras 12.220 - 12.222.

Conclusions and analysis

7.124 If the protected characteristic is expressed as sex/gender, then it would not be necessary to include transgender identity specifically as a separate protected characteristic.

7.125 For the avoidance of doubt, any new statute could be worded to inclusively and explicitly specify in the definition section that gender is defined as including gender identity and gender expression.

7.126 I note that the terms 'gender identity and gender expression' feature in section 718.2 (a) (i) of the Canadian Criminal Code. In New Zealand, section 9 (1) (h) of the Sentencing Act 2002 includes 'gender identity' as a protected characteristic in hate crime legislation.

7.127 In the USA, the District of Columbia, Hawaii, and Nevada include gender identity and gender expression in their law.

7.128 Closer to home, directive 2012/29/EU of the *European Parliament and of the Council* of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, also referred to as 'the Victims Directive', includes 'Gender, gender expression, gender identity and sexual orientation' in its preamble as suggested protected characteristics.

7.129 I find myself largely in agreement with Schweppe and Haynes on this issue who have argued that:

> [W]e believe that any legislation which seeks to protect the rights of victims should, at the very least, utilise terms which are accepted by the community, are up to date in terms of discourses, and are compliant with human rights principles, both in terms of the principle of equality but also the principle of legality. This is particularly true for members of the trans community who have a problematic and distrustful relationship with the police. For these reasons, in including trans identities in legislation, we would argue that the terms 'gender identity and gender expression' should be included in the legislation.[116]

7.130 The definition section proposed above will address all of these concerns and ensure that any new legislation will be consistent across protected characteristics, and in the words of Schweppe and Haynes, will be 'a pragmatic solution…. inclusive of the range of biases associated with misogyny and trans phobia, while guarding against the wilful or unconscious exclusion of trans people from protection.' (Ibid, p166).

7.131 I am satisfied that transgender identity requires protection. I note that it is already protected in Scotland and in England and Wales but I think it is important, where possible, to offer similar levels of protection to groups throughout the United Kingdom.

7.132 There has been a recent and significant rise in trans-phobic hate crime in Northern Ireland as evidenced by the *PSNI* and the *Public Prosecution Service*. It is impossible to fully appreciate the scale of the problem given the fact that transgender victims appear reluctant to engage with the criminal justice system for a number of reasons, not least the fact that they are not currently a protected group, and the serious failings in the 2004 Order already identified earlier in this report. Furthermore, they have real concerns about being 'outed'.

[116] Schweppe and Haynes, 'You can't have one without the other : 'gender' in hate crime legislation (2020) Criminal Law Review issue 1 p163.

7.133 A 2017 Scottish study into levels of hate against the LGBT plus community found that 80% of transgender respondents had been a victim of hate crime. 90% of such respondents who had been a target of hate crime experienced it on two or more occasions, and 30% of the same group say that they experienced hate crime more than ten times. [117]

7.134 In addition, I am satisfied by the arguments raised by the majority of organisational respondents that intersex people should be included as a group requiring protection. In my view, intersex should be seen as a separate characteristic rather than as a subcategory of transgender identity.

7.135 Intersex is not the same as gender identity or sexual orientation. I share the position reached by Lord Bracadale i.e. that the language of any future provision should reflect up-to-date terminology and usage. He recommended that intersex should be treated as a separate category rather than as a subcategory of transgender identity.

7.136 In recognition of this, the *Scottish Government* has proposed the removal of intersexuality from the current definition of transgender identity given what they accept now as the clear differences between intersex and transgender identities, so as not to lose protection for this group of people.

7.137 The current Hate Crime and Public_Order (Scotland) Bill includes the term 'variations in sex characteristics' as a separate characteristic within hate crime law. The term 'variations in sex characteristics' as opposed to intersex is used in the Bill as this is the term most commonly used by stakeholders.[118]

[117] Pearson et al, *Scottish LGBTI Hate Crime Report.* (2017) at https://www.equality – netwall.org/wp – content/uploads/2017/10/enhc17-full final 1 alores.pdf

[118] Hate Crime and Public Order (Scotland) Bill, cl 1 (2) (G) (2020).

7.138 I recommend that sex/gender be included as a protected characteristic. For the avoidance of doubt, the protected characteristic of sex/gender includes gender identity.

7.139 I further recommend variations in sex characteristics be included as a protected characteristic.

7.140 I recommend that all protected characteristics in Northern Ireland – race, religion, disability and sexual orientation, together with any new recommended protected characteristics, should be protected for all purposes including any amended public order provisions.

7.141 Paragraphs 7.138, 7.139 and 7.140 are captured in Recommendation 9.

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Hate crime legislation in Northern Ireland

Independent Review

Final Report

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Age

7.142 The question addressed in this section is whether age should be added as a protected characteristic.

7.143 The current position in Northern Ireland is that age is not a protected characteristic under existing hate crime laws.

7.144 Including age would protect all age groups, although one would imagine that the majority of such cases are likely to involve crimes against older people. Recommending older age as a characteristic would probably mean including an agreed age.

7.145 In Scotland, Lord Bracadale's recommendation was in favour of the inclusion of age under Scottish hate crime legislation. This proposal is now carried forward in clause 1 of the Hate Crime and Public Order (Scotland) Bill, recently introduced into the Scottish parliament.

7.146 Clause 14 of that bill provides an interpretation. Clause 14 (2) notes that "a reference to age includes a reference to an age falling within a range of ages".

7.147 In agreeing to propose adding age as a protected characteristic, it was acknowledged by the *Scottish Government* that there might only be a relatively small proportion of crimes relating to malice and ill will towards a person because of their age but it stated that it wants to ensure that these crimes are treated in the same way as other hate crimes through the use of the statutory aggravation model.

7.148 The *Scottish Government* acknowledged that an alternative approach would be not to introduce a statutory aggravation for age but rather to allow the court to take into account the motivation of the offender in terms of prejudice towards a person because of their age in the absence of a statutory aggravation.

7.149 However, it observed that this would mean that there will be no requirement to record data and no message would be sent to society of the unacceptability of such crimes and it concluded that the Bill should include age as a protected characteristic within the suite of statutory aggravations.

7.150 The terms of reference of the *Law Commission's* latest review in England and Wales includes consideration as to whether to add hatred of older people to hate crime legislation.

7.151 The consultation paper for this review highlighted arguments in favour of including age/older age as a protected characteristic and arguments against taking this course.

7.152 A short summary of the main arguments in favour were the following:

> a) There is increasing evidence that older people are deliberately targeted by offenders. This is likely to become more apparent when the number of older people in the community exceeds other age groups;
>
> (b) When older people are targeted, this causes wider societal damage in that it increases fear of crime among the older population and there is a "trickle down" effect in terms of family members including younger members of the family;
>
> (c) It is important as a society to communicate the message that targeting older people is unacceptable. There is also a need to set good standards of behaviour that the community and society at large can relate to – vulnerable members of society need to be protected as often they may struggle to have

their voices heard or to articulate their fears; and

(d) There is a perception amongst older people that crimes targeting their age group are not currently being treated sufficiently seriously by authorities and have not been sentenced appropriately. Amongst older folks, there may also be a lack of acceptance or willingness to admit to their age, infirmity or vulnerability in public, as they may feel this is a private matter.

7.153 There are arguments against including age/older age as a protected characteristic. These may be summarised as follows:

(a) Crime targeted at older people is based on their perceived vulnerability, not their age. People are not vulnerable because of age per se;

(b) Crime targeted at younger people is not motivated by hostility based on age;

(c) Including age means that everyone would be protected by hate crime legislation and therefore it ceases to be about protecting disadvantaged minorities, diluting its function; and

(d) Sentencers already take into consideration the vulnerability of older victims when sentencing offenders even if this is not widely known to the general public. The case of *R v Edward Cambridge (2015) NICA 4* involved sentencing for a violent factual robbery but, presumably, given its designation as 'attacks on the elderly sentencing guideline', the case has wider applicability for sentencing cases involving older victims of crime.

7.154 This guideline states that a factor that will tend to lead to a presumption of an increase in sentence will be: increasing age, vulnerability or infirmity of the victim. Aggravating factors listed in this case include: an especially serious physical or psychological effect on the victim, even if unintended; deliberately targeting a vulnerable victim.

7.155 In his report, Lord Bracadale observed that there was clearly considerable support for some form of recognition that offences against the elderly do constitute a type of offence, which the criminal law should mark in a particular way. He was particularly impressed by evidence given to his review by the UK wide charity, *Action on Elder Abuse*. In its main submission, in 2017, it conducted a poll of 3183 people across the United Kingdom to assess attitudes to making elder abuse a hate crime.

7.156 Almost 95% of respondents considered that the abuse of older people should be an aggravated offence like hate crimes based on race, religion or disability. Almost 95% of respondents agreed, or strongly agreed, that older people are specifically targeted for abuse due to their perceived physical frailty or mental vulnerability.

7.157 The charity further argued that offences committed against older people are not treated as seriously as offences committed against other groups. Within care settings they refer to anecdotal evidence that the social care system tries to 'manage' instances of abuse internally and via adult protection referrals, without involving the police or the criminal justice system. They argued that this was a key reason why so few cases of elder abuse reach the courts and pointed out further that having a specific aggravation provision relating to offences committed against the elderly would encourage criminal justice authorities and the courts to take the issue much more seriously and would result in the imposition of more significant sentences.

7.158 It was accepted that while in some cases older people may experience malice or ill-will on the basis of their age, the vast majority of crimes against older people were driven by the perpetrators' perception of the victims' vulnerability due to their age.

7.159 A number of other organisations noted that many crimes committed against the elderly were committed because of their perceived vulnerability and that this should be the basis for an aggravation. *Police Scotland* observed:

> If one adopts the working definition as reference to 'selection of the victim on the basis of a particular feature', then crimes that target elderly people can be considered a form of ill-will or malice towards elderly people.

7.160 In Scotland, the *Crown Office and Procurator Fiscal Service* noted that:

> Many stakeholder groups make compelling arguments in favour of creating legislation to deal with crimes that specifically target older people, such as bogus workmen, breach of financial trust, neglect in care homes or any behaviour that dehumanises or shows complete disregard for the health and well-being of the elderly – essentially a legal recognition of 'elder abuse'.

7.161 Other respondents opposed adding age as a protected characteristic. Some, including *City of Edinburgh Council, the Faculty of Advocates, the Law Society of Scotland and the Glasgow Bar Association*, pointed out that the existing law was robust enough to deal with offences committed because of the perceived vulnerability of the elderly. Sentencers could already take the vulnerability into account in the sentencing process.

7.162 Despite these reservations, Lord Bracadale was satisfied that there was sufficient evidence of hostility-based offences against the elderly to include age as a protected characteristic in Scotland. That recommendation was the subject of further consultation by the *Scottish Government* and has now been accepted by the Government and introduced in the current Bill before the *Scottish Parliament*.

7.163 Even though Lord Bracadale did not find an evidential base suggesting that offences were being committed against young people because they are young people, he considered it was appropriate to adopt an approach where a protected characteristic of age generally is introduced. Whether a particular offence is motivated

by hostility in relation to age, or in the course of an offence, hostility to age is demonstrated, would be a matter for consideration on a case-by-case basis.

Other jurisdictions

7.164 In some jurisdictions, age is sometimes, but not routinely, protected in hate crime laws. The US State of Florida specifically protects 'advanced age' as part of its hate crime provisions. The Florida statute defines 'advanced age' to mean that the victim is older than 65 years of age.

7.165 Other jurisdictions, notably Canada and New Zealand, recognise the wider term "age" for purposes of hate crime laws without limiting it solely to older people.

7.166 In New Zealand, the Sentencing Act 2002 is the primary legal mechanism for addressing hate crime. Section 9(1)(h) of that Act allows judges to consider hostility as an aggravating factor in sentencing where the offence is partly or wholly committed because of hostility to a group of persons who have an "enduring common characteristic".

7.167 The meaning of 'enduring' is not limited to innate or fixed characteristics. It is broadly interpreted by courts and can include reversible characteristics, such as religion. The inclusion of the characteristic of age is of particular note.

7.168 It is, therefore, part of a suite of enduring characteristics such as race, colour, nationality, religion, gender identity, sexual orientation and disability.

7.169 It has sometimes been argued that age is different to other characteristics such as race or gender because it lacks their permanence.

7.170 Age is included as a protected category in the Equality Act 2010 and this is intended to protect all age groups from discrimination, primarily in the realms of employment and provision of goods and services. Although the Equality Act 2010 does not apply in Northern Ireland, it provides an objective touchstone for groups in respect of what is thought necessary to protect against discrimination.

7.171 In evidence to the *Law Commission*, Helen Herklots, the *Older Person's Commissioner for Wales*, noted the importance of visibly prosecuting age-based hate crime. She argued that recognising age as a protected category for hate crime purposes might help to change the hidden nature of elder abuse.

7.172 The *Law Commission* noted that research by *Age UK* had emphasised that so-called 'doorstep crimes' are disproportionately committed against older people. A 2015 Age UK report notes that 85% of those who experienced doorstep crimes were aged 65+, 59% were aged 75+ and 18% were aged 18 to 24.[119]

7.173 A member of the Review's Core Expert Group, Dr Hannah Bows, has conducted extensive research in this area and estimates that one in four domestic homicides taking place in England and Wales involves a victim aged 60 and over, despite older people only constituting 18% of the population in England and Wales.

7.174 On the other hand, Dr Bows points out that there is:

> Absolutely no evidence that violence/abuse against older people is usually, often, or even sometimes

[119] Age UK, *Only the tip of the iceberg: fraud against older people* (April 2015) p14. https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-andbriefings/safe-at-home/rb_april15_only_the_tip_of_the_iceberg.pdf.

> committed by offenders who have a hatred of, or hostility towards older people. [120]

7.175 It is interesting to note that during the *Scottish Government's* consultation on amending Scottish hate crime legislation following Lord Bracadale's review, those in favour of creating a new statutory aggravation relating to age were mainly organisations. However, in a poll of over 3000 older people in Scotland conducted by *Action on Elder Abuse*, almost 100% were in favour of making 'elder abuse' an aggravated offence.[121]

7.176 In its current consultation paper in 2020, the *Law Commission* indicates that it is not currently satisfied that there is a clear principled case for explicitly recognising the characteristic of age in hate crimes laws, but concedes that there are some factors – such as the prevalence of elder abuse and exploitation – which would suggest inclusion may be appropriate. It has invited further views from consultees on this question.

7.177 Were age to be included as a protected characteristic, it is the view of the *Law Commission for England and Wales* that age-based hate crime protection should use the word 'age' as opposed to more specific terms such as 'older people'.

7.178 This makes sense and avoids the problem of age protection for old but not young people.

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[120] Dr Hanna Bows, *Written submission to the Scottish Justice Committee, Prosecution of Elder Abuse* (February 2019), p3.
https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111160.aspx

[121] Action on Elder Abuse Scotland, *Written submission to the Scottish Justice Committee, Prosecution of Elder Abuse*, p12.
https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111160.aspx

7.179 Another member of this review's Core Expert Group, Dr Kevin Brown of *Queen's University Belfast*, co-authored a technical report commissioned by the *Commissioner for Older People for Northern Ireland* in 2019 entitled 'Improving Access to Justice for Older Victims of Crime: Older People as Victims of Crime and the Response of the Criminal Justice System in Northern Ireland'.[122]

7.180 Among a number of key findings in that report, the following were included:

- Older people have been neglected in research-based studies on victims of crime;
- Numbers of recorded violent crimes against the older population are increasing according to the *Police Service of Northern Ireland (PSNI)* statistics at a time when recorded violent crimes against other age groups remains stable*;*
- Certain characteristics and circumstances make older people as a group more vulnerable to the harm that being a victim of crime can cause in comparison to other adult age groups. These factors include: higher rate of fear of the impact of crime; a higher rate of physical and mental impairment and disability; a greater likelihood of living alone; a greater likelihood of the absence of a support network; and higher rates of feelings of insecurity;
- The crimes that older people are most likely to be victims of include burglary, criminal damage and vehicle-related theft. These three categories of crime involve intrusions into supposedly safe spaces;
- Being a victim of crime can cause older people emotional, psychological, physical and financial harm, which has the potential to undermine quality of life and exacerbate inherent physical and mental disabilities and social disadvantage;
- Older people are more likely to be reluctant to want to pursue a report through to prosecution because of fear of the experience of giving evidence in court and/or the risk of reprisals for doing so;
- The delays in processing cases through the criminal justice system in Northern Ireland disproportionately impact on older and vulnerable victims of crime. He proposed that statutory time limits for dealing with all cases should be explored, including the possibility of establishing a lower statutory time limit for cases involving older people who are the victims of crime; and

[122] Available at: https://www.copni.org/media/1541/improving-access-to-justice-for-older-victims-of-crime-k-j-brown-and-f-gordon-v1.pdf

- The report recommended that consideration be given to introducing an older person's victim advocacy scheme in Northern Ireland to champion and support the needs of older victims.

Consultation responses to the review: age

7.181 The majority of respondents to the review were opposed to the inclusion of age as a protected characteristic. On the other hand, a sizeable number, 63% of respondents to the online survey agreed that age should be included as a protected characteristic.

7.182 In general terms, those who were opposed to the inclusion of age argued as follows:

- Age is primarily a factor in opportunistic forms of crime rather than a hate motivated crime. Particularly in the case of older people, it was thought that the majority of crimes do not fit within the model of hate crime, that is, where victims are targeted due to their perceived membership of a group;

- Age is applicable to everyone and therefore cannot be considered as an identity;

- Unlike other minority groups, older people have not historically suffered disadvantage, prejudice, discrimination and a lack of political power or recourse; and

- Older people are targeted because of their perceived vulnerability, rather than because of hate or hostility about their age. The conflation of hate and vulnerability risks undermining the meaning and impact of hate crime legislation.

7.183 *Hourglass NI*, a UK wide charity that supports vulnerable people, indicated a preference for the introduction of separate legislation to prosecute crimes against older people stating that:

> In relation to crimes such as theft, fraud or assault . . . we know that older people are often specifically

> targeted due to their actual or perceived vulnerability. This may be based on physical frailty, mental capacity, memory difficulties, loneliness and isolation, or dependency on others for basic care needs. The vast majority of crimes against older people are driven by the perpetrator's perceptions of the victims' vulnerability due to their age.

7.184 A similar view was held by *Victim Support NI,* who stated that:

> We are not convinced that age should be included specifically as a characteristic within hate crime law, and believe that further exploration of whether crimes against people on the basis of hatred of their age takes place. While there is no doubt that older people are often the targets and victims of crime, in our experience this is due to their vulnerability, not hatred of their age per se.

It is, perhaps, difficult to be sure that such a distinction can be so clearly delineated.

7.185 The *Democratic Unionist Party (DUP)* warned that:

> By aiming to protect everyone under hate crime framework, there is an inherent risk that no one will benefit.

7.186 A number of respondents argued that there was as yet insufficient evidence of a substantive nature to support the inclusion of age as a protected characteristic. Organisations such as *Victim Support NI* and the *Committee of the Administration of Justice (CAJ)* conceded that, should sufficient evidence be established, they would then consider that age should be included as a protected characteristic. *CAJ* stated that:

> This would be evidence relating to criminal offences being committed motivated by hatred et cetera against older persons and/or children and young persons as a group, and also whether there is an evidence base of hate expression consisting of incitement to hatred against either group.

7.187 However, there was widespread agreement that crimes against older people and young people was a significant issue and a number of measures to deal with this as an alternative to introducing age as a protected characteristic were offered:

- The introduction of a separate model for aggravating offences regarding crimes and exploitation of particularly vulnerable members of society;

- Mandatory minimum sentences for attacks against older people regardless of whether the criminal act was motivated by hatred, prejudice or simply the victim's vulnerability;

- Steps to ensure better understanding of how judges take vulnerability of the victim into account in sentencing;

- Action to increase public knowledge that targeting someone because of real or perceived vulnerability will be punished more severely; and

- The use of hate crime legislation to strengthen legal protections for older people, through a definition of hate crime that allows for the consideration of vulnerability.

7.188 Those respondents who argued that age should be included as a protected characteristic in hate crime legislation presented a range of arguments including:

- This approach would be consistent with hate crime legislation in several European and other countries (including Austria, Latvia, Lithuania, Belgium, Canada, New Zealand and some states of the United States);

- Age is included as a protected ground in wider legislation including the Charter of Fundamental Rights, Article 14 of the Convention of Human Rights (ECHR), and under the EC Victims Directive;

- Research shows that older people are particularly vulnerable to the effects of crime, in part, due to the fact that certain offences against older people are less likely to be prosecuted; and

- The inclusion of age as a protected characteristic is in line with academic research that advocates the utilisation of characteristics already present in anti-discrimination legislation.

7.189 Taking a holistic view of age as a protected characteristic, the *Equality Commission for Northern Ireland (ECNI)* were strongly supportive of the inclusion of age as a protected characteristic.

7.190 It pointed out that age was a protected ground under anti-discrimination law in Northern Ireland in the area of employment and vocational training, as well as being a ground on which due regard to the need to promote equality of opportunity must be provided under Section 75 of the Northern Ireland Act 1998.

7.191 The *ECNI* noted that the *Organisation for Security and Co-operation in Europe (OSCE)* analysis of hate crime provisions in its 57 member states identified gender, age, mental or physical disability, and sexual orientation as characteristics that are quite frequently protected. Whilst recognising the arguments against the inclusion of age, the *ECNI* considered on balance that there is a need for hate crime legislation to be extended to cover the ground of age.

7.192 It went on to highlight that the *PSNI* does not currently record separate age-based hate crimes, thus limiting the available evidence on the extent of such crimes. It argued that including age should assist with both capturing the nature and extent of age-based hate crime, as well as ensuring an increased focus by the criminal justice agencies on such crime.

7.193 The *Commission* pointed out the lack of effective protection against age discrimination in Northern Ireland and that this is in stark contrast to the protection available in other parts of the United Kingdom.

7.194 *Sinn Féin*, in its submission, supported the inclusion of age as a protected group noting that, although older people are not vulnerable because of their age per se, their perceived vulnerability in the eyes of the offender can often lead to brutalisation, abuse and other criminal behaviour. It felt that the expansion of the definition of hate to include contempt would provide adequate legal justification to include age protected characteristics, given that perpetrators often select older people because they are deemed to be of less worth as regards their value as human beings.

7.195 The *Commissioner for Older People for Northern Ireland* argued that older people as a group must be encompassed by any development in hate crime protections. The Commissioner acknowledged the apparent reluctance in some debates on the development of hate crime to include older people on the basis that crimes against this group are rarely based on hostility towards the group, but are more often motivated by perception of weakness on the part of this victim group. He said:

> The *Commissioner for Older People for Northern Ireland* maintains that targeting a group due to an actual or perceived weakness is a form of contempt or hatred for that group. An individual who commits an offence against an older person wholly or partially because they consider that older person to be 'easy pickings' on the basis of their age, is evidence of an

> attitude of hostility based on active disdain for members of that group.

7.196 The Commissioner referred to the 2019 report "**Crime and Justice**" which found that:

> When it comes to crime such as burglary, criminal damage, vehicle theft and violence without injury, the *PSNI's* outcomes for these crimes continue to be lower for older people than for other age groups. These are crimes which include what might be considered 'safe spaces' and can cause severe and lasting harm.
>
> Findings from the Northern Ireland Perceptions of Crime survey suggest that almost one in six adults age 65 to 74 in Northern Ireland reported high levels of concern about being a victim of crime in their own home. This was particularly the case with burglary, with almost one in 10 adults age 60+ believing that they would be a victim of burglary in the next 12 months.[123]

7.197 *Age NI*, one of the leading charities for older people in Northern Ireland, strongly supported the inclusion of age as a protected characteristic.

7.198 It noted that population projections for Northern Ireland indicated that in the 25 years from 2016 to 2041, the number of people aged over 65 years will increase by almost two thirds, and that this changing demographic presents many opportunities and challenges for society, employers, the economy, welfare, housing, and health and social care.

7.199 It confirmed that its response was informed by knowledge of key issues impacting on older people, their work with *Age UK, Age Scotland and Age Cymru,* and

[123] Commissioner for Older People for Northern Ireland (COPNI), *Crime and Justice: The Experience of Older People in Northern Ireland,* (2019) p6-9, https://www.copni.org/media/1540/206567-online-a4-crime-report-56p.pdf

the views of older people who engaged with the charity on an ongoing basis. It noted the on-going experience of the coronavirus pandemic which was having a disproportionate impact on older people and will cause many aspects of their lives to change significantly over the coming months and years.

7.200 Of particular concern was *Age NI's* comments that:

> *Age NI* fears that current portrayals of older people, particular those over 70 years, as being alone and isolated, totally reliant on others for care, food provision and connections, will have an adverse impact on how older people are viewed by the public and increase their vulnerability to be victims of crime.

7.201 It noted further that older people are more likely than others to be living alone and to experience a higher level of physical and mental impairment and disability including dementia. It argued that this health condition makes people particularly vulnerable to become victims of crime for a range of reasons.

7.202 It noted the negativity about ageing and older people, which it said was pervasive in society, pointing to implicit messages and reporting news coverage of the coronavirus pandemic. It observed:

> During the early weeks of coverage on infection and death rates, news reports repeatedly used the phrase that most of those who died in that report had been "elderly" and with underlying health conditions.

7.203 It referenced reports in the United Kingdom and international media of extremely worrying attitudes towards older people and their access to care treatment and services, and argued that this sort of hostility, contempt and prejudice can foster

an environment that allows ageism, age discrimination and crimes against older people to grow, become permissible, and lead to dehumanising of older people.

7.204 The *Probation Board for Northern Ireland* supported the inclusion of age for the following reasons:

- There is increasing evidence that older people are deliberately targeted by offenders;
- When older people are targeted, this causes wider societal damage and that increases fear of crime amongst the older population;
- It is important as a society to communicate the message that targeting older people is unacceptable; and
- There is a perception among older people that crimes targeting their age group are not currently being treated sufficiently seriously by authorities and not being sentenced appropriately.

Recommendations and analysis

7.205 Careful consideration has been given to the various representations as well as academic and expert opinion. Opinions were sharply divided on the main issue of whether or not age should be a protected characteristic. However, there is an emerging consensus amongst wide ranging opinions for some form of legal recognition that differently motivated offences against the elderly do constitute a threat that should receive some protection from the operation of the criminal law. As the law currently stands, hate crime motivated by age is not adequately protected by the law in Northern Ireland.

7.206 This is an area of policy-making that is challenging and sensitive to strong political and social opinions about the role of age. The media has an important role in forming public opinion. In the final analysis, much will depend on whether or not the Assembly accept my recommendation that the current thresholds used elsewhere in the United Kingdom, that is, the motivation test and demonstration of hostility test, should be expanded to include a third threshold which applies when an offence is committed "by reason of the victim's membership of a group with the protected characteristic".

7.207 If this test is added and the concept of hostility is expanded to include bias, prejudice, bigotry and contempt, such principles would clearly allow the inclusion as hate crime of offences committed because of the perceived vulnerability of the individual arising from a protected characteristic, such as age.

7.208 The inclusion of age as a protected characteristic is likely to be controversial. However, having weighed up all the submissions received including the expert evidence submitted to the review, I consider that there is sufficient evidence of hostility-based offences against the elderly to include age as a protected characteristic. The arguments in favour are well summarised by the *Northern Ireland Commissioner for Older People NI* who noted:

> Stated or implicit concerns that the inclusion of older people (or age) as a category and legislative developments would render prospective measures too broad are wholly misplaced. Likewise, suggestions that, as we will (nearly) all become older people, the inclusion of such a category would be inconsistent with currently protected characteristics of race, religion, sexual orientation and disability. Such propositions are based on a mistaken assumption that the currently protected characteristics are comparable in terms other than membership of a group requiring protection. Membership of these groups is not necessarily similar: membership of a racial group being from birth, while an individual can experience a disability either from birth or later in life. The motivation, form and language of hatred directed towards a racial group and say, hatred directed towards a person or persons with a disability,

> are not necessarily analogous. In sum, hate crime legislation is intended to demarcate offences which are especially socially divisive, in that they target members of vulnerable groups in society because they are or are assumed to be part of such a group. The development of hate crime legislation should focus on whether and how extra protection is afforded to a particular group. It should not attempt to draw parallels between various groups in vain.

7.209 Although I have seen very little evidence to suggest that offences are being committed against young people because they are young people, it is of course possible that such behaviour does occur.

7.210 It is therefore preferable to adopt an approach where a protected characteristic of age generally is introduced rather than an elder specific protection.

7.211 **The approach in Scotland in the Scots Hate Crime Bill defines age as a 'range of ages' and I am content to recommend a similar approach for Northern Ireland. I therefore recommend that there should be a statutory aggravation based on age hostility.**

7.212 In light of the preceding discussions, I recommend that the protected characteristics should be as follows:

Recommendation 9

All current protected characteristics in Northern Ireland - race, religion, disability and sexual orientation - should continue to receive protection under the proposed model set out in Recommendation 2, together with the new recommended protected characteristics of age, sex/gender and variations in sex characteristics.

For the avoidance of doubt, the protected characteristic of sex/gender includes transgender identity.

The protected characteristics will be protected for all purposes including any amended public order provisions.

7.213 The consultation paper invited responses as to whether there were any other new characteristics which should be protected in Northern Ireland hate crime legislation. The following are some of the additional protected characteristics considered in the review that may warrant inclusion.

Homeless status

7.214 The present position is that in Northern Ireland homeless status is not a protected characteristic under hate crime legislation. The question arises as to whether homeless status should be added to hate crime law.

7.215 There are a number of US states that include homelessness/homeless status as a protected characteristic. These includes Florida, Maine, Maryland, Washington and the District of Columbia.

7.216 The Florida legislation defines 'homeless status' to mean that the victim:

(a) Lacks a fixed regular and adequate night-time residence; or

(b) Has a primary night-time residence that is:

(i) A supervised publicly or privately operated shelter designed to provide temporary living accommodation; or

(ii) A public or private place not designed for, or ordinarily, used as, a regular sleeping accommodation for human beings.

7.217 Lord Bracadale's review of hate crime in Scotland touches briefly on homelessness within the wider context of hostility to individuals on the basis of socio-economic status. His review did not recommend any new categories based on socio-economic status, arguing that such crimes are motivated by "exploitation of vulnerability rather than hostility".[124]

7.218 Arguments in favour of including homelessness as a protected characteristic include:

(a) Like other protected groups, homeless people are and have been historically disadvantaged; [125]

(b) There is widespread prejudice against homeless people in our society;

(c) There is evidence that crimes being committed against homeless people are motivated by hostility towards their status;

(d) Homeless people are a particularly vulnerable group within society and as a vulnerable group they are deserving of enhanced protection;

(e) It is important to reinforce community standards of acceptance and including homeless people as a protected group sends a strong

[124] Lord Bracadale, *Independent Review,* para 4.88.

[125] Mohamad Al-Hakim, 'Making a Home for the Homeless in Hate Crime Legislation', *Issue of Interpersonal Violence,* 30:10 (2015).

message to society at large that hostility towards homeless people is unacceptable and should be protected by the criminal law; and

(f) Including the category of homelessness would encourage agencies of the criminal justice system to keep a clear record of hostility motivated crimes that are committed against homeless people.[126]

7.219 There are also arguments against including homelessness/homeless status and they include:

(a) The floodgates argument, namely the inclusion of homeless status might open the possibility of other socio-economically disadvantaged groups to request to be included; and

(b) An aggravation covering 'vulnerability' would be more appropriate to deal with such cases.

7.220 The majority of respondents to the consultation paper (80%) disagreed with the inclusion of homeless status as a protected characteristic in Northern Ireland hate crime legislation. All individual respondents were opposed to the proposals, whereas a majority (62%) of organisations were in favour of the inclusion of homeless status.

7.221 77% of respondents to the online survey believed that homeless status should be included as a protected characteristic.

7.222 The main arguments by those who supported the inclusion of homeless status as a protected characteristic are reflected in the various arguments already mentioned above.

[126] Sarah Marsh and Patrick Greenfield (2018) 'Recognise attacks on rough sleepers as hate crimes, say experts', *The Guardian*, 19 December 2018.

7.223 *Victim Support NI* argued:

> Homelessness and sex workers would be more effectively protected under the category of vulnerability. Much like attacks on elderly people, we believe that such crime should fall under a vulnerability category and carry enhanced sentences because of the exploitative element of crime against them.

7.224 It was suggested that homelessness is not due to a characteristic inherent to identity.

7.225 Those opposed to the inclusion of homeless status as a protected category gave the following main reasons:

- There was insufficient persuasive evidence to justify the inclusion of homeless status as a protected category;
- There was a risk that inclusion would lead to the lobbying for inclusion of other social-economically disadvantaged groups, in turn, diluting the legislation's deterrent effects;
- The law should apply equally to all rather than to any specific selected groups. This argument was primarily – though not exclusively – made by individual respondents; and
- Homeless status is not an identity, but rather is a vulnerability that should be addressed through mechanisms other than hate crime legislation.

7.226 Three different types of homelessness have been identified – rough sleeping, statutory homelessness, and hidden homelessness.

7.227 Rough sleepers are people who predominantly live on the streets. Statutory homelessness refers to those who lack a secure place in which they are entitled to live. Hidden homelessness refers to those who often live outside the welfare state with no entitlement to housing assistance, instead staying in hostels, squats or relying on good-natured friends and family.

7.228 In its recent consultation paper in September 2020, the *Law Commission for England and Wales* has looked at this issue and notes that whilst research might support the existence of homeless identity, this does not necessarily mean it is core to a homeless person's overall self-perception.

7.229 There is little doubt that homeless people experience disadvantage and that some people, particularly rough sleepers, are criminally targeted and in some cases this may well be because of prejudice or hostility towards their homeless status.

7.230 In discussion with the charity *Crisis*, which helps homeless people, the *Law Commission* noted that the charity had some concerns about creating a protected category centred on homelessness. The premise appeared to be that homelessness should not exist in society at all or be considered inevitable. Furthermore, there was a concern that including homelessness in law as a protected characteristic alongside immutable characteristics such as a race, could affirm its position as a permanent feature of society.

7.231 Not everyone might agree with this proposition – it can be argued that homelessness is systemic.

7.232 As part of the work of the review, I met with Simon Jones, Head of Accommodation Services at the *Simon Community* headquarters in Belfast. This organisation works exclusively with homeless people. Mr Jones made the following points:

- The issue of rough sleepers is exaggerated in Northern Ireland. There are approximately six rough sleepers at any one time on the streets of Belfast and potentially all of them might have a property (such as *Housing Executive* property) somewhere, but they chose to sleep rough. Sadly, there were three deaths last year, but all of those who died had a property where they chose not to sleep;

- In his experience, it was difficult to say that homeless people suffered prejudice because of their homelessness. There were no significant problems of stranger attacks on homeless people – they were more likely to suffer assault at the hands of fellow rough sleepers;

- Generally, the public are very generous and supportive of the work of the *Simon Community* as a group looking after homeless people;

- He highlighted that 'beggars' are not necessarily homeless; and

- The *Simon Community* has 450 spaces in 18 hostels across Northern Ireland – five of those in Belfast.

7.233 The *Church and Society Commission of the Church of Ireland* felt that homeless status should be included as a protected characteristic. It reasoned that:

> Homeless individuals should be protected from hostility motivated bias crime but it may be more appropriate for their protection to fall under (an) aggravating offence for targeting/exploitation of vulnerable members of society. However, given that the effects of the crimes are so closely aligned to those of hate crime, crimes perpetrated against homeless individuals do often come from a place of malice and contempt, and homelessness is not a 'chosen' characteristic like political affiliation, it would not be wrong to include it in hate crime legislation and would not risk diluting the meaning of such legislation.

7.234 It is noted that in the Scots review of hate crime legislation, *Amnesty International UK* had recommended that such provision should be made, specifically dealing with socio-economic status, but did not set out substantive arguments in favour.

7.235 As in Northern Ireland, responses on this issue were limited and mixed. Some respondents noted that there was an increasing vilification of people experiencing poverty, and referred to examples of verbal abuse, harassment and physical assaults, particularly against homeless people. The contrary argument was that socio-economic status is a very difficult concept to define and not an inherent personal characteristic; an individual's socio-economic status was likely to change over time.

7.236 Lord Bracadale concluded that it would not be appropriate to recommend a new statutory aggravation to deal with hostility related to socio-economic status – including homelessness. He noted:

> I am not persuaded that a person's socio-economic position can be equated with any kind of identity characteristic: it is a matter of fact determined by a number of factors (employment, poverty, security of housing et cetera) which will change over time. These factors may well render an individual vulnerable to particular offending patterns, but I think it would stretch the concept of 'hate crime' too far from what is readily understood by society to treat offending based on hostility to these factors as hate crime.[127]

7.237 In Northern Ireland, there appears to be a dearth of reliable evidence of hate crimes perpetrated against homeless persons.

7.238 For the reasons discussed, I conclude it would not be appropriate at this time to recommend a statutory aggravation relating to socio-economic status and/or homelessness. Perhaps not surprisingly, Lord Bracadale and the Law Commission reached a similar conclusion.

[127] Lord Bracadale, *Independent Review,* para 4.87.

7.239 The consultation paper asked respondents to identify any other new characteristics which could/should be protected in Northern Ireland hate crime legislation, other than those mentioned above.

7.240 The majority of organisations (58%) and individual respondents (76%) did not consider that any new characteristic should be protected.

7.241 Amongst the minority overall (31%) who were in agreement that other new characteristics should be protected, the most common suggestion was 'sex workers' which was mainly (but not exclusively) made by organisations from the women's sector.

Sex Workers

7.242 It is noted that Northern Ireland, along with Sweden, Norway, Iceland, Canada and France makes it a criminal offence for clients to pay for prostitution. This so-called 'Nordic model' is controversial, the argument being that such a law may drive sex workers underground.[128]

7.243 Some respondents argued that sex workers are subjected to particular forms of violence, prejudice, abuse and intimidation which should be treated as hate crime. Additionally, it was noted that sex workers' particular vulnerability can prevent them from accessing the criminal justice system. They may be reluctant to report abuse due to the perception that the relevant authorities will not process their complaints appropriately. They argued further that the addition of 'sex workers' as a protected characteristic could be viewed as offering crucial protection to such workers, increasing confidence in the reporting of crimes.

[128] See the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

7.244 It is noted that the police in Merseyside began recording crimes targeted against sex workers as hate crime in 2006, in response to the disproportionate levels of violent crime that this group experiences. *Merseyside police* recognised:

> The fact that violent and other crimes against sex workers are often shaped by discrimination, attitudes of hostility and prejudice.[129]

7.245 Whilst it is clear that sex workers are often exposed to criminality and prejudice, it is difficult to accept that they have a group identity in the sense required for hate crime. Some sex workers may continue to work for many years, but many others merely participate for very short periods of time, or from time to time, depending on their personal circumstances. I saw no evidence that the nature of their work is any kind of enduring characteristic or constitutes any core part of their identities.

7.246 There is little doubt that there is a serious problem with assaults and other forms of crime perpetrated against sex workers – at least as far as England and Wales is concerned.

7.247 If the proposal from this review is accepted, that is, that there should be a new protected characteristic of sex/gender, this may catch much predatory behaviour for criminals who routinely target sex workers because they harbour prejudice and contempt against such people because of misogynistic attitudes. Such misogyny featured in the notorious case of Peter Sutcliffe who murdered thirteen women between 1975 and 1980, some of whom were thought to be sex workers. He claimed to have heard a voice from God sending him on a divine mission to rid the streets of prostitutes.[130]

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[129] Merseyside Police, *Hate Crime Policy* (December 2018).

[130] Louise Wattis, 'Revisiting the Yorkshire Ripper Murders: Interrogating Gender Violence, Sex Work, and Justice', *Feminist Criminology,* 12:1 (2017).

7.248 I am not persuaded that it would be appropriate or consistent to recommend a new statutory aggravation to deal with hostility related to sex workers.

Humanists

7.249 A response submitted by Northern Ireland Humanists noted that the 2004 Order and the Public Order (Northern Ireland) Order 1987 defines 'religious group' as "a group of persons defined by reference to religious belief or lack of religious belief". It argued that this definition does not include non-religious beliefs such as humanism and urged that this should be amended in line with human rights and equality legislation.

7.250 The current protection includes converts and apostates (those who have left their religion) but does not include non-religious beliefs such as humanism.

7.251 This group suggests there is a gap in the current legislation that could be addressed by clarifying the wording in the legislation to 'religious or belief group' and 'religious or belief-based aggravation'.

7.252 Philosophical beliefs fall within the broad definition of Article 9 of the European Convention on Human Rights (ECHR) which protects 'freedom of thought, conscience and religion' as follows:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief in freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public

order, health or morals, or for the protection of the rights and freedoms of others.

7.253 I consider that there is sufficient evidence to suggest that philosophical beliefs such as humanism can well be core to the identity of some people, notwithstanding arguments that this is choice based.

7.254 Crucially in this context, no evidence has been produced that humanists per se are the target of criminal hostility. As already discussed, apostates are protected.

7.255 In the text of their response, Northern Ireland Humanists detailed evidence of hate crimes experienced by apostates.

7.256 In evidence to the *Law Commission for England and Wales*, *Humanists UK* told the Commission that they were not aware of research investigating the scale of hate crimes targeted at humanists, arguing that this was because there is no central police recording of hate crimes committed on the basis of humanism or any other non-religious belief systems.

7.257 The *Law Commission* concluded that evidence of criminal targeting on the basis of philosophical beliefs is sporadic and largely anecdotal in England and Wales, and it is not clear that this anecdotal evidence stems from hostility or prejudice towards the philosophical belief itself.

7.258 No such evidence of criminal hostility on the basis of philosophical belief has been produced to this review apart from reference to incidents involving apostates. As already indicated, apostates are already protected under the law.

7.259 For a group to be accorded the protection of hate crime laws, there must be at least persuasive evidence that the group qualifies for protection.

7.260 I therefore conclude that it would not be appropriate to recommend a new statutory aggravation to deal with hostility related to philosophical belief.

7.261 However, that said, I recommend that:

Recommendation 10

Provision should be made for any future legislation to be framed in such a way as to allow any other protected characteristic to be added to the list of protected characteristics referred to in Recommendation 9 above by statutory instrument if sufficient evidence emerges to show such a group or groups are victims of hate crime or hate speech. The reasoning behind this recommendation is to allow suitable protection to be provided in the changing circumstances of the time.

Vulnerability and/or exploitation of vulnerability

7.262 The consultation paper also asked respondents to consider whether or not a general aggravation covering victim vulnerability and/or exploitation of vulnerability should be introduced into Northern Ireland hate crime law.

7.263 The great majority of respondents (81%) disagreed with this idea. However, 71% of respondents to the online survey agreed with this proposition.

7.264 One key argument advanced by those in favour of a general statutory aggravation was that such a provision would be particularly beneficial in terms of dealing with hate crimes involving victims such as 'older people'.

7.265 Most respondents acknowledged the importance of providing protection to vulnerable individuals.

7.266 Among other key points made by respondents opposed to the introduction of such an aggravation were:

- The inclusion of such a statutory aggravation in hate crime legislation would serve to dilute its purpose, broaden its scope and diminish its impact;
- The concept of vulnerability itself is too vague and potentially difficult to prove. The introduction of a general statutory aggravation might therefore be counter-productive;
- Vulnerability is distinct from hostility, and, as such, separate legislation may be more appropriate; and
- Vulnerability can already be considered and dealt with in sentencing under current legislation.

7.267 Arguably, vulnerability is a term which can carry connotations of weakness or helplessness. Some victims will object to being labelled as such or not wish to admit that they are vulnerable. Vulnerability might also expose fears and self-loathing that could also expose mental illness and depression.

7.268 A further issue with the concept of vulnerability is that it can fluctuate - for example, someone under the influence of alcohol or drugs may be temporarily vulnerable.

7.269 A strong argument against the introduction of such an aggravation – which would be a more complex reform than adding another characteristic to hate crime legislation – is that the courts already take into consideration vulnerability and the exploitation of vulnerability when sentencing. This is a persuasive argument. Both

exploitative behaviour and the vulnerability of a victim are recognised as aggravating factors in sentencing guidelines.

7.270 Adding a statutory aggravation may well complicate and confuse matters.

7.271 The formulation of strong sentencing guidelines – considered in chapter 16 – offers a more practical solution.

7.272 In the absence of persuasive evidence, I do not consider it appropriate to recommend such an aggravation. In any event it is doubtful that such a recommendation would have fallen within the terms of reference of the review.

Intersectionality

7.273 An oversimplification of victim groups does not necessarily take into account the diverse experiences of victims and the nuances of the harms that they may suffer.

7.274 Academics such as Hannah Mason-Bish have argued that it is necessary to rethink hate crime and intersectionality. Intersectionality describes a situation where hate crime is experienced on more than one characteristic. Mason-Bish cites the example of one victim she talked who observed:

> I am disabled, gay and a woman. If I am targeted, am I supposed to say which aspect was the most hurtful and damaging?

7.275 She continues:

> Crime policy needs to circumvent traditional notions of primary identity characteristics and to understand the

> fluidity of identify and the multiple ways in which prejudice and violence might be experienced.[131]

7.276 Although Mason-Bish accepts that the concept of intersectionality is a useful tool to break away from the single strand-based approach to hate crime, she acknowledges its limitations and doubts whether policy can truly take into account each individual's experience of oppression.

7.277 In evidence given to the recent review by the *Law Commission for England and Wales*, people of faith from ethnic minority backgrounds informed the Commission that where criminal hostility was directed at them, it was often a combination of racism and religious hatred. Many Asian people described being explicitly abused on the basis that they were, or were presumed to be, both Muslim and of South Asian or Middle Eastern origin. They felt that to focus on only one of these aspects was inadequate to understand and describe the extent of the hostility, and the harm they and their community had experienced.

7.278 If applied properly, the intersectionality approach would allow for a more comprehensive monitoring of recorded crimes by the police and criminal justice agencies and present a more accurate picture of the scale of the problem.

7.279 In response to this review, it has been suggested that any proposed new legislation should be able to accommodate this important issue, particularly if the law protects all the acknowledged characteristics equally – unlike the position in England and Wales where only race and religion are protected under the aggravated offences model provided in the CDA 1998. Under any new legislation in Northern Ireland, more than one protected characteristic could be referred to in any indictment or summons.

[131] Hannah Mason-Bish, 'Beyond the Silo: Rethinking Hate Crime and Intersectionality', in *The Routledge International Handbook on Hate Crime,* eds. Nathan Hall *et al.,* (Oxon: Routledge, 2014) p24-25.

7.280 Clearly, there are practical difficulties as regards implementation and on how the law records crime to which I will return. However, these practical difficulties should not obscure the fact that intersectionality is an important lens through which we need to understand the nature, dynamics and experiences of some people who are victims of hate crime. It allows us to more fully comprehend how offenders can be directed towards people because of their multiple identities, and it enables responders to identify those people who might be particularly vulnerable to targeted abuse.

7.281 There is a problem at present with civil anti-discrimination legislation in Northern Ireland which is dealt with under separate statutes, rather than under a single Equality Act, such as the Equality Act 2010 which applies in England and Wales.

7.282 Currently in Northern Ireland, for example, the present legal situation makes it very difficult to bring a case on the grounds of discrimination as a black woman, when one has to engage two separate pieces of legislation that do not intersect.

7.283 However, if the law on hate crime is consolidated and drafted so as to ensure that all victims can expect the same level of justice, the issue of intersectionality can begin to be addressed properly.

7.284 In its recent report in 2019, the *All-Party Parliamentary Group on Hate Crime* accepted that hate crime is often intersectional in nature and acknowledged that the current legislation in England and Wales does not allow this phenomenon to be recorded. It accepted that a significant proportion of hate crime victims were targeted because of more than one of their identity characteristics, demonstrating multiple intersecting prejudices held by perpetrators. Among its key recommendations it suggested:

> Hate crime is a deeply complex object to unravel and understand, and the current reporting tools are far too

> crude to allow for a truly nuanced analysis to take place. It is clear to this enquiry that hate crimes are often intersectional; victims are attacked because of their multiple identities. This is supported by evidence submitted to the *APPG on Hate Crime* that says how LGBT+ people who are disabled or persons of colour are more likely to fall victim to hate crimes than LGBT+ people who are not, or that the majority of Islamophobic attacks are carried out by men against women (although sex is not currently a protected characteristic for hate crimes). This is something that needs rectifying as it will allow the *police*, the *CPS*, and the *government* to get the most detailed pictures and mapping of hate crimes possible.[132]

7.285 The consultation paper asked respondents whether or not they considered that intersectionality is an important factor to be taken into consideration in any new hate crime legislation.

7.286 If the answer to that question was in the affirmative, it then asked for views on the best way to achieve this.

7.287 Not for the first time, there was a significant difference in opinion between individuals and organisations. 83% of organisations answered positively, as opposed to only 12% of individuals who took the same approach.

7.288 Among those respondents who indicated that intersectionality should be considered, it was felt that this was crucial to gaining a comprehensive understanding of the victim's experiences of hostility, prejudice and violence, and of the nuances of harm suffered.

[132] All-Party Parliamentary Group on Hate Crime, '*How do we build community',* p56.

7.289 Additionally, it was suggested that taking intersectionality into account in legal responses to hate crime would:

- Allow for greater visibility and understanding for the multiple factors motivating hostility;
- Reassure victims that their nuanced experience would be taken seriously by the judicial system, which, in turn, will encourage reporting; and
- Allow for specific harm on the grounds of two or more particular characteristics to be considered and addressed.

7.290 Some respondents also argued that intersectionality is an important factor to be taken into account by the courts when determining sentences and that without the capacity to take properly into account two or more characteristics, the victim's ability to achieve legal redress would be undermined.

7.291 There was strong consensus on the need for more comprehensive monitoring of hate crime including the recording of disaggregated data – by *PSNI*, *PPS* and other criminal justice system agencies. The *Equality Commission NI* viewed this as imperative in order to better understand, monitor and identify trends in hate crime, including online crime, experienced by people with multiple identities.

7.292 Among those who took the view that intersectionality should not be included, a strong theme was that they disagreed with hate crime legislation in principle. Their comments often did not specifically address the issue of intersectionality.

7.293 However, specific reasons given by those who did address the question included concerns that to consider intersectionality could create complexities for legislators and the justice system.

7.294 Other concerns were that legislating for multiple aggravations could pose a risk to successful outcomes, raising difficult questions about how this issue could or should be reflected in sentencing.

7.295 As regards suggestions on the best way to factor in issues around intersectionality, some argued for the addition of an option for 'multiple group hostility' (along with other new protected characteristics). It was said that such an approach would allow the courts to address the issue throughout the trial and, accordingly, promote understanding among stakeholders involved of the dynamics of the issue. Several respondents stressed the importance of considering this matter at different stages of the legal process, including at sentencing stage, recording and provision of victim support.

7.296 It was further argued that consideration should be given to 'additional sentencing' in cases involving multiple protected characteristics.

7.297 Although there was considerable disagreement as indicated above, there was general acknowledgment that the inclusion of intersectionality in hate crime legislation could prove to be complex. Some respondents suggested that detailed guidance and training drawing on academic and legal theory on the issue could help to overcome such complexities.

7.298 This report advocates moving away from the current enhanced sentencing model in the 2004 Order to the use of statutory aggravations applicable to all existing offences, based generally on the model currently used in Scotland, as the core method of prosecuting hate crimes in Northern Ireland.

7.299 There is strong evidence to suggest that seeking to incorporate the notion of intersectionality into this proposed framework will create challenges in attempting to reflect more than one protected characteristic in prosecuting aggravated offences.

7.300 This issue has already confronted prosecutors in England and Wales in using the CDA 1998. It will be recalled that this legislation provides for prosecution of aggravated offences solely on the grounds of racial and religious hostility. The enhanced sentencing model under Section 146 of the CJA 2003 provides for hostility in relation to the remaining protected characteristics.

7.301 However, if the prosecution has to deal with a case involving racial and religious hostility, this can create real difficulties.

7.302 In this situation – which would arise in Northern Ireland if all the protected characteristics were dealt with on the basis of statutory aggravations – which is the recommended model – *Crown Prosecution Service (CPS)* Guidance in England and Wales is **not** to specify both forms of aggravation in a single count.

7.303 The *Law Commission for England and Wales* explain the rationale behind this as follows:

> First, this might be open to challenge due to the rule against duplicity; this requires the prosecution to draft the indictment reflecting a single criminal offence in relation to each count. Secondly, if permissible, it would require that the trier of fact to find to the . . . criminal standard that the legal test was met in respect of both the characteristics specified in the charge. If the prosecution failed to satisfy the trier of fact in respect of one of the characteristics, but were satisfied in respect of another, the entire aggravated prosecution would fail. It would then be necessary to fall back on the base offence as the alternative.[133]

[133] Law Commission, *Hate Crime Laws*, para 16.115.

7.304 In such a situation the *CPS* guidance in cases of both racial and religious hostility states:

> The Crime and Disorder Act 1998 provides that the specific aggravated offence is committed if it involves racial or religious hostility. If both elements are present, then two offences should normally be charged: one in respect of the racially aggravated offending and another in respect of the religiously aggravated offending.
>
> Consideration should also be given to putting a 'base' non-aggravated alternative charge in accordance with the guidance above.
>
> Where there is evidence to support a realistic prospect of conviction in respect of both racial and religious aggravation, but it is clear from the evidence that:
>
> (a) The offence was predominantly motivated by one type of such hostility; and/or
>
> (b) Involved a demonstration of hostility predominantly based on one type of aggravation.
>
> then it may be appropriate to charge only the one aggravated offence (together with the 'base' offence in the alternative if considered appropriate).
>
> However, in doing so, the prosecutor should make it clear to the defence that all of the defendant's words and behaviour will be opened by the prosecution, including that which relates to the element of aggravation which has not been charged. If the defence do not accept this, then separate offences relating to the racial aggravation and to the religious aggravation may be required in the public interest.
>
> Prosecutors must always apply the overarching principles contained in the code for Crown prosecutors and ensure that the charges selected:
>
> - Reflect the seriousness and extent of the offending;

- Give the court adequate powers to sentence and impose appropriate post-conviction orders; and
- Enable the case to be presented in a clear and simple way.

Where the offence is not a specific aggravated offence as provided by the Crime and Disorder Act 1998, only one charge can be put as there is only one offence established in law. However, if such an offence involves evidence of both racial and religious hostility, both elements should be drawn to the court's attention as an aggravating factor at sentencing, applying the provisions of Section 145 of the Criminal Justice Act 2003.[134]

7.305 It appears that in some cases the *CPS in England and Wales* have pursued both the racially aggravated offence and the religiously aggravated offence.

7.306 On occasion, a perpetrator has been found guilty in respect of both, and in these cases, sentencers have imposed an aggravated sentence in relation to one of the offences, reflecting the totality of the conduct. No further additional penalty has been imposed in respect of the other offence but both forms of aggravation appear on the offender's criminal record.

7.307 It may be thought cumbersome to bring two separate charges if there is evidence that two criminal offences have been committed.

7.308 However, in the more likely scenario, where a single instance of criminality is being dealt with but contains allegations based on two or more characteristics, this may be challenged as being bad for duplicity – the principle being that only one offence can be charged on each count. In such a situation, even if the indictment is effective,

[134] Crown Prosecution Service (CPS), 'Racist and Religious Hate Crime – Prosecution Guidance', (updated 15 June 2020). https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance

the prosecution would fail unless both allegations were proven to the requisite standard.

7.309 With this in mind the *Law Commission for England and Wales* notes:

> Cases of intersectional hate crime will therefore require very careful, strategic decision making by prosecutors, and may require tough decisions to drop characteristics from a prosecution where the evidence is less strong. Victims reasonably may struggle to understand why the totality of their experience is not reflected in the charge.[135]

7.310 The *Law Commission* provisionally suggests a novel approach – to include a provision allowing for the recognition of hostility based on "**one or more characteristics".**

7.311 Thus, the characteristics could be specified in the charge or count on the indictment, but conviction would only require the jury to be satisfied that at least one had been made out on the evidence led by the prosecution.

7.312 It observes that:

> The advantages of this approach from the perspective of prosecutors and victims are clear. It would mean that charges for aggravated offences could better reflect the true nature of the offending and also encourage more accurate recording of prosecution and conviction statistics in respect of different characteristics. It would allow the *CPS* to pursue a single charge which reflects the totality of the offending with a single alternative base offence, and ensure that charges and indictments were simplified rather than offering multiple alternatives and complex routes to verdict which may

[135] Law Commission, *Hate Crime Laws*, para 16.124.

> confuse a jury, particularly when dealing with multiple victims and multiple defendants.
>
> The defendant would know the case against him or her. The evidence will be open to challenge in the usual way with the opportunity for cross-examination of the complainant and any witnesses.
>
> It gives sufficient indication to the accused of the criminal conduct alleged against him or her. The judge would be able to sentence the defendant having heard the entirety of the evidence at trial and impose an appropriate sentence to reflect the totality of offending.[136]

Recommendation and analysis

7.313 I agree with the approach of the *Law Commission of England and Wales* on this important issue and have suggested an appropriate form of words to action this at Recommendation 7 above.

7.314 I also recommend as follows:

Recommendation 11

Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences referred to in Recommendation 2.

7.315 I appreciate that there may be practical concerns over the outworking of this issue but emphasise that it is important to deal with this issue in a way that is fair both to complainants and defendants.

[136] Ibid, paras 16.126-16.128.

Chapter 8

Sectarianism

CHAPTER 8

SECTARIANISM

8.1 This chapter addresses sectarianism in Northern Ireland, its causes and consequences and how best to tackle the challenges it sets for Northern Ireland's society.

8.2 In the 'New Decade, New Approach' agreement, which led to the restoration of the *Northern Ireland Executive* in January 2020, the Executive Office agreed to 'celebrate and support all aspects of Northern Ireland's rich cultural and linguistic heritage, recognising the equal validity and importance of all identities and traditions'.[137]

8.3 Appendix 2 of that agreement sets out a possible outline of a programme for Government.

8.4 Significantly, there is a section entitled 'Ending Sectarianism'. This reads as follows:

- There will be an enhanced strategic focus within the programme for Government on ending sectarianism and robust supporting strategies and actions will be put in place.

- All parties reaffirm their support for the right to freedom from sectarianism, sectarian harassment and intimidation. The Executive's '*Together: Building a United Community*' (T:BUC) strategy defines sectarianism as, 'threatening, abusive or insulting behaviour or attitudes towards a person by reason of

[137] UK Government, Irish Government, *New Decade, New Approach, (*January 2020).

that person's religious belief or political opinion; or to an individual as a member of such a group.'

- The T:BUC strategy outlines a vision of 'a united community, based on equality of opportunity, the desirability of good relations and reconciliation – one which is strengthened by its diversity, where cultural expression is celebrated and embraced and where everyone can live, learn, work and socialise together, free from prejudice, hate and intolerance'.

- The parties recognise the need to tackle sectarianism, prejudice and hate in seeking to eliminate discrimination. The parties endorse the objectives outlined above and wish to see sectarianism given legal expression as a hate crime. [my underlining]. To this end, the parties believe the Executive should formulate and require all public representatives to commit to an anti-sectarian pledge.[138]

8.5 The T:BUC strategy referred to dates from 2013 when the Executive sought to define sectarianism, saying:

> We believe that we cannot build a united community until the fundamental issues of division and intolerance are specifically tackled. This cannot be achieved without tackling the underlying prejudices and behaviours caused by sectarianism.[139]

8.6 Although the terms of reference for this review does not explicitly reference sectarianism as requiring special attention, it does ask the review to consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice.

[138] Ibid, p42-34.
[139] The Executive Office, *Together: Building a United Community Strategy* (2013), p19, para 1.36.

In addressing this question, the issue of including sectarianism arises. There are compelling reasons to do so. The *PSNI* record incidents as sectarian, even though there is no explicit reference in the substantive criminal law of Northern Ireland to the term, with the exception of section 37 of the Justice Act (Northern Ireland) 2011 which creates an offence of chanting at a regulated football match, where the chanting is of a sectarian or indecent nature.

8.7 The question of whether or not to include sectarianism in any proposed new legislation is timely, but it is freely admitted that it may prove highly controversial.

8.8 I do not believe that this is a reason to ignore the subject or avoid discussion.

8.9 At the outset, it is necessary to be clear that the term 'sectarianism' does not have a precise legal meaning although it is used frequently in everyday speech.

8.10 Sectarianism is well documented in Northern Ireland, with strong historical roots based on long-standing divisions in society. It has resulted in many adverse effects on communities. Tracing the causes of sectarianism raises many issues associated with the separation of different communities on issues ranging from housing to education. Sectarianism elicits differing responses from different groups in Northern Ireland, but there is a growing consensus in the community about attempting to address its causes and prevent it from continuing to act as a catalyst for fear and hatred in our society, bringing with it severe damage, loss of life and suffering.

8.11 Whilst most people claim to recognise it when they see it, defining and dealing with it in the criminal law has proved to be a much more difficult task. What is true is that there is no single cause and no single solution. Building trust in the community is a good starting point. It is well recognised that there are political and religious as well as economic reasons for its existence, although many secular and religious groups are concerned that sectarianism might appear to stress religious differences over any other explanation for its existence.

8.12 Various definitions have been attempted, but none appear to be sufficiently clear to be easily adapted into a legislative formulation, capable of legal enforcement and appropriate prosecution. This causes unease because it is at odds with the common expectation that the law should contain clear words familiar in meaning to every citizen and crime should be fairly labelled. A common thread running through the literature on sectarianism is the presence of some form of 'hostility', which provides a building block towards consensus.

8.13 In *R v White (2005) NICC 52*, a Crown Court case involving attempted murder, Coghlin J described sectarianism as follows:

> *Sectarianism is the corrosive toxin that remorselessly eats away at the social fabric surrounding the main communities in Northern Ireland. Its manifestations include the crude daubing of slogans upon houses, schools and churches, the grotesque activities of those who orchestrate recreational rioting by children, social exclusion, harassment, physical eviction and community division.*
> *Over time, sectarianism has been cynically exploited by politicians and paramilitaries. It has both nurtured, and in turn, been re-invigorated by more than 30 years of terrorism. Like the 'dreary steeples' in Churchill's famous speech, as the tide of terrorism abates sectarianism re-emerges oozing forth again to corrupt another generation.*

8.14 The history of references to sectarianism in Northern Ireland legislation have been set out in detail in Chapter 13 of the consultation paper, and are not repeated again here, except where relevant.

8.15 It will be noted that the first example of 'hate crime' related legislation in Northern Ireland was explicitly introduced to deal with sectarianism. That was the Prevention of Incitement to Hatred Act (Northern Ireland) 1970 (the 1970 Act), introduced at the start of the 'Troubles' by the then *Stormont Parliament*.

8.16 It was not a success in terms of prosecution – there was only one prosecution under this Act before it was replaced in 1981 – and the defendant was acquitted - but the Act was in advance of the law in England and Wales by addressing religious belief for the first time since the foundation of Northern Ireland's legal system.

8.17 As with subsequent legislation, the 1970 Act did not explicitly use the term 'sectarian'. Instead, the Act relied primarily on the protected ground of '*religious belief*' as an indicator of sectarianism. The Act also included the other protected grounds of 'colour, race or ethnic or national origins'. These other protected grounds reflected those in Section 6 of the Race Relations Act 1965, applicable in Great Britain to protect against racist incitement to hatred. The 1965 Act did not apply to Northern Ireland.

8.18 This Act, which also outlawed discrimination, did not similarly include 'religious belief' as a protected ground, leaving an ambiguity as to whether ethnic groups in Britain that would be primarily associated with religious belief as an ethnic indicator (for example, Jewish, Muslim and Sikh communities) were covered by the scope of the legislation. It was not until the decision in *Mandla v Dowell-Lee (1982) UKHL 7* which held that Sikhs were to be considered an ethnic group for the purposes of the Race Relations Act 1976 that the matter was ultimately clarified.

8.19 A similar approach using 'protected grounds' as indicators of sectarianism, rather than referring to defining sectarianism per se is reflected in current incitement to hatred legislation – Part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order).

8.20 The 1987 Order includes – in addition to sexual orientation or disability – the protected grounds of 'religious belief, colour, race, nationality (including citizenship) or ethnic or national origins'.

8.21 A number of these grounds overlap as indicators of sectarianism or other forms of racism.

8.22 The Criminal Justice (No. 2) (Northern Ireland) Order 2004 (the 2004 Order) provided for increased sentences when offences were aggravated by hostility on similar protected grounds.

8.23 The formulation in the 2004 Order varies from the 1987 Order, referring to a victim's membership of (or perceived membership or association with) a 'racial group'; 'religious group'; 'sexual orientation group' or disability. 'Racial group' has the same meaning as in the *Race Relations (Northern Ireland) Order 1997* (the 1997 Order).

8.24 Article 5 of the 1997 Order defines 'racial group' as 'a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.'

8.25 Article 5(3) of the 1997 Order provides that 'racial group':

> *(a) Includes the Irish Traveller community;*
>
> *(b) Does not include a group of persons defined by reference to religious belief or political opinion.*

8.26 In the 2004 Order, 'religious group' means a group of persons defined by reference to religious belief or lack of religious belief.

8.27 The fact that this definition of 'racial group' explicitly excludes sectarianism means that 'religious group' is the only current indicator for sectarianism, and not other indicators (like nationality) that are part of the definition of racial group. This may give rise to difficulties in relation to what is defined in law is a 'religious group'.

8.28 It is noteworthy that, in the *T:BUC* definition of sectarianism referred to in the *New Decade, New Approach* report above, that sectarianism is defined as:

> *[T]hreatening, abusive or insulting behaviour towards a person by reason of that person's religious belief or political opinion; or to an individual as a member of such a group.*[140]

8.29 Although the category of 'political opinion' is used as a protected ground in legislation protecting against sectarian discrimination – as, for example, in the Fair Employment and Treatment (Northern Ireland) Order 1988 and Sections 75 and 76 of the Northern Ireland Act 1998, there are significant concerns that the use of 'political opinion' as a category of offence dealing with hate expression would risk capturing legitimate political speech, and conflict with human rights obligations on freedom of expression.

8.30 It is to be observed that the category of 'political opinion' was not used in either the 1987 or 2004 Orders.

8.31 An amendment to include 'political opinion' as a category in legislation dealing with sectarian chanting at major sports events was ultimately defeated.[141]

8.32 "Sectarian" is mentioned in section 37 of the Justice Act (Northern Ireland) 2011 which creates a specific offence, narrowly defined, of chanting at a regulated football match where the chanting is of a sectarian or indecent nature; or as threatening, abusive or insulting to a person by reason of colour, race, nationality, ethnic or national origins, religious belief, sexual orientation or disability. The reference to sectarian

[140] UK Government, Irish Government, *New Decade, New Approach,* p42.
[141] Justice Act (Northern Ireland) 2011. See also: Neil Jarman, *Defining sectarianism and sectarian hate crime, the challenge hate crime project:* Belfast: Institute for Conflict Research, (2012).

chanting was not included in the Bill as introduced, but was added at a later stage. There is no definition of the term 'sectarian' in the Act, although in the course of the parliamentary procedure an unsuccessful attempt was made to introduce a definition in the following terms:

> Chanting is of a sectarian nature if it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's religious belief or political opinion.

8.33 No one has ever been prosecuted under this Act in Northern Ireland.

8.34 The *Police Service of Northern Ireland (PSNI)* record hate crime distinguishing between 'sectarian' hate crime and 'faith/religious (non-sectarian)' hate crime and maintain separate records for each.

8.35 This, despite the fact that there is no statutory aggravation in relation to sectarianism in Northern Ireland.

8.36 In the latest set of statistics on incidents and crimes with a hate motivation recorded by the police in Northern Ireland (period ending 30 June 2020), sectarianism is defined in the following terms:

> The term 'sectarian', whilst not clearly defined, is a term almost exclusively used in Northern Ireland to describe incidents of bigoted dislike or hatred of members of a different religious or political group. It is broadly accepted that within the Northern Ireland context an individual or group must be perceived to be Catholic or Protestant, Nationalist or Unionist, Loyalist or Republican. However, sectarian can also relate to

> other religious denominations, for example, Sunni and Shi'ite in Islam.[142]

8.37 In relation to faith/religion (non-sectarian) crimes, the definition states:

> A faith or religious group can be defined as a group of persons defined by reference to religious belief or lack of religious belief. This would include Christians, Muslims, Hindus, Sikhs and different sects within a religion. It also includes people who hold no religious belief at all.[143]

8.38 The *Public Prosecution Service* take the approach that, where applicable, offences motivated by sectarianism may be considered to be aggravated on the basis of either race or religion, depending on the circumstances of the case. Some offences, which are considered in broad terms to be sectarian, do not fall within either statutory category of race or religion. It would appear that in such situations the offence will still be prosecuted, but the legislation relating to the aggravation element will not apply.

8.39 In examining the issue of sectarianism in Scotland, Lord Bracadale made a number of observations. He pointed out:

> It is clear that the concept of sectarianism extends beyond hate crime. The references to 'exclusion' and 'discrimination'…. emphasise that sectarianism is not restricted to crime at all. It is a broader societal issue. In addition to criminal offences, it may feature in non-legislative contexts and in circumstances governed by the civil law… There is a range of strongly held views as to what is meant by the term. There are sharp divisions of opinion as to whether it is a religious concept, a political and cultural concept or involves a mixture of religion, politics and culture…. The working group has been established to work on a definition of

[142] PSNI, *Incidents and Crimes, (*2020) p3.
[143] Ibid.

> sectarianism and they are best suited to take that forward.[144]

8.40 The *Working Group on Defining Sectarianism in Scots Law*, chaired by Professor Duncan Morrow of the *University of Ulster*, produced its final report in November 2018.[145]

8.41 The Working Group's description of sectarianism in Scotland sounds many familiar chords for Northern Ireland. It noted that:

> Historically, sectarianism has been used in Scottish society to describe discord and tensions relating to internal divisions between Christian denominations. The roots of this complexity lie in the political, economic and religious history of Scotland after the Reformation (when anti-Catholicism was integral to many aspects of public life), the impact of, the reaction to, large-scale Irish emigration to Scotland in the 19th and 20th centuries, and the history of opposition to/support for British sovereignty in Ireland and then later Northern Ireland.
>
> These divisions with their religious, economic, national, cultural and political associations, spawned identity around what are sometimes called 'cultural signifiers' in many parts of Scotland, and were exploited in a variety of ways in social, political and economic life. These identity markers extended beyond the religious and into associated cultural expression.[146]

8.42 The *Working Group* noted that the Justice Act (Northern Ireland) 2011 is the only criminal statute ever passed in the United Kingdom which uses the language of sectarianism, although, as indicated earlier, despite attempts by the Minister

[144] Lord Bracadale, *Independent Review,* p100.
[145] Scottish Government, *Final Report of the Working Group on Defining Sectarianism in Scots Law* (November 2018).
[146] Ibid, p7.

responsible for the Bill to propose a legal definition, the word 'sectarian' is not defined in the 2011 Act.

8.43 It proved very difficult to find a definition that was acceptable to the majority of Members of the Legislative Assembly (MLAs) in the *Northern Ireland Assembly* so, although the language of sectarianism was finally incorporated into the law in Northern Ireland, the term was left undefined in law.

8.44 The *Working Group* reached a number of conclusions:

- The principle of 'fair labelling' should apply so that criminal acts of prejudice can be named for what they are whether that be anti-Catholicism; anti-Protestantism; sectarianism or any other descriptor . . . The *Working Group* seeks to open up options which will allow the criminal justice system to fairly label sectarian crime rather than allowing it to fall through the cracks if it does not, for example, fit neatly into a descriptor such as religious or racial hatred.

- In taking forward the principle of fair labelling we recognise that the language of sectarianism is widely used in society even if it has not been previously defined in law. Therefore, we have recommended the legal definition of sectarianism is established to reflect the fact that such language is used in day-to-day life.

- We believe that sectarianism in Scotland should be specifically defined as an issue that exists between Christian communities in Scotland at this time. We do not believe that enough is understood about sectarianism in relation to other communities in Scotland to make the application of 'sectarianism' to these communities meaningful in the legal or social sense.

- We do not believe the legal concept of sectarianism is any more abstract than the legal concepts of religion or race which are already

specified in law. Therefore, while recognising the complex nature of sectarianism, we do not believe that this is a sufficient reason not to establish a legal definition.

- Sectarianism is undoubtedly an intersectional issue, that is to say that it does not fall easily into a single categorisation, but has evolved over time to be present within the religious, racial, cultural and political spheres. Additionally, the original link to religion is often completely obscured as the language of sectarianism is applied and cultural areas where the links to religion are no longer obvious.

- We are very conscious of the conclusion of Lord Bracadale's review of hate crime legislation in Scotland and his proposal to establish a comprehensive set of statutory aggravators relating to all the protected characteristics covered by equality law. We believe that as part of this work new intersectional statutory aggravation of 'sectarian prejudice', should be incorporated into future consolidated hate crime legislation.[147]

8.45 The *Working Group* argued that a single, intersectional, sectarian aggravator could have two key advantages for police and prosecutors.

8.46 Firstly, it would streamline decision-making where the accused's conduct immediately before, during or after the offence might arguably fall within racial or religious aggravations, where the hostility evinced is of a sectarian character.

8.47 They argued that a single compound aggravator avoids the need for duplication where, for example, the accused's behaviour could arguably ground both the religious and a racial aggravator, observing that there is no reason in principle why a sectarian prejudice aggravator should be any more difficult to apply in practice than the existing aggravators based on religious and racial prejudice.

[147] Ibid, p2-3.

8.48 The *Working Group* argued powerfully that introducing a sectarian prejudice aggravator would signal something significant to Scots law and to Scottish society, using the language of sectarianism for the first time in Scots law without dramatically extending the powers of the police, or curbing the liberty of citizens, whilst at the same time recognising and naming the intersectional reality of sectarianism in modern Scotland.

8.49 The *Working Group* drew up the following definition of sectarianism, recommending that it should be incorporated into a consolidated Hate Crime Bill alongside the existing aggravators based on religious and racial hatred:

> Aggravation by sectarian prejudice
>
> (1) This subsection applies where it is: –
>
> (a) libelled in an indictment, or specified in the complaint, that an offence is aggravated by sectarian prejudice, and
>
> (b) Proved that the offence is so aggravated.
>
> (2) for the purposes of this section, an offence is aggravated by sectarian prejudice if either Condition A or Condition B are met, or if Condition A and Condition B are both met.
>
> (3) Condition A is that: —
>
> (a) at the time of committing the offence or immediately before or after doing so, the offender demonstrates hostility towards the victim (if any) of the offence based on the victim's membership (or presumed membership) of a Roman Catholic or Protestant denominational group, or of a social or cultural group with a perceived Roman Catholic or Protestant denominational affiliation; or
>
> (b) The offence is motivated (wholly or partly) by hostility towards members of a Roman Catholic or Protestant denominational group, or of a social or cultural group with a perceived Roman

Catholic or Protestant denominational affiliation, based on their membership of that group.

(4) Condition B is that: –

(a) at the time of committing the offence or immediately before or after doing so, the offender demonstrates hostility towards the victim (if any) of the offence based on the victim's membership (or presumed membership) of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a group based on their Irish or British nationality (including citizenship) or ethnic or national origins.

(5) For the purpose of this section it is immaterial whether or not the offender's hostility is also based (to any extent) on any other factor.

(6) The court must: -

(a) state on conviction that the offence was aggravated by sectarian prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated, and

(c) take the aggravation into account in determining the appropriate sentence.

(7) for the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by sectarian prejudice.

(8) In subsections (3)(a) and (4)(a)—
'membership' in relation to a group includes association with members of that group; and 'presumed' means presumed by the offender.

(8) In this section, "Roman Catholic or Protestant denomination group" means a group of persons defined by reference to their:-

(a) Roman Catholic or Protestant denominational religious belief or lack of religious belief;

(b) membership of or adherence to a Roman Catholic or Protestant denominational church or religious organisation;

(c) support for the culture and traditions of a Roman Catholic or Protestant denominational church or religious organisation; or

(d) participation in activities associated with such a culture or such traditions.[148]

8.50 The *Working Group* argued further that its proposed draft sectarian aggravator could be applied to the stirring up of hatred offences – although in this case the *Group* warned that introducing a new substantive criminal offence of stirring up hatred must be undertaken with extreme care, with particular regard to free expression and the need for an appropriately high legal threshold to justify criminal sanctions.

8.51 They argued that any new offences concerned with the stirring up of hatred must incorporate explicit recognition of the right to free expression under the European Convention on Human Rights, and differentiate between behaviour which genuinely incites hatred from robust, critical and perhaps challenging and difficult forms of expression concerning any of the protected characteristics.

8.52 On receipt of the report of the *Working Group*, the *Scottish Government* engaged in a further consultation exercise and wider engagement with stakeholders. It was found that, in Scotland, there was no clear consensus on the benefits, or otherwise, of including specific protections for sectarianism in any new proposed hate crime legislation, and the Government therefore did not provide for a sectarian statutory aggravation in the *Hate Crime and Public Order (Scotland) Bill* introduced in April 2020. Although some would agree with this decision, others might see it as a missed opportunity.

[148] Ibid, p30-31.

Consultation responses: sectarianism

8.53 The consultation responses on the inclusion of sectarianism as an offence in Northern Ireland provides an important snapshot of public opinion, albeit on a narrow basis and confined to only those who chose to respond.

8.54 That said, 75% of organisations which responded were in favour of there being a specific reference to the term 'sectarian' within any new hate crime legislation. As previously noted, individual responses were different, with 65% of individuals disagreeing.

8.55 From those who responded to the online survey, 83% agreed that the term sectarian should be included in any new hate crime legislation.

8.56 84% agreed that if the term sectarian is included, sectarianism should be defined in any new hate crime legislation.

8.57 Respondents who agreed that there should be such a specific reference gave a variety of reasons, the chief ones being:

- Sectarianism continues to be a significant problem in Northern Ireland. In order to address this, robust legislation, including a specific reference to sectarianism within any new hate crime legislation is essential, providing recognition of the high level of sectarian hate crime and incidents in Northern Ireland, as well as the damaging impact on individuals and communities.
- The absence of an agreed definition of sectarianism within law, as is currently the case, is problematic in terms of recording and dealing 'sectarian' crime.
- Inclusion of the term 'sectarianism' would be consistent with other legislation, including fair employment legislation, and in line with the *Northern Ireland Executive's* focus on tackling this issue as outlined in the New Decade, New Approach framework.

- The current ‘religious group’ indicator does not adequately capture the meaning and impact of sectarianism, which extends beyond religion to include aspects of nationality and political identity.

8.58 The *Public Prosecution Service* drew attention to the intersectional nature of sectarianism, noting that:

> It does not fall easily into a single categorisation, but has evolved over time to be present within the religious, racial, cultural and political spheres.

8.59 Additionally, it was pointed out by the *Church of Ireland Church and Society Commission* that the current approach to categorisation:

> Ignores the nuances of the issue and creates potential issues in the form of a defence that argues that an incident was not driven by ethnic or religious hatred but instead cites an aggravation related to political/sporting/class animosity.

8.60 A number of respondents referred to the *United Nations* and *Council of Europe* expert treaty bodies, who advocate that sectarianism should be treated as a specific form of racism.

8.61 *Sinn Féin* argued for a broader definition of sectarianism, that is:

> As a specific form of racism based on the expressions of the *Council of Europe, United Nations and the Human Rights Commission* – whose list of indicators would be expanded to include race, religious beliefs, nationality (including citizenship), ethnicity, cultural background and language.

8.62 The *Public Prosecution Service* supported consideration being given to placing the aggravating nature of sectarian crime on a statutory basis, endorsing the final report of the *Working Group* on Defining Sectarianism in Scots law referred to earlier. Their response noted the conclusions of the *Working Group*, in particular, that:

> The principle of 'fair labelling' should apply so that criminal acts of prejudice can be named for what they are whether that be anti-Catholicism, anti-Protestantism; sectarianism or any other descriptor.

8.63 The *Northern Ireland Human Rights Commission (NIHRC)* also referenced the work of the *Working Group* on Defining Sectarianism in Scots law and its proposed definition of sectarianism as:

> Hostility based on perceived:
>
> (a) Roman Catholic or Protestant denominational affiliation,
>
> (b) British or Irish citizenship, nationality or national origins, or
>
> (c) A combination of (a) and (b).

8.64 *NIHRC* recommended that any new hate crime legislation in Northern Ireland recognises the specific harm of sectarianism as a particular characteristic of hate crime, under the umbrella of racism and racial discrimination, and takes the opportunity to develop a statutory definition of sectarianism in line with international human rights standards on racism and racial discrimination.

8.65 *Victim Support NI* observed that:

> International human rights law encourages countries to adjust their approach to hate crime based on their individual circumstances and idiosyncrasies and

> sectarianism is undoubtedly Northern Ireland's unique form of hate crime.

8.66 The *Equality Commission for Northern Ireland* considered that there was merit in including a specific reference to 'sectarianism' within proposed hate crime legislation. It observed that:

> This would have a symbolic value by sending a clear message to victims, perpetrators and the general public that sectarian hate crime is unacceptable. It would also make clear that one of the aims and purposes of the hate crime legislation is to protect against sectarian hate crime . . . Specific reference to 'sectarianism' in the hate crime legislation will also be a recognition of the high level of sectarian hate crime and incidents that occur in Northern Ireland, as well as the damaging impact of those crime/incidents on different communities and individuals.

8.67 The *NIHRC* recommended that:

> the indicators of sectarianism are expanded so that they include religious belief, national identity, nationality and citizenship; legislative gaps in protection relating to sectarian hate crime should be addressed; and that there is recognition that victims of sectarian hate crime can be targeted due to their multiple identities.

8.68 The *NIHRC* acknowledged that there are presently clear gaps in protection under current hate crime legislation, in terms of addressing sectarian hate crime, that need to be addressed urgently.

8.69 Comments offered by those opposed to the inclusion of a specific reference to the term 'sectarian' were comparatively less detailed.

8.70 A notable exception was the contribution from the *Democratic Unionist Party* who recognised that:

> Sectarianism is a multi-faceted term and can be interpreted as meaning direct malice against someone's religious belief, community background, nationality or culture. All such proven acts of intent are wrong and should be addressed. We are not convinced, however, that inserting a reference to sectarianism into hate crime law in Northern Ireland would aid better enforcement or application. Such a definition would be undoubtedly subject to political debate – particularly when considering the outcome of previous debates on a definition of sectarian chanting at sporting events – potentially undermining public confidence or deflecting from the purpose and outcomes of a revised framework . . . Relying therefore on existing protected grounds like 'religious belief' and 'nationality', and perhaps exploring better explanation of current provision, may be a more measured approach in the short term. It should be noted that characteristics referenced by the current provisions on stirring up hatred in Northern Ireland extend to nationality and ethnic background.

8.71 The *Bar of Northern Ireland* saw no evidence to suggest that the current provisions are not operating as intended to properly protect against sectarianism.

8.72 Among those who were generally supportive of the expansion of the indicators of sectarianism, many agreed that the inclusion of 'political opinion' as an indicator was not appropriate. In particular, it was argued that this would risk capturing legitimate political speech and conflict with human rights obligations and freedom of speech, such as Article 10 of the *European Convention on Human Rights.*

8.73 Despite this widespread agreement, it will be remembered that in the *PSNI* definition of 'sectarianism' it is noted that the term 'sectarian':

> [W]hilst not clearly defined, is a term almost exclusively used in Northern Ireland to describe incidents by bigoted dislike or hatred of members of different religious or **political** groups.[149] [my emphasis]

8.74 These responses – and others – highlight misunderstandings and misconceptions as regards the reach of the current limited hate crime legislation.

8.75 So, while the indicators for sectarianism are limited to religious belief and political opinion in anti-discrimination legislation, political opinion has not been used in hate crime legislation precisely because it could engage rights relating to freedom of expression. The current 'aggravated by hostility' offences in the 2004 Order are **wholly** reliant on the protected category or 'religious group' as a sole indicator for sectarian aggravation.

8.76 However, in relation to public order, the 1987 Order dealing with 'stirring up' offences has a broader set of indicators, including 'ethnic or national origins' and 'nationality (including citizenship)', that are also indicators of sectarianism as well as religious belief. Such indicators – including religious belief – are also grounds relating to other forms of racism.

8.77 The 1987 Order also references 'race' and 'colour' and covers most of the protected grounds in international standards relating to racism, except language and descent.

8.78 This patchwork approach has had an impact on policy. This is reflected in the *PSNI* monitoring of incidents where racism and sectarianism are separated into three separate categories. These are namely 'racist motivations', 'sectarian motivations' and 'faith/religion motivations'.

[149] PSNI, *Incidents and Crimes, (*2020).

8.79 As indicated above, the latter is defined as 'non-sectarian' faith/religion incidents relating to 'Christians, Muslims, Hindus, Sikhs and different sects within a religion'. Whilst the definition explicitly excludes sectarianism, it will be reliant on the indicator in legislation of 'religious belief', and such incidents could also fall under the racist motivations category.

8.80 The *PSNI* hate definitions acknowledge the lack of a clear definition of sectarianism in Northern Ireland but, in reference to community background, states that 'an individual or group must be perceived to be Catholic or Protestant, Nationalist or Unionist, or Loyalist or Republican'. Clearly, only the first of these categories is captured by the category of 'religious belief'.

Conclusions and recommendations

8.81 I am satisfied that 'religious belief' is too limited to function as a sole indicator for sectarianism.

8.82 As an example, the consultation paper – at paragraph 13.18 – highlights examples of abuse attack against individuals due to wearing of a GAA or Northern Ireland football top, or a shamrock or poppy, as well as because of speaking Irish or Ulster Scots, and the potential that such offences would not be covered by the ground of religious belief.

8.83 I am clear that crimes of this nature committed against such individuals, whether Catholic, Protestant or of no religion, should be covered by new hate crime legislation and that the gaps in protection should be rectified.

8.84 The argument that such persons would be afforded protection by the category of 'religious belief' is even weaker if the persons in question are a Protestant Irish speaker or a Catholic Ulster Scots speaker.

8.85 I am satisfied, therefore, that the current legislative and policy construction in relation to sectarianism is not only complex, but also inconsistent and must be addressed in a modern and more straightforward way.

8.86 I have carefully reviewed a number of potential options including the option of 'no change'.

8.87 As indicated earlier, in the *'New Decade, New Approach'* document, the parties to that agreement were clear that they recognised:

> The need to tackle sectarianism, prejudice and hate and seeking to eliminate discrimination. The parties endorse the objectives outlined above and wish to see sectarianism given legal expression as a hate crime.[150]

8.88 I recommend that:

Recommendation 12

The findings of the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in Northern Ireland – subject to any necessary adjustments.

8.89 I agree with the *Working Group* that although this is a complex issue, that is not a sufficient reason not to establish a workable legal definition.

8.90 I am persuaded that the principle of fair labelling should apply so that criminal acts of prejudice can be named for what they are, whether that be anti-Catholicism; anti-Protestantism; sectarianism or any other descriptor.

[150] UK Government, Irish Government, *New Decade, New Approach,* p43.

8.91 Whilst I acknowledge concerns expressed by other communities, I believe that sectarianism in Northern Ireland should be specifically defined as an issue that exists between Christian communities in Northern Ireland at this time. I do not believe that enough is understood about sectarianism in relation to other communities in Northern Ireland to make the application of 'sectarianism' to these communities meaningful in a legal or social sense.

8.92 Earlier in this chapter, I set out the *Scots Working Group* proposal for a draft clause which could be incorporated into a consolidated Hate Crime Bill for Scotland.

8.93 Such a clause could well be the basis for a similar draft in any new Hate Crime Bill to be considered by the Assembly.

8.94 Of course, there would need to be changes. An obvious example would be to include the proposed third threshold – the so-called 'by reason of' threshold...(see Recommendation 7 (c) and (d). Note also Recommendation 8 in relation to the proposed obligations on the sentencing judge.

8.95 Subsection (7) in the Scots proposal would be unnecessary for Northern Ireland as this deals with a particular requirement, normally to have corroboration in proof of criminal offences in Scotland, an issue not relevant to Northern Irish law.

8.96 These proposals are radical but in keeping with public expectation and a desire to ensure that the law is coherent, consistent and addresses the issues at stake when dealing with hate crime Northern Ireland.

8.97 The language of 'sectarianism' has not been used and has not been defined in any statute passed by the *Westminster or Scottish Parliament.*

8.98 As already noted, the only criminal statute which uses the explicit language of sectarianism in the United Kingdom is the Justice Act (Northern Ireland) 2011, which make specific provision for prohibited conduct at regulated matches of football. An opportunity to define sectarianism for the purposes of that Act was missed – it was not acceptable then to the majority of members of the Assembly and so, although the language of sectarianism was incorporated into the Act, the term was left undefined in Northern Irish law.

8.99 It is clear that times have changed – the major parties in Northern Ireland have declared that they wish to see sectarianism given legal expression as a hate crime. This proposal opens up the option to allow the criminal justice system to fairly label sectarian crime for the first time.

8.100 I must admit that when I first read the Scots group draft proposal, it looked somewhat complicated. However, on further examination, it is no more complex than many other examples of criminal law, and I am confident that it is capable of improvement.

8.101 Complexity itself is not a sufficient reason not to establish a legal definition.

8.102 I believe that the introduction of a sectarian prejudice aggravator along the lines of that proposed for Scotland would represent a major step in safeguarding the aspirations for peace set out in the Good Friday Agreement, whilst recognising and naming the intersectional reality of sectarianism in Northern Ireland.

8.103 I therefore recommend as follows:

Recommendation 13

There should be a new statutory aggravation for sectarian prejudice. It is recommended that the introduction of the new offence of statutory aggravation for sectarian prejudice should be carefully monitored by the proposed Hate Crime Commissioner on an annual basis and provide an annual report to the Northern Ireland Assembly.

Chapter 9

Stirring Up Offences

CHAPTER 9

9.1 Chapter 9 is divided into two parts. Part 1 addresses the issues surrounding stirring up offences; part 2 considers the significance of freedom of expression and its importance in the context of hate crimes and hate speech.

PART 1 - Stirring up offences – Public Order

9.2 The review's terms of reference includes the consideration of the implementation and operation of the current legislative framework for incitement offences, in particular, Part III of the Public Order (Northern Ireland) Order 1987 (the 1987 Order), and make recommendations for improvements.

9.3 The current law of Northern Ireland includes Part III of the 1987 Order which relates to 'stirring up hatred or arousing fear'.

9.4 Stirring up hatred is conduct which encourages others to hate a particular group. It is important to distinguish this concept from the definition of 'hate crime' discussed in the early part of this review. In a hate crime the baseline conduct (or basic offence) is already criminal; it is the motive or demonstration of hostility that marks it out currently as a hate crime. However, a stirring up hatred offence may criminalise conduct which would not otherwise be criminal. These so-called 'stirring up' offences criminalise certain forms of hate speech and should be clearly distinguished from hate crime generally.

9.5 Hate speech has been defined as speech that "expresses, encourages, stirs up or incites hatred against a group of individuals distinguished by a particular feature or

set of features such as race, ethnicity, gender, religion, nationality and sexual orientation".[151]

9.6 Historically, while Part III of the 1987 Order may be a key element in legislation pertaining to hate speech, it has been little used and there continues to be limited awareness of the law.

9.7 In 2017, the *Criminal Justice Inspection Northern Ireland* in examining hate crime observed that the 1987 Order had been little used in recent years, with only 73 cases being considered for prosecution between January 2010 and the end of September 2016. Of these, just 28 were prosecuted and no information was available for outcomes.[152]

9.8 McVeigh (2018) cites *Department of Justice* records, indicating that from 2012 to 2016 there were in fact six convictions under this law.[153] Recent figures provided to this review by the *PSNI* in relation to prosecutions and convictions where there was an offence under Articles 9-13 of the 1987 Order with a hate motivation suggest a modest increase in numbers so that, for example, in 2019 there were seventeen such prosecutions with five convictions.

9.9 A similar pattern of prosecutions may be observed in Scotland. In his review of hate crime legislation in Scotland, Lord Bracadale noted that between 2006 and 2016 there were only nine prosecutions for stirring up racial hatred under the Public Order

[151] Parekh, 'is there a case for banning hate speech'. In the context of hate speech: rethinking regulation and responses (2012) page 37

[152] Criminal Justice Inspection (2017). *Hate Crime: An Inspection of the Criminal Justice System's Response to Hate Crime in Northern Ireland.* Belfast: Criminal Justice Inspection Northern Ireland.

[153] R. McVeigh (2018). *Incitement to Hatred in Northern Ireland.* Belfast: Equality Coalition.

Act 1986 (the 1986 Order). Racial hatred is the only basis for prosecuting offences of this type in Scots law at present although the Hate Crime and Public Order (Scotland) Bill, presently under consideration by the *Scottish Parliament*, proposes to extend the reach of the law to other groups such as age, disability, religion, including perceived religious affiliation, sexual orientation, transgender identity and variations in sex characteristics.

9.10 So far as England and Wales are concerned, beginning with racial hatred in the 1986 Order, analogous offences addressing religious hatred and hatred on the grounds of sexual orientation were added in 2006 and 2008 respectively.

9.11 The 1987 Order in Northern Ireland – extended further in 2004 – has the broadest reach compared to England and Wales. It covers all aspects of hate crime including hate relating to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.

9.12 In all three jurisdictions, the contemporary offences adopt a similar approach. They do not necessarily require proof of an intention to stir up racial hatred: it is sufficient to prosecute when there is evidence either that the accused has such an intention or that "having regard to all the circumstances racial hatred is likely to be stirred up thereby". This means that, looking at all the circumstances, the finder of fact can adduce evidence sufficient to satisfy the guilty mind required by the law.

9.13 Changes in the law followed criticism by Lord Scarman that the requirement for proof of intent (amongst other aspects of the offence under the Race Relations Act 1965) rendered the offence "useless to a policeman on the street".[154]

[154] Report of Inquiry By the Rt. Hon. Lord Justice Scarman, O.B.E. (cmd. 5919) (1975)~ p. 35.

9.14 That said, the breadth and scope of the law in Northern Ireland is greater than the law in England and Wales.

9.15 Firstly, the law in Northern Ireland also offers protection to disabled people who are not protected in the same way in England and Wales.

9.16 There are three significant differences between the offence in England and Wales relating to religious hatred and sexual orientation – as opposed to the offences relating to racial hatred. So, for offences relating to religious hatred and sexual orientation:

(1) The words or conduct must be threatening – not merely abusive or insulting;

(2) There must have been an intention to stir up hatred – a likelihood that it might be stirred up is not enough; and

(3) There are express provisions protecting freedom of expression, covering, for example, criticism of religious beliefs or sexual conduct.

9.17 The law in Northern Ireland does not draw any distinction whatsoever between offences relating to racial hatred and other protected groups. All are treated equally.

9.18 It is also important to note that there are no express provisions protecting freedom of expression in relation to criticism of religious beliefs. Until recently, the same could be said in relation to there being no express provision protecting freedom of expression in relation to sexual orientation.

9.19 However, in the absence of a functioning Assembly from 2017 to 2020, such a freedom of expression principle was introduced in January 2020 on the initiative of the UK government and through regulation to give legal protection in relation to any discussion or criticism of marriage which concerns the sex of the parties to marriage.

9.20 This is a topic that will be examined later in this chapter in the context of discussing the protection afforded by the principles of freedom of expression.

9.21 There is a further important difference between the structure of the offences found in Sections 18 to 23 of the 1986 Order and the structure of Articles 9 to 13 in the 1987 Order.

9.22 Order 9(1) of the 1987 Order provides that:

> *A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –*
>
> *(a) He intends thereby to stir up hatred or arouse fear; or*
>
> *(b) Having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby. [my underlining]*

9.23 The reference to arousing 'fear' and whether or not "fear is likely to be aroused having regard to all the circumstances" is unique to Northern Ireland. It is not found in the legislation for other jurisdiction in United Kingdom nor in the current Hate Crime and Public Order (Scotland) Bill 2020.

9.24 It is also noteworthy that Article 8 of the 1987 Order defines 'fear' as follows:

> *'Fear' means fear of a group of persons defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.*

9.25 One theme that is common to all jurisdictions of the United Kingdom is the reference to 'hatred' as the appropriate benchmark for stirring up offences.

9.26 Hatred is not defined in the 1986 Order. An attempt to define it in the 1987 Order is made under Article 8, which notes:

> *'Hatred' means hatred against a group of persons defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origin.*

9.27 Arguably, to define something by reference to itself is circular and unhelpful. The Oxford English Dictionary defines hate as:

> The emotion or feeling of hate, active dislike, detestation, enmity, ill-will, malevolence.

9.28 The verb is defined as "to hold in very strong dislike, to detest, to bear malice to, the opposite of 'to love'."

9.29 It is generally accepted that 'hatred' is a much stronger term than 'hostility'.

9.30 In a leading textbook commentary, Card, *Public Order Law*, the author points out that the stirring up offences would have been easier to prove if only hostility or ill-will had been intended, and that hatred, as a minimum, connotes:

> Intense dislike, enmity or animosity . . . A much stronger thing than simply bringing into ridicule or contempt, or causing ill-will or bringing into distaste.[155]

9.31 The *Crown Prosecution Service* guidance on the stirring up hatred provisions states:

> Hatred is a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.[156]

9.32 On this point the *Law Commission for England and Wales* notes:

> Therefore, the expression of political views expounding policies of a racially discriminatory nature but not intended or likely to stir up hatred against a racial group would not be an offence. However objectionable such views might be, the ECHR protects the right to shock, offend or disturb.[157]

9.33 The hatred must be directed at the group, not merely at an individual.

9.34 It has been observed that this is a very high threshold and some argue that hatred should be defined by references to concepts such as hostility, bias, prejudice,

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[155] R Card, Public Order Law (2000) p 186

[156] See CPS, Racist and religious crime – CPS prosecution policy, Legal Guidance, Hate crime, available at https://bit.ly/2E6vxsk; archived here. http://webarchive.nationalarchives.gov.uk/20111115164417/http://www.cps.gov.uk/publications/prosecution/violent_extremism.html.

[157] *Law Commission* paper no.213: Hate crime: the case for extending the existing offences.

bigotry or contempt or that it should be replaced altogether by terms such as those. This argument suggests the word 'hatred' is too high a bar, thus ensuring that prosecutions under the 1987 Order are very rare.

9.35 On the other hand, it is important to remember that the 1987 Order is designed to deal with hateful behaviour which is sufficiently severe to reach the threshold for criminal prosecution, and that there are complex legal arguments making it necessary to balance potential offending against the right to freedom of expression.

Consultation responses: stirring up offences

9.36 The consultation paper (question 34, page 182) asked respondents whether the term 'hatred' is the appropriate test to use in the stirring up offences under the 1987 Order.

9.37 Although the great majority of respondents did not consider the term 'hatred' as the appropriate test, there was little support for an alternative term or for lowering the evidential test.

9.38 The *Public Prosecution Service (PPS)* in Northern Ireland advocated retention of the word 'hatred' on the basis that this was perceived to meet legislative obligations in accordance with international standards. The *PPS* noted that the term 'hatred' sets a very high threshold for the prosecution of offences and argued that this was appropriate given the seriousness of such offences and their potential impact on freedom of speech.

9.39 A number of women's groups in Northern Ireland argued that the current threshold for prosecution is set too high, resulting in rare successful prosecutions. For these groups, 'hostility' was a preferable term which it was said would serve to create

consistency and clarity, enabling the judicial process to function in a more streamlined and effective manner.

9.40 *Sinn Féin* agreed, asserting that the threshold for prosecution was too high and that the police tended to interpret this as if the bar was even higher, resulting in the police tending not to use the provision even when it could be used.

9.41 Another respondent, *TrangenderNI*, highlighted what were perceived as negative implications, particularly for minority groups:

> This high threshold is ostensibly to protect 'free speech', when in reality it leads to minorities and marginalised groups struggling to speak out, participate in society and contribute to public discourse due to fear of unchecked harassment or violence.

9.42 *The Christian Institute* argued that society would be better off without offences such as stirring up hatred on disputed and controversial grounds such as religion and sexual orientation. It argued that such offences present a threat to freedom of expression and noted that:

> Hate crime laws, and particularly offences of stirring up hatred, threaten freedom of religion and belief if they prevent people from giving an account of what they believe. This is as true for atheists as it is for religious people.

9.43 Other respondent faith groups took a broadly similar line. One individual respondent observed that:

> 'Hatred' is already too subjective a term to be used in the criminal law, especially for issues like religion and

> sexual orientation. Disagreement is often labelled hatred. It encourages vexatious and politically motivated complaints that waste police time and chill freedom of speech.

9.44 The *Democratic Unionist Party* argued that the threshold for prosecution should not be lowered and opposed any expansion or lowering of the current test, observing that the focus should be on clear intent to cause malice or ill-will, as has been applied in Scotland.

9.45 The *PSNI* supported the continued use of the term 'hatred', suggesting that it helps to define the significance and severity of the acts. A similar stance was taken by the *Law Society of Northern Ireland*. The *Bar of Northern Ireland* cautioned that:

> [F]rom a human rights perspective there is a genuine danger that expanding provisions in this area will also impact adversely on freedom of speech and a danger that legitimate criticism could be construed as 'stirring up hatred'.

9.46 The *Church of Ireland Church and Society Commission* agreed that there are strong arguments against lowering the threshold for such a crime and that care must be taken to ensure freedom of speech and freedom of expression are maintained.

9.47 It noted, however, that the requirement that the *Director of Public Prosecutions (DPP)* consent to any such prosecution taken under the 1987 Order already acts as something of a safety net to catch spurious cases. This might also offer reassurance to those respondents who claimed that freedom of expression might be overridden. It concluded:

> Ultimately it is important to ask if the legislation, rarely used as it is, is solving the problem it was intended to solve and whether it was intended to act as a rarely

used tool against only the most extreme cases or to be more commonly applied.

Recommendation and Analysis

9.48 I have carefully considered whether the points made by some respondents that the term 'hatred' sets a very high bar for prosecution requires reform.

9.49 I am satisfied that the term is appropriate given the seriousness of such offences and the potential impact on freedom of speech if a lower threshold was to be employed.

9.50 **I therefore recommend that the term 'hatred' should remain as the appropriate test in any revised Hate Crime and Public Order Bill in relation to stirring up offences. This is encapsulated in recommendation 14 below.**

9.51 Reviewing the operation of the 1987 Order, I have considered whether Northern Ireland should amend legislation to add the equivalent to Sections 4, 4A and 5 of the Public Order Act 1986. Such provisions are not currently part of the law in Northern Ireland.

9.52 Sections 4, 4A and 5 of the 1986 Act create the following offences:

> ***4. Fear or provocation of violence.***
>
> *(1) A person is guilty of an offence if he—*
>
> *(a) Uses towards another person threatening, abusive or insulting words or behaviour, or*

(b) Distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

4A Intentional harassment, alarm or distress.

(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he -

(a) Uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) Displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

(3) It is a defence for the accused to prove—

(a) That he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(b) That his conduct was reasonable.

5. Harassment, alarm or distress

(1) A person is guilty of an offence if he -

(a) Uses threatening or abusive words or behaviour, or disorderly behaviour, or

(b) Displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove—

(a) That he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) That he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) That his conduct was reasonable.

9.53 Section 4 creates an offence of using, distributing or displaying threatening or abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence would be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence would be used or it is likely that such violence would be provoked.

9.54 Section 4A differs from Section 4 in that, rather than a requirement for immediate violence, an offence under Section 4A is committed if there is an intention to cause harassment, alarm or distress and that harassment, alarm or distress is caused.

9.55 An offence under Section 5 is committed if threatening or abusive words or behaviour or disorderly conduct are used within the hearing or sight of a person likely to be caused harassment, alarm or distress.

9.56 There are no direct equivalents to these provisions within the current law of Northern Ireland.

9.57 The question arises as to whether incorporating such sections or their equivalent into the law of Northern Ireland would be beneficial? The answer to this question is important in considering any new form of hate crime in Northern Ireland.

9.58 The consultation paper noted that there are at present a number of offences in Northern Ireland which are designed to cover offensive conduct – disorderly behaviour, behaviour likely to cause a breach of the peace and harassment. However, each of these offences has its limitations in the context of regulating offensive conduct.

9.59 Disorderly behaviour requires the offence to be committed in a public place. Breach of the peace requires harm to be done or apprehended from an assault, affray, riot or unlawful assembly. Harassment requires at least two incidents. This jigsaw of current provisions creates the potential for a lacuna to be created in particular factual scenarios.

9.60 The consultation paper gave two relevant hypothetical scenarios. (At paragraphs 11.39 and 11.40 – page 173).

9.61 In the first example, D is standing in the public street shouting racial abuse at another person. At present, this case could be prosecuted as disorderly behaviour – aggravated by hostility. However, if D was standing in his own front garden the offence of disorderly behaviour could not be used.

9.62 In contrast, Sections 4A and/or 5 of the 1986 Order could be used in England and Wales to prosecute such an offence as those offences are not restricted by the public place requirement.

9.63 In the second example, a police officer on duty in a town centre is approached by a member of the public who quietly and calmly calls him a racist and uses offensive language. It is arguable that such a factual scenario could amount to disorderly behaviour. Disorderly behaviour is hard to define as it covers words and/or conduct in the context of how, when and where done, whether or not directed to any person, and whether it would give annoyance to members of the public and attract public

attention so as to merit the intervention of the criminal law. Again, such a scenario would unarguably fall under Sections 4A and 5 of the 1986 Order.

9.64 It has been held that the words of Section 5 are to be given their natural ordinary meaning. It is clear that the terms 'harassment, alarm or distress' carry different levels of emotional disturbance. Distress is said to entail real emotional disturbance or upset that is not necessarily present in respect of harassment. Neither is it sufficient for the prosecution to show that only trivial harassment has been caused. The importance of the wording used in a statute cannot be over-estimated.

9.65 So, in *Hammond v DPP (2004) EWHC 69* an evangelical preacher carried a placard with the words 'stop immorality, stop lesbianism'. About 30 to 40 people had gathered round him. Some threw soil at him. Someone tried to pull his placard away from him, while another person poured water over him.

9.66 A police officer asked him to stop preaching and move on. When he refused, he was arrested and charged with a Section 5 offence. He was convicted and on appeal to the Divisional Court the conviction was upheld on the basis that the magistrates had been entitled to find that his words were insulting even though he had not used threatening or abusive language.

9.67 In another case, Muslim protestors who chanted "British soldiers burn in hell" and burned poppies during a Remembrance Day event were convicted of a Section 5 Public Order Act 'insulting' conduct offence. *R v Choudhury (UK Human Rights Blog (2011).*

9.68 Since those cases were decided, Section 5 has been amended to remove the word 'insulting' with the result that a defendant has to use 'threatening and abusive' words before liability can be established (Crime and Courts Act 2013 Section 54).

9.69 In assessing whether expressive conduct entails a breach of Section 5, the court must give appropriate weight to the freedom of expression interests of the defendant *Percy v DPP (2001) EWHC 1125*.

9.70 Whether words or conduct are directed to the police officers, the remarks of Glidewell LJ in *Orum v DPP (1989) 88Criminal Appeal reports 261* should be recalled when determining if harassment, alarm or distress were in all the circumstances likely to result from the defendants words. Glidewell LJ explained as follows:

> *Very frequently words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom. It may well be that, in appropriate circumstances, justices will decide . . . as a question of fact that the words and behaviour were not likely in all the circumstances to cause harassment, alarm or distress to either of the police officers. That is a question of fact for the justices to be decided in all the circumstances, the time, the place, the nature of the words used, who the police officers are, and so on*.

9.71 Merely using offensive words toward officers will not suffice to meet the threshold of liability under Section 5.

9.72 In *Harvey v DPP (2011) EWHC 3992,* the defendant swore at two officers whilst being arrested. Neither officer mentioned being caused any alarm or distress as a consequence. There was no evidence of anyone else having been within earshot other than the associates of the defendant. Accordingly, the defendant's conviction in the lower court was quashed.

9.73 On the question of what constitutes 'reasonable conduct' for the purpose of the Section 5(3)(c) defence, guidance is to be found in *Norwood v DPP (2003) EWHC 1564.*

9.74 The defendant had placed a poster on the window of his flat which stated “Islam out of Britain” and “protect the British people”. The poster also displayed a photograph of the Twin Towers in flames after the terrorist attacks on September 11, 2001.

9.75 The *Divisional Court* held that the defendant’s conduct was not reasonable. The restriction on his freedom of expression was proportionate and needed to safeguard the protected rights of others and/or prevent crime. It was irrelevant that no one person had actually suffered harassment, alarm or distress. The prosecution needed only to show that it was likely that a person be caused harassment, alarm or distress.

Consultation responses: stirring up offences

9.76 The consultation paper (question 31, page 176) asked respondents whether there is merit in adding equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 to the Public Order (Northern Ireland) Order 1987 (referred to below as the proposed reforms).

9.77 This question resulted in some major disagreements between the different responses from organisations and the responses from individuals. The main points of disagreement are examined as follows:

9.78 A large majority of respondent organisations (89%) supported the proposition that there should be reform by adding the relevant sections of the Public Order Act 1986 to the Northern Ireland law, whereas the ten respondent individuals strongly disagreed. The main source of disagreement centred on concerns about freedom of speech being curtailed and legitimate criticism or opinion being interpreted as being capable of constituting a stirring up offence.

9.79 The *Evangelical Alliance* expressed concern that the proposed reforms might result in the public order law being used in a "heavy-handed way to quash unpopular opinions that have no intention of stirring up hatred or civil uprising of any kind".

9.80 The *Christian Institute* took a middle road and suggested that any Section 5 equivalent for Northern Ireland should not cover insulting words or behaviour but only what is threatening or abusive.

9.81 It agreed that equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 for Northern Ireland might help to tackle lower-level conduct noting that:

> Those offences have built-in defences, have relatively low maximum penalties and are not targeted at speech on particular topics.

9.82 Respondents who were supportive emphasised the need for a consistent approach across all the different jurisdictions within the United Kingdom. They also considered it essential to address any legislative gaps in protection against hate crime under the public order legislation.

9.83 Various women's groups who responded argued that the provisions might be used to "strengthen action taken to address harassment of women and pregnant people accessing abortion clinics".

9.84 The *PPS* supported the reform proposals noting that of such offences would capture situations not covered by existing Northern Ireland law, arguing that there were advantages to dealing with a 'hate speech' incident under specific and bespoke legislation, rather than by means of a more general offence such as disorderly behaviour or breach of the peace.

9.85 The *Bar of Northern Ireland* agreed that there may be some merit in adding these sections but urged some caution in their application and use.

Recommendations and Analysis

9.86 It is clear that the majority of respondents have made out a strong case showing that there are gaps in the present stirring up provisions in the 1987 Order, which would be assisted and improved by the addition of sections equivalent to Sections 4, 4A and 5 of the 1986 Act.

9.87 I agree with the amendment to Section 5 which removed the word 'insulting'. There is an obvious distinction between the offences and Sections 4, 4A and Section 5. The *Law Commission* for England and Wales in its current consultation paper have noted:

> The former offences cover behaviour aimed directly at another person; by contrast defence in Section 5 can be carried out merely where a person nearby is likely to be affected. Abuse directed at an individual is qualitatively different to insulting words which are not intended to cause a person harassment, alarm or distress.

9.88 The then *Director of Public Prosecutions*, Sir Kier Starmer QC, observed that the *CPS* had been unable to find a case in which behaviour leading to a charge under Section 5 could be characterised as 'insulting' but not 'abusive'.

9.89 He concluded that the word 'insulting' could therefore be safely removed without undermining the *CPS's* ability to bring prosecutions successfully.

9.90 I recommend that provisions equivalent to Sections 4, 4A and 5 (as amended) be added to the stirring up provisions of the 1987 Order as reflected

in any new Hate Crime and Public Order Bill in Northern Ireland. This recommendation is encapsulated in the body of Recommendation 14 below.

The dwelling defence

9.91 The consultation paper noted that in relation to the use of words or behaviour or display of written material under Article 9(3) of the 1987 Order:

> *No offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.*

9.92 I observed that it was unclear why stirring up hatred inside a building is considered acceptable whilst the same expression outside the building would be considered an offence. It is to be observed the other offences in Section 111 – Articles 10 -13 – do not exclude actions inside a building.

9.93 At the time this defence was introduced, the Internet had not been developed. It is now available in most homes. If the dwelling defence is read literally, much that is posted online could fall into this category so that even if one was to enter into a legalistic discussion about how, in this time of smart phones, a defendant could realistically argue that he had no reason to believe that his words will be seen by a person outside a dwelling, it is clear that this offence is not ideally suited to the online era. This issue is considered further in chapter 13.

9.94 The consultation paper noted that the simplest solution would be to remove the dwelling defence but pointed out that this solution brings with it its own problems and might well require the inclusion of some form of defence for 'private conversations' but not one which relies on the word 'dwelling' which is clearly not appropriate for the online world. In trying to determine the difference between 'private' and 'public'

conversation, it may be difficult to come up with a definition which clearly identifies the difference between the two.

9.95 Instead, it may work better to include a number of criteria that can be taken into account to determine whether a conversation can justifiably be labelled as private. For example, the number of people who are privy to the conversation, whether there were 'bystanders' who could be affected, the intent of the parties, and whether there is a public interest to criminalise such behaviour. This issue is considered again later in the context of online hate speech in chapter 13.

9.96 The consultation paper asked whether the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should be retained. (Question 32, page 177). This question was the subject of a number of responses as follows:

9.97 Organisational respondents were evenly split in their views whilst the great majority of individual respondents supported retaining the defence.

9.98 Among those who indicated support for retention of the dwelling defence, few respondents gave specific reasons for their views. These respondents made some general points that the dwelling defence was considered a reasonable defence and that freedom of expression within the private domain should be protected, on the condition that material is not made available to a public audience.

9.99 The *Bar of Northern Ireland* was concerned that if the dwelling defence was removed and the offence was widened to include private places, this would create issues engaging Article 8 of the European Convention of Human Rights.

9.100 Respondents who took the view that the dwelling defence should be removed argued that it was outdated in the modern world, inappropriate and unreasonable in

its current form. This was mainly attributed to developments in online communication technology which make it possible for individuals to reach large public audiences from a private dwelling, effectively blurring the boundaries between private and public domains. Given that context, the distinction between public and private is hard to maintain in a modern Internet society.

9.101 The *Church of Ireland Church and Society Commission* noted that:

> [P]articularly with the advent of the Internet it is clear that one can stir up hatred, arouse fear and incite dangerous behaviour from the comfort of one's own home. Especially with the Internet providing the potential for private individuals to broadcast their writing and speech to a potentially unlimited audience instantaneously and with little or no barrier to entry and no required middlemen.

9.102 Several respondents questioned the rationale of differentiating between conduct that was designed to stir up hatred from within the private dwelling with that which took place in the public sphere. These respondents argued that the potential to incite hatred and violence towards protected groups was relevant in both settings. Furthermore, online forms of incitement to hatred from within a private dwelling, including hostility towards BAME people and women, was perceived as an issue of growing concern, thereby justifying consideration of removal of the defence.

9.103 *Victim Support NI* provided a useful analysis as follows:

> We would question the necessity for a dwelling defence and advocate that it is removed. Such a defence is arguably redundant in the age of online hate crime, which is very much public yet mostly committed from within one's home.

9.104 *Victim Support NI* recommended that further attention should be given to privacy rights, with particular consideration of what constitutes 'private' in an online context. This was considered pertinent given that 'private' groups online may comprise "over a thousand members".

9.105 It is interesting to compare these responses (to question 32) to a virtually identical question (question 42) about the dwelling defence asked in the context of online harm.

9.106 In answer to question 42, it is noteworthy that 76% of respondent organisations agreed that the dwelling defence should be amended/removed while 63% of individuals disagreed.

9.107 There was general consensus among organisational respondents that the dwelling defence was outdated, redundant and particularly problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media.

9.108 The dominant view among most organisational respondents was that the dwelling defence should be removed. Respondents argued that there is no justification for the differential regulation of hate speech which occurs from within a private space with that which is perpetrated in a public space, particularly if the material harm/content of the actions is the same. They considered that such an approach reflects limited awareness of the impact of hate speech/incitement to hatred and is not consistent with a victim centred approach. They argued that the defence must be removed in order to ensure that the legislation is fit for purpose.

9.109 An important note of caution offered by some respondents was that if removal was to occur, some alternative form of protection would have to be implemented in order to preserve the right to freedom of speech and prevent the criminalisation of private conversations.

9.110 Comments offered by those opposed to amendment/removal of the dwelling offence were made by a few respondents and were limited in detail. However, a key concern expressed across both categories of respondents (organisations and individuals) was the importance of the protection of freedom of expression.

9.111 The *Bar of Northern Ireland* suggested that, should the dwelling defence be removed, some alternative measures would be required:

> [T]he dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should remain in place. However, if it is to be removed then we recognise that it would be essential for some form of defence for 'private' conversations to be implemented and that one which relies on the word 'dwelling' may not be entirely appropriate for the online world with regard to other forms of private conversation.

9.112 The *PPS* recommended that the dwelling defence should be retained, indicating that this represented a balance being struck in terms of the reach of the criminal law into conversation that takes place in the privacy of one's own home.

9.113 The *Law Society of Northern Ireland* agreed, as did the *Evangelical Alliance* who argued that there should be robust protections to allow people to express their genuinely held opinions to each other in a private conversation.

9.114 The *Committee on the Administration of Justice (CAJ)* agreed with the proposal to remove the dwelling defence, describing it as a relic of the pre-digital age. They argued that if stirring up law was reformulated to ensure that incitement to hatred must occur in a public context, such a defence would be redundant.

9.115 The *Northern Ireland Human Rights Commission (NIHRC)* agreed as did a number of organisations from the women's sector.

9.116 The *PSNI* did not feel that the defence should be retained as the conduct is the same, whether inside or outside a building.

9.117 Historically, before 1986 in England and Wales, the offence of using words or behaviour intended or likely to incite racial hatred could only be committed in a public place. However, the 1986 Act extended the offences to the private sphere and created the exception where words or behaviour are used or written material displayed within a dwelling, provided they cannot be seen or heard outside that or another dwelling. Similar protections were later incorporated into the legislation on religious hatred and hatred on the grounds of sexual orientation.

9.118 This exception also applies to the Public Order offences of using threatening, abusive or insulting words or behaviour with intent to put a person in fear of violence or to provoke violence, or causing a person harassment, alarm or distress (see e.g. Public Order Act 1986 Section 4(2)).

9.119 In its recent consultation paper, the *Law Commission* for England and Wales noted that:

> To the extent that the aim is to ensure that the criminal law does not intrude on purely private matters, the exception is poorly targeted. It would include a meeting held in a large private house, for instance, but will exclude a private conversation conducted in an office. Other jurisdictions handle this issue differently. For instance, the Canadian Criminal Code excludes 'private conversation' from the offence of wilful promotion of hatred.

9.120 There is a further anomaly, as noted in the consultation paper, that the parallel offence of showing video or sound recordings does apply in a dwelling.

Recommendations and Analysis

9.121 The *Law Commission* questioned the need for this exception to the stirring up offences, noting that the harm at which these offences are targeted is the propagation of hatred. Other incitement offences, such as inciting or encouraging commission of an offence, are not protected simply because they take place within a person's home.

9.122 It therefore proposed that the dwelling exception should be removed from the stirring up offences.

9.123 Clause 3 of the Hate Crime and Public Order (Scotland) Bill 2020 deals with offences of stirring up hatred and it is noteworthy that the proposed provisions in Scots law do not include a dwelling defence – even though this was not an issue expressly considered specifically by Lord Bracadale In his review.

9.124 In light of the above, I recommend that the dwelling defence should be removed from any stirring up provisions in a new Hate Crime and Public Order Bill in Northern Ireland. That said, I further recommend that careful consideration should be given to ensuring that truly private conversation can be excluded from the reach of the criminal law. This is set out in recommendation 14 below. This is a subject to which I will return when considering how to deal with online hate speech.

Private conversations

9.125 The consultation paper asked respondents whether or not there should be an explicit defence of 'private conversations' in stirring up legislation to uphold privacy protection. (Question 44, page 227).

9.126 100% of respondent organisations who responded to the review supported this proposition together with 83% of individual respondents.

9.127 There was general agreement among those who supported an explicit defence that a basic principle underpinning freedom of expression and the right to a private/family life is the right to private conversations. As such, it was considered imperative that legislation does not criminalise genuinely private conversations between individuals. It was further pointed out by the *Public Prosecution Service (PPS)* that such an explicit defence would be necessary if the dwelling defence in Article 9(3) of the 1987 Order was removed.

9.128 Some respondents stressed that clarification was needed around what constitutes a 'private' conversation. This was considered particularly important in the context of the Internet and social media platforms, where 'private' groups may comprise a large number of people.

9.129 Respondents noted that such groups can act as a platform for people who hold extreme views to facilitate the communication of hate to potentially large audiences.

9.130 One respondent, *Northern Ireland Women's European Platform (NIWEP),* stressed that 'private' groups on social media should not be included but instead that "this should be limited to conversations between two or at most a very small group of individuals that are not shared beyond the group and are explicitly intended for the group only".

9.131 There is considerable merit in this latter proposal.

9.132 The *Democratic Unionist Party* indicated an interest in exploring how a reasonable defence could be provided to ministers or pastors addressing only those voluntarily attending worship.

9.133 Only one respondent who did not agree that there should be an explicit defence of 'private' conversations offered a comment. This was a general comment articulating their opposition to hate crime legislation generally and did not make specific reference to private conversations.

Recommendation and Analysis

9.134 The importance of freedom of speech in this area is underlined by the criticisms made recently against the Scottish Government's proposal on repeal of the dwelling defence in the Hate Crime and Public Order (Scotland) Bill 2020.

9.135 As it stands, the Bill removes the dwelling defence in section 18 of the Public Order Act 1986 but, crucially, makes no proposal for a specific defence of private conversations. This has led many to argue that the proposed hate crime law in Scotland is an attack on freedom of speech.

9.136 For example, the comment section in the *Times* of 2 November 2020 argues that the "…Scottish Minister's plan to criminalise "offensive" remarks made in private homes is a foolish way to promote tolerance". The article suggests that the proposal seeks to criminalise fireside chats between family members and that this portion of the Bill threatens to curtail "…our precious freedoms in their foolish pursuit of tolerance".

9.137 In its consultation paper of September 2020, the *Law Commission* for England and Wales makes proposals similar to those recommended in this review i.e. to repeal the dwelling defence, but to replace it with a specific defence of private conversations.

9.138 In spite of this important difference, these proposals continue to attract fierce criticism from opponents of the proposed legislation. In the *Times* of November 5

2020, it is suggested that *"…Conversations at the dinner table could fall foul of "completely crazy" reformed hate speech legislation, opponents have said*.

9.139 *The Law Commission has proposed removing the so called dwelling exemption from legislation covering "stirring up" offences. Its experts argues that this would clarify the law. Critics said it would criminalise dinner-table conversations in which remarks were made about other nationalities or groups such as transgender people.*

9.140 *Tim Loughton, a Conservative on the Commons Home Affairs Committee, said freedom of speech was at risk".*

9.141 In fairness, the article then proceeds to set out the *Law Commission's* reasoning including, crucially, its proposal to replace the dwelling defence with a defence of private conversation. The paper notes:…"the Commission proposes amending the law to target the context of speech and the number of people addressed and to move the exception to cover what would be considered private discussions. The *Commission* is quoted as saying "We are not intending for private conversations at the dinner table to be prosecuted as hate speech".

9.142 In the consultation process for this review there was general consensus among respondents that the dwelling defence was outdated, redundant and particularly problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media.

9.143 However, to protect Article 8 ECHR rights – which deal with respect for family life, home and correspondence – it is **essential** that there should be an explicit defence of private conversations in any reformed legislation.

9.144 Respondents to the consultation paper were overwhelmingly in favour of such a defence. This was supported by all respondent organisations and 83% of respondent individuals.

9.145 Such a defence already exists in Canada where the Canadian Criminal Code provides at Article 319 (2):

> ***Wilful promotion of hatred***
>
> *(2) Everyone who, by communicating statements,* ***other than in private conversation****, wilfully promotes hatred against any identifiable group is guilty of*
>
> *(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or*
>
> *(b) an offence punishable on summary conviction.(my emphasis).*

9.146 I recommend that there should be a specific defence of private conversations. This is set out in Recommendation 14. This defence will ensure that truly private conversations, e.g. around a family dinner table- will continue to be fully protected.

Consent of the DPP to prosecutions

9.147 The consultation paper stated that at present any prosecutions for an offence under Part III of the 1987 Order – or Article 21(1) of the 1987 Order – shall not be instituted, except by, or with the consent of, the *Director of Public Prosecutions for Northern Ireland* by virtue of Section 41(2) of the Justice (Northern Ireland) Act 2002.

9.148 Until the passing of the 2002 Act, the consent of the *Attorney General for Northern Ireland* was required. The rationale for this provision is to help protect private individuals from abuse of prosecution by others to pursue trivial disputes or grievances and also to ensure consistency of prosecution policy.

9.149 In England and Wales under the 1986 Act, Parliament has decided that the consent of the *Attorney General* is needed to bring a prosecution for all of the existing stirring up offences. The protocol between the *Attorney General* and the prosecuting Department states:

> It is a constitutional principle that when taking a decision whether to consent a prosecution, the *Attorney General* acts independently of Government, applying well-established prosecution principles of evidential sufficiency and public interest.

9.150 The protocol states that where the *Crown Prosecution Service (CPS)* considers that there is sufficient evidence to prosecute for one of these public order offences and that a prosecution is or may be in the public interest, it seeks the *Attorney General's* consent to bring a prosecution.

9.151 In describing the consent function, a previous *Attorney General*, Lord Goldsmith QC, has stated that the requirement of consent by the *Attorney General* is an important filter which potentially prevents fictitious and unmeritorious cases coming to court.

9.152 In considering whether to consent, the *Attorney General* is required as a public authority to act in accordance with the Human Rights Act and with Convention Rights. However, although this principle applies also to the *Director of Public Prosecutions*, it should be noted that the *Attorney General* is directly accountable to Parliament (the Assembly in Northern Ireland) whereas the *Director of Public Prosecutions* is not.

9.153 The consultation paper sought the views of respondents on whether the requirement that the *DPP* gives consent to any prosecutions taken under Part III of the 1987 Order is necessary and appropriate. (Question 33, page 179).

9.154 In response to this question, there was widespread agreement that such a provision is necessary and appropriate. Some 78% of organisations and 69% of individuals agreed.

9.155 There was strong consensus among respondents that this was necessary to safeguard against potential misuse of the legislation. Specific concerns focused on freedom of speech and the need to ensure that individuals were sufficiently protected from prosecution of trivial or unfounded allegations. *The Christian Institute* said:

> This is an important additional check on the use of a serious offence. It reflects the weighty consideration that should be given to bringing a prosecution under this provision, particularly given the potential impact on freedom of speech.

9.156 The *Democratic Unionist Party* argued that it was vital that checks against prosecution of unfounded vexatious or frivolous allegations are upheld and even strengthened.

9.157 The *Bar of Northern Ireland* agreed, noting that prosecutions taken under this legislation should be consented to by the *DPP*, in order to ensure that frivolous or vexatious private prosecutions are not taken.

9.158 However, a number of respondents stressed the need for effective review of this process to ensure accountability and understanding of issues pertaining to incitement to hatred by those involved.

9.159 Comments by those who did not consider the requirements necessary and appropriate were comparatively limited. For example, the *Northern Ireland Council for Racial Equality* considered the role of the *DPP* to be outdated, arguing that:

> The *UN Committee on Racial Discrimination 2000* had strong criticism on the *DPP's* consent as it infringes international human rights standards.

9.160 More general points were that the provision was unnecessary, inappropriate and could act as a deterrent to the uptake of cases.

9.161 Women's organisations were generally supportive but *NIWEP* argued that this was 'unjustified' and potentially detrimental to the judicial process. It went on to state that:

> There is also a risk that retaining the provision leads to concerns or accusations about less than objective judgment, which is unhelpful for the effective functioning of the judicial system. Clear guidelines relating to prosecuting offences, with an appeal process that may well involve the *Attorney General*, would appear sufficient to meet the threshold of ensuring the case is in the public interest and has merit.

9.162 In its current consultation process, the *Law Commission for England and Wales* has looked at a similar issue. It will be recalled that in that jurisdiction it is the consent of the *Attorney General* which is required to bring stirring up offences.

9.163 The *Law Commission* for England and Wales expressed concern about the possibility that the requirement for consent could be removed altogether. It was concerned that this could result in private prosecutions being brought with a view to restricting the freedom of expression of the defendant. It noted:

> Unlike the *Crown Prosecution Service*, such third parties would not be subject to the constraints of the Human Rights Act to have regard to defendant's rights to freedom of expression and respect for their home, correspondence, private and family life. Although in such circumstances it would be open to the *CPS* to take over and discontinue a prosecution as not being in the public interest, it is conceivable that private prosecutions – or threats of private prosecutions – could have a chilling effect on communication.[158]

9.164 The *Law Commission* concluded therefore that consent should be obtained for any prosecution, but proposed that the requirement for the *Attorney General's* consent be replaced by requirement for the consent of the *Director of Public Prosecutions*, as in Northern Ireland.

9.165 However, it noted that, unlike the *Attorney General's* consent, unless the law explicitly requires this consent to be given personally, the power to consent is delegable by the *DPP* to a Crown Prosecutor, with a number of limited exceptions.

9.166 Given the low number of stirring up prosecutions, and the gravity and complexity of the stirring up offences, the *Law Commission* argued that this discretion should be exercised personally by the *DPP*.

Recommendation and Analysis

9.167 In Northern Ireland, under the current arrangements proceedings can be taken 'by or with the consent of the Director', 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 – see *Young v Public Prosecutions Service [2012] NICA 35.*

[158] *Law Commission* for England and Wales - Hate Crime consultation paper (2020) para 18-233

9.168 In that case, the *Court of Appeal in Northern Ireland* ruled that the proceedings could be initiated by the Director or with his consent. In this instance the Director had delegated the power to initiate proceedings pursuant to Section 36 of the Justice (Northern Ireland) Act 2002.

9.169 Having carefully considered all the responses, I have concluded that in the public interest, it is important that the *DPP* gives consent to any prosecutions taken under the stirring up provisions of any new Hate Crime and Public Order Bill in Northern Ireland.

9.170 I am satisfied that this is both necessary and appropriate and, as a further safeguard, that such consent should be the personal consent of the *DPP*. Again, this view is encapsulated in Recommendation 14 as part of the Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order Bill.

Should all protected groups be included as such under Part III of the 1987 Order?

9.171 The consultation paper sought the views of respondents as to whether or not any new proposed additional characteristics or groups should also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987. (Question 35, page 191).

9.172 At the time of publishing the consultation paper in January 2020, potential groups or characteristics identified as potentially falling under the protection of stirring up offences were gender, gender identity, age or other groups.

9.173 If a number of new protected characteristics are added to the list including, for example, sex/gender, age and variations in sex characteristics as set out in chapter 7, should the new categories fall within the remit of the stirring up offences?

9.174 It may be useful to remind the reader, not only in relation to the responses on this issue but generally, of some of the comments made by Dr Arlene Robertson who analysed the consultation responses on behalf of the review, and whose report is produced as Part 2 of this review. In her introduction, Dr Robertson notes in relation to individual responses that:

> It is important to note that, overall, individual respondents were remarkably homogeneous in their views. With a few exceptions, individual responses were of a campaign-like nature in that comments contained within them were similar (in a few cases identical) and they comprised a limited range of key points.

She also noted that:

> In the case of a small number of organisational respondents, it was clear that there had been some collaboration in the preparation of their responses. In a few cases, respondents made reference to and/or endorsed the views of another organisational respondent as part of the answer/s. There were also a few cases whereby organisational respondents (from the same sector) submitted identical or almost identical responses albeit separately. In the case of these 'shared' responses, verbatim quotes included in the results section name all respondents concerned. For analysis purposes, 'shared' responses were counted separately for each of the respondents.

9.175 I understand that these concerns are not particularly unusual in a consultation process.

9.176 Turning then to the question of whether or not any new proposed groups/characteristics should be included under the groups protected in stirring up provisions, it is noted that 74% of organisations agreed with this proposition as compared to only 2% of individuals who agreed.

9.177 Those who agreed that all protected groups, including any newly added groups, should be included in stirring up offences give the following main reasons:

- Parity and consistency across all hate crime provisions is essential in order to ensure the provision of equal protection to each of the protected groups. Consistency will also help to ensure accurate interpretation of the law and enhance operational effectiveness;
- The exclusion of some groups could create a hierarchy of characteristics across hate crime legislation, with the implication that some forms of hate crime are considered more or less acceptable than others; and
- Their inclusion across all legislation would also convey a clear message to protected groups and wider society that their protection is merited.

9.178 Women's organisations, in particular, argued strongly that any additional groups to be protected under new hate crime legislation should also be protected under the stirring up provisions.

9.179 Support for the inclusion of any new protected groups to be included within stirring up offences came from the *Equality Commission NI, NIHRC, Victim Support NI, the PSNI and* the *PPS*.

9.180 The Northern Ireland *Department of Justice* argued that there should be consistency in terms of the application of stirring up offences so far as any protected groups are concerned unless there is evidence advising otherwise.

9.181 Although a large number of individual respondents were opposed to the protection of all groups by the stirring up provisions, their respective comments tended to cover similar/a limited range of points as reflected below.

9.182 Many of those who were opposed argued that stirring up provisions generally threaten freedom of speech and religious expression. As such, the inclusion of all protected groups was generally viewed as inappropriate. The comments presented below reflect the main arguments made by individuals and organisations:

- *The Christian Institute* stated their view that:

> Stirring up hatred offences have great potential to do harm when they cover areas of contentious public debate. This includes transgenderism. No stirring up offence should cover this issue, whether through gender, gender identity or transgender identity.

- The *Democratic Unionist Party* argued:

> There should be no extension of the groups to which Part III applies.
>
> The offence criminalises insulting words even where they were not intended to stir up hatred or fear. It will be too easy for someone to be punished just for offending another person. There is no right not to be offended.

- One individual wrote:

> There is no need for the groups to which Part III applies to be extended. There is an on-going threat to religious beliefs with allegations of hatred being the primary focus. People must be free to express their beliefs without fear of arrest whether they are atheist, agnostic or religious.

9.183 Whatever the deficiencies in the operation of the 2004 Order or the 1987 Order, Northern Ireland, unlike England and Wales and Scotland, has historically provided the same level of protection to all protected groups – presently race, religion, sexual orientation and disability.

9.184 I see no principled reason why such an obviously fair and balanced approach should not be continued in any new Hate Crime and Public Order Bill. The addition of any new category of protection in any legislation reforming hate crime laws in Northern Ireland should continue to afford the public the protection of stirring up offences.

9.185 Doubtless, there will be lively and well-informed discussion in the community and in the Assembly as to the merits or otherwise of adding new protected groups.

9.186 However, if one assumes for the moment that one or more new protected characteristics will be added – and it may be a large assumption – then, in that eventuality, there would need to be very strong objective reasons for giving that group or groups less protection under the law than other groups.

9.187 To do otherwise, would offend all principles of fairness and equality.

9.188 It is my firm belief that whatever the final list of protected characteristics may be, it would be highly anomalous for such a group to be given protection under the proposed new statutory aggravations, but to be denied such protection under the stirring up provisions.

9.189 In other words, there should be parity across all protected characteristics in relation to all legislation dealing with hate crime in Northern Ireland, thus avoiding a hierarchy of characteristics where some types of hate crime or hate speech are seen to be more acceptable or less harmful than others.

9.190 The *Church of Ireland Church and Society Commission* provided a good example of the unfairness that could be created, noting:

> [A] speech which attempts to stir up hatred or arouse fear based on racism would be considered worthy of prosecution but a near identical speech based on transphobia would not be considered illegal. If it is decided that a group is vulnerable, marginalised and at risk of hate motivated crime then they should be protected to the same extent as any other protected group.

9.191 I recommend that all protected characteristics/groups, including any new characteristics/groups thought worthy of protection, should be included under the groups protected by the stirring up provisions in any new Hate Crime and Public Order Bill in Northern Ireland. This is captured formally in Recommendation 7 and Recommendation 14.

9.192 It is noteworthy that a similar approach to reform of hate crimes has been taken in Scotland under the Hate Crime and Public Order (Scotland) Bill presently before the *Scottish Parliament*.

9.193 In making this particular recommendation, I note the concerns of those who are particularly exercised by any possible threat to the issue of freedom of expression. It is particularly important and relevant to consider the question of freedom of expression and its application in Northern Ireland.

CHAPTER 9

PART 2

STIRRING UP OFFENCES – FREEDOM OF EXPRESSION

9.194 The consultation paper asked: should the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation be specifically added as defences to Part III of the Public Order (Northern Ireland) Order 1987? (Question 36, page 192).

9.195 Further, it asked: should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the 1987 Order be retained in law or repealed? (Question 37, page 192).

9.196 Finally, it asked: if there are to be offences dealing with the stirring up of hatred against protected groups, does there need to be any specific provision protecting freedom of expression? (Question 39, page 193).

9.197 It should be remembered that part of the remit for this review is to examine the implementation and operation of the current legislative framework for incitement offences, in particular Part III of the Public Order (Northern Ireland) Order 1987, and make recommendation for improvements.

9.198 One way to examine the implementation and operation of the legislation is to look at the number of prosecutions and convictions.

9.199 Applying this simple test, it cannot be said that the legislation has been a success. There have been few prosecutions and a small number of convictions.

9.200 However, one must be careful in establishing the true value of the legislation. Some argue that the preventative aspect of the law means that the number of offences is limited because people tend to moderate their language or behaviour to avoid prosecution.

9.201 As discussed above in examining the 'hatred' threshold, this has led some respondents to the review to argue that the bar for prosecution has been set too high and that it should be lowered.

9.202 For the reasons advanced above, I have not accepted that proposition and have recommended that the test for stirring up hatred or arousing fear – 'hatred' as in the current Article 9 of the 1987 Order should remain unchanged. The introduction of a lower test might conflict with the right to freedom of expression and this would be self-defeating.

9.203 Many of those who responded to the consultation paper have expressed strong concerns about freedom of expression. These concerns are well articulated in the response from *The Christian Institute* which argued:

> Society would be better off without stand-alone offences of stirring up 'hatred' on disputed and controversial grounds such as religion and sexual orientation. They present a threat to freedom of expression. They risk clamping down on the kind of free debate that we should uphold and value. They are a weapon in the hands of those who are intolerant of world views which do not align with their own.

9.204 The *Christian Institute* appended to its response extracts from a legal opinion taken from Ivan Hare QC. His analysis is as follows:

> The optimal solution for protecting free speech in Northern Ireland (as in the rest of the United Kingdom) would be to repeal the incitement offences altogether.

9.205 In this review of the operation of the law and making recommendations for its improvement, it is crucially important to reiterate that the issue of freedom of expression has a central role to play in ensuring fairness between complainant and defendant in compliance with the Human Rights Act 1998 and international treaty obligations.

9.206 Freedom of expression and equality rights provide the fundamental legal framework for considering hate speech. Freedom of expression encompasses various human rights protections, under international as well as domestic law.

9.207 Setting the correct balance in protecting human rights, while at the same time addressing hate speech, is one of the most important and challenging parts of this review. The value rightly attached to freedom of expression requires careful appraisal when there are competing concerns about victims and hate speech.

What is freedom of expression?

9.208 The basic obligations on the United Kingdom regarding incitement to hatred are clear under the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Appropriate legislation is a minimum requirement of combating incitement to racial hatred.

9.209 The focus of the various international law provisions is on racial and religious incitement – other protected or potentially protected characteristics are missing from the standards.

9.210 This point is reinforced by the *NIHRC.* In its review of racist hate crime and human rights and the criminal justice system in Northern Ireland in 2013, the *NIHRC* observed that:

> The ICCPR, Article 20(2) requires an express prohibition of incitement to hatred stating that: any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The CERD, Article 4(a) expands upon the legal prohibition laid down in the ICCPR Article 20(2) . . . It requires the imposition of criminal sanctions for the dissemination of ideas based upon racial superiority or hatred, incitement to racial hatred or acts of racial violence.[159]

9.211 The *NIHRC* noted that the 1987 Order broadly fulfils the requirement to criminalise hate speech. It is also important to remember that the 1987 Order is integral to freedom of expression but does not permit the 'freedom' to stir up hatred or arouse fear.

9.212 There are a number of other relevant international treaties and mechanisms including the European Convention on Human Rights and Fundamental Freedoms (ECHR) as interpreted by the European Court of Human Rights case law.

9.213 The Human Rights Act 1998 requires that UK courts will take account of the jurisprudence of the Court of Human Rights.

9.214 Article 10 of the ECHR provides a wide range of freedoms in terms of expression, through both spoken and written words, and applies to acts of protest as

[159] *Northern Ireland Human Rights Commission* (2013):racist hate crime and human rights in the criminal justice system in Northern Ireland.p.42

well as artistic expression. Conduct and opinions are both covered, as is the tone and manner of the way they are expressed.

9.215 Cases such as *Handyside v United Kingdom (1979) 1 EHRR 737*, decided before the passing of the Human Rights Act 1998, has clearly acknowledged that Article 10 protects expression that may shock, offend or even disturb.

9.216 As the Court said:

> *The courts supervisory functions are obliged to pay the utmost attention to the principles characterising 'a democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions of its progress and for the development of every man.*

9.217 Very few rights, however, can be regarded as absolute or unqualified and Article 10 rights are no exception to this concept.

9.218 Restrictions on freedom of expression may be imposed if prescribed by law and if they meet one of the legitimate aims set out under Article 10.2, namely, that such restriction is necessary in a democratic society because of a pressing social need and that it is proportionate to that legitimate aim.

9.219 The right to freedom of expression under Article 10 has also to be considered in the context of Article 17, which provides that not all the freedoms protected under Article 10 are allowed.

9.220 So, activities aimed at the destruction of the rights and freedoms guaranteed under the Convention are not protected. Expression is not protected when it relates

to extreme conduct or speech that incites violence against the general population based on extremist, religious or racial views.

9.221 Another important Council of Europe mechanism is the *European Commission Against Racism and Intolerance (ECRI)*. In *ECRI* General Policy, recommendations No. 15 (2015) in combating hate speech the following is noted:

> Considering that hate speech is to be understood . . . as the advocacy, promotion or incitement, in any form of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the grounds of 'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other person characteristics or status….
>
> The relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero-sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.

In the Rabat plan of action, it is noted that:

> It is often purported that freedom of expression and freedom of religion or belief are in a tense relationship or can even be contradictory. Instead, they are mutually dependent and reinforcing. The freedom to exercise or not one's religion or belief cannot exist if the freedom of expression is not respected as free public discourse depends on respect for the diversity of deep convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which a constructive discussion about religious matters could be held. Indeed, free and critical thinking in open debate is the

> soundest way to probate whether religious interpretations adhere to, or rather distort the original values that underpin religious belief[160].

9.222 It is sometimes overlooked in discussions about freedom of expression that the United Kingdom played a major role in the drafting of the 1950 European Convention on Human Rights and that that Convention existed primarily to shield the citizens of other European countries after the abuses of power committed by the governments of some of those countries during the Second World War.

9.223 The Human Rights Act 1998 incorporated the European Convention on Human Rights into domestic law by (1) imposing duties on public authorities to act in accordance with incorporated Convention rights (including a qualified freedom of expression) unless the unequivocal terms of a domestic statute prevented compliance and (2) obliging domestic courts to give effect to the rights by giving a reading where possible of domestic law that conforms to the Convention.

9.224 Relevant decisions, judgements and advisory opinions of the European Court of Human Rights "must be taken into account" by domestic courts and tribunals when determining a question that has arisen in relation to the meaning of a Convention Right (Human Rights Act 1998 Section 2.).

9.225 Thus, the influential status of Convention Rights means that any ambiguities in domestic law must be resolved in favour of an interpretation of domestic law that is compliant with the Convention. So, in relation to freedom of expression, existing common law rules of confidentiality that limit freedom of expression must now be given

[160] *UN* 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence: Conclusions and recommendations emanating from the four regional expert workshops organised by *OHCHR*, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012

an interpretation that is consistent with the prevailing understanding of Article 10 of the Convention. (See the *ULLAH principle (2004) UK HL 26 per Lord Bingham*).

9.226 It is against this background that one should consider the words of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions (1999*) 7 BHRC 375:

> *Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, heretical, the unwelcome and the provocative . . . freedom only to speak inoffensively is not worth having.*

Interpreting freedom of expression and the ECHR

9.227 The *European Court of Human Rights* has provided a rich body of jurisprudence dealing with Article 10 which outlines to what extent Member States can deviate from the basic principle of freedom of expression. This has established different levels of protection depending on the type of speech in question.

9.228 The Strasbourg case law on hate speech through a line of decisions appears to have established a relatively low level of protection for speech deemed to incite hatred against minorities.

9.229 *In Pavel-Ivanoff v Russia, (application number 35222/04,Eur.Ct.H.R. (2007))* the defendant owned and edited a newspaper in Russia. He published a series of articles which claimed that Jews were the root of all evil in Russia. He was duly convicted of the offence of public incitement to ethnic, racial and religious hatred. He argued that this conviction breached Article 10 rights. The court declared his application inadmissible saying that such an assault against Jewish people was a fundamental attack against the Convention's underlying values, notably, tolerance, social peace and non-discrimination, and therefore fell within Article 17 which prevents the use of Convention rights to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' in the Convention.

9.230 In essence, the *ECHR* said that the attack on Jewish people did not constitute 'speech' and thus did not engage Article 10 or its exceptions. This appears to give this type of speech very little, if any, protection and it offers a very wide margin of appreciation when it comes to criminalising such behaviour.

9.231 A similar approach was taken in the case *of Norwood v UK (application number 23131/03, Eur.Ct.H.R. (2004).*

9.232 The applicant had displayed a BNP poster showing the Twin Towers in New York and flames with the words 'Islam out of Britain – Protect the British People'. He was charged with an offence under Section 5 of the Public Order Act 1986 and argued to the court that his right to freedom of speech had been breached.

9.233 However, the *European Court of Human Rights* said that he could not use Article 10 to justify displaying the poster because the poster was a direct attack on the underlying values of the Convention and so, again, Article 17 was engaged effectively disallowing him from any protection.

9.234 In one sense, this approach makes the outlawing of hate speech a fairly simple matter from the point of view of freedom of expression. It appears that very little scrutiny of the legislation itself will be undertaken by the *ECHR* as long as legislation is only aimed at hate speech and not at other kinds of speech.

9.235 The approach of the *ECHR* in relation to hate speech is not welcomed by all commentators. Critics argue that this does not give sufficient protection to freedom of speech and that subsequent case law has gone too far in using Article 17 as a means of excluding a proper discussion of whether or not the limitation was justified on its facts. It is also fair to say that the application of Article 17 has not been entirely consistent. Whilst it has been applied to ethnic hate, racial hate and religious hate, a

somewhat different approach has been adopted in relation to homophobic hate, incitement to ethnic hatred and incitement to racial discrimination or hatred.

9.236 In these cases, the *ECHR* has adopted an approach whereby the speech is found to engage Article 10 and so any legislation which prohibits such speech can only do so if the infringement can be justified under one of the exceptions under Article 10(2).

9.237 It would appear, therefore, that the level of scrutiny given to any individual piece of legislation will depend on whether or not the *ECHR* defines it as pure hate speech or some other kind of hate speech.

9.238 In the absence of a clear definition of what constitutes hate speech, as well as any clear justification as to the different levels of protection offered, it would be appropriate for the Assembly to take an approach which assumes that all hate speech legislation should be exposed to the higher level of scrutiny found under Article 10(2). Thus, the presumption would be that all hate speech legislation engages Article 10 and so any incursion into freedom of expression needs to be justified under the Article 10 exceptions.

9.239 The practical effect of this approach is that the underlying purpose of each piece of legislation needs to be articulated and subsequently examined to determine whether the mischief it is protecting does indeed fall into the Article 10(2) exceptions. Further, as hindsight has made clear, it is not just the legislation itself that needs to be compatible with Article 10.

9.240 Each individual prosecution needs to be considered in the light of the exceptions. Therefore, contextual factors will need to be taken into account to determine whether each individual prosecution is necessary and proportionate.

9.241 In England, the *CPS* has already outlined a number of these factors in their guidelines on social media, such as whether effective action to remove the communication from the Internet was taken or whether it was intended for a wider audience.

9.242 This latter point is particularly important and will require a nuanced approach to material available online. It may be argued that any new legislation on online communication must contain guidance on how the context within which comments are made online can be important in determining the harm caused by that speech. It may be easier to justify the prohibition of speech where comments have been made publicly, such as on social media or in below the line comments of newspapers, than it would be to prosecute comments made on a personal blog or in a private e-mail. Equally, it may be necessary to accommodate the different ways in which people converse online, as well as the level of thought and preparation that has gone into the speech.

9.243 In his review of the stirring up offences in Scotland, Lord Bracadale noted:

> The court has found interference with Article 10 rights permissible in relation to the publication of a book with extreme comments about Islam (Soulas v France 10 July2008), electoral leaflets exhorting foreigners to be sent home (Feret v Belgium 15615/07, July 2009) and the distribution of leaflets in students' lockers at a school stating that homosexuality is morally destructive (Vejdeland and others v Sweden 1813/07 February 2012). (130) (Independent review of hate crime legislation in Scotland – final report. Para 5.26)

9.244 Hate speech legislation also raises the question of whether such legislation might have an adverse effect on the articulation of religious beliefs, including public preaching.

9.245 This is a sensitive issue for many of the respondents to the consultation.

9.246 In Scotland, it was emphasised that there should be protection for groups who are voicing religious beliefs but are not inciting others to hatred. From the responses received in Northern Ireland, it is clear that a number of faith groups are seriously concerned that religious belief may be threatened by hate speech legislation. The key issue is to draw the distinction between expressing disagreements and debate from the stirring up of hatred and incitement of violence.

9.247 Examples of religious preaching or the discussion of religious beliefs might be capable of being represented- or misrepresented as race-related prejudice, homophobia or sectarianism.

9.248 The decision to prosecute in such circumstances is a delicate one, which is why I have recommended that in Northern Ireland such decisions should be taken personally by the *Director of Public Prosecutions*.

9.249 In Northern Ireland, the current stirring up offences legislation has its origins in the Prevention of Incitement to Hatred Act (Northern Ireland) 1970 which made it an offence to intend to stir up hatred or arouse fear in any section of the Northern Ireland community on the grounds of religious belief, colour, race or ethnic or national origins.

9.250 It will be remembered that the current provision under Article 9 of the 1987 Order provides that:

> *(1) A person who uses threatening, abusive or insulting words of behaviour or displays any written material which is threatening, abusive or insulting is guilty of an offence if –*
>
> *(a) He intends thereby to stir up hatred or arouse fear; or*

(b) Having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.

9.251 'Fear' is defined in Article 8 thus:

'Fear' means fear of a group of persons defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.

9.252 Sexual orientation and disability were added to protected groups by the 2004 Order.

9.253 The reference to the arousal of fear is unique to Northern Ireland and its inclusion in the law is of long-standing because of the specific circumstances of Northern Ireland's problems of sectarianism.

9.254 It is designed to deal with situations where the speaker does not overtly encourage his audience to hate the target group, but is prepared to describe that group in terms as posing a threat, thus encouraging fear among the listeners.

9.255 This is a significant addition to the law in Northern Ireland for it refers to arousing fear among those who might be incited not those who are the targets of the incitement.

9.256 The 1987 legislation softens the requirement on 'intent' providing that the offence may be committed if, "he intends thereby to stir up hatred or arouse fear; or having regard to all the circumstances, hatred is likely to be stirred up or fear is likely to be aroused thereby".

9.257 Before looking at the arguments as to whether there should be specific defences of freedom of expression for religion, sexual orientation and same-sex marriage – or any other protected characteristics – it should be remembered that no such provisions have applied in the 1987 Order for over 30 years -or until very recently in the case of same-sex marriage. The number of prosecutions under the 1987 Order are very few and no evidence has been placed before the review to document any injustices said to arise from a lack of such defences.

9.258 Nevertheless, there is concern from various faith groups and others calling for the introduction of such defences who would argue strongly that, without them, there has been a chilling effect on their ability to speak out on issues of concern to them.

9.259 In general, however, an evidence base is often said to be an essential pre-requisite in considering significant changes to the law, especially the criminal law. Some argue that the law must not be forward-looking in preventing harms that might occur sometime in the future.

9.260 Question 36 asked:

> Should the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation be specifically added as defences to Part III of the Public Order (Northern Ireland) Order 1987?

9.261 97% of individual respondents agreed, together with 48% of organisations. 52% of organisations disagreed together with 3% of individuals.

9.262 Question 39 asked a similar question:

> If there are to be offences dealing with the stirring up of hatred against protected groups, do you consider

> that there needs to be any specific provision protecting freedom of expression?"

9.263 To this question, 100% of individuals agreed together with 56% of organisations. 44% of organisational respondents disagreed.

9.264 Finally, question 37 asked:

> Should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the Public Order (Northern Ireland) Order 1987 be retained in law or repealed?

9.265 Since respondents were given more than one choice in this question, the meaning of yes and no in response to this question was not clear. However, there was considerable overlap with comments made in response to Question 36.

9.266 In relation to the question of defences of freedom of expression for religion and sexual orientation, those who supported this addition indicated that they felt very strongly about the protection of freedom of expression, with some expressing concerns this would be curtailed by any expansion and/or modifications to Northern Ireland hate crime legislation.

9.267 One respondent argued that hate crime legislation encourages individuals to self-censor due to fears of committing an offence and thereby impacts freedom of expression beyond the formal scope of the legislation.

9.268 The significance of freedom of expression was underlined by many respondents for the following reasons:

- Freedom of speech is subject to growing challenges and should therefore be protected as far as possible. Individuals should be free to express their opinions or make comments about religion and/or sexual orientation, free from potential allegations of hate speech or hate crime;
- Explicit recognition of the defence of freedom of expression would indicate that free speech is valued in public debate;
- There should be parity between hate crime legislation in Northern Ireland and legislation in England and Wales. The current formation of the defences of freedom of expression under the Public Order Act 1986 was viewed as striking an appropriate balance between protecting racial or religious groups from threats or incitements to violence and protecting the right to dissent and express ideas contrary to the beliefs of those groups;
- The protection of freedom of expression is in accordance with human rights legislation, in particular, Articles 18 and 19 of the Universal Declaration of Human Rights, Articles 9 and 10 of the European Convention of Human Rights and the International Covenant on Civil and Political Rights; and
- Prohibiting 'dissenting' speech against religion promotes religious intolerance, as highlighted by the UN's Special Rapporteur on freedom of religion or belief, Dr Ahmed Shaheed, in his report to the UN General Assembly in 2017 on the elimination of all forms of religious intolerance.

9.269 The *Christian Institute*, together with other respondents argued that:

> There should be a defence to a charge of stirring up religious hatred that protects freedom to: urge people to change religion, call a religion false, and say that a particular religion is the only true faith. The defence covering sexual orientation must protect freedom to: disagree with same-sex marriage, urge people to change their sexual behaviour, and call such behaviour sinful. If, contrary to our submissions above, a stirring

> up hatred defence is created covering transgender issues, then a free speech clause will be essential on this ground too.

9.270 As regards those who opposed the addition of such defences, a common view was that such defences are unnecessary. Several respondents considered that the defences are sufficiently covered by free speech provisions included within the Human Rights Act/Article 10 of the European Convention of Human Rights (ECHR). This legislation places an obligation on all other legislation to be interpreted and comply with ECHR rights and, as such, negates the need to introduce similar provisions within the 1987 Order.

9.271 The *Public Prosecution Service* for Northern Ireland stated that:

> The *PPS*, as a public body, has a duty under the Human Rights Act not to act inconsistently with an individual's right to freedom of expression. It does this through a proper application of both the evidential and public interest tests for prosecution. There is no suggestion that too many prosecutions are brought under this legislation such that Article 10 rights require greater recognition or protection. It is not considered that such an amendment would bring any greater clarity for prosecutors or the public as to what type of speech or behaviour should be prosecuted under these provisions.

9.272 Furthermore, there were a number of groups which expressed the view that hate crime laws needed to be effective. Among these groups, strong concerns were expressed about the potential impact of the proposed addition of the defences to the 1987 Order. Particular concerns were that the legislative provisions would be used to justify homophobia, sectarianism and anti-religious discourse. This view was shared by a range of organisations (women's sector groups, political groups, and voluntary and human rights organisations).

9.273 The question of whether or not the law Northern Ireland should be the same as the legislation in England and Wales provided a diverse number of responses to the consultation paper

9.274 Referring to the law in England and Wales, *TransgenderNI* stated that:

> The decision to include these defences was made politically, not backed up by evidence of need and did not provide meaningful additional protections to free expression.

9.275 The *Equality Commission for Northern Ireland* noted the low number of prosecutions and lack of judicial interpretation post introduction of the defences in England and Wales, as highlighted by the *Law Commission* in 2013. It argued further that the introduction of such defences, which apply only to certain equality areas – freedom of expression for religion and sexual orientation and same-sex marriage – would effectively create a hierarchy of protected groups.

9.276 The *NIHRC* argued that:

> Consideration should be given to the removal of specific defences for categories of hate expression from any incitement law, as their inclusion could have the unintended consequence of protecting hate speech that reaches the threshold of incitement targeted against specific individuals or communities.

9.277 *CAJ* argued for strengthening the current legislation dealing with incitement to hatred in line with international human rights standards.

9.278 Differing views were expressed on these important questions, in relation to the general question of whether or not there needs to be specific provision protecting freedom of expression and as to whether or not the defence of freedom of expression for same-sex marriage should be retained or repealed.

9.279 Among additional arguments, raised in favour of making specific provision protecting freedom of expression, were the following responses:

9.280 *Ulster Human Rights Watch* stated:

> All the existing protected characteristics are not of the same nature. Some are undeniable like race, but others are absolutely and lawfully debatable, such as 'sexual orientation'.
>
> Anybody who disagrees with homosexuality, transgender or other unnatural sexual practices should have the right to say so and to provide reasons for their opinion and beliefs.

9.281 Some respondents argued that the protections provided by the European Convention on Human Rights (ECHR) were insufficient on their own, due to the wide margin of appreciation provided to the Member States under the ECHR.

9.282 Among those who thought that the express defence of freedom of expression for same-sex marriage should be repealed, the following main reasons were provided:

- The defence provides justification for and implicit endorsement of homophobia;
- It is inappropriate for the law to make express reference to freedom of expression in the context of hate crime against certain protected groups to the exclusion of others; and

- Explicit statement of the protection of freedom of expression within the legislation is unnecessary. The *PPS* pointed out that "in legal terms, Article 8(2) is a statement of the obvious."

9.283 The argument that specific provisions were unnecessary, was supported by a number of organisations on the basis that all legislation is interpreted and applied in accordance with freedom of expression defences set out in the European Convention on Human Rights and in the Human Rights Act. The *Church of Ireland Church and Society Commission* observed:

> It is not essential to reiterate the freedom in every relevant piece of legislation. Rather the courts should be trusted to judge the law in an individual case against the inherent right to expression of the individual.

9.284 A number of respondents acknowledged that existing legislation which provided a range of freedoms in terms of expression may require improvement and that this should be addressed by the courts rather than through hate crime legislation.

9.285 In what appears to have been an acknowledgment of the genuine concerns of some of the faith community, the *CAJ* proposed that, rather than add specific defences protecting freedom of expression, there should be reference in any revised hate crime legislation to existing ECHR defences of freedom of expression, as set out in the Human Rights Act, acknowledging formally that these defences apply to offences against all protected groups. This proposal was endorsed by *Victim Support NI* who agreed that such an approach would negate the need for any further 'free expression' defences within the legislation.

9.286 By way of reminder, there are three key differences between the stirring up offences in England and Wales relating to religious hatred and sexual orientation – as compared to the offences relating to racial hatred.

9.287 So, for offences relating to religious hatred and sexual orientation:

(1) There must be an intention to stir up hatred – a likelihood that hatred might be stirred up is not enough;

(2) The words or conduct must be threatening – not merely abusive or insulting; and

(3) There are express provisions protecting freedom of expression covering criticism of religious beliefs or sexual conduct.

9.288 These express provisions are as follows: first, in relation to religion by Section 29J of the 1986 Act.

> *Nothing in this part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*

9.289 And, in relation to sexual orientation, Section 29JA provides:

> *(1) In this part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.*

> *(2) In this part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.*

9.290 Up until quite recently, none of these important differences can be found in the 1987 Order in Northern Ireland.

9.291 Major change came about in July 2019 when the *United Kingdom Parliament* passed legislation requiring the *Government* to act to legalise same-sex marriage in Northern Ireland if the devolved *Northern Ireland Executive* was not re-established by October 21, 2019. In the event, the *Executive* was not re-established before this deadline. This left the *Government of the United Kingdom* responsible for amending the law applicable in Northern Ireland.

9.292 In light of this, the *UK Government* enacted the Marriage (Same Sex Couples) and Civil Partnership (Opposite Sex Couples) (Northern Ireland) Regulations 2019, which came into force on 13 January 2020. Regulation 131 amends the 1987 Order by inserting the following in Article 8:

> *(2) For the purposes of this part, any discussion or criticism of marriage, which concerns the sex of the parties for marriage is not to be taken of itself to be –*
>
> *(a) Threatening, abusive or insulting, or*
>
> *(b) Intended to stir up hatred or arouse fear.*

9.293 It is important to note that no further changes were made to the law of Northern Ireland in respect of sexual orientation or religious hatred.

9.294 The implementation and operation of the 1987 Order remains a devolved matter notwithstanding the changes made in 2020.

9.295 This review was tasked to consider any changes to the 1987 Order.

9.296 The review sought clarification from the *Government* as to the reasoning behind introducing such an important change in the law in Northern Ireland at a time when issues such as this were under close consideration by the independent review and just prior to the commencement of the process of public consultation.

9.297 The then *Secretary of State* responded, explaining that during the debate in Parliament on the relevant legislation (Section 8 of the Northern Ireland (Executive Formation etc) Act 2019), considerable concerns were expressed by some members on the issue of same-sex religious marriage, and whether or not appropriate protections would be put in place for Northern Ireland. In response to these concerns, the *Government* gave assurances that these would be equivalent to the protections existing in the law of England and Wales and in Scotland.

9.298 In its response to the conclusion, the *Christian Institute*, stated that:

> In November 2019, the *Christian Institute* notified the Secretary of State for Northern Ireland that it would litigate if the *Northern Ireland Office* failed to include protections for free speech in respect of same-sex marriage.

9.299 There is a dilemma as many respondents who urged for the inclusion of specific freedom of expression defences for religion, sexual orientation and same-sex marriage did so on the basis that there should be parity between Northern Ireland and the position in England and Wales under the 1986 Act.

9.300 However, in doing so, one would have to accept that the combination of factors discussed above would mean that the scope of the stirring up offences for these groups or characteristics would then be very significantly narrower than for the offences of inciting racial hatred. This is a matter of considerable importance.

9.301 The logic for making such a fundamental distinction is unclear.

9.302 It is sometimes argued that race is given higher protection because it is an immutable characteristic. Although some disagree, it is now almost universally accepted that sexual orientation is equally immutable and cannot be 'cured'. To suggest otherwise is insulting and abusive towards homosexuality. Furthermore, it is surely inconsistent, unfair and irrational to treat one protected characteristic differently than any other. There is in law no hierarchy of protected characteristics as their creation is a result of historical accident rather than a choice of characteristics over any other.

9.303 Whilst, in theory, a person could change their religion – and some do – most people who have religious belief regard this as a key part of their identity.

9.304 I also note that the defence in England and Wales protecting freedom of expression in relation to religious belief purports to protect not only insult, but '**abuse'** of particular religions or the beliefs or practise of their adherents.

9.305 The Cambridge Dictionary defines 'abuse' as "to treat someone cruelly or violently . . . to revile, malign."

9.306 It is one thing to 'shock, offend or disturb' – as elaborated in the *Handyside* decision:

> Ridicule and insult may also be protected, but, following the hate filled conflict endured in Northern Ireland for almost 40 years, where religious intolerance and sectarianism drove much of the violence and mayhem, it is difficult to understand what benefit there would be to society here to provide specific protection for the abuse of another person's religion.

9.307 So far as England and Wales are concerned, the *Law Commission*, in its consultation paper in 2013: *Hate crime: The Case for Extending the Existing Offences* noted, so far as the religious belief defence was concerned

> It is difficult to assess the practical effect of this provision, in part because prosecutions under the religious hatred provisions are so rare. In any event, the provision cannot override the protection of Articles 9 and 10 of the ECHR…. In commentary, it has been argued that the saving would allow someone to say 'Islam is a wicked evil faith' but not 'Muslins are wicked and evil', because this could stir up hatred against Muslims as a group. However, this can be a fine line and it may be an artificial exercise to distinguish between insulting and abusive attacks on belief systems, and similar attacks on a group of religious adherents…. Some have argued that the narrowing of the offence (from the racial hatred version) and the insertion of free-speech savings could render religious hatred offences unworkable. One of the key potential difficulties is the narrowing of scope brought about by removing 'abusive or insulting' to leave only 'threatening'. If it is an essential component of the conduct element of these offences that the words or material be threatening in nature, this rules out much content that could nonetheless incite hatred.[161]

9.308 Later in the same consultation paper, the *Law Commission* noted:

> The effect of the provisions is to specify significant areas of expression as being excluded from the scope

[161] (at paras 2.118 – 2.121)

> of the stirring up offences. It is not clear that these provisions necessarily add anything to the Article 9 or 10 assessment the court would be required to undertake in any case:[162] they seem to have been included for the avoidance of doubt. The arguments advanced in debates in the *House of Lords* in favour of such provisions for religious hatred and hatred on grounds of sexual orientation were that they:
>
> (1) Prevent a chilling effect resulting from the new offences;
>
> (2) Provide clarification as to the scope of the new offences, by offering guidance on the threshold for prosecution, in light of Articles 9 and 10; and
>
> (3) Curb overzealous reliance on the offences by police officers and prosecutors. [163]

9.309 The *Law Commission* noted further that, although the provision on religious hatred was created to protect believers without protecting beliefs:

> In practice, of course, this distinction may be difficult to draw: ridicule towards the central tenets of a person's religion may be experienced, and intended as, ridicule of a person who is an adherent of that religion.

9.310 In relation to the defence regarding sexual orientation, the *Law Commission* noted:

> The focus of the provision is expression relating to conduct or practices undertaken by people on account of their sexual orientation rather than hatred of those individuals themselves. As in the case of religious hatred, this distinction may be difficult to draw in

[162] By virtue of the Human Rights Act 1998

[163] (Ibid at para 4.79)

> practice: criticism of homosexuality may be experienced, and intended as, criticism of a homosexual person.[164]

9.311 The protection for freedom of expression in relation to religion in the 1986 Act is extensive, excluding a whole class of speech from the offences. The protection in relation to sexual orientation is less absolute.

9.312 These 'free speech' clauses generated a great deal of controversy at the time of their introduction and there is no general consensus about their effectiveness or utility.

9.313 Some academic commentators have suggested that free-speech provisions have effectively denuded the stirring up offences of any practical impact.[165]

9.314 The fact that these 'free speech' protections only apply to religious hatred and sexual orientation appear to offend against principles of fairness. As indicated above, these protections do not apply to racial hatred, which may give the impression in England and Wales that some kinds of expression explicitly protected in relation to sexual orientation and religion are not also protected in the context of racial hatred.

9.315 Furthermore, the various free-speech defences are confined to Part IIIA of the 1986 Act and do not cover threatening, abusive or insulting words or behaviour charged under Section 4, Section 4A or Section 5 of the Act. It is easy to see how such a difference could lead to important anomalies.

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[164] ibid at para 4.83

[165] See, for example, Goodall. K. "incitement to religious hatred: all talk and no substance?" (2007) Modern Law Review, 89.

9.316 None of these difficulties should lead to a situation in Northern Ireland which would improperly restrict the ability of Christians – or any other religious group – to speak freely and responsibly about their faith or robustly disagree with the tenets of another faith.

9.317 In its response, the *Evangelical Alliance* helpfully drew the review's attention to an important judgment on Article 9 of the ECHR, which held that the protection to hold personal beliefs and thoughts, and to manifest the values inherent within them, is a fundamental part of both individual human dignity and a liberal democratic society. This is a foundational principle and underlines the importance and attention given to freedom of expression in this review.

9.318 In the leading decision *of Kokkinakis v Greece (1994) 17 EHRR 397*, the *ECHR* stated:

> *As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been clearly won over the centuries depends on it.*

9.319 Freedom of expression is a precious right of our society. As a principle it underlines the values that contribute to a tolerant and fair society. Aspirations for improvements in society draw from the setting of clear standards that help contribute to an enlightened exchange of views that are the hallmarks of civilised discussion and debate.

9.320 Safeguarding freedom of expression and ensuring that hate crimes are not used for any collateral purpose of suppressing legitimate discussion, fair exchanges of viewpoints and analysis, has remained at the centre of my deliberations throughout this review.

Freedom of expression and international guidance

9.321 The fundamental question is the dilemma of how best to achieve a fair balance between the use of the criminal law to prevent, deter and, if necessary, prosecute hate speech and, on the other hand, protect freedom and expression and other rights including Article 9 rights.

9.322 The answer may come from guidance found in the advice offered by international organisations.

9.323 The Rabat Plan of Action (2012) provides comprehensive United Nations backed expert guidance on how a State should interpret and implement their obligations on incitement to hatred provisions. Importantly, it makes clear that criminal law should **only** be used in the most extreme cases and as a last resort, and sets out a six factor test to assist judges and prosecutors to make a case-by-case analysis of whether this high threshold has been met.

9.324 The Rabat six tests are (a) context; (b) standing or position of speaker; (c) intent; (d) content or form; (e) extent of the speech; (f) the likelihood, including the imminent risk, that actual action is incited as a result of the speech.

9.325 As regards content and form, the content of speech constitutes one of the key foci of the court's deliberations and is a crucial element of incitement. The extent of the speech act: extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of the audience.

9.326 As regards likelihood including imminence: incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for the said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be direct.

9.327 In 2014, the *Office of the Attorney General* for Northern Ireland issued statutory Human Rights Guidance to the *PPS*. This guidance is helpful and provides a test that follows the 'due regard' guidance references found in the UN Rabat Plan of Action, which includes the six stage threshold test for incitement to hatred within the guidance.

9.328 As noted by the *PPS*, it has the legal obligation, as a public body, to acknowledge and act on and apply its obligations under the Human Rights Act 1998 not to act inconsistently with an individual's right to freedom of expression. As the *PPS* state:

> It does this through a proper application of both the evidential and public interest tests for prosecution. There is no suggestion that too many prosecutions are brought under this legislation, such that Article 10 rights require greater recognition or protection. It is not considered that such an amendment would bring any greater clarity for prosecutors or the public as to what type of speech or behaviour should be prosecuted under these provisions.

9.329 The review has not received any evidence that the *PPS* are falling in this duty, nor have they been shown to be overzealous in the prosecution or pursuit of cases involving the stirring up offences in Northern Ireland. The same point applies to the *Police Service of Northern Ireland* who have acted prudently in their handling of stirring up offences.

9.330 In Northern Ireland, the number of prosecutions for stirring up offences is very small. An example is the most recent high-profile case of the prosecution of a pastor for an offence contrary to Section 127(1) of the Communications Act 2003.

9.331 The sermon said, among other things, that "Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell".[166]

9.332 Although this case was not prosecuted under the 1987 Order, prosecuting counsel accepted that the defendant was entitled to use strong language in criticism of Islam, noting that such criticism was protected by Articles 9 and 10 of the Convention.

9.333 I agree with the *PPS* and other respondents that, in reality, these 'free speech' defences are not defences as such, but rather expressions of the statutory recognition of the fact that freedom of expression is protected in law.

9.334 None of this discussion should deflect the genuine concerns of some in the faith community that there are serious challenges to freedom of speech in modern society. Such concerns are important and need to be addressed in the drafting of any crime reforms.

9.335 The heavy-handed behaviour of *Northumberland police* in the Miller case (see chapter 3.40 et seq.) is a salutary reminder of the importance of freedom of expression in a modern democratic society.

[166] DPP v McConnell (2016) N.I. Mag 1

9.336 Those who share Mr Miller's proper concerns can take comfort from the robust protection of his rights offered in the judgment. There is no basis to believe that the courts are failing in their public duty to uphold ECHR rights.

9.337 There are also concerns as to the impact of a new and recent phenomenon in society in what has been called the growth of the 'cancel culture'. This may occur when one side to an argument asserts vehemently that the giving and taking of offence trumps the right to speak and seeks to deny those on the other side of the debate a platform to express their views.

9.338 Just recently, a group of 153 academics and writers, including Margaret Atwood, Noam Chomsky, JK Rowling and Salman Rushdie wrote a letter on justice and open debate to Harper's magazine to defend what they called the "free exchange of information and ideas, the lifeblood of a liberal society, against an intolerance of opposing views and a vogue for public shaming and ostracism."

9.339 The leader writer of *The Times* argued that it is a defiance of basic freedoms to silence legitimate views that some may find offensive in the following terms:

> The right not to hear unedifying opinion seems to have trumped the right to free speech. This latter right has been a bedrock of democracy, its importance sanctioned and embodied in Article 19 of the Universal Declaration of Human Rights, which states that 'everyone shall have the right to hold opinions without interference'. There have always been restrictions to the unbridled freedom of expression that protect national security or egregiously offensive statements that target race, gender or religion. Yet the cancel culture goes way beyond this and seeks to bracket off a space in which healthy debate and dissent are stifled.
>
> The pursuit of safety has become illiberal and intolerable and has resulted in good people being shouted down and interesting arguments not being

> aired. As the correspondents to Harper's say, this attitude will ultimately harm the cause of public debate. The conversation of liberal democracy will be the poorer for it.[167]

9.340 George Orwell once said:

> If liberty means anything at all, it means the right to tell people what they do not want to hear.

9.341 This generational war over free speech is outside the remit of this review but it illuminates the importance of the right to freedom of expression in a very pointed way.

9.342 Having considered the arguments, I have concluded that the freedom of expression defences for religion and sexual orientation in the 1986 Act should not be specifically added to Part III of the Public Order (Northern Ireland) Order 1987 – or its replacement in any new Hate Crime and Public Order Bill.

9.343 For the same reasons, I recommend that the express defence of freedom of expression for same-sex marriage in Article 8(2) of the 1987 Order be repealed.

9.344 However, I am satisfied that any new hate crime legislation should have clarity in the setting of the general purpose and intent behind the legislation and recommend that the right to freedom of expression should be explicitly recognised in amended legislation.

9.345 Such a provision should state that any stirring up offences should be interpreted compatibly with ECHR rights. Such a provision should reflect the

[167] The *Times* – July 9 2020

real concerns that some religious groups and organisations hold in that discussion of a wide range of issues associated with religious belief, including sexual matters, might fall foul of any reformed hate law.

9.346 The views expressed in the preceding three paragraphs are set out in Recommendation 14 below.

9.347 It is clear that there are current safeguards under the existing law of Northern Ireland and these include the protections found under the Human Rights Act 1998 and Articles 9 and 10 of the ECHR. This does not alter the fact that in any new hate crime law, the inclusion of an explicit recognition of freedom of expression would go a long way to reassure many communities and faith groups that might otherwise be fearful of expressing their beliefs and understandings of faith.

9.348 As mentioned above and to reiterate, freedom of expression is inexorably linked to the adoption of effective hate crime legislation. Northern Ireland has suffered greatly from sectarianism, which the *United Nation* argues, is a form of racism.

9.349 The foundations of any revised hate crime legislation should be aligned to setting freedom of expression as a means of distinguishing unacceptable from acceptable speech and behaviour.

Setting the threshold of stirring up offences

9.350 Question 38 in the consultation paper reads:

> Under Article 9(1) of the Public Order (Northern Ireland) Order 1987, should the test remain referring to a person using 'threatening, abusive or insulting words or behaviour or displaying any similar written material which is threatening, abusive or insulting'. Or, should

be the words ‘abusive’ or ‘insulting’ be removed from the test for the commission of this offence?

9.351 The 1987 Order sets a high threshold for the stirring up offences and this explains why so few cases are taken to court, particularly in relation to cases concerning religion and sexual orientation.

9.352 As indicated earlier, my recommendation is that the test for the stirring up offences should continue to be ‘hatred’ as opposed to tests based on ‘hostility’, ‘bias’, ‘prejudice’ etc. which are suitable descriptors for hate crime.

9.353 This acknowledges the fact that hate speech is very different from hate crime and the corresponding importance of freedom of expression as regards speech.

9.354 However, when considering reform in this area, it is appropriate to reflect on whether other aspects of the prosecution threshold are necessary or desirable, particularly in the face of the sheer scale of online hate.

9.355 The high threshold for the prosecution of stirring up offences is at least in part due to the fact that the offence under Article 9(1) requires both the words are ‘threatening/abusive/insulting **and** that there was either an intention to stir up hatred/fear or that hatred/fear was likely to be stirred up thereby.

9.356 In other words, the prosecution not only need to show that there was an intention for the material to stir up hatred/fear or that hatred/fear was likely to be stirred up thereby, **but also** that it was materially threatening or abusive or insulting in character.

9.357 It is worth asking why both of these factors are needed – if someone could be shown to be using words that are intentionally stirring up hatred/fear, why should there be a need to show that the material was threatening/abusive and insulting?

9.358 It may be argued that we do not want to criminalise speech, purely because it is threatening/abusive and insulting, but an argument could be made that speech (whether or not it is threatening/abusive and insulting), but which is **intended** to stir up hatred/fear where it can be shown that hatred/fear was likely to be stirred up or aroused should be a criminal offence.

9.359 If the mischief here is the stirring up of hatred/fear, then the characterisation of the material may not seem to play a particularly vital role.

9.360 Even if the current test is maintained, the question arises as to whether or not the words 'abusive' or 'insulting' should be removed from the current test for the commission of the offence.

9.361 It is helpful to set out the current Article 9 of the 1987 Order. Part III of the Order encompasses Articles 8 - 17 inclusive but Article 9 is the fundamental provision.

9.362 Article 9 is as follows:

> ***Use of words or behaviour or display of written material***
>
> *9-(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if -*
>
> *(a) He intends thereby to stir up hatred or arouse fear; or*

(b) Having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.

(2) An offence under this Article may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) In proceedings for an offence under this Article it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(4) A person who is not shown to have intended to stir up hatred or arouse fear is not guilty of an offence under this Article if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(5) This Article does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

'Dwelling' is defined in Article 17 thus:

Dwelling' means any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others), but does not include any part not so occupied, and for this purpose 'structure' includes a tent, caravan, vehicle, vessel or other temporary or movable structure.

The words 'fear' and hatred' are defined in Article 8 thus:

'Fear' means fear of a group of persons defined by reference to religious belief, sexual orientation,

disability, colour, race, nationality (including citizenship) or ethnic or national origins;

'Hatred' means hatred against a group of persons defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.

9.363 It is important to note that, apart from the reference to the arousal of fear in Article 9 of the 1987 Order, this article is word for word **identical** to Section 18 of the Public Order Act 1986 which deals with acts intended or likely to stir up racial hatred in England and Wales.

9.364 For reasons discussed elsewhere, higher thresholds are set in England and Wales in relation to the stirring up of hatred on grounds of religion or sexual orientation. Currently, in England and Wales, there is no offence to criminalise stirring up hatred on the grounds of disability.

9.365 It is argued, therefore, that the law in Northern Ireland as it currently stands, offers identical protection to that provided in England and Wales in respect of racial hatred, but much stronger protection for groups defined by reference to religious belief, sexual orientation and disability.

9.366 The reference to the arousal of fear is unique in UK law, dating back to the Prevention of Incitement to Hatred Act (Northern Ireland) 1970.

9.367 Its insertion in that law was originally intended to deal with the specific and widespread problem of sectarianism in Northern Ireland, which had contributed significantly to the breakdown of public order and sectarian strife and hatred, which had begun in 1969 and continued for almost 40 years until the Good Friday Agreement of 1998.

9.368 As discussed earlier, sectarianism is still a serious problem in this country and the reference to arousal of fear in the 1987 Order is arguably still very relevant to deal with cases where the speaker or writer is careful not to incite hatred directly or obviously but subtly insinuates fear of one or more of the protected groups into his listeners or readers.

9.369 One thinks of Mark Anthony's oration at the funeral of Julius Caesar in the Shakespeare play where the orator appears to praise the group of senators who murdered Caesar – "Brutus is an honourable man – so are they all, all honourable men" – but, whilst studiously avoiding any overt incitement to hatred, subtly and by degrees creates an atmosphere of fear and anger in the minds of his listeners against the senators.

9.370 Again, I am satisfied that the reference to the arousal of fear in Article 9 of the 1987 Order is entirely appropriate to the dynamics of the situation in Northern Ireland and provides an additional level of protection for all the protected groups.

9.371 It appears to me that it is important to bear this in mind when some respondents argue for parity with England and Wales.

9.372 Although there is ample room for a reasoned discussion on the pros and cons of providing specific 'free speech' defences – as discussed above – from the point of view of prospective victims of hate speech, if parity with England and Wales – or with Scotland, is regarded as desirable as an end in itself then the result would be to leave these groups less protected when it is clear that their vulnerability is in need of protection in Northern Ireland. That would leave Northern Ireland less well protected by laws than at present and that would surely be an undesirable outcome of this review.

9.373 Among many other issues examined by the *Law Commission* in 2014, was whether or not additional groups, such as disability, should be included in the protection offered by the stirring up offences. It recommended then that the evidence base for doing so was insufficient.

9.374 A further, much deeper review of hate crime legislation was begun by the *Law Commission* in 2018. It is expected to report sometime in 2021 and is looking again at the stirring up offences. The *Law Commission* published a consultation paper in September 2020.

9.375 Before looking at the responses to the consultation paper, it is worth remembering the reasoning behind the twin alternative tests for criminal liability under Article (1) of the 1987 Order. So, a defendant can be found guilty of an offence if –

(a) He intends to stir up hatred or arouse fear (using threatening, abusive or insulting words or behaviour or displaying any written material which is threatening, abusive or insulting); or

(b) Having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.

9.376 The original Race Relations Act 1965 (for England and Wales) was enacted against a background of African-Caribbean immigration in the 1950s and 60s, the Notting Hill race riots in 1958 and the Bristol bus boycott in 1963.

9.377 Under Section 6 of that Act, a person could be found guilty only if intent was proven. The conduct must have been both intended and likely to stir up racial hatred.

9.378 This offence was amended by the Race Relations Act 1976 following racial disturbances in Red Lion Square which culminated in the death of a student. Sir Leslie (later Lord) Scarman described the 1965 Act as:

> Merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney General's consent) it is useless to a policeman on the street. [my underlining][168]

9.379 The Race Relations Act 1976 repealed Section 6 of the Race Relations Act 1965 and inserted a new section into the Public Order Act 1936 as follows:

> *5(a)(1) A person commits an offence if –*
>
> *(a) He publishes or distributes written matter which is threatening, abusive or insulting; or*
>
> *(b) He uses in any public space or any public meeting words which are threatening, abusive or insulting, in the case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.*

9.380 This marked a significant change from the 1965 Act in that the likelihood of stirring up racial hatred was sufficient: there was no requirement of intention to do so. However, subsection (3) provided that it was a defence that the accused was not aware of the content of the written matter in question and neither did suspect, nor had any reason to suspect, it of being threatening, abusive or insulting.

[168] Sir Leslie Scarman (1974), the Red Lion Square disorders of June 15, 1974

9.381 The present provisions on stirring up hatred for England and Wales are contained in the Public Order Act 1986.

9.382 The current position in England and Wales, at least as far as racial hatred is concerned, is therefore as follows:

(1) The words or material must be threatening, abusive or insulting;

(2) It is sufficient if either the defendant intends to stir up hatred or hatred is likely to be stirred up; but in the second case there is a defence if the defendant did not intend the words or material to be, and was not aware that they might be, threatening, abusive or insulting; and

(3) The words or behaviour need not be in public, but there is a defence if they were in a private dwelling house and the defendant had no reason to believe that they would be seen or heard from outside.

9.383 In these important respects, the law in Northern Ireland is identical to the law in England and Wales. The only exceptions are that Northern Ireland continues to apply the arousal of fear test as discussed in detail above and the fact that Northern Ireland has not raised the threshold for religious hatred or for hatred on the ground of sexual orientation.

9.384 It will be recalled that for these latter offences, there are key differences:

(1) The words or conduct must be threatening (not merely abusive or insulting);

(2) There must have been an intention to stir up hatred (the likelihood that it might be stirred up is not enough); and

(3) There are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.

9.385 In its report in 2014 – *Hate Crime: Should the Current Offences be Extended?* – the Law Commission noted arguments that the religious offences are unworkable due to the 'free speech' provisions in combination with the requirements that material be 'threatening' rather than 'threatening, abusive or insulting'.[169]

9.386 Those who pressed successfully for a requirement for intent argued that with the offence being capable of being committed using merely 'insulting' words – which need not be directed at the person – there was a real fear that legitimate criticism of religions could be criminalised.

9.387 In its consultation paper of 2013, the *Law Commission* described the meaning of 'threatening, abusive or insulting' as follows:

> Whether words or conduct are 'threatening, abusive or insulting' is a question of fact, to be decided on the basis of the facts of the case. The words are to be given their ordinary meaning and whether they meet this test must be decided based on the impact such words, behaviour or material would be likely to have on a reasonable person.[170]

[169] The *Law Commission*: hate crime: should the current offences be extended? May 2014. CM 8865 para 2.47

[170] *Law Commission* consultation paper number 213: hate crime: the case for extending the existing offences part 2.59. See also Handyside v UK APP. No. 5493/72. see further Brutus v Cousins (1973) Ac854 and DPP v Clark (1991) 94 c AR 359

9.388 The words “threatening, abusive or insulting” was based on a provision under the Metropolitan Police Act 1839.

Analysis of responses to Question 38

9.389 In response to question 38 a strong majority of individual respondents proposed that the words ‘abusive or insulting’ should be removed from the test for the commission of the offence.

9.390 The views of organisational respondents were less conclusive but the majority agreed that the words ‘abusive or insulting’ should be retained.

9.391 Among those who thought that these words should be removed from the test for the commission of the offence, a commonly held view was that these words were too subjective and open to misinterpretation. It was considered particularly problematic in the case of stirring up offences since these offences do not require identification of actual harm caused for the crime to be proved.

9.392 Many of these respondents again expressed concerns about freedom of expression and particularly that the terms ‘insulting’ and ‘abusive’ could be used in a censorial manner in the application of hate crime legislation. It was argued that the higher threshold of ‘threatening’ words or behaviour was more appropriate.

9.393 Several respondents also made distinctions between race and other protected characteristics in their arguments for the protection of freedom of expression.

9.394 The *Christian Institute* argued:

> Race is a neutral, inherited physical trait. Sexuality and transgenderism manifest in behaviour. The morality of the latter can be debated in a way that the former cannot.
>
> It is well established in case law that the view that homosexuality is sinful is worthy of respect in a democratic society. A very wide range of different religious beliefs meets this threshold. These are matters that it should be possible to openly debate. The same is not true of racist views . . . If stirring up hatred offences are going to apply to areas of controversy like sexual orientation, religion or transgender identity, only conduct that is intended to stir up hatred should be covered.

9.395 The argument that any new stirring up of hatred offences should only cover threatening conduct that is intended to stir up hatred was a theme taken up by a number of religious/faith groups. A further argument for the removal of the term 'insulting' was that this would ensure consistency with the legislative approach in England and Wales, where the word 'insulting' was removed from Section 5 of the Public Order Act 1986 in 2012 due to problems relating to freedom of speech.

9.396 Among those who agreed that the test referring to a person using 'threatening, abusive or insulting words or behaviour' should remain, there was general agreement that to remove the terms 'abusive' and/or 'insulting' would set the threshold at an unreasonably high level. The *Church of Ireland Church and Society Commission* noted that:

> Changing the test to refer only to words or behaviour which is threatening would seem like a significant change which would further narrow the applicable cases for the order to be used in. Retaining the words 'abusive' and 'insulting' allows for incitement of sufficient extremity which, while not directly threatening or using threatening terms, is still to be considered to

> be stirring up hatred or fear or likely to stir up hatred or fear to be appropriately charged. Given the increasing tendency for hate groups to use so-called 'dog whistles' and otherwise couch hateful and even violent rhetoric in seemingly inoffensive terms, symbols and phrases, it is important that laws regarding hate speech be able to appropriately prosecute all cases where the intent is to stir up hatred or arouse fear.

In a footnote in relation to 'dog whistles', they go on to say:

> [A] form of communicating using coded language which, to the general populace has one meaning but which carries an altered/additional/more specific meaning to a target group. These are widely used in politics (see, for example, those who state their commitment to 'family values' in United States politics to signal a traditional, conservative viewpoint, opposing ideas such as same-sex marriage without outright stating support for any particular conservative policy that could be argued against) and among hate groups can act as both a way of communicating ideas which would not be welcome in public discussions and as a furtive shibboleth of sorts).

9.397 Many women's groups agreed. For example, *NIWEP* observed:

> The test is appropriately high as at present. Removing references to 'abusive' or 'insulting' would raise the bar so high that many cases would fall short of the threshold, while nevertheless meeting the hallmarks for hate speech offences. This will increase the risk that serious hate speech goes unchecked with potentially significant impacts on the groups targeted. Further guidance and clarification regarding how and when to prosecute may be useful to ensure that relevant freedom of expression is safeguarded as provided for in the ECHR.

9.398 However, the *PSNI* agreed that the test should remain as is.

9.399 Among others who took this view, the *PPS* argued that:

> The removal of the terms 'abusive' and/or 'insulting' would have the effect of raising the threshold for these offences. The threshold is already high having regard to the other elements of the offence and the number of prosecutions for these offences is already a low level. We do not consider that a narrowing of these offences is necessary or appropriate.

9.400 An additional argument was that the Article 9 offence includes an important *mens rea* element and, given that, the retention of these terms was considered as appropriate.

9.401 Other respondents, including the *NIHRC* and the *CAJ,* argued that these terms were in line with international standards, including the *Council of Europe European Commission against Racial and Intolerance* hate expression definition, and were therefore appropriate.

9.402 The *CAJ* noted:

> [A] provision should make clear that the Incitement to Hatred offence encompasses the matters covered by the existing legislation including the various forms of conduct listed (words or behaviour, publication etc); that the offence includes conduct that 'stirs up hatred' or 'arouses fear'; and that the offence encompasses conduct either when committed with intent to incite hatred or, that having regard to all the circumstances, hatred will likely be incited.

9.403 Careful consideration has been given to the arguments of respondents received by the review.

Recommendation and analysis

9.404 An offence under Section 5 of the Public Order Act 1986 is committed if a person uses threatening or abusive words or behaviour or disorderly conduct within the hearing of or sight of a person likely to be caused harassment alarm or distress. Like Sections 4 and 4A, it covers a broad range of behaviours and instances of public disorder. It is the least serious of the public order offences.

9.405 There is no mens rea requirement such as the intent or likelihood requirements of Article 9 of the 1987 Order. The defences are relatively limited including that the accused had no reason to believe that there was any person within hearing or sight who is likely to be caused harassment, alarm or distress or that his conduct was reasonable.

9.406 In many ways, it is quite a draconian offence in no way similar to the high threshold found in Article 9 of the 1987 Order.

9.407 As previously noted, in *Hammond v DPP (2004) EWHC 69,* the defendant was an evangelical Christian preaching in public in Bournemouth town centre. During his sermon, he held a sign bearing the words 'stop immorality', 'stop homosexuality' and 'stop lesbianism'. A crowd of 30 to 40 people gathered, some of whom were hostile to him. There was a disturbance, soil was thrown at the defendant and someone was hit over the head with his placard. A police officer spoke to the defendant and asked him to take the sign down and leave the area. He refused, saying he was aware that his sign was insulting because he had had a similar reaction previously, but that he intended to return the following Saturday to preach with the sign again. He was arrested for breach of the peace. He was subsequently charged and convicted under Section 5. At this time, Section 5 referred to 'threatening, abusive or insulting words or behaviour'.

9.408 The *Divisional Court* confirmed that, while the defendant was no doubt exercising his freedom of expression, it was open to the magistrates to decide that in all the circumstances his conduct was not reasonable. In giving his judgment, Lord Justice May stated:

> *The words on the sign appear to relate homosexuality and lesbianism to immorality. The justices themselves took this into consideration when they say that the words on the appellant's sign were directed specifically towards the homosexual and lesbian community, implying that they were immoral. Accordingly, not without hesitation, I have reached the conclusion that it was open to the justices to reach the conclusion that they did as to the fact that these words on the sign were, in fact, insulting.*

9.409 It seems clear that the learned appeal judge was uncomfortable with the conclusion and may not have convicted Mr Hammond if he had been the judge at first instance.

9.410 Since the *Hammond* case, Section 5 has been amended to remove the word 'insulting' with the result that the defendant has to use 'threatening or abusive' words before liability can be established (Crime and Court Act 2013 Section 54).

9.411 Few would argue with the fairness of this change in the law, but the comparison between the then criminal threshold faced by Mr Hammond under Section 5 of the 1986 Order and the much higher criminal threshold in Northern Ireland under Article 9 of the 1987 Order does not stand up to examination. An offence under Section 5 can be carried out merely where a person nearby is likely to be affected.

9.412 Similarly, if Article 9 was amended to provide that only conduct that is intended to stir up hatred should be covered and the likelihood test removed then, arguably,

there would be a reversion to the test under the 1965 Race Relations Act so roundly criticised by Lord Scarman.

9.413 It will be recalled that Lord Scarman criticised the practical application of the existing law and concluded the Act needed:

> Radical amendment to make it an effective sanction, particularly . . . in relation to its formulation of the intent to be proved before an offence can be established.

9.414 Whilst appreciating that this is currently the test for hatred on the ground of religious belief and sexual orientation in England and Wales, it has never been found necessary to make such provision in the law of Northern Ireland.

9.415 This is likely to be a retrograde step given the fact that the threshold is already high having regard to the other elements of the offence and the very low number of prosecutions.

9.416 As I have indicated earlier in another context, no evidence has been brought to my attention of any miscarriages of justice in Northern Ireland in the 33 years since the passing of the 1987 Order which would justify the assertion that the protection for lawful expression in Northern Ireland is significantly more limited than in England and Wales, or that the risks of injustice are greater in Northern Ireland.

9.417 In its current consultation process, the *Law Commission* is examining the racial element of stirring up offences.

9.418 The racial hatred offences in England and Wales have two limbs – behaviour that is intended to stir up racial hatred and behaviour that is likely to stir up racial

hatred. On the other hand, incitement of religious hatred and hatred on grounds of sexual orientation are only unlawful where there is intent to stir up hatred.

9.419 The *Law Commission* notes:

> The offence of stirring up racial hatred in its simplest form is complete when a person uses threatening, abusive or insulting words or behaviour (threatening alone in the case of religious hatred or hatred on the grounds of sexual orientation) and intends thereby to stir up hatred. This particular combination of the conduct element (the words used) and the fault element (the intention to stir up hatred) results in a narrowly defined offence. This means that where the conduct involves threatening words or behaviour (or in the case of racial hatred abusive or insulting words or behaviour), and the accused intended to stir up racial hatred – the intent to stir up hatred alone is sufficiently for a conviction. It is not necessary to show that the defendant knew that the words used were threatening (or for racial hatred, abusive or insulting), nor whether they were in fact likely to stir up hatred. Indeed, most of the defences available to someone who disseminates hate material are unavailable where they intended to stir up hatred . . . A key difficulty with the conduct element of the offence is that the requirement for threatening (or abusive or insulting) words to be used creates a loophole. It is not hard to envisage situations which a person might deliberately spread hate by engaging in speech which, while defamatory of a group, does not involve threatening (or abusive or insulting) words – for instance by the deliberate spreading of untruths about the group. Examples would include anti-Semitic tropes such as the 'blood libel' or the protocols of the Elders of Zion.[171]

9.420 These so-called protocols were a hoax text purporting to document a Jewish conspiracy to control the world by controlling the press and finance. Even today these 'protocols' continue to be cited by modern anti-Semites and conspiracy theorists.

[171] *Law Commission* – Hate Crime consultation paper 2020. P.397

9.421 As regards the 'likelihood' test, in *Parkin v Norman (1983) QB 92*, the *Divisional Court* considered the wording in Section 5 of the Public Order Act:

> Threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace whereby a breach of the peace is likely to be occasioned. Observing that criminal law provisions should be restrictively interpreted, the court stressed that the offence was 'likely to' not 'liable to'.

The court concluded:

> *This is a penal measure and the courts must take care to see that the former expression is not treated as the latter considering 'likely to' to indicate a greater degree of probability than 'liable to'.*

9.422 In *Re H,* Lord Nicholls held that the Children Act 1989 standard of "likely to suffer significant harm" means a real or substantial risk of significant harm, but should not be equated with more likely than not.[172]

9.423 To ensure greater certainty, the *Law Commission* provisionally proposed that for prosecution under the 'likely to' line, the prosecution should have to show that the defendant ought to have known that the inflammatory words were likely to stir up hatred.

9.424 The *Law Commission* suggests a new approach. It argues that the link between the nature of words spoken and the speaker's intention are properly aligned in stirring up provisions. As previously noted, it argues that the current legislation means that

[172] RE H (1995) UKHL 16

words clearly intended to promote racial hatred fall outside the law simply because the speaker avoided using threatening, abusive or insulting terminology.

9.425 In its earlier report in 2014, the *Commission* noted that Stop Hate UK had argued:

> One of the reasons there are so few prosecutions for the existing stirring up hatred offences is that organised groups, such as the far right (as opposed to individuals not associated with any group), who may be likely to make statements which would amount to an offence under the existing provisions are generally aware of the offences and limit their conduct accordingly, so as not to become criminally liable.

9.426 The *Law Commission* saw no obvious reason for treating knowledge of whether the words used were threatening, abusive or insulting differently from knowledge of whether hatred was likely to be stirred up, arguing that there is a stronger case for allowing a defence based on knowledge of the consequences of the conduct than knowledge of the nature of a person's own words.

9.427 It proposes a new approach where the "current linguistic constraints in prosecuting intentional incitement to hatred are relaxed, but the protections under the 'likely to' limb would be retained and strengthened through removal of the term 'insulting'". As the *Law Commission* says:

> We consider that this would enable prosecutors to focus on the more egregious cases of incitement, while reducing the possibility of a chilling effect on legitimate free speech.

9.428 Under the *Law Commission's* proposal, intentionally stirring up hatred would be an offence regardless of whether the words used were 'threatening' or 'abusive or insulting'. They suggest that:

> The prosecution would be required to prove to the criminal standard that the words had been used with intent to stir up hatred. Of course, in many cases the language used would be strong evidence of the speaker or writer's intent. However, there might be cases where despite using apparently moderate language, there is other evidence available to prove that the person did so with the demonstrable intention to stir up hatred."

9.429 The *Law Commission* propose further that there would be a higher threshold applying to prosecutions under the 'likely to' limb. Where a person is not shown to have intended to stir up hatred, that person will only be guilty of an offence if the prosecution could prove that the defendant:

(1) Had used threatening or abusive words or behaviour;

(2) Knew or ought to have known that the words or behaviour were threatening or abusive;

(3) Knew or ought to have known that hatred would be likely to be stirred up as a result; and

(4) In all the circumstances hatred was likely to be stirred up.

9.430 The *Law Commission* concluded:

> We prefer the formulation 'knew or ought to have known' to a strict requirement for knowledge or for knowledge or belief, that the words or behaviour were

> threatening or abusive, or likely to stir up hatred. First, requiring knowledge (or belief) to be proven would place an undue burden on the prosecution . . . second, or provisional proposal would make clear that culpable self-induced ignorance, whether because of intoxication or turning a blind eye, would give no defence.

9.431 The formulation 'knew or ought to have known' – which considers the subjective circumstances of the defendant – appears preferable to possible alternatives such as a wholly objective test, based, for instance, on what a 'reasonable person' would have known.

9.432 At paragraph 12.65 of this review's consultation paper published in January 2020, I observed:

> The high threshold is at least in part due to the fact that the offence requires both that the words are 'threatening/abusive/insulting' and that there was either an intention to stir up hatred/fear or that hatred/fear was likely to be stirred up thereby. The prosecution not only need to show that there was an intention for the material to stir up hatred/fear, but that it was materially threatening or abusive or insulting in character. It is worth asking why both of these factors are needed. If someone could be shown to be using words that are intentionally stirring up hatred/fear why is there also a need to show that the material was threatening/abusive or insulting? It could be argued that we do not want to criminalise speech purely because it is threatening/abusive and insulting, but an argument could be made that speech (whether or not it is threatening/abusive/and insulting) but which is intended to stir up hatred/fear should be a criminal offence. If the mischief here is the stirring up of hatred/fear, then the characterisation of the material does not seem to play a particular role.

9.433 Furthermore, at paragraph 12.71 of the consultation paper, I voiced reservations concerning the 'likelihood' test noting that:

> In order to ensure the offence is not overly restrictive, consider removing the part of the offence that reads 'having regard to all the circumstances hatred is likely to be stirred up'. This part of the offence effectively allows for strict liability – a defendant can be guilty of the offence even if they did not intend to stir up hatred or were even unaware that their words might have this effect. This part of the offence not only contravenes general principles of criminal liability by removing the need for *mens rea*, this also means that it is more likely to be seen as a disproportionate restriction on freedom of expression under Article 10.

9.434 The *Law Commission* has addressed both of these serious concerns in a thoughtful and practical way which is likely to prove even-handed for complainants and accused persons alike.

9.435 I believe that the concerns I raised in the consultation paper in this respect can be fully addressed by adopting and endorsing the *Law Commission* proposals – suitably adapted – for the law in Northern Ireland.

9.436 I therefore recommend the following:

9.437 Intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear.

9.438 Where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.

9.439 Where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:

(1) The defendant's words or behaviour were threatening or abusive;

(2) The defendant's words or behaviour were likely to stir up hatred or arouse fear;

(3) The defendant knew or ought to have known that their words or behaviour were threatening or abusive; and

(4) The defendant knew or ought to have known that their words or behaviour were likely to stir up hatred or arouse fear.

9.440 The recommendations in paragraphs 9.437, 9.438 and 9.439 are captured in Recommendation 14.

Recommendation 14

The Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order Bill, should be amended to:

(a) **include all the current and proposed protected characteristics referred to in Recommendation 9;**

(b) **introduce articles equivalent to Sections 4, 4(a) and 5 (as amended) of the Public Order Act 1986 with the proviso that the dwelling defences in those sections be removed.**

(c) **repeal Article 8 (2);**

(d) **repeal the dwelling defence in Article 9 (3);**

(e) **include a specific defence for private conversations.**

(f) **the test of hatred for the stirring up offences should remain unchanged.**

(g) **all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions.**

(h) **there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics. However,**

(I) **there should be formal statutory recognition of the importance of freedom of expression article 10 rights and all other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, in particular, rights guaranteed under article 6, 8, 9 and 14.**

(j) **the term 'publication' in article 10 should be amended to include 'posting' or 'uploading material online'.**

(k) **intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear:**

(3) **where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.**

(4) **where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:**

(v) the defendant's words or behaviour were threatening or abusive;

(vi) the defendant's words or behaviour were likely to stir up hatred or arouse fear;

(vii) the defendant knew or ought to have known that his words or behaviour were threatening or abusive; and

(viii) **the defendant knew or ought to have known that his words or behaviour were likely to stir up hatred or arouse fear.**

9.441 When the 1987 Order was passed into law, the Internet did not exist as we know it today. As things stand, there was no explicit legislative provision for online publication. The Internet now provides unprecedented means for people to communicate and connect, providing a platform for social and political discussion, analysis and comment.

9.442 It is constantly changing, with new technology and innovative programmes that often outpace current legislation and regulatory systems. It has become a major platform for online hate speech. Although the provisions of the 1987 Order were not designed or enacted with the Internet in mind, the courts have shown flexibility to accommodate material posted online.

9.443 In *R v Shepherd (2010) EWCA Crim 65*, the *Court of Appeal* in England rejected submissions that Section 19 of the 1986 Act did not apply to material published on the Internet and held that the expression 'written material' was sufficiently wide to include articles in electronic form. It also held that a person who produced racially inflammatory material and posted it on a website hosted in the United States, could be tried in the United Kingdom if a substantial measure of his activities took place in the United Kingdom.

9.444 In that case, the defendants had uploaded Holocaust denial material through a remote sever in California, but the website was accessible in the United Kingdom. The court determined that because the defendants were based in this country and the material was written, edited and uploaded in this country and was clearly aimed at people in this country, there was no question but that the court had jurisdiction over the material. However, there are still problems with the reasoning of this case, which means that the scope of the provisions and how they relate to the Internet are still unclear.

9.445 For example, on the facts of this case, it was clear that most of the crime had taken place in the United Kingdom: the defendants wrote and edited the material here and the material was directed at an audience in this country. However, it was unclear what would be the outcome of such a case if the facts differed.

9.446 For instance, would the courts have jurisdiction if the defendants had used a server in the United States, the material was clearly aimed at an audience in this country, but the defendants were based in France? Or what if the defendants and the server they used had been based in England, but the material was directed at a German audience?

9.447 It is not clear from the reasoning in this case what would have been the outcome.

9.448 A reasonable response would be to say that the court should have jurisdiction wherever the material is downloadable but the court did not go this far.

9.449 There are a number of other important issues in this area of law to do with attaching liability to those involved in hosting online content. This will be looked at in more detail in chapter 13.

9.450 At present, I reference the report of the *House of Commons Affairs Committee* in 2017 on Hate Crime: Abuse, Hate and Extremism Online.[173]

It concluded:

> If social media companies are capable of using technology immediately to remove material that

[173] *House of Commons Home Affairs Committee* (2017) hate crime: abuse, hate and extremism online. 201617: HC 609 para 12

> breaches copyright, they should be capable of using similar content to stop extremists re-posting or sharing illegal material under a different name. We believe that the Government should now assess whether the continued publication of illegal material and the failure to take reasonable steps to identify or remove it is in breach of the law, and how the law and enforcement mechanisms should be strengthened in this area.

9.451 For present purposes in terms of jurisdiction, it makes sense to clarify this issue by stating that any material downloadable in the United Kingdom is within the jurisdiction of the UK courts – including the courts of Northern Ireland. As a matter of practicality, trying to track down perpetrators who are not also resident in the United Kingdom will be immensely difficult and this will clearly limit who is likely to be prosecuted.

9.452 I therefore recommend that any new hate crime legislation in Northern Ireland clarifies the legal position so that material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the Northern Ireland courts.

9.453 This is captured in Recommendation 26 in chapter 13.

Chapter 10

Removing Hate Expression from Public Space

CHAPTER 10

REMOVING HATE EXPRESSION FROM PUBLIC SPACE

10.1 This chapter addresses the question of the extent to which the law should regulate hate expression displayed in public places as distinct from hate expression in private places. The chapter includes the critical question of the powers and duties of public authorities to remove sectarian and other hateful graffiti or items displayed on roadsides or other public property.

10.2 Public displays of graffiti, that include hate crime slogans, tend to diminish respect for the law and treat hate crime as somehow respectable or acceptable. This may 'normalise' hate slogans and enhance the factor of fear within an individual or community. This is dangerous and unacceptable in society as fear engenders hatred and makes victims anxious and concerned about their own private safety and security.

10.3 Section 75(2) of the Northern Ireland Act 1998 places a 'good relations duty' on public authorities. This means that a public authority 'must have regard to the desirability of promoting good relations between persons of different religious beliefs, political opinion or racial groups when carrying out its functions'. Interpreting this duty gives local authorities a fairly wide remit of discretion.

10.4 Clearly, it is unarguable that any public authority which tolerates incitement to hatred in its functions is not promoting good relations. Indeed, it is also arguable that inaction or inactivity may also have a similar effect of allowing fear and distrust to fester in communities.

10.5 This question of hate expression displayed in public places is pivotal to the effective working of the law and falls within the remit of this review of hate crime

legislation in Northern Ireland. There are a number of potential offences that are relevant, including the stirring up offences under the 1987 Order.

10.6 There are also potential offences of intimidation whereby an offence is committed by the placing of items in situations which may constitute sectarian intimidation, leading potentially to a person having to leave their home or workplace.[174]

10.7 There are also offences dealing with harassment, which could engage graffiti messages targeting an individual.[175]

10.8 Hate crime offences also engage with a number of Human Rights treaties that provide various legally binding obligations agreed by the United Kingdom. Human Rights obligations place positive duties on relevant public authorities to tackle hate expression, including the European Convention on Human Rights and Fundamental Freedoms (ECHR), herein after the Convention.

10.9 This Convention is given further legal effect by the Human Rights Act 1998, so, for example, Article 8 of the ECHR, the right to a private life, provides for positive obligations to intervene to tackle racist expression by providing obligations that engage with the rights of individuals to the peaceful enjoyment of their private life.

10.10 This includes duties to protect persons from hate expression, with some provisions explicitly tied to racist and sectarian expression. Article 6 of the *Framework Convention for National Minorities* imposes duties on public authorities to:

[174] Protection of the Person and Property Act Northern Ireland) 1969
[175] Protection from Harassment (Northern Ireland) Order 1997.

> *Undertake appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.*

10.11 Under Section 32 of the Police (Northern Ireland) Act 2000 and under the common law, the *PSNI*, as well as their duty to take steps to bring offenders to justice, are also under a duty to prevent the commission of criminal offences.

10.12 There are a number of specific powers vested in other public authorities in Northern Ireland.

10.13 For example, district councils in Northern Ireland have powers to:

> *[R]emove or obliterate graffiti detrimental to the amenity of any land in its district, or any placard or poster in its district that does not have planning permission.*[176]

10.14 Further powers were granted to councils in 2011 in relation to graffiti and posters and placards, including powers to issue 'defacement removal notices'.[177]

10.15 Such powers may not be easy to activate, given community circumstances and costs as well as the need to maintain public order.

[176] The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 Article 18, as amended by the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011.
[177] Clean Neighbourhoods and Environment Act (Northern Ireland) 2011.

10.16 This includes material which is 'offensive', a term defined in departmental guidance as graffiti which is:

> *Racially offensive, hostile to a religious group, sectarian in nature, sexually offensive, homophobic, depicts a sexual or violent act, was defamatory.*[178]

10.17 Powers are also vested in the *Department for Infrastructure*, under planning legislation to remove items and recover the cost of doing so, for any unauthorised materials on lampposts or other street furniture.[179]

10.18 Much of graffiti containing hate expression in public space will constitute criminal conduct. However, it is not always possible to enforce the law or, indeed, remove or control the spread of graffiti.

10.19 Although in many cases it may prove impossible to apprehend an individual offender, such manifestations of hatred raise important questions about the duties and powers of public authorities to remove such material.

10.20 The consultation paper sought responses as to whether any recommendation should be considered to clarify and strengthen the law to regulate duties to tackle hate expression in public space.

10.21 Among the principles and commitments made by the political parties in Northern Ireland in the '*New Decade, New Approach'* deal, the parties affirmed:

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[178] Department for Environment, *Guidance for District Councils on (The Clean Neighbourhoods and Environment Act (Northern Ireland)* (2011) para 2.6 and sections 31 to 35.

[179] Roads (Northern Ireland) Order 1993.

> The need to respect the freedom of all persons in Northern Ireland to choose, affirm, maintain and develop their national and cultural identity and to celebrate and express that identity in a manner which takes into account the sensitivities of those with different national or cultural identities and respects the rule of law. They also affirm the need to encourage and promote reconciliation, tolerance and meaningful dialogue between those of different national and cultural identities in Northern Ireland with a view to promoting parity of esteem, mutual respect, understanding and cooperation. These principles will be reflected in legislation.

10.22 The main political parties also reaffirmed their support for the right to freedom from sectarianism, sectarian harassment and intimidation, and the need to tackle sectarianism, prejudice and hate in seeking to eliminate discrimination.

Consultation responses: removing hate expression from public space

10.23 Question 53 in the consultation paper (paragraph 14, page 149) asks:

> Should the law relating to the duties of public authorities to intervene to tackle hate expression in public space be strengthened or further clarified?

10.24 There was strong support for this idea among organisations – 88% percent of organisations agreed.

10.25 Although support was considerably less prevalent among individuals – with 47% answering 'yes' – the overall approval for this idea was 67%. 84% of respondents to the online survey agreed with this idea.

10.26 A number of organisations expressed concern at what they saw as the relative lack of action to tackle this issue from public authorities.

10.27 The *Rural Community Network* observed:

> The law relating to the duty of public authorities to intervene to tackle hate expression in public space should be further strengthened. The current system is not working with various statutory agencies often passing the buck to each other. The *FICT Commission* had been tasked with looking at this issue, amongst a range of others, as part of its remit but has yet to report.

10.28 It is important to note that there is a *Commission on Flags, Identity, Culture and Tradition (FICT)* set up in 2016. The *FICT Commission* sent a report to the *Executive Office* in July 2020 and currently, the report is being considered by Ministers. To date, its findings and recommendations have not been made public.

10.29 The Terms of Reference for the *FICT Commission* included:

> Scoping the range, extent and nature of issues relating to flags, identity, culture and tradition. A further part of its remit was to map the benefits and opportunities in terms of flags and related issues whilst also highlighting that more challenges remain.

10.30 The findings of the *FICT* report will require careful consideration in terms of any implications for hate crime.

10.31 In examining what the *FICT Commission* called 'shared outcomes', it observed that this would "maximise opportunities to achieve significant reductions in manifestations and levels of hate crime".

10.32 In 2018, the *Equality Coalition* commissioned a report on *Incitement to Hatred in Northern Ireland*, written by Dr Robbie McVeigh.

10.33 The report was critical of the perceived failure by public authorities to take or prompt any action to remove hate speech materials from public space.

10.34 Dr McVeigh observed:

> There is also a specific local context in terms of the issue of executive action to remove offending materials. At present, there often appears to be a policy and practice vacuum in which no organisation is prepared to accept responsibility for removing materials – even when there is a broad acceptance that the materials are inciteful or unlawful. A central element in all of this is the need for a radical overhaul of executive action on incitement to hatred. Clearly the *de facto* toleration policy should cease. This means that executive action to remove offending materials should be prioritised. The existing toleration is often premised on the belief by both police and councils that they are unable to act. This is clearly not the case. If offending materials are required for evidence, they should be recorded and removed with appropriate speed.
>
> Our discussions with the *PSNI* on incitement to hatred suggested that their reading was that such incitement was less problematic in areas that were effectively entirely of 'one community'. But here incitement to hatred seems likely to be one of the key mechanisms through which areas become or are kept institutionally segregated. . . . any toleration policy of incitement becomes a toleration policy for segregation as well as criminality. This approach needs to change radically if Northern Ireland is to meet its obligations on prohibiting incitement to hatred. Rather, a 'zero tolerance' approach should be adopted with regard to any expression – including graffiti, flags and murals – that meets the threshold on incitement to hatred.[180]

[180] Robbie McVeigh, *Incitement to Hatred,* p53. In Northern Ireland. Belfast: *Equality Commission(2018)*

10. 35 The report concluded:

> There is a broad recognition across sectors that the approach needs to change. Essentially, the key intervention should be to change the terms of the debate and move from a 'toleration' towards a 'zero tolerance' policy on incitement to hatred.
>
> This broad intervention should ensure that incitement to hatred is named for what it is and signal that it can no longer be tolerated. One clear element of this would be a new, integrated policy to remove instances of incitement to hatred as soon as they appear. The current 'buck-passing' between different agencies must stop and be replaced with an integrated response to manifestations of incitement to hatred across Northern Ireland.[181]

10.36 Such comments and conclusions are largely supported by the majority of respondents to the consultation paper and to the online survey, and this serves to emphasise their importance.

10.37 The *PSNI*, in their submission to the review, agreed that the law should be clarified and highlighted:

> So that victims understand what avenues of redress and protection are available to them and to ensure clarity of ownership and responsibility to support prompt action by the relevant authority and relevant accountability.

[181] Ibid, p56.

10.38 The *Public Prosecution Service* agreed, noting that:

> Hate expressions should be removed as quickly as possible to avoid further harm and distress being caused to protected groups.
>
> The difficulty at present is that the roles and responsibilities in respect of the removal of hate material is vested in a number of different departments/agencies and it appears that a piecemeal approach is currently adopted in relation to addressing the problem.
>
> *PPS* consider that consistency of approach is required. The powers and duties in respect of the removal of the material should be clearly outlined and codified and the law strengthened to achieve that end.

10.39 Among other groups, which supported this proposition, was the *Law Society of Northern Ireland, the Probation Board for Northern Ireland, the Northern Ireland Catholic Council of Social Affairs, Victim Support NI, the Equality Commission for Northern Ireland*, *the Northern Ireland Centre for Racial Equality, Sexual Orientation/Transgender Human Rights Groups, the Church of Ireland Church and Society Commission, the Belfast Jewish Community* and a number of groups from the women's sector.

10.40 There was also a broad spectrum of agreement across the political parties advocating a proactive and more supportive approach to work with local communities to remove graffiti linked to hate or sectarianism.

10.41 In supporting this idea, *Sinn Féin* noted that there were already positive duties on public authorities to tackle hate expression, including under the European Convention of Human Rights. *Sinn Féin* observed:

> Unfortunately there remains too many instances of hate expression being displayed in public spaces and

> there is a need to tackle hate expression in the public space. The law could be strengthened here to place a statutory duty on all public authorities to take all reasonable steps to remove hate expression from public space. Hate expression in this sense would be expressions of hostility, bias, prejudice and/or contempt as per the proposed protected groups . . . This would apply to all public authorities including the *Housing Executive*, *Councils* and the *Department for Infrastructure* in relation to roads and street furniture.

10.42 The *Democratic Unionist Party* agreed that there should be:

> A fair and balanced outcome in this area, which is particularly relevant to the display of flags, murals and activities at bonfires.

10.43 However, it tempered this conclusion by noting:

> Given the political sensitivity of these issues, we are concerned that seeking to legislate in this area may overshadow and dominate public and political scrutiny of the well-intentioned aims of reforming hate crime legislation.
>
> However, we believe that content and activity where malicious intent is evidenced and no reasonable defence provided should be tackled. Any solution to these collective issues, including the role of public authorities, should seek grassroots support rather than favour an imposed, top-down approach.
>
> We want public authorities to be held accountable for unjustified pursuit of those expressing freedom of speech which does not incite or invite violence.

10.44 Among those respondents – primarily individual respondents – who did not agree that the law relating to the duties of public authorities to intervene to tackle hate expression in public space should be strengthened or further clarified, it was argued

that strengthening the law in this area would impact negatively on freedom of speech/religious expression.

10.45 One individual respondent suggested that such an approach might actually intensify civil unrest in some areas. These respondents (organisations and individuals) agreed on the importance of tackling hate expression effectively, but considered current legislation to be sufficiently robust. They argued that more consistent implementation of the current law was needed.

10.46 However, a number of respondents to this review were unhappy with the current law and its application and wanted to see positive duties on public bodies to deal with hate expression.

10.47 One respondent noted:

> There is also a perception in the community that the law is ineffective as there are many examples of hate expression in public places which the *PSNI* and *District Councils* are unable to remove . . . the law needs to be strengthened and enforced.

10.48 Strong concerns on the role of the authorities having sufficient powers to address it expression in public places were voiced by a number of groups representing the opinion from the women's groups.

10.49 The *Women's Resource and Development Agency* observed that:

> Examples can be found across Belfast, and Northern Ireland more generally, of graffiti or slogans that advocate genocide against certain communities (for example, 'kill all Taigs, kill all Huns') or homophobic

> and racist messages of a threatening nature (for example, 'gays out', 'no blacks', 'locals only' and 'Romas out'). Other forms of hate expressions in public spaces include the extremely complicated nature of burning flags and other emblems in Northern Ireland.

10.50 The *Northern Ireland Housing Executive*, one of the largest public sector funded housing associations in Europe and one of the public bodies likely to be affected by any change in the law, cautioned that:

> This is an area of work that demands attention on its own. It requires a more in-depth analysis as it includes issues of culture and freedom of expression. This is an important comment because of the wealth of local knowledge residing within the *Housing Executive* and the undoubted sensitivity around how to operationally address the challenge of hate expression in public places.

10.51 The *Committee on the Administration of Justice (CAJ)* submitted a detailed response on the issue, observing that this has been an area of priority focus for the *CAJ* and the *Equality Coalition* for some time.

10.52 The *CAJ* noted the importance to victims of the removal of the material in question, especially in circumstances where there are usually significant evidential difficulties in identifying suspects. They also observed that the likelihood of incitement and intimidation on protected grounds occurring is exacerbated by the paramilitary context of such expression.

10.53 They added:

> This context has also contributed to a situation whereby there is little policy or due intervention by

> public authorities to address public hate expression, despite an existing array of relevant powers and duties.

10.54 They argue that:

> There is also a tendency to confuse and conflate the above issues with broader policy questions in relation to flags and bonfires that do not relate to hate expression. For example, the issue of paramilitary flags placed outside a new housing development will be treated as a generic 'flags' issue rather than an issue of sectarian expression and intimidation, and risks therefore falling under a default policy of non-intervention.

10.55 Overall, they submitted that there is no overarching strategic policy duty in relation to combating hate expression in public space. They evidenced this argument by referring to a survey carried out by the *CAJ* in relation to all the district councils in Northern Ireland, noting that none of them had a specific policy on the matter.

10.56 They recommended the following:

> We therefore urge that the review considers the recommendation of a statutory duty on relevant public authorities to take reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.
>
> There should be no requirement that such hate expression is manifest within likely sight and sound of its target group given the incitement effect such expression can have. . . .
>
> The duty would apply to public authorities in general in relation to their own property (including the *Housing Executive* and housing associations);
>
> The duty would also specifically apply to public authorities in the exercise of existing functions, particularly district councils, in the exercise of their

existing powers to remove and obliterate graffiti, placards, notices etc. and to the *Department for Infrastructure* in relation to its existing powers in relation to roads and street furniture. Where necessary, the *PSNI* would support public authorities in the exercise of the duty.

Discussion

10.57 Hate expression in public spaces is one of the most difficult areas for public bodies, including the *PSNI* in terms of enforcement and operational support for local communities. There is also an underlying balance to be struck between freedom of expression and the enforcement of the law.

10.58 Many of these difficulties were illustrated in the dramatic events of July 2018 in Belfast.

10.59 In July 2018, a huge bonfire structure, some 80 pallets high, was erected at Bloomfield walkway in East Belfast, land owned by the *Department for Infrastructure (DfI).* The size of the bonfire went beyond limits recommended by *Fire Service* Safety Guidelines and, in default of any action by the *DfI*, the *Belfast City Council* initiated an application to apply for judicial review of the decision by the *DfI.*

10.60 Counsel for the *Belfast City Council* argued that the bonfire was under the control of 'sinister forces' within the *East Belfast UVF*, who had hampered efforts to resolve the issue in the area. It was further claimed that the structure, in its current state, towered over surrounding property and posed a significant risk to lives and property. The court was told that up to 50 houses might have to be boarded up, whilst the *Northern Ireland Fire and Rescue Service* had to make plans to take the unusual step of having a fire appliance pre-deployed at the scene.

10.61 Counsel for the *DfI* countered that any intervention by his client could lead to resistance and violence. He was quoted as saying:

> There is a possibility disorder could spread to other bonfire sites or to sectarian interfaces not only in Belfast but across Northern Ireland.

10.62 In a plea often made by public bodies in similar circumstances, counsel argued "the *Department* was stuck between a rock and a hard place – it did the best it could".

10.63 The judge, Mrs Justice Keegan, expressed frustration that the issue of bonfires had ended up in court once again but stressed that any potential unlawfulness should not be able to prevent steps taken to manage the identified risks. She observed that it was perfectly proper for the *Belfast City Council* to bring this matter to court and ordered that the *DfI* forthwith should take steps to reduce the height of the bonfire to a height of not exceeding three metres and to remove from the immediate vicinity of the bonfire all excess materials taken from the existing bonfire.

10.64 Reacting to the decision, a spokesman for a group called the *East Belfast Community Initiative* appealed for calm, but expressed extreme concern about the potential ramifications of the judgment. According to a report in the *Belfast Telegraph* of July 10, 2018, the group spokesman is quoted as saying:

> We regret the actions of *Belfast City Council* officers and a select number of elected representatives who have undermined community mediation in favour of an extremely provocative attempt to aggressively force a confrontation…. We will appeal to all Loyalists to remain calm in the face of this enormous provocation and we again want to reaffirm our commitment to ensuring a peaceful and safe summer for all.

10.65 A further report from the *Belfast Telegraph* of July 11, 2018 noted that, after the High Court judge's ruling, the bonfire had been set alight prematurely – and that there had been "a tense stand-off between police and Loyalist youths". More than 100 police in public order uniform were on the site overnight.

10.66 The case is illustrative of how legal rules and implementation in the context of the local community in Northern Ireland is fraught with difficult choices and require a careful balance of interest between different public bodies.

10.67 It is inevitable that such a balancing exercise is needed to apply the public interest as well as upholding the rule of law.

10.68 However, the overwhelming response to the consultation question on this issue should be respected.

10.69 As Dr McVeigh observed in his paper in 2018 on *Incitement to hatred in Northern Ireland*:

> The existing toleration policy is often premised on the belief by different elements of the statutory sector – especially police and government departments and councils – that they are unable to act. This is clearly not the case . . . This requires a novel intervention whereby all relevant parties establish a protocol of responsibility and process for the removal of materials constituting incitement to hatred.[182]

10.70 In response, the authorities would surely suggest that at the end of the day, a judgement has to be made – inaction or self-restraint is an option that is as important as a positive intervention.

[182] See fn 180, infra

10.71 It is obvious that there are important political sensitivities that need to be understood and recognised.

10.72 Although the report of the *Commission on Flags, Identity, Culture and Tradition* has not been published, the fact that it took four years to produce a report is testament to these sensitivities.

10.73 It may be that the group tasked with producing the report are unable to agree and may have underestimated or failed to recognise that public expectations may not be easy to meet.

10.74 The *Democratic Unionist Party* have noted that any solution to an issue such as this, dealing with the role of public authorities "should seek grassroots support rather than favour an imposed, top-down approach".

Recommendation and analysis

10.75 However, despite these practical and principled concerns, I am of the opinion that it is time to cut the 'Gordian knot' and produce a recommendation which can form the basis of reasoned debate when the issue of improving hate crime legislation is placed before the Assembly.

10.76 I therefore recommend:

Recommendation 15

There should be a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.

10.77 As regards the formulation which would constitute 'hate expression' for the purposes of the proposed statutory duty, the *CAJ* argued that:

> (1) where the content of the material or conduct in relation to it would be considered by a reasonable person in the light of all the circumstances as hate expression on a protected ground;
>
> (2) where the context of the placement of the material or expressive behaviour in question, in the light of all the circumstances, would be likely to constitute hate expression, including intimidation or harassment, on a protected ground.

10.78 The first ground would cover material that will almost always be hate expression e.g. swastikas, Confederacy flags, homophobic or sectarian graffiti et cetera – whereas the second ground would deal with material which is only 'hate expression' due to the context it is placed in – e.g. paramilitary flags/national flags placed on a lamppost of a new housing development where the context will have the effect of deterring the 'other' community from living in the area.

10.79 This second ground would involve careful and measured judgement from a public authority. The precise legal formulation of such an important statutory duty will require detailed consideration but the suggested formulation offers a sound basis for such consideration.

Chapter 11

Restorative Justice

CHAPTER 11

RESTORATIVE JUSTICE

11.1 The terms of reference of the review includes the question of restorative justice and its application to hate crime offences

> Whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

11.2 In 2017, the *Scottish Government* produced guidance for the delivery of restorative justice. It observed that:

> Restorative justice is a process of independent, facilitated contact, which supports constructive dialogue between the victim and the person who has harmed . . . arising from an offence or alleged offence.
>
> It gives victims the chance to meet, or communicate with, the relevant people who have harmed, to explain the impact the crime has had on their lives. This has the potential to help some victims by giving them a voice within a safe and supportive setting, giving them a sense of closure. It also provides those who have harmed with an opportunity to consider the impact of the crime and take responsibility for it, with the aim of reducing the likelihood of reoffending. In some circumstances, it can also allow them the opportunity to make amends for the harm caused.

Academic opinion

11.3 The vast majority of academic studies in the United Kingdom and abroad have found that a higher percentage of victims were satisfied with restorative interventions when compared to conventional justice processes – particularly at the low to medium range of offences.

11.4 Imprisonment is important and necessary for the protection of society but it has been acknowledged that imprisonment has limited deterrent value and offers limited opportunity for rehabilitative programmes.

11.5 Professor Mark Walters has suggested the punishment and labelling of offenders as 'hate offenders' does little to challenge hate motivated behaviour, or support the healing process for hate victims, beyond perhaps appeasing the understandable desire for an offender to receive appropriate punishment.

11.6 In suitable cases, he argues that the restorative approach offers a viable and more inclusive alternative in seeking to restore harm, by including the affected parties and offender in the process of understanding through voluntary and honest dialogue and encounter.

11.7 In a study co-authored by Professor Walters and Carolyn Hoyle, looking at a hate crimes project run by a community mediation centre in London, they noted that the majority of victims who participated in the mediation process found it to be a positive experience. The vast majority of those interviewed stated that the mediation process had directly contributed to an improvement in their emotional well-being[183].

11.8 It is important to note that this kind of restorative intervention will not be appropriate for all cases. However, in many cases, the restorative approach has shown considerable potential benefits for both victims and offenders.

[183] Walters, M. and Hoyle, C. (2012), 'Exploring the everyday world of hate victimisation through community mediation', International Review of Victimology, 18 (1); 7 – 24

11.9 In its report on hate crime in 2017, the *Criminal Justice Inspection (CJINI) Northern Ireland* noted that:

> Victims' views on how offenders were dealt with were generally based on their wish for the offending behaviour to be stopped.
>
> Victims were focused on the prevention of further instances of hate crime and favoured restorative approaches, such as education on the benefits of cultural and other differences.
>
> Inspectors believe that this will only be achieved when a hate crime strategy becomes an integral part of an overall *Northern Ireland Executive* social cohesion strategy, robustly led and monitored using outcome-based accountability measures.[184]

11.10 In another major survey – the Sussex Hate Crime Project[185]– the participants were presented with the choice of either enhanced sentencing for hate crime or restorative justice for offenders.

11.11 61% of those who responded preferred restorative justice to an enhanced sentence. Most participants agreed that, compared to a prison sentence, restorative justice provided more benefits for both perpetrator and the victim, and was less likely to lead to feelings of bitterness, anger and sadness.

11.12 In its most recent report in 2019, the *All-Party Parliamentary Group on Hate Crime* recommended:

> There is a strong level of support for the use of restorative justice as a tool against hate crime

[184] *Criminal Justice Inspection Northern Ireland* (2017) hate crime: An inspection of the criminal justice system's response to hate crime in Northern Ireland

[185] The Sussex hate crime project (2018) University of Sussex – Leverhulme Trust.

> offences. It has been shown to have support amongst victims, both for their own sakes but also from the perspective of improving offenders' views and reducing re-offending rates. Whilst it has its limitations, the apparent absence of restorative techniques for hate crime should be addressed by government, with additional funding made available if needed. There is a role for charities and community organisations to play here as well, as trained mediators and facilitators in this process, particularly if there is low trust in local police forces.[186]

11.13 The present position in Northern Ireland is that there is statutory provision for restorative justice for defendants who are under 18, primarily through the use of youth conferencing which is delivered at both a diversionary level (when recommended by the *PPS*) and as a court ordered disposal.

11.14 The statutory basis for this can be found in the Criminal Justice (Children) (Northern Ireland) Order 1998 (as amended).

11.15 Numerous reviews and reports, including the independent *Youth Justice* Review in 2010 and Sir John Gillen's recent report on serious sexual crimes, have all held this model of conferencing in high esteem. A number of reports from the *Criminal Justice Inspectorate for Northern Ireland* are favourably disposed to restorative justice arrangements.

11.16 However, in terms of those defendants who are over 18 years of age, none of the existing legislative provisions apply. This represents a clear gap in current Northern Ireland criminal law.

[186] *All Party Parliamentary Group on Hate Crime* (2019) – how do we build community cohesion when hate crime is on the rise?

11.17 In a recent briefing on Restorative Justice in Northern Ireland, the *Department of Justice* noted that:

> In a series of reports for the *Ministry of Justice (in England and Wales),* researchers found both victim participation rates and victim satisfaction rates to be very high across the three restorative schemes evaluated. They reported participation rates of up to 77% in cases involving adult offenders, and up to 89% in those cases involving child offenders. Of these participants, 86% expressed satisfaction with their experience. The same research demonstrated a 27% drop in the frequency of reoffending following a restorative conference.

11.18 The full text of the briefing is provided as Annex 5 to the consultation paper.

11.19 The briefing contains a helpful appraisal of the current position of the development of restorative justice in Northern Ireland, and the work of accredited community-based restorative justice organisations, such as *Northern Ireland Alternatives (NIA) and Community Restorative Justice Ireland (CRJI)*.

11.20 The briefing also notes the possibility of creating a Restorative Practices Centre of Excellence and raises important issues regarding the funding of restorative justice generally and, in particular, whether such a centre should be administered by a statutory agency, such as the *Probation Board for Northern Ireland (PBNI*), or whether or not it should be developed as a support for community-based interventions.

11.21 The role of the *PBNI* is to challenge offending behaviour.

11.22 Since 2015, it has had a specific policy for dealing with hate crime and has trained staff to use a tailored programme, ‘Accepting Difference’, since 2010.

11.23 However, to date, the programme has only been used in a small number of cases.

11.24 If a model for over 18 offenders as recommended along the lines presently employed for youth justice, legislation would be required as any emerging restorative justice approaches for adults would require a statutory disposal involving pre-court and court ordered sanctions. It would also require financial support and assistance.

11.25 In this event, I noted in the consultation paper that a likely provider would be the *PBNI*, a statutory body which enjoys acceptance by, and the confidence of, all parts of the community in Northern Ireland.

11.26 In such a scenario, the existing accredited community-based restorative justice bodies would act to complement the work of such an agency.

11.27 The consultation paper also looked at models for restorative justice in a number of countries including Norway, Belgium and the United States of America.

11.28 A centralised model is a common feature of more comprehensive and effective restorative justice systems, although the type of providers varies.

11.29 The consultation paper also looked at the provision for restorative justice in Scotland. It has usually been limited to low level and youth offending.

11.30 The Scottish scheme is interesting in allowing diversion from prosecution. It may briefly be summarised as follows:

11.31 If the prosecutor considers such a scheme to be appropriate and likely to be effective in a particular case, this option may be offered to the defendant.

11.32 If the offender engages effectively with the programme, he/she will not be prosecuted and the behaviour in question will not be reflected on any criminal record.

11.33 However, if he/she does not engage effectively, the Procurator Fiscal can still decide to proceed with the prosecution.

11.34 Some particular observations need to be made when considering responses to Lord Bracadale's consultation on hate crime legislation in Scotland.

11.35 A majority of respondents considered that diversion and restorative justice schemes should be considered in dealing with the perpetrators of hate crime.

11.36 Not everyone agreed. As Lord Bracadale reported:

> Amongst those who disagreed, the view was that such schemes were not effective or might be seen as a 'soft option'. Some respondents expressed concern that there is an insufficient focus on the role of the victim, and that there had been instances in which victims felt pressurised to take part in restorative justice conversations in a way which was not truly voluntary. This could lead to further harm to the victim, particularly if the scheme was administered by someone who did not have a full understanding of the power dynamics which may be at play . . . There was a common theme among respondents (whether they agree or disagree with the principles of diversion and restorative justice) that their use is not straightforward and must be assessed on a case-by-case basis.[187]

[187] Independent Review of Hate Crime in Scotland – Final report. P.120

11.37 Lord Bracadale concluded that there was a strong potential for diversion and restorative justice techniques to be effective when used appropriately, but made it clear that they could have a negative effect – either through causing further harm to the victim or reducing confidence in the criminal justice system - if used without due care.

11.38 Lord Bracadale's conclusion was that he was satisfied that there was no need for statutory change to facilitate restorative justice or diversion from prosecution in Scotland. He felt that the *Office of the Procurator Fiscal* had clear structures which allowed it to offer diversion from prosecution in appropriate cases, but then retain the option of proceeding with the prosecution of the individual if he/she did not engage effectively with the programme. He also referred to guidance on restorative justice published by the *Scottish Government*, which could be used to ensure the consistent governance, oversight and standards which consultation respondents considered important.

Consultation responses: restorative justice

11.39 In the consultation paper, I pointed out that these structures and guidance do not yet exist in Northern Ireland, at least not for adult offenders, and I sought the views of respondents as to whether or not the case for legislative change was stronger in Northern Ireland.

11.40 Question 54 of the consultation paper asked:

> Should restorative justice be part of the criminal justice process in dealing with hate crime in Northern Ireland?

Question 55 asked:

> Should restorative justice schemes be placed on a statutory footing?

Question 56 asked:

> Should there be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime?

Question 57 asked:

> What role do you envisage for the accredited community-based restorative justice organisations in the delivery of adult restorative justice?

Question 58 asked:

> Do you consider diversion from prosecution is an appropriate method of dealing with low-level hate crimes as per the practice in Scotland?

11.41 In respect of question 54 asking whether restorative justice should be part of the criminal justice process in dealing with hate crime in Northern Ireland, there was overwhelming support for this proposition – 90% – from organisations.

11.42 There was also very strong support from individuals – 73% – for this proposition. 66% of respondents to the online survey agreed that restorative justice should be part of the criminal justice process dealing with hate crime in Northern Ireland.

11.43 Respondents who were supportive of restorative justice argued that the efficacy of such an approach is validated by academic evidence.

11.44 One respondent made reference to evidence from Professor Mark Walters (*Professor of Criminal Law and Criminology at the University of Sussex* and Co-Director of the *International Network for Hate Studies)* which support the positive benefits of a restorative approach.

11.45 It was further suggested that the use of restorative justice practices could bring about a number of benefits. Several respondents considered this would meet the needs of victims more effectively, by giving them a 'voice', allowing them greater involvement, confidence and trust in the criminal justice process, and, in some cases, through swifter outcomes than the court process.

11.46 As such, in appropriate cases, restorative justice was viewed as a viable and/or preferred alternative to more conventional processes of criminal justice.

11.47 *Victim Support NI* observed that:

> Not all victims want to go through a trial or seek a custodial sentence for their perpetrators. For some victims, they want recognition of the harm that has been caused, and for the abusive behaviour to stop…
>
> We are therefore of the view that a range of restorative options should be made available to those who wish to go down that route, as such options may be more suited to matching the victim's idea of what justice looks like and more effectively challenge the prejudices underpinning such offences.

11.48 A further perceived benefit of restorative justice was that it was said to have the potential to address the root causes of hate crime and thereby reduce the risk of re-offending.

11.49 This was thought to be particularly so if offenders were compelled to take responsibility for the harm caused to victims, and their prejudices were challenged in a way that leads to a change in beliefs/behaviours.

11.50 *The Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)* stated:

> It is in our experience delivering Get Real that we see better outcomes for those who engage during a diversion from prosecution. They are enabled to feel empowered and involved, and therefore more willing to understand the impacts of the harm they caused and to move away from this damaging thinking and behaviour.

11.51 The *Democratic Unionist Party* argued that:

> When a young or vulnerable person enters the criminal justice system, it is often a revolving door to reoffending. We acknowledge the benefits of bringing offenders and victims together to prevent further harm and educate people on the impact of their actions towards others . . . We reiterate the view that dealing with hate crime means more than simply a system of enhanced offences or sentences.

11.52 This approach was endorsed by the *Northern Ireland Catholic Council on Social Affairs*, who submitted that:

> Until there are educational programmes and other supports in place to address the root causes of hate crime, amending the criminal legislative framework for dealing with such incidents, while important, can never prevent them from happening or re-occurring.

11.53 However, some respondents urged caution in the use of restorative justice, suggesting that there must be clear guidance as to the particular circumstances in which restorative justice should be considered, as well as appropriate steps should an agreeable outcome not be reached following the use of such interventions.

11.54 It was further argued that the willingness of victims to participate in the assessment of suitability for the specific offence/offender was critical.

11.55 In this vein, the *Law Society of Northern Ireland* observed that:

> It is of central concern that any restorative justice programme is victim centred. It must be clear that participation is wholly voluntary. The victim should not feel that his/her participation results from implied pressure and their concerns and expectations regarding the restorative justice process are fully understood and built into any such programme. If these elements are not properly determined, then it would be difficult to see merit in any such scheme.

11.56 In respect of question 55 of the review which asks whether restorative justice schemes should be placed on a statutory footing, there was even stronger support from organisations and individuals.

11.57 94% of organisations and 79% of individuals agreed with this proposal.

11.58 Respondents who agreed that the provision of adult restorative justice should be placed on a statutory footing, indicated that there were a number of obvious benefits. Specifically, it would:

- Help to ensure consistency of application of restorative justice processes, quality of provision and a co-ordinated and strategic approach;
- Enable the development of a system with clear criteria and guidelines, which is victim led/focused;
- Help to ensure the process has credibility and is not considered as a 'soft' option by those working within the judiciary; and
- Help to secure long-term funding.

11.59 A number of respondents made reference to existing schemes which were applicable to young people and described them as ‘very successful’.

11.60 The *PBNI* pointed to their experience in this area and suggested that their trained practitioners could assist in delivery of the service.

11.61 The *Bar of Northern Ireland* also endorsed the potential involvement of *PBNI,* suggesting that it may be ‘well-placed to coordinate this and any collaborative engagement with accredited community-based restorative justice organisations’.

11.62 There were suggestions that any such system should be closely monitored to ensure offender compliance and the service should involve voluntary and community organisations, including those currently working in restorative justice.

11.63 The *Department of Justice* in its response indicated that it considered that to place restorative justice schemes on a statutory footing might not prove as effective as current community-based schemes. It argued:

> Restorative justice groups are important in terms of community engagement and linkages between the police and the community. Community-based restorative justice organisations work closely with people and local communities, with the purpose of building and recognising the desired behaviours within communities, with the key outcome to be securing acceptable behaviour identified and agreed by communities, for communities, in order that people respect and adhere to the behaviours expected in their community…. Communities currently engage more positively with the two accredited groups as they are not on statutory footing and are responsive to emerging issues within communities.

11.64 One respondent argued that placing schemes on a statutory footing could undermine the trust of community members, but agreed that there should be a role for statutory agencies in restorative schemes. Another respondent expressed concerns that the need of victims would not be a priority in a system that is primarily offender focused.

11.65 Question 56 asked whether there should be a formal justice agency responsible for the delivery of adult restorative justice for hate crime.

11.66 95% of organisations and 62% of individuals agreed with this proposition.

11.67 Among respondents who agreed that there should be a formal justice agency with responsibility for the delivery of adult restorative justice for hate crime, the following justifications were offered:

- The current system is only available in certain geographical areas of Northern Ireland. A formal agency would help to ensure consistency of provision for victims and offenders.
- A formal justice system agency could lead to greater sustainability of funding, which, in turn, would add credibility and help to ensure quality of provision.
- A formal agency with strong community links would ensure confidence in the process, accountability and consistency of approach.
- Such an approach would be in line with the findings from a feasibility study on the potential for a centre of restorative excellence for Northern Ireland.

11.68 The *PBNI* highlighted their experience in the delivery of restorative interventions in response to growing levels of hate crime and noted:

> We fully understand the benefits of restorative practice and have trained key staff to deliver restorative practices. Our staff are both social worker qualified and trained in restorative practices. Our in-house psychology staff provide oversight of research and evaluation of a range of interventions including our restorative work.

The importance of the voice of the victim

11.69 A number of respondents stressed that the appointed agency must ensure that victim groups and representative organisations are involved in the establishment and delivery of restorative justice programmes, and that in the case of any new protected characteristics, relevant representative groups should be consulted to ascertain their needs and ensure that these needs are provided for.

11.70 A small number of respondents did not agree that there should be a formal justice system agency responsible for delivery of adult restorative justice for hate crime.

11.71 The main reasons given by individuals were that the current system was sufficient and that additional bureaucracy should be avoided.

11.72 Among organisations, *Victim Support NI* was strongly opposed to placing responsibility with one formal justice agency, arguing that this could curtail delivery capacity, limit available options and restrict the involvement of independent victims' organisations to provide expertise-driven restorative practices in Northern Ireland. There was also a risk that victims could face secondary or repeat victimisation if the correct expertise was absent. This respondent recommended that:

> Restorative justice provision should be grassroots – based and be able to be both flexible and innovative. We believe it will be difficult to achieve these aims if sole responsibility for delivery was placed with a formal justice agency.

11.73 Question 57 asked respondents to envisage what role could be played in the delivery of adult restorative justice for hate crime by the accredited community-based restorative justice organisations.

11.74 A number of respondents noted the wealth of experience and expertise of accredited community-based restorative justice organisations, placing them in a strong position to contribute to the effective delivery of adult restorative justice for hate crime.

11.75 One respondent argued that the involvement of such organisations was particularly important in the context of Northern Ireland, where levels of trust and confidence in the police and criminal justice system to tackle hate crime are generally low.

11.76 However, a different view was taken by the *Law Society of Northern Ireland*, who suggested that such organisations should have only a 'limited role, as appropriate funding and accountability should be directed to the established agency'.

11.77 The overarching duty is to ensure defined standards and consistency of approaches.

11.78 A number of key suggestions regarding the specific roles such organisations might play included:

- To work alongside, in partnership with, or in an advisory role to a formal justice system agency;
- To inform and support the development and design of any new model;
- To take responsibility for the delivery of community restorative interventions, under the umbrella of a formal agency; and
- To lead restorative justice practice in the community, ensure community engagement and that the specific needs of victims (protected groups) are met.

11.79 A number of respondents recommended that a statutory framework of restorative justice should be introduced, as a component of the judicial process, rather than as a separate element. One respondent also noted that while the involvement of community-based organisations would be of value, the appointment of a lead formal justice agency was imperative for public confidence and to ensure transparency.

11.80 Question 58 asked respondents whether they considered that diversion from prosecution is an appropriate method of dealing with low-level hate crimes, as per the practice in Scotland.

11.81 There was considerable support for this proposition; 94% of organisations agreed, together with 71% of individuals.

11.82 Those who supported the proposition argued as follows:

- It constitutes an effective educational tool to support rehabilitation, address the root causes of offending behaviour and reduce the risk of re-offending;

- Use of restorative programmes centres on the experience of the victim and gives victims an opportunity to articulate the harm caused by their experience of hate crime;
- Such an approach would enable the prosecution service to focus on more severe hate crime cases; and
- First-time offenders, in particular, would benefit from diversion as it offers an opportunity for both reparation and exit from the criminal justice system at the earliest possible stage.

11.83 However, a degree of caution was urged. Some respondents suggested that victims should have the option to choose, while others thought that the decision to use diversion should be taken on a case-by-case basis. It was also suggested that the 'level' of the crime should not be the sole determining factor in the application of such an approach.

11.84 One respondent considered that, in cases involving perpetrators who hold deeply ingrained beliefs of hostility, diversion may not be appropriate regardless of the 'level' of the crime.

11.85 *Northern Ireland Women's European Platform* argued that it was critical that the victim's perspective should be fully taken into account in determining whether or not a crime qualifies as 'low-level'.

11.86 It noted that:

> Each victim will have their own experience and identifying their trauma as 'low-level' may serve to further traumatise some victims.

11.87 Victims of hate crime are fully considered in chapter 12.

11.88 A number of respondents who supported both restorative justice and diversionary techniques qualified their support with a number of criteria and conditions that should be met in the use of such practices:

- Provision of clear guidelines on the threshold for diversion. These should take into consideration the emotional harm caused by hate crime;
- Appropriate safeguards, risk assessments and support structures for victims should be built into the system, with voluntary withdrawal as an option for victims at any stage of the process;
- As per the Scottish system, should the victim or perpetrator decide at any stage of the process that they do not wish to engage, the matter should be referred back to the courts; and
- Provision of training for professionals in the criminal justice system, by community organisations working with protected groups, to ensure understanding of the power dynamics between victims and perpetrators.

11.89 A common theme among respondents in respect to restorative schemes was that such an approach should learn from and draw on international best practice.

11.90 Among the small number of respondents who did not agree with the use of diversion to deal with low-level hate crime, it was argued that prosecution should be required for all crimes.

11.91 This review has argued for and explored better ways to protect victims, and to propose new hate crime legislation which will offer the most effective approach to

enable the justice system to deal with criminal conduct motivated by hatred, malice, ill and prejudice, including both hate crime and hate speech.

11.92 In dealing with hate crimes, the State's main response is to criminalise and punish offenders. Not only does this send out an important symbolic message to would-be perpetrators, but the law should also provide a measure of support to victims – usually minority groups – that the State will not tolerate such behaviour and will protect them.

11.93 That said, it has been argued that retributive measures alone often failed to provide any meaningful long-term resolution.

11.94 As Walters has observed:

> Complex and ongoing conflicts are rarely resolved using traditional policing measures and/or retributive penalties, mainly because these measures overlook the situational contexts within which much hate abuse occurs. The failure of conventional justice measures to resolve most hate crimes means that victims continue to feel unsupported by the state and, in turn, remain subject to repeat victimisation.[188]

Some comparative studies on restorative based practices and the role of victims

11.95 The past twenty years has seen a proliferation of restorative based practices within criminal justice systems throughout the world, including in countries such as Australia, Canada, Norway, Belgium, the United States and New Zealand – to name just a few.

[188] Walters. M. Repairing the harms of hate crime – a restorative justice approach. Routledge International Handbook on Hate Crime. (2018) p 401

11.96 There have been numerous empirical studies, some of which have been referenced above and in the consultation paper, into the effectiveness of restorative justice.

11.97 Most of these studies have concluded that a higher percentage of victims are satisfied with restorative interventions, when compared to conventional justice processes.

11.98 By and large, it has been noted that victims confirm that they are provided with a greater opportunity to express how an incident may have affected them, compared with their experiences of going through the traditional criminal justice system.

11.99 Walters notes:

> [O]f particular significance . . . is that a growing number of studies have suggested that restorative justice helps to alleviate the emotional traumas caused by crime, including reducing feelings of fear, anger and insecurity.[189]

11.100 One of the most disturbing features of hate crime is the significant proportion of hate victims reporting repeated victimisation.

11.101 It is crucial, therefore, that any restorative justice intervention will help to bring an end to their suffering.

[189] Ibid.p 402.

11.102 Offenders are strongly encouraged to take responsibility for their actions. Walters warns of overstating the benefits of restorative justice and of the assumption that it may be a panacea for hate crime.

He notes:

> There are various risks posed by bringing stakeholders of such incidents together via dialogical processes. A major concern raised by some critics of restorative justice is that the involvement of community participants from different cultural backgrounds holds the potential for some stakeholders to dominate the process . . . This has led some theorists to question whether the more informal processes found within restorative practices will provide opportunities for offenders to reassert the sense of superiority over those perceived as vulnerable.

11.103 Whilst the great majority of respondents supported restorative justice interventions, many expressed concern of the risk of exposing victims to further harm. They emphasised the importance of any such processes being victim led and administered by highly trained skilled facilitators who are trusted by victims and offenders.

11.104 There is overwhelming support for the introduction of restorative justice techniques as part of the criminal justice process in dealing with hate crime.

11.105 Furthermore, 94% of organisations and 79% of individuals believe that this should be placed on a statutory footing.

11.106 95% of organisations and 62% of individuals agree that there should be a formal justice agency responsible for the delivery of adult restorative justice in dealing with hate crime.

Gaps, anomalies and inconsistencies in law

11.107 This review is also tasked with identifying any gaps, anomalies or inconsistencies in current Northern Ireland law which could be addressed in any new legislative framework for hate crime in Northern Ireland.

11.108 As regards restorative justice, there is a very obvious gap – the *Department of Justice* has acknowledged this in issuing its consultation document on a draft Adult Restorative Justice Strategy on 22 June 2020.

It noted:

> To date, the most extensive, formal application of restorative justice in Northern Ireland has been in the area of youth justice. Acting on the recommendations of the Criminal Justice Review in 2000, restorative approaches were introduced to youth justice legislation as a statutory disposal and are now firmly embedded in both pre-court and court ordered disposals . . . Some progress has been made in the application and use of restorative practices with adults, through community-based interventions in particular, . . . Until now there has been no overarching strategic or coordinated approach to its development in spite of the proven benefits of this approach.[190]

11.109 In other words, there is **no** legislative provision in Northern Ireland at present to provide statutory disposal for adults in respect of restorative justice.

11.110 It is noteworthy that the *Department of Justice* was the only organisation - out of the sixteen organisations which replied to the question of whether a restorative justice scheme should be placed on a statutory footing - which argued that it considered that to place restorative justice schemes on a statutory footing might not

[190] *Department of Justice* – Restoring Relationships, Redressing Harm, Development of an Adult Restorative Justice Strategy for Northern Ireland. (June 2020)

prove as effective as current community-based schemes. An extract from its response is noted earlier (at 11.63).

11.111 In the course of its response, the *Department of Justice* observed that:

> Communities currently engage more positively with the two accredited groups as they are not on statutory footing and are responsive to emerging issues within communities.

11.112 The two accredited groups to which the *Department* refers are *Northern Ireland Alternatives (NIA) and Community Restorative Justice Ireland (CRJI)*. These groups have been accredited since 2007.

11.113 The delivery of restorative justice for under 18s, primarily through the use of youth conferencing, is delivered at both a diversionary level (when recommended by *PPS*) and as a court order disposal. As already noted, numerous reviews and reports, including the Independent Youth Justice Review 2010 and Sir John Gillen's recent report on serious sexual crimes, have all held the statutory model of conferencing in high esteem.

11.114 A number of reports from the *Criminal Justice Inspectorate for Northern Ireland* were also very positive.

11.115 In his annual address at the opening of the legal year in September 2015, the Lord Chief Justice publicly acknowledged the progress made in the use of restorative approaches within the youth justice system in Northern Ireland, and expressed a desire to develop similar options for the adult system.

11.116 It is difficult to see why a statutory model for under 18s which has proven highly successful should not be an obvious template for over 18s.

11.117 The *Department of Justice* also noted that community-based restorative justice organisations are able to work closely with people and local communities, with the purpose of building and recognising desired behaviours within those communities.

11.118 That might well be a good reason to maintain and nurture those accredited groups who clearly have an important role to play, but it does not follow from that statement that the statutory model for young people should not be replicated for adults.

11.119 It will be recalled that the *PPS,* arguably one of the most significant stakeholders in the criminal justice system – together with the *PSNI* – were firmly of the view that any proposed restorative justice scheme should be placed on a statutory footing.

11.120 It acknowledged the high success rate of the statutory scheme for young people and felt that a statutory scheme would support a coordinated and strategic approach. Furthermore, the introduction of more formal mechanisms should enhance the delivery of restorative justice and ensure that it is effectively deployed in appropriate cases.

11.121 This view was supported by a number of key organisations, such as the *PBNI*, various groups from the woman's sector, and both branches of the legal profession.

11.122 The *Bar of Northern Ireland* saw merit in the proposal and argued that, if a formal justice system agency is to be made responsible for the delivery of adult restorative justice, then an organisation such as the *PBNI* might be well placed to co-

ordinate this and any collaborative engagement with accredited community-based restorative justice organisations.

11.123 In its 2020 consultation paper on an Adult Restorative Justice Strategy for Northern Ireland, the *Department of Justice* acknowledged the success of the statutory provision for restorative justice for young people and noted that:

> The experience of both youth conferencing and community-based programmes has taught us that it is possible to undertake changes of both perspective and process, and successfully integrate restorative elements into an existing justice system at two distinct stages: pre-court (diversionary) and as part of a court sentence. An agreed strategy would seek to introduce and test these approaches within the adult justice system.

11.124 The aim of that review is described as*:*

> To consider the development of a strategic approach to the utilisation of restorative practices at all stages of the adult criminal justice system, given the current absence of any such strategy. By 'all stages', we mean from early intervention in the community, formal diversion by statutory agencies, court ordered disposals, custody and reintegration.

11.125 Since they were accredited in 2007, the important work of *NIA* and *CRJI* has been noted by the *Criminal Justice Inspection Northern Ireland*. Reports from the *Inspection* acknowledge that these groups have grown and matured and have described their work as valuable.

11.126 The most recent *CJINI* report views them as being:

> Especially important in terms of community engagement and linkages between the police and the community. The restorative justice bodies also promote and develop non-violent community responses to the issues of low-level crime and antisocial behaviour in areas across Northern Ireland[191].

11.127 It is clear that the work of such organisations can be particularly helpful for early intervention in the community and have set high standards of professionalism and expertise. This is acknowledged by the *DoJ* consultation paper which, however, refers to some issues as highly problematical:

> There are, however, certain aspects which some feel are limiting the impact of the schemes. The low number of cases being referred to the schemes from *PPS* is one example of how the structure of the current criminal justice system, and in some cases the delay experienced through the system, has not easily lent itself to the use of community restorative justice.

11.128 It is much harder to see a practical or appropriate role for such organisations in relation to court ordered disposals, custody and reintegration.

11.129 At present, *PBNI* provides the court with pre-sentence reports to assist the court in arriving at a just sentence. The probation officers concerned are skilled social workers and have access to in-house psychology services.

11.130 They work with prisoners in the prison setting to assist them with rehabilitation and reintegration into the community, and will monitor the licence conditions set by the *Department of Justice* for those prisoners released on licence.

[191] *Equal Partners? An inspection of the voluntary, community and social enterprise sectors engagement with the criminal justice system in Northern Ireland,* CJI NI (May 2019)

11.131 There is widespread acceptance of the independence and professionalism of probation officers in carrying out what is often very challenging work.

11.132 A fuller description of the work of *PBNI* is set out at page 10 of the *DoJ* consultation paper.

11.133 Particular attention needs to be given to the *PBNI's* Restorative Intervention Strategy (2014–2017), designed to ensure that victim needs and restorative principles were further integrated as components of its practice with adult offenders, and that it has also funded a number of pilot restorative justice projects in partnership with accredited Community Based Restorative Justice (CBRJ*)* schemes, most significantly the introduction and delivery of enhanced combination orders. The pilot scheme for enhanced combination orders was very successful and has now been further extended.

11.134 I note that statutory agencies such as *PBNI, the Northern Ireland Prison Service* and the *Youth Justice Agency* have engaged to a limited extent in restorative approaches for serious offences.

11.135 It is acknowledged that the accredited community-based restorative justice organisations have an important role to play in early intervention and prevention, particularly in situations where a formal justice system response may not always be required.

11.136 However, this must be seen in the context of where the *CBRJ* organisations originated.

11.137 The 'Fresh Start' Panel[192] recognised the potential for *CBRJ* organisations to provide early identification and support for those within their communities who are at risk of being drawn into criminal or paramilitary activity.

11.138 One of the recommendations in the report from the Panel proposed:

> An initiative focused on young men who are at risk of becoming involved, or further involved, in paramilitary activity. This initiative should be a collaboration between government departments and restorative justice partners to combine restorative practices and peer mentoring with targeted support.

11.139 While such work is vitally important in a post-conflict society still suffering from the cancer of sectarianism, it must be recognised that such work may not offer succour or support to the many and varied protected groups and victims who have no connection with paramilitaries or former paramilitaries.

11.140 Although *CRJI* and *NIA* have done and continue to do much important work, much of that work is targeted exclusively at dealing with paramilitaries.

11.141 So, for example, the feasibility study commissioned by the *Department of Justice* which reported in March 2018 noted that:

> The restorative justice programmes prevented nearly 500 cases of paramilitary beatings and shootings. *NIA* and *CRJI* caused a significant drop in the number of

[192] The number, Fresh start' panel is an independent three-person panel set up by the DoJ to make recommendations on the disbandment of paramilitary groups.

> beatings and shootings compared to neighbourhood areas outside the catchment population[193].

11.142 In 2007, the *Criminal Justice Inspection* noted:

> Some of those working in the scheme have a history of paramilitary membership in their history which to some extent contributes to their status in their communities and gives them extra influence in dealing with the paramilitaries and that organisations such as these are ideally placed to reach those individuals and groups traditionally defined as hard to reach[194].

11.143 Whilst acknowledging the key importance of this work, such perceptions may mean that a number of minority and victimised groups may feel more confident and comfortable in dealing with a formal statutory agency.

11.144 Despite its stated reservations on the matter, the *Department of Justice* in its current Consultation paper on Restorative Justice acknowledged the importance of statutory restorative justice.

It notes:

> Statutory restorative justice in the form of court ordered youth conferencing has also been shown to be effective in Northern Ireland following the introduction of legislation in 2002. Therefore adult conferencing may be considered as an option to progress any strategy that is developed, albeit that this is likely to be

[193] Feasibility study on a Restorative Practices Centre of Excellence for Northern Ireland – Final Report: March 2018 - RSM UKGroupLLP.

[194] *Northern Ireland Alternatives* – report of an inspection with a view to accreditation under the Governments Protocol for Community Based Restorative Justice. April 2007.

> a longer-term action as it would require legislative change.

11.145 The *Department of Justice* also acknowledged recommendations from the *Council of Europe* on the question of how provision is made for restorative justice, when the *Council* advised:

> Member states . . . may wish to establish a clear legal basis where restorative justice is referred to by the judicial authorities, or where it is otherwise used in a way which impacts, or which may impact, upon prosecution or court proceedings.

11.146 The *Department of Justice* further acknowledged the role of the probation officers in relation to sentencing, thus*:*

> On the issue of restorative justice as part of a sentence, individuals detained in custody have Personal Development Plans (PDPs), which are designed to help address the risk factors behind the offending behaviours, to build on their strengths and to assist their effective rehabilitation. PDPs are agreed with the prisoner by their coordinator and could incorporate a restorative element to assist the individual to recognise the consequences of their offending, hurt and harm caused, provide an opportunity to address this and also to undertake reparative actions.

11.147 In 2018, a feasibility study[195] on the proposed Restorative Practices Centre of Excellence for Northern Ireland was published, having been commissioned by the *Department of Justice.*

[195] Feasibility study on a Restorative Practices Centre of Excellence for Northern Ireland-Final Report:March 2018-RSM UKGroupLLP)

11.148 The report clearly identified the need for legislative change to support adult restorative justice.

It noted:

> Whilst a significant level of adult RJ (restorative justice) can take place in the absence of legislation, the experience of Northern Ireland's youth sector is that the development of supporting legislation provided a significant level of momentum in the sectors adoption/use of RP/RJ. The development of legislation to support adult RJ may provide a similar level of impetus. We suggest that legislation change will also be needed to:
>
> - Allow for the non-prosecution of adult offenders/their placement on an RJ scheme and to make provision for enforcement (e.g. if a court order was breached and an offender does not attend a restorative conference); and
> - Ensure buy-in and adherence to professional standards in training and service delivery. If the centre's work is not underpinned by legislation it could be regarded as an 'optional extra' for those engaged in RP work and would therefore have limited impact on professionalism and raising of practice standards.
>
> We recommend that the centre of excellence utilises its resources to advocate for the development of adult RJ legislation. (Note 'RP' means restorative practice).

11.149 In reviewing stakeholder feedback on current provisions, the report raised a number of issues associated with the current restorative practice provision.

11.150 One of those constraints was said to be the lack of political support/currency.

The report noted:

> The majority of stakeholders highlighted a lack of awareness of RP and its benefits, and this, coupled with an association with paramilitary transition in Northern Ireland limits the ability of RP to be mainstreamed. Stakeholders highlight that there is a need for political support, buy-in from elected representatives and within government departments, agencies and local communities to widen the application of RP/RJ.

11.151 The report also noted, as a deficiency, the limited geographical coverage stating that:

> Stakeholders highlight a lack of community-based RP/RJ outside those areas where *CRJI* and Alternatives have local contacts and influence, and state that there is a need to extend RP provision to other geographies and communities. It was stated this is mainly due to lack of funding to expand.

11.152 This is an obvious concern and, arguably, one that is best met by placing restorative justice schemes on a statutory footing, whilst ensuring that the statutory agency works in close collaboration with existing groups.

11.153 On the simplest level, legislation needs to be in place for enforcement purposes, for example, if a court order was breached and the defendant does not attend a restorative conference.

11.154 In its conclusions and recommendations, the report noted, among other things, that community-based restorative justice:

> has been largely . . . confined to those communities where *CBRJ* organisations have had reach, that is, where they have been able to influence/guide the transition of paramilitaries and communities out of conflict. Further expansion of RJ/RP in other geographies/communities is required, particularly in areas of social disadvantage, chronic offending, ongoing paramilitary activity and significant potential for threat/exclusion.

11.155 As regards the need for legislative change, the report observed that:

> In relation to legislation, feedback from a number of stakeholders highlights that:
>
> - Voluntary participation is an underpinning key principle of RP and other significant range of adult RP/RJ activity can be carried out without legislation;
> - Legislation can create a level of rigidity within the system that is not always conducive to effective practice; and
> - Adult RP/RJ is unlikely to be high priority for legislators and the development of supporting legislation is unlikely to take place in the short/medium term, if at all.

11.156 The report acknowledged these issues, but responded to them by stating:

> Whilst being cognisant of the above, the experience of the youth sector has been that the development of supporting legislation provided the sector with significant momentum in its use of RP/RJ. We suggest that the development of legislation to support adult RJ may provide a similar level of impetus.
>
> We also suggest that there is a need to review existing legislation and consider developing new legislation to:
>
> - Allow for the non-prosecution of adult offenders and their placement on an RJ scheme;
> - Make provision for enforcement e.g. if a court order is breached and an offender does not attend a restorative conference;

- Support the *PSNI* in determining that a crime can be considered under RJ; and
- Ensure buy-in and adherence to professional standards in training and service delivery. If the centre's work is not underpinned by legislation it could be regarded as an 'optional extra' for those engaged in RP work and would therefore have limited impact on the professionalisation and raising of practice standards.

We recommend that *DoJ,* in collaboration with the centre of excellence, consider the development of an action plan to bring about legislative change to support adult RJ. In addition, the absence of a statutory duty for government to enhance community safety has been reported as being a missed opportunity to support a cross-cutting approach to RP/RJ.

We recommend that the *Centre of Excellence* utilises its resources to contribute to a campaign to lobby for the enactment of the statutory requirement.

Recommendation and analysis

11.157 Having examined the arguments carefully, I conclude that there is a very strong case for providing that restorative justice should be part of the criminal justice process in dealing with hate crime in Northern Ireland.

11.158 There is a clear gap in the legislation in that such provision is already made for those who are under 18, but no statutory provision is made for those over that age.

11.159 The acknowledged success of the provision for those who are under 18 encourages confidence that, with appropriate adjustments, the model operated by the *Youth Justice Agency* can be replicated for those who are over 18.

11.160 Placing such provision on a statutory basis will help to ensure consistency in the application of restorative justice processes and enable the system to be completely victim led and victim focused.

11.161 I am satisfied that there should be a formal justice system agency, independent of the *Department of Justice*, responsible for the delivery of adult restorative justice for hate crime. I therefore recommend that:

Recommendation 16

There should be a new statutory scheme for restorative justice for over 18s, organised and delivered on lines similar to the *Youth Justice Agency* in Northern Ireland.

Recommendation 17

It is desirable that such a statutory restorative justice framework be established with the necessary financial funding.

Recommendation 18

The new statutory scheme for restorative justice should be independent of the Department of Justice.

Recommendation 19

As such a scheme will involve referrals from the Public Prosecution Service and the Courts, it is recommended that it should be run by a statutory agency, such as the Probation Service for Northern Ireland.

11.162 The 2018 report carried out by the accounting and consulting firm, *RSM*, noted that stakeholders identify that current funding for *CBRJ* is limited and is provided on a short-term basis – often year by year. This does not provide financial stability to allow for medium to long-term planning to occur.

11.163 If a formal justice system agency is established in legislation, this will provide a long-term and stable funding model to support any further development of restorative justice.

11.164 Whilst much good work is done under the current system, there are concerns about its reach.

11.165 It appears to be available only in certain geographical areas of Northern Ireland.

11.166 I agree with the submission of the *Police Service of Northern Ireland* that referrals from criminal justice agencies require to be more formalised to enable oversight and accountability.

11.167 It would appear that *PBNI* is well placed to take on this role given its experience and the qualifications of its staff in social work and in-house psychology.

11.168 *Victim Support NI* have expressed concerns that restorative justice needs to be accessible and perceived as impartial to victims as much as offenders. It has criticised restorative justice development within the criminal justice arena as having been led by offender focused organisations.

11.169 It argues that there should be clear 'victim initiated' pathways for restorative justice and that those leading the groups need to be perceived as impartial to victims as opposed to groups of primary interest is in offenders.

11.170 However, *Victim Support NI* acknowledges the fairness, impartiality and professionalism of the *PBNI*.

11.171 One's own experience of reading pre-sentence reports and hearing evidence from probation officers, whether at court or at parole hearings, strongly suggests that the *PBNI i*s entirely impartial and empathetic to victims and can be relied upon to undertake this vitally important work in a wholly professional way.

11.172 I note the 'Accepting Differences' Programme delivered by the *Probation Service*, which has included international best practice in its design and delivery.

11.173 Any new formal justice agency tasked with delivering restorative justice for adults should work collaboratively with the existing accredited groups who will continue to have an important role, particularly in the prevention of crime.

11.174 It is accepted that these community-based restorative justice bodies have much experience, knowledge and links into communities that are historically disadvantaged and remain in the shadow of paramilitarism.

11.175 Their wealth of experience is an invaluable asset which should be encouraged and provided with a more appropriate funding model.

11.176 I am of the view that the ongoing work of the current adult restorative justice strategy will be crucial in deciding on any relevant lines of demarcation.

11.177 It is noted that *PBNI* already work closely with the accredited community-based groups and have provided funding to them over the last ten years, including in the working out of the Enhanced Combination Order Scheme.

11.178 I therefore recommend:

Recommendation 20

The presently accredited restorative justice groups should continue to provide community support and support to the statutory agency, which would take the lead in any such collaboration.

11.179 In particular, should the victim or perpetrator decide at any stage of the process that they do not wish to engage, the matter should be referred back to the court system.

11.180 Overarching these recommendations must be the principle that a future restorative justice strategy must be victim-centred.

11.181 It is vital that victims should not be placed under pressure to engage in a restorative justice process against their wishes.

11.182 Those practitioners who will administer such processes in a statutory scheme must be impartial, thoroughly trained, suitably experienced and professional.

11.183 Any such process must be based on international best practice, including a full range of appropriate safeguards for the victim.

11.184 It should not be assumed that non-court options are the best option.

11.185 Clear guidelines for the use of restorative justice in any statutory scheme should be produced and implemented. This might also include a Code of Practice.

11.186 I also recommend that

Recommendation 21

There should be further consideration of the benefits of establishing a Centre of Excellence for Restorative Justice.

11.187 I further recommend that:

Recommendation 22

Diversion from prosecution is an appropriate method of dealing with low-level hate crimes. The model as per the practice in Scotland appears to offer an efficient and practical template.

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VICTIMS

12.1 Victims of hate crime deserve support and public understanding. In many cases, their vulnerability is not fully addressed by the operation of the criminal law and their fears and insecurities may not be properly acknowledged. The fact that hate crime was on the increase and was subject to significant under-reporting was acknowledged in 2004 by the *House of Commons Northern Ireland Affairs Committee*.

12.2 A similar finding emerged in 2019, when the *All-Party Parliamentary Group on Hate Crime* observed that hate crimes in the UK are on the rise.

12.3 It also noted that while rates of reporting had increased, the overall shortcomings of under-reporting have not been addressed:

> Hate crime remains chronically under-reported across all protected characteristics . . . For hate crime to be tackled effectively, people need to feel able to report their experiences, ideally to the police or alternatively to a third party service . . . Increased reporting rates are a welcome development but there is still a long way to go before anyone has the full picture of the levels of hate crime in the UK.[196]

12.4 In 2017, The *Northern Ireland Criminal Justice Inspection* Report, 'Response to Hate Crime in Northern Ireland', noted that:

> Under-reporting in Northern Ireland had resulted in continuing suffering within communities. Some victims

[196] All Party Parliamentary Group on Hate Crime, *How do we build* (2019) p55-57.

> told inspectors they were isolated in their homes, often sitting in the dark to make it look as if they were not in, because of the physical verbal and mental abuse inflicted by 'haters'.[197]

12.5 Although reporting figures have improved, this was from a low in Great Britain in 2010/2011 of just over 18% of those who experienced hate crime being prepared to report the matter to the police. This percentage was identified by research undertaken by the *Home Office* analysing data from the British Crime Survey[198].

12.6 There is no reason to suspect that patterns of reporting in Northern Ireland are now any better, meaning that a significant proportion of hate crime continues to remain unrecorded by the police in Northern Ireland. The annual published statistics must therefore be examined with a degree of caution.

12.7 In examining this issue, the consultation paper noted at paragraph 16.3, page 264 that a number of reasons have been offered by way of explanation for such low levels of reporting. These included:

- Previous experiences of victims and their lack of confidence in police, the prosecution of crime and, more generally, the criminal justice system;
- A perception that police and criminal justice agencies are not interested and will not take action;
- A perception about how the police and criminal justice agencies will respond;
- Fear of breach of privacy and exposure to further incidents;
- Lack of knowledge of reporting systems;

[197] Criminal Justice Inspection Northern Ireland, *Hate Crime: An Inspection,* para 3.2.
[198] see Jarman . *Acknowledgement, recognition and response: the Criminal Justice System and Hate Crime in Northern Ireland. Critical perspectives on Hate Crime: Contributions from the island of Ireland ,45 at 57*

- Language difficulties;
- Personal circumstances e.g. immigration status;
- A perception that it is acceptable to treat members of certain groups in this way;
- A concern about the implications if action is taken, for example, having to go to court, potentially being 'outed' (for example, as transgender), leading to sensationalist press reporting;
- Fear of victimisation, retribution or reprisal; and
- Concerns that no action will be taken by the authorities.

12.8 In its 2017 report, the *Criminal Justice Inspection Northern Ireland (CJINI)* found that victims' knowledge of systems of reporting had been enhanced by work undertaken by community support groups, often sustained either directly or indirectly by the *PSNI*, the *NIPB*, *Policing and Community Safety Partnerships (PCSP)* and the *Hate Crime Advocacy Service*, a non-governmental organisation.

12.9 Whilst observing that the work of the *Hate Crime Advocacy Service* was known and trusted by victims, *CJINI* concluded:

> Despite the work of advocates, community support groups and agencies, under-reporting of hate crime remained a substantial problem. Not all victims engaged with the support networks and every group of victims spoken to by inspectors identified many incidents which had not been reported. . . . It is therefore imperative that work continues to encourage reporting of incidents to begin to tackle the underlying, enabling factors of hate crime.[199]

[199] Criminal Justice Inspection Northern Ireland, *Hate Crime: An Inspection,* para 3.12.

Consultation responses: under-reporting

12.10 The consultation paper – question 59, page 267 – sought the views of the public as to how high levels of under-reporting might be improved.

12.11 There was a consensus among most respondents that under-reporting was a significant issue that needs to be addressed. Respondents identified a number of barriers to reporting which were identical to or similar to those described earlier.

12.12 There was also a consensus that fresh legislation alone was insufficient to tackle this difficult issue. Specific suggestions to improve the under-reporting situation included:

- The creation of robust legislation that can be effectively operationalised to address all forms of hate crime;
- Without fresh legislation, it was felt that communities would not easily be persuaded that reporting of hate crime was worthwhile;
- Training, education and capacity building across the criminal justice system, community organisations, schools and the wider public. It was said that this should focus on improving understanding and knowledge of hate crime, and how to report to support mechanisms that are currently available;
- Further investment in third-party reporting mechanisms was considered essential and it was argued that learning from successful third-party schemes would help to improve levels of reporting;
- Media campaigns to raise awareness of any revised legislation and the work being done to tackle hate crime generally. Respondents argued that it would be helpful in raising awareness if the press routinely reported on successful convictions;

- Partnerships and collaborative working to ensure that victims have the necessary information and support to report hate crimes;
- The implementation of policy measures, including the introduction of a justice communications and engagement strategy to tackle hate crime. This should aim to build greater awareness and understanding of work being done by justice agencies and to encourage engagement with minority groups;
- Better support mechanisms for victims, including an increased number of full-time advocates and greater use of special measures by the *Public Prosecution Service (PPS)* to encourage victims to feel better supported in criminal justice environments such as courts; and
- Relationship building between specific communities and enforcement agencies, with a view to building trust in the criminal justice system. It was argued that the *PSNI* should continue to improve its work on improving confidence within communities, so that those who have been victimised trust that their experiences will be responded to and taken seriously. The importance of discouraging false expectations on the part of victims was also stressed.

12.13 *TransgenderNI* was typical of many responses in arguing that:

> Creating robust laws that can be effectively operationalised to address all forms of hate crimes is crucial, and this consultation was a good step in reaching out to community groups to ensure that. However, the collaboration cannot stop here, and widespread training for police and judicial staff as well as public education programmes must be developed with the third sector to increase reporting and begin addressing the root causes of hate crime.
>
> We have maintained throughout this process that reforming hate crime legislation is not the be all and end all of addressing hate crime: it also requires a significant change of attitudes within the police, political

> class and wider society, to the rights and protection of marginalised groups.

12.14 The *Democratic Unionist Party* noted that:

> There are many factors impacting under-reporting of crime in Northern Ireland. This covers all types of crime. Obstacles include a lack of confidence in the system, a lack of clarity and victim-centred support and a perception that prosecution and conviction is not likely.
>
> We believe any reform of the legal framework for hate crime must increase public understanding of what constitutes a hate crime, narrow the scope, prevent abuse and misapplication, and support those officers, jurors and judges involved in the process to have a working knowledge of what is expected. It is also our opinion that the clear gap in what is recorded as hate crime or incidents by the *PSNI* is better aligned with what is actually prosecuted. Preventing false expectations for victims is critical.

12.15 The *Grand Orange Lodge of Ireland* identified some explanations for possible under-reporting of incidents directed at the *Orange Institution*, noting that some of their members – especially in border areas – are reluctant to report incidents to the police and typically shy away from any media coverage on incidents for fear of further attacks. It observed:

> Under-reporting also contributes to an already abysmal conviction rate for hate crimes directed against the *Orange Institution*, which further hampers the provision of policing resources in areas which are prone to attack.

12.16 The former Chief Constable of *Nottinghamshire Police*, Sue Fish, observed that the identification of misogyny as a category of hate crime by that police force was a factor which engaged the public and encouraged women to come forward to report

any behaviour that left them feeling intimidated, uncomfortable or threatened. The public support for this project led to a significant improvement in levels of reporting.

12.17 *Victim Support NI* argued that:

> A comprehensive, effective, working hate crime law will go some way to raising awareness about hate crime and increasing victim confidence to report. However, legislation alone cannot solve the under-reporting issue. Provision of sustainable, independent support infrastructure, for example, by making advocate roles full-time and funding them more sustainably, would be a positive step.
> So too would continuous training for all first responding officers…. Confidence in the system is as reliable as the last figure of authority who did or did not respond effectively and compassionately to a reporting victim – and communities talk to each other and vote with their feet.

12.18 I am satisfied that the introduction of better and more effective hate crime laws as a result of this review will instil new levels of confidence among victims and marginalised communities, and will encourage them to come forward and better trust the police and other actors in the criminal justice system with more confidence than heretofore.

12.19 On a practical level, one finding that many respondents on the subject noted is the necessity to provide appropriate and effective support for victims. This also includes ensuring that the level of training and education amongst those working with victims is at a high level of competence. It is critical that victims of hate crime are responded to appropriately and effectively as a matter of fundamental human rights.

12.20 Paul Iganski, Professor of Criminology and Criminal Justice at *Lancaster University Law School* co-wrote 'The Personal Injuries of Hate Crime' with Spiridoula

Lagoua, a research analyst who had previously contributed data analysis for the *Equality and Human Rights Commission*.

Their research provides support for the following:

- It is important…. that victims are responded to with sensitivity and offered empathetic support;
- Putting the victim's wishes at the centre of managing a complaint, or empowering victims, is also fundamental. Those involved in supporting victims of hate crime need to be fully aware of and appreciate the emotional and psychological impacts of such crimes to be sensitive and to be able to most effectively support victims;
- As many individuals engage with non-governmental organisations and civil society organisations working against hate crime have themselves been victims of hate crime, they potentially offer a significant experiential expertise which cannot be offered to the same extent by other agencies such as the police and other public authorities;
- This will be further enhanced by the understanding that comes from specialist work in supporting victims with a variety of experiences. Specialism enables the concentration of skills that are more diluted for organisations such as the police;
- NGOs and civil society organisations are uniquely positioned to support victims and engage in partnership with different agencies at all stages in the criminal justice process;
- Victims will expect something to be done. Keeping them informed of progress provides reassurance that action is being taken. Because of the multiple demands they face, some agencies in the criminal justice process are less able to regularly keep victims in the picture. Again NGO and civil society organisations can be uniquely positioned to provide consistent communication; and

- There is a need to identify and document good practice by NGOs and civil society organisations with regard to the provision of support to victims of hate crime, and the need to disseminate and share examples of good practice to potentially inform others.[200]

12.21 The *Hate Crime Advocacy Service (HCAS)*, which began its work in July 2013, received additional support and encouragement from the *Department of Justice* following the decision of the then *Justice Minister*, David Ford MLA, to publish a Victims Charter, which was placed on a statutory footing under the Justice Act (Northern Ireland) 2015 (the 2015 Act). This gave effect to the transposition of the *EU Victims Directive*, setting out the standards of service and entitlement that victims of crime can expect to receive from a range of service providers.

12.22 Provision was made in the 2015 Act to facilitate the police in disclosing relevant information relating to victims to a prescribed body, for the purposes of enabling that body to advise the victim about support services, or to offer and provide support services to the victim.

12.23 Under the Disclosure of Victims and Witnesses Information (Prescribed Bodies) Regulations (Northern Ireland) 2015, a non-governmental organisation, *Victim Support NI*, was identified as the prescribed body for the provision of support services for victims.

12.24 *HCAS* is part funded by the *Department of Justice* and the *PSNI*.

12.25 It is comprised of a Hate Crime Advocacy co-ordinator based in *Victim Support NI*, and hate crime advocates based in host organisations – *Leonard Cheshire*

[200] Paul Iganski and Spiridoula Lagou, 'The Personal Injuries of Hate Crime'. In *The Routledge International Handbook on Hate Crime,* eds Nathan Hall *et al*.,(Oxon: Routledge, 2015).

Disability, the *Migrant Centre NI*, with two advocates based in Belfast and Foyle, and the *Rainbow Project* for LBGT victims.

12.26 The service was developed to provide victims of hate crime with access to specialist support tailored to their needs. Information and guidance is made available through the service to help victims make decisions and choices to increase their safety and well-being.

12.27 The work of the *HCAS* is described in some detail in Chapter 16 (pages 262 – 272) of the consultation paper.

12.28 It suffices to say that the 2017 *Criminal Justice Inspection* Report was highly supportive of the work of *HCAS*.

12.29 It noted in particular that:

> Victims spoken with by inspectors said that the advocates have ensured that they were supported throughout a difficult process. Some victims stated that they would have abandoned their complaints had the *Advocacy Service* not provided support.… The advocate groups were independent of the criminal justice system, although funded by the *PSNI*. A co-ordinator was funded by the *DoJ*. There was no advocate to provide support for religious hate crime (although the review understands that the co-ordinator in *VSNI* also acts as the advocate for this category of hate crime). Inspectors understand the difficulties in Northern Ireland with the bulk of hate crime being recorded as sectarian and faith/religious hate crime being consistently low.
>
> However, as religious diversity increases, provision of a dedicated religious hate crime advocate should be considered. Consideration should also be given to the source of funding for advocates. There is a risk that in

> the climate of diminishing budgets, competing police priorities may result in loss or reduction of the advocacy service. The advocates provide services, which impact much wider than criminal justice. There is potential for the service to be widened to deliver support to victims of hate incidents as well as those which enter the system for prosecution.
>
> Widening the role of the hate crime advocates could only be achieved by substantially increased funding as part of a wider executive led strategy aimed at achieving community cohesion.
>
> These are vital services given the barriers experienced by victims when trying to access criminal justice in unfamiliar contexts. Victims mentioned to inspectors the provision of updates on progress of cases and explanation of court outcomes as being especially important.
>
> The management of expectations of victims of hate crime is an essential part of their role in keeping victims engaged with the system and building confidence within the victims' communities to improve reporting rates. The work of advocates should continue to be evaluated with regard to its effectiveness and to further develop the service offered to victims of hate crime.
>
> The evaluation should include an assessment of whether the provision of a dedicated religious hate crime advocate is required.[201]

12.30 During the pre-consultation stage of the review, it became obvious that the work of *Victim Support NI* and the *HCAS* has a vital role in increasing the engagement of victims of hate crime with the criminal justice system at all levels, and in helping victims to cope and deal with the effects of hate crime and support them through a very difficult process.

12.31 At paragraph 16.16 of the consultation paper I noted that:

[201] Criminal Justice Inspection Northern Ireland, *Hate Crime: An Inspection,* paras 3.36-3.38.

> The current funding model is precarious to say the least. In view of the stubbornly high levels of hate crime there seems no obvious reason why the funding model should not be fixed on a permanent basis. This will allow for better planning, retention of staff and provision of a proper career structure for the hate crime advocates. Such a permanent arrangement would require agreement from the *PSNI* and *DoJ* and significant commitments for additional resources, particularly if the work of *HCAS* is expanded as recommended by the criminal justice inspector. Although the vital funding issues may not require any change of legislation, it is highly relevant for the review to consider this important work against the background of the most effective approach for the justice system to deal with hate crime and hate speech.

Consultation responses: *Hate Crime Advocacy Service*

12.32 In the consultation paper, four questions were posed on the role and function of the *Hate Crime Advocacy Service* as follows:

1. Do you consider that the *Hate Crime Advocacy Service* is valuable in encouraging the reporting of hate crime?
2. Do you consider that the *Hate Crime Advocacy Service* is valuable in supporting victims of hate crime through the criminal justice process?
3. How might the current *Hate Crime Advocacy Service* be improved?
4. Do you consider that the funding model for the *Hate Crime Advocacy Service* should be placed on a permanent basis as opposed to the present annual rolling contract model?

12.33 The responses to the consultation paper showed that there was widespread public support for *HCAS*, with 89% of respondent organisations regarding the service as valuable in encouraging the reporting of hate crime. A relatively smaller proportion - 45% - of individual respondents agreed.

12.34 A majority of respondent organisations (89%) acknowledged that the service was valuable in supporting victims of hate crime through the criminal justice process, whilst 63% of individual respondents agreed, giving an overall percentage in support of 81%.

12.35 A majority, (94%) of organisational respondents, considered that the funding model for the service should be placed on a permanent basis, as opposed to the present annual rolling contract model.

12.36 In comparison, 60% of individual respondents agreed, giving an overall approval percentage of 81%.

12.37 There was general agreement that the service requires further assistance, in order to improve levels of service and ensure more victims are supported through the criminal justice process.

12.38 Among specific recommendations a number deserve particular attention as follows:

- Placing the right to advocacy on a statutory footing, though such a provision would need to have the flexibility to allow the service to evolve to meet victims' needs on an evidence driven basis (*Equality Commission for Northern Ireland*);
- To review the role and ownership of the service and to explore wider cross-departmental ownership and funding arrangements, as it is evident through the lifetime of the scheme to date that the needs of minority communities go beyond criminal justice issues (*Police Service of Northern Ireland*); and

- That it be expanded in scope and placed on a permanent footing with specialist advocates appointed to support victims from each of the characteristics protected in the hate crime legislation and across all parts of Northern Ireland, especially in rural areas where victims can feel especially isolated (*Northern Ireland Human Rights Commission*).

12.39 The *PPS* reflected the views of many in acknowledging the valuable work of the *HCAS* in supporting victims of hate crime through the criminal justice process. It said:

> Acting as intermediaries on their behalf, the advocate can make enquiries and obtain updates on the victim's case, as well as raising any questions they may have of police. They also provide information and support for victims giving evidence in court. The service is invaluable to victims of hate crime who are often vulnerable and frightened.

12.40 Many respondents were concerned that the current model for the service was too fragile, particularly with regard to current funding arrangements.

12.41 A common suggestion from many respondents was that improvements would only be obtained through the provision of a more sustainable model of funding. It was thought that the current funding approach was subject to various difficulties, relating to forward planning, effective service delivery and staff retention.

12.42 There was strong support for placing funding on a permanent basis to enable *HCAS* to reach its full potential. It was considered that this would enable long-term strategic planning and development to take place. Many felt that such a change would lead to improved quality of service provision, thus helping to ensure consistent support for victims.

12.43 Several respondents noted that if new protected characteristics were added to the current protected groups, then this needed to be reflected in the recruitment of additional advocates.

12.44 Many respondents argued that there was insufficient awareness of the service and that it would be wise to have public awareness campaigns, advertising, the provision of one-stop community hubs and resources in multiple languages.

12.45 The *Grand Orange Lodge of Ireland* noted that, whilst it was aware of the *Victim Support Service*:

> The overwhelming majority of our members and local lodges are not…. The establishment of one-stop community hubs for those who have been the victim of hate crime would be a welcome improvement in both awareness and support of hate crimes…. The *Grand Orange Lodge of Ireland* would also welcome proactive engagement with the Orange community to raise awareness of the support available in the event of an attack on Orange people, parades or property.

12.46 The *Belfast Islamic Centre* argued that more hate crime advocates were needed and that, currently, advocates were overstretched.

12.47 *Participation and the Practice of Rights (PPR)*, noted that each advocate has a caseload of 600 to 700 cases per year described by the group as '*untenable*', and argued that this impacts on the ability of advocates to deliver high quality of service and engage fully and consistently with victims.

12.48 *PPR* added:

> This consultation period and subsequent responses, should highlight the lack of resources for the *HCAS* both in terms of service stability and consistency . . . and personnel on the ground dealing with high levels of race motivated hate crime and the victim's lives affected by that, often doing the work of *PSNI* officers and stations in terms of community initiatives and supporting reporting and checking appropriate recording as well as promoting the service and engaging with diverse migrant communities with complex needs. There needs to be a significant investment financially and in education and training hate crime advocates and *PSNI*, that is medium to long term, investing in the relationship between them when it comes to dealing with hate crime.

12.49 The *PSNI* observed that the current funding arrangements are not suitable and that a more sustainable model needs to be developed.

12.50 This argument was supported by many groups and individuals, some of whom argued that *HCAS* should be a statutory service funded directly by Government on a permanent basis. They argued that the current rolling annual contract, sometimes only a six-month contract, creates huge uncertainty within the service and prevents any long-term strategic planning from being done.

12.51 The *Church of Ireland Church and Society Commission* voiced the opinions of many in noting:

> This funding model is a key problem with the scheme. The rolling contract creates unnecessary instability, staff turnover and loss of institutional expertise by not providing a permanent position for expert staff. Reforming this is likely to lead to a significant improvement.

12.52 The *Democratic Unionist Party* affirmed their support for the service and argued that there should be additional representation for those from faith-based organisations. It stated:

> As with all statutory funded projects, we wish to see the New Decade, New Approach commitment to multi-year budgets honoured in order to allow long-term planning. Access to victim centred support must continue to be a primary goal.

Recommendations and analysis

12.53 After the consultation paper for this review was published in January 2020, the review team undertook a number of public outreach events throughout Northern Ireland between January and March 2020. These are listed in appendix 1.

12.54 One of the striking features of the responses at all of those meetings was the largely unanimous opinion of attendees who stressed the importance of the *HCAS* in supporting victims, primarily in navigating a way through the criminal justice system and in promoting positive coping strategies to help victims deal with the impact of crime.

12.55 In December 2016, *Community Evaluation Northern Ireland (CENI)* was commissioned by the *Department of Justice*, *Community Safety Division* and the *PSNI – Policing with the Community Branch* – to carry out an evaluation of the *HCAS*.

12.56 This evaluation was designed to generate evidence to feed into decision-making about the future development of the service.

12.57 The responses completed by victims did indicate a high level of user satisfaction. The report made a number of recommendations and identified the need

for *PSNI* and *DoJ* to develop a corporate approach to planning and funding of the service, and to develop an integrated strategic plan specifying what they wanted the service to achieve – '*outcomes*' – and how they wanted it to be delivered.

12.58 At the time of writing, my understanding is that the *DoJ* and the *PSNI* are considering a new funding model.

12.59 The high levels of approval for the *HCAS* found in the responses to the consultation but also reinforced in the concerns of many stakeholder groups as to the sustainability of the current model, have helped to confirm my preliminary views. The respondents provide compelling evidence that has convinced me that the current model for the *HCAS* is not sustainable and an appropriate financial arrangement needs to be established to ensure the longevity of the *HCAS* and also its independence.

12.60 It is clear that the *HCAS* provides a vital service for victims and their future well-being and also as a means of ameliorating some of the harmful effects of hate crime.

12.61 I recommend that the *HCAS* must be sustained on a permanent basis with appropriate levels of financial support.

12.62 Implementation of this recommendation will help to allow for better planning, retention of staff and provision of a proper career structure for the advocates employed by the *HCAS*, which will put their role on a professional footing.

12.63 This will require additional resources, particularly if this work is expanded and the number of advocates increased to allow for a better geographical spread of services and the inclusion of new protected characteristics as recommended in this report.

12.64 I therefore recommend that the right to advocacy, as acknowledged in the Victims Charter, should be placed on a statutory basis, thus securing the future for the *Hate Crime Advocacy Service*.

12.65 Such a statutory basis will ensure permanent sustainable streams of funding and will allow the service to grow to meet the obvious need identified by numerous respondents.

12.66 I also recommend that as well as providing advocates to support the proposed new protected characteristics of sex/gender, age and variation of sex characteristics, an advocate should be retained who should be a dedicated religious hate crime advocate. Such an advocate could also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variations of sex characteristics.

12.67 My overall recommendation on this is as follows:

Recommendation 23

The work of the *Hate Crime Advocacy Service* should be expanded and placed on a permanent statutory footing to ensure a more sustainable funding model with specialised advocates appointed to support victims for all protected characteristics thus ensuring that the right to advocacy acknowledged in the Victim's Charter is guaranteed.

For the avoidance of doubt, such specialised advocates should include a dedicated religious hate crime advocate who can also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variation of sex characteristics.

Anonymity and restrictions on reporting

12.68 The consultation paper asked two questions in relation to this issue as follows:

1. Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?

2. In what circumstances should a restriction on press reporting of the identity of the complainant in hate crime be permissible?

12.69 The consultation paper noted (pages 278–280) that it is possible for witness anonymity orders to be granted under limited circumstances only, including (1) where it is deemed necessary to protect the safety of the witness or (2) for reporting restrictions to be put in place.

12.70 However, given the importance of the principle of open justice, these are subject to rigorous conditions.

12.71 The consultation paper further noted that the issue of press reporting was examined by Lord Bracadale in his independent review of hate crime legislation in Scotland.[202] He observed that a concern particularly expressed by some in the LGBT community related to potential adverse publicity if the case was reported by the press and broadcasters.

12.72 Lord Bracadale invited respondents to his consultation paper to consider whether or not in certain circumstances press reporting of the identity of the complainer in a hate crime should not be permitted.

[202] Lord Bracadale, *Independent Review of hate crime legislation in Scotland* – Final Report: *Scottish Government*. (May 2018).

12.73 A substantial majority of the respondent organisations considered that, in certain circumstances, the identity of a complainer (a complainant in Northern Ireland) in a hate crime case should not be published.

12.74 The views of respondent individuals were evenly divided for and against such a restriction on publication.

12.75 Those who considered that preventing press reporting of the identity of the complainer thought that this would remove a potential barrier to reporting of hate crimes. They referred to issues around further victimisation and retaliation, the fear of being shunned by others in their own community, and sensationalised press reporting that focused on the victim rather than the perpetrator.

12.76 It was argued that restrictions on press coverage could make the process of taking a case to court less traumatic for victims.

12.77 In the Scottish review Lord Bracadale observed that:

> While some favoured a standard approach of anonymity for all hate crime victims, others thought restrictions on press reporting should be judged on a case-by-case basis
>
> Those respondents who were opposed to anonymity for victims of hate crime in press coverage considered that it was important that justice was 'seen to be done', that the press should be free to cover court proceedings, and that the public had a right to know the identity of those making complaints. Some did not think that hate crime should be treated differently to any other crimes, while others thought that protecting the

> identity of complainants could encourage false accusations.[203]

12.78 Lord Bracadale pointed out that the general legal principle has always been that justice is administered by the courts and public, and the proceedings are open to public scrutiny. The media are the conduit through which most members of the public receive information about court proceedings and the ability to identify a person in a story is important. He also noted, however, that the principle of open justice may be departed from in certain circumstances.

12.79 Section 11 of the Contempt of Court Act 1981 (the 1981 Act) provides:

> *In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appears to the court to be necessary for the purpose for which it was so withheld.*

12.80 The same principles of law that apply in Scotland also apply in Northern Ireland – orders under Section 11 of the 1981 Act are rare, but are granted from time to time, for example, in cases of blackmail.

Consultation responses: anonymity and restrictions on reporting

12.81 It is useful to analyse the views of respondents on anonymity and restrictions on reporting.

[203] Ibid, paras 10.17-10.18.

12.82 Overall, a large majority of respondents (83%), considered that, in certain circumstances, press reporting of the identity of the complainant in a hate crime case should not be permitted.

12.83 In the online survey, 29% of respondents said the media should never be allowed to report the identity of the individual affected. 38% said sometimes this should be allowed and 6% said it should always be allowed.

12.84 Those who were opposed to this idea offered various reasons for their views.

12.85 The *Bar of Northern Ireland* pointed out that the current law in Northern Ireland already made provisions for restrictions on press reporting to be considered by the judge on a case-by-case basis.

12.86 The *Bar* highlighted the importance of 'open justice' and suggested that, given the role of the media in conveying information to the public about court proceedings, restrictions should not generally be permissible.

12.87 Another respondent suggested that, if such an approach were to be taken routinely, consideration should then be given to protecting the identity of the defendant.

12.88 Respondents who agreed that, in certain circumstances, press reporting of the identity of the complainant in a hate crime case should not be permitted, reasoned as follows:

- Restrictions on publishing a complainant's identity is consistent with victim protection; identification can place victims and their families at

significant risk of further hate incidents, reprisals, re-traumatisation and public 'outing' (in cases involving LGBT individuals);

- Protecting a complainant's identity could help address the problem of under-reporting, by giving victims more confidence to report offences; and
- Complainants might be encouraged to participate in court proceedings.

12.89 Respondents also suggested specific circumstances and conditions under which press reporting restrictions might apply. Several suggested that restrictions in some sectarian hate crime cases may be appropriate, particularly if there are concerns about reprisals.

12.90 *Victim Support NI* argued that restrictions should apply in circumstances where:

> [P]ublic reporting could result in the withdrawal of a complaint on the grounds of fear of the consequences of the case being reported in the press.

12.91 The *Equality Commission for Northern Ireland* argued that there should be express provision in hate crime legislation for courts to restrict reporting in some circumstances. It submitted that such provision might take into account:

> Whether the disclosure of a person's identity will make the complainant or witness, due to an equality characteristic(s), more susceptible to victimisation or retaliation, or result in that characteristic, such as sexual orientation, being made public without their permission.

12.92 Some respondents argued that all victims should be able to request anonymity, whilst decisions about restrictions should be at the judge's discretion.

12.93 The *Probation Board for Northern Ireland* recommended that media guidelines should be developed to inform decision-making, as has been the approach in other areas, for example, reporting of cases of child sexual abuse. This would provide greater clarity and certainty for courts, complainants and the wider public, and help to increase the confidence of marginalised communities in the criminal justice system.

12.94 The *PPS* pointed to the fact that, as the law stands, the prosecution can apply for a reporting restriction, in relation to an adult victim or witness, under Section 46 of the Youth Justice and Criminal Evidence Act 1999.

12.95 Under this law, an adult witness is eligible for protection if the quality of his/her evidence or his/her cooperation with the preparation of the case is likely to be diminished, by reason of fear or distress in connection with identification by the public as a witness.

12.96 Quality of evidence relates to its quality in terms of completeness, coherence and accuracy. Factors which the court must take into consideration include the nature and circumstances of the offence, the age of the witness, any behaviour towards the witness by the defendant or his family or associates, and the views of the witness (Section 46 (4)).

12.97 The court must also consider whether the making of a reporting direction would be in the interests of justice, and consider the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of proceedings (Section 46 (8)).

12.98 The *PPS* stated:

> [W]here there is evidence that the statutory criteria are met and the victim wishes to have the benefit of a reporting restriction, press reporting of the identity of the complainant should not be permitted.
>
> A reporting restriction is different to an order for anonymity. Anonymity involves the withholding of the identity of the witness from the defendant. In most cases, the defendant will already know, or be able to ascertain, the identity of the victim. The threshold for an anonymity order is much higher than that for a reporting restriction as the defendant's right to a fair trial is directly engaged by such an order.

12.99 The *Bar of Northern Ireland* agreed, noting that:

> Any restrictions on press reporting can already be considered on a case-by-case basis by a judge where appropriate. Open justice is a fundamental principle which has been a pillar of our criminal justice system for many years and it represents a vital element in commanding public confidence in the court system and should be open to scrutiny. The media provides the channel through which most members of the public receive information about court proceedings and therefore restriction should not generally be permissible.

12.100 I agree with the submissions from the *Public Prosecution Service* and the *Bar of Northern Ireland*.

12.101 The 1999 Act provides a legal mechanism whereby the prosecution can apply for reporting restrictions in appropriate cases and the judge can make such decisions on a case-by-case basis.

12.102 **No evidence has been provided that that judges are interpreting their reporting restriction powers inappropriately and I therefore make no recommendation for legislative change in this matter.**

12.103 There is, however, another evidential issue which directly has the potential to affect complainants adversely in giving evidence in hate crime/hate speech criminal cases.

12.104 One of the principal recommendations from this review is that the core method of prosecuting hate crime in Northern Ireland should be the introduction of statutory aggravations to existing offences, based largely on the model used in Scotland.

12.105 I am also recommending the introduction of an aggravator relating to sectarian prejudice.

12.106 It is further recommended that such statutory aggravations should apply to any criminal offence.

12.107 If my recommendations are accepted, then various sections of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 dealing with enhanced sentencing would be unnecessary and should be repealed.

12.108 Effectively, therefore, for the first time in Northern Ireland, there will be substantive hate crime offences where the hate/hostility issue in a trial will have to be determined by a jury (or a district judge in summary proceedings).

12.109 In many cases, this will require the giving of evidence by complainants and other witnesses.

12.110 From accounts given to me by victims and victims groups, it is clear that hate crime often involves a campaign of abuse where the perpetrator is known to the victim and criminal harassment and intimidation of that victim continues over a period of time.

12.111 I have serious concerns that many victims will be discouraged from giving evidence in cases where perpetrators (alleged or otherwise) choose to exercise a right to cross examine their victims in person.

12.112 It is widely accepted that such cross examination can cause the victim significant distress and can sometimes amount, on occasion quite deliberately, to a continuation of the abuse.

12.113 The Criminal Evidence (Northern Ireland) Order 1999 - the 1999 Order makes specific legislative provision prohibiting a non-represented defendant from cross-examining in person the alleged victim of a sexual offence (Article 22).

12.114 Similar provision is made in the 1999 Order in relation to child complainants and other child witnesses (Article 23).

12.115 In cases where the statutory prohibition on cross-examination in person by a non-represented defendant does not apply, the court can, on an application by the prosecution, or of its own motion, make a direction preventing an unrepresented defendant from cross-examining a witness in person (Article 24).

12.116 The court can make such a direction if it considers that this would improve the quality of evidence given by the witness and that it would not be contrary to the interests of justice.

12.117 Where a court orders that a defendant is prevented from cross-examining a witness in person, it must invite that defendant to arrange for a legal representative to carry out cross-examination on his/her behalf.

12.118 If the accused notifies the court that no legal representative is to act for him/her for the purpose of cross-examining the witness, or gives no notification to the court, the court must consider whether it is necessary in the interests of justice for the witness to be cross examined by a legal representative appointed to represent the interests of the accused.

12.119 If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative chosen by the court to cross-examine the witness in the interests of the accused. A legal representative appointed by the court is paid for by the *Department of Justice*.

12.120 Article 24(5) provides that a person so appointed shall not be responsible to the accused.

12.121 A fundamental Review of Family Justice in Northern Ireland, led by Lord Justice Gillen and published in 2017, specifically considered the issue of protection of witnesses from cross-examination by personal litigants. It noted that this was a problem raised by stakeholder groups and particularly by the judiciary.

12.122 The review considered:

> To allow a perpetrator of domestic abuse to cross-examine their victim in this manner is not only simply another tool used by a perpetrator to extend their control and abuse of vulnerable women but a clear disregard for the consequences and impact of abuse.

12.123 The *Assembly* is currently considering the Domestic Abuse and Family Proceedings Bill (Northern Ireland) 2020.

12.124 Clause 23 of that Bill amends the Criminal Evidence (Northern Ireland) Order 1999 by providing that:

> *22A. No person charged with an offence involving domestic abuse . . . may in any criminal proceedings cross-examine in person a witness who is the complainant, either –*
>
> *(a) In connection with that offence, or*
>
> *(b) In connection with any other offence . . . with which that person is charged in the proceedings.*

12.125 In moving the second stage of the Bill in April 2020, the *Minister of Justice*, Naomi Long MLA, said:

> Shamefully, some abusers also seek to use the criminal justice system itself to further victimise their partner, ex-partner or family member. For that reason, the Bill includes safeguards to prevent an abuser using the criminal justice process to further exert control and influence over a victim.
>
> These provisions should help to minimise the trauma for the victim, while ensuring that the proper administration of justice is achieved.
>
> Those subject to a domestic abuse offence, or an aggravated offence, will automatically be eligible for consideration of special measures when giving evidence, which could include the use of live links or screens.
>
> The provisions will also prohibit the cross-examination of an individual in a criminal court by the accused where that relates to the domestic abuse offence, or an offence aggravated by domestic abuse. That provision currently applies to sexual and trafficking offences.

> I believe that the provisions will help victims to give the best evidence that they can in court, and also reduce the number of victims disengaging from the criminal justice system.[204]

12.126 I believe there is a strong argument to put victims/complainants of hate crime on the same footing as domestic violence and sexual violence witnesses.

12.127 The Victims Directive states at paragraph 57:

> Victims of human trafficking, terrorism, organised crime, violence in close relationships, sexual violence or exploitation, gender-based violence, hate crime, and victims with disabilities and child victims tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation.
>
> Particular care should be taken when assessing whether such victims are at risk of such victimisation, intimidation and retaliation and there should be a strong presumption that those victims will benefit from special protection measures.

12.128 As hate crime victims are already grouped together in the Directive with sexual violence and gender-based violence victims, it would make sense for them to be offered the same special measures as those offered to other similar groups.

12.129 Clause 22 of the Domestic Abuse and Family Proceedings Bill (Northern Ireland) 2020 further provides that those subject to a domestic abuse offence, or an aggravated offence, will automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens.

[204] Naomi Long, Domestic Abuse and Family Proceedings Bill: Second Stage, Executive Committee Business – in the Northern Ireland Assembly at 11.45 am on 28th April 2020.

12.130 For similar reasons to those set out above, I believe that there is a strong argument for treating hate crime victims on the same footing as domestic violence and sexual violence victims in relation to special measures.

12.131 I therefore recommend:

Recommendation 24

Complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens.

Protection for complainants in hate crime/hate speech criminal proceedings should be provided as follows:

(i) no person charged with any aggravated or stirring up offence may in any criminal proceedings cross-examine a witness who is the complainant either –

(a) in connection with that offence or

(b) in connection with any other offence with which that person is charged in the proceedings

Chapter 13

Online Hate Speech

CHAPTER 13

ONLINE HATE SPEECH

13.1 This chapter will examine:

(1) Definition of online harms.
(2) The regulation of online hate speech.
(3) Personal criminal liability for online hate speech

13.2 The growth in Internet usage is well documented. Internet users generate billions of pieces of online content weekly across a number of social media platforms.

13.3 Social media companies have created platforms used by billions of people to come together, communicate and collaborate. The Internet provides unprecedented means for people to communicate and connect. It is constantly changing with new technology and innovative programmes that often outpace current legislation and regulatory systems.

13.4 It has been estimated that in 2018 the number of Internet users exceeded 4 billion, more than half the global population. Over 3 billion people use social media platforms such as *Twitter*, *Facebook* and *YouTube*.

13.5 *Facebook* alone claims to have more than 2 billion users.

13.6 Much of the material on these platforms is benign and useful for individuals and organisations. Unhappily, there is growing evidence that these platforms are being used to spread hate, abuse and extremism.

(1) Defining online harms

13.7 Online harm may take many forms. Individuals may be subject to harm in private forums. Harm may also occur in public forums.

13.8 Although there is no universally accepted definition of hate speech, for the purposes of this review, I suggest that this form of cyber hate encompasses the use of technology to express hatred, hostility, bias, prejudice, bigotry or contempt towards a person or persons because of a protected characteristic.

13.9 As discussed earlier in this review, such a definition expands the current use of the term 'hostility' and uses the term 'hatred', as used in the Public Order (Northern Ireland) Order 1987 (the 1987 Order).

13.10 This definition will capture a great deal of activity that currently takes place on the Internet or through email and mobile telephone technology.

13.11 Recent studies from across the world have found alarming levels of abuse online:

- More than one in ten Americans have suffered online harassment based on a protected characteristic;[205]
- An abusive or problematic tweet is sent to a female politician every thirty seconds;[206]

[205] Anti-Defamation League (ADL), *Online Hate and Harassment Report: the American Experience 2020*, (June 2020).
[206] Amnesty International, 'Troll Patrol Project'.

- Black women are 84% more likely than white women to receive abusive tweets;[207]
- Online disability hate crime increased by 33% between 2016/17 and 2017/18;[208] and
- One in four LGBT people have experienced hate speech – mostly online.[209]

13.12 It is important to emphasise that there are a number of features of online hate which make it distinct from offline hate. In summary, these are the following:

- Much of online hate is committed on social media and brings with it a '**public**' element which is quite distinct from off-line hate speech. This 'public' element needs to be distinguished from 'public order' which lies at the heart of some of the offences to be discussed below. The public element of online hate is about the potential for reputational damage or for public humiliation and embarrassment when comments appear on social media;
- This is compounded by the fact that an attack carried out on the Internet is potentially **permanent** in nature, and can have an almost limitless **reach.** Whilst there is no doubt that off-line attacks can leave permanent scars and can cause immeasurable pain, the attacks themselves will usually be of a finite nature; and, once a perpetrator is caught, can be stopped;
- However, the **permanency** and **reach** of the Internet can mean the online attacks never go away, even if a perpetrator is caught. This

[207] Ibid.
[208] Leonard Cheshire, 'Online disability hate crimes soar 33%' (May 2019). https://www.leonardcheshire.org/about-us/press-and-media/press-releases/online-disability-hate-crimes-soar-33
[209] Elida Hoeg, 'One of four LGBT people experience hate speech', *Science Norway* (23 March 2019). https://sciencenorway.no/forskningno-gender-and-society-norway/one-of-four-lgbt-people-experience-hate-speech/1553837

results in the victims of online hate being at risk of being exposed to the attack time and time again, thus rendering them re-victimised;[210]

- This demonstrates that the harm caused by online hate goes far beyond the impact of the words themselves. In some cases, damage can occur simply because the hateful material appears online;
- In her book, Citron shows that the harassment reported by interviewees for her survey went beyond the harm caused by the initial verbal attacks, and the fact that these attacks appeared on the Internet, and were therefore publicly and permanently accessible to anyone, caused additional pain and harm in the form of broken relations and damage to careers;[211]
- Furthermore, there is increasing evidence that online attacks of this kind can have an impact on victims' ability to maintain a public presence on the Internet. There is evidence that victims of cyber hate change their online behaviour in order to avoid attacks.[212] In an era when having a presence online is crucial – both for social and professional reasons – this is something that cannot be ignored; particularly, when we know that it is often minority groups that are most affected. There is even some evidence that the fear of online attacks has made some journalists very cautious about following certain stories which they know will attract online attacks;[213]
- There is also evidence that women in particular – including politicians – are at significant risk of being targeted online;[214]and
- This has led to calls for legislators to give serious consideration to the inclusion of gender as a protected characteristic for any online

[210] Chara Bakalis, 'Rethinking Cyberhate Law', *Information and Communications Technology Law* 27(1) (2017) p86-110.
[211] Danielle Keats Citron, *Hate Crimes in Cyberspace (*Boston: Harvard University Press, 2014)
[212] Melanie Stray, *Online Hate Crime Report 2017: Challenging online homophobia, biphobia and transphobia* (London: Galop report, 2017).
[213] Amy Binns, 'Fair game? Journalists' experiences of abuse online', *Journal of Applied Journalism and Media Studies,* 6(2), (2017) p183.
[214] Demos, *The use of misogynistic terms on Twitter* (2016). https://demosuk.wpengine.com/WP-content/uploads/2016/05/misogyny – online.pdf

offences. This characteristic is discussed in chapter 7, part one earlier.

13.13 There are strong and compelling arguments made by many respondents that online hate crime is a serious and growing problem that needs to be addressed.

13.14 This has been a significant reason for my recommendation that sex/gender should be a protected characteristic in any reformed hate crime legislation.

13.15 Given these distinctive features, a leading academic writer, Chara Bakalis, argues that it is necessary to think about online hate differently to offline hate, and that any offences we have need to be able to cover four distinct types of harm:

- The first type of harm is the harm caused to an individual when they are attacked online but in a private forum. This may happen by emails or text messages. This causes harm similar to off-line behaviour such as harassment, stalking or threats, causing alarm or distress;
- The second type of harm is the additional harm caused to an individual when the hate is communicated on social media or another public forum. As well as harassment, alarm or distress, a victim in this scenario is likely to suffer additional reputational harm that may manifest itself in broken relationships, career damage and that individual's ability to maintain a presence on the Internet. This necessitates a different offence than the first type of harm in order to recognise this additional harm;
- The third type of harm covers the case of speech that is not directed at any one person in particular but involves generalised hateful comments which poison the atmosphere and demonise particular groups of individuals who share a protected characteristic; and

- The fourth type of harm is the potential radicalisation of individuals or the entrenching of global hate movements.[215]

13.16 It is argued that these different categories of offence could form the framework for reformulation of the rules on cyber hate. It is important when regulating online hate to take account of these categories when considering the scope of existing or proposed criminal offences. I agree.

13.17 The relevant legislation in Northern Ireland was examined in some detail at chapter 12 of the consultation paper and this may be read by anyone interested in the full details of the legislation.

(2) The Regulation of online hate speech

13.18 Whilst it is accepted that there must always be scope for holding individual perpetrators criminally liable for hate speech online, the consultation paper argued that this is not the only way to regulate in this area, or even necessarily the most desirable for the following reasons:

- The sheer number of offences potentially taking place online make it impossible for the police and the courts to handle anything other than the most serious or obvious breaches of the law;
- Anonymity online can often make it extremely difficult to track down individual perpetrators;
- Sending an individual perpetrator to prison is often not the outcome or remedy that victims want. Time and again victims told the review

[215] Bakalis, 'Rethinking Cyberhate Laws', p86 -110.

team that what they want and need is for the offending material to be removed from the Internet as quickly as possible;

- Even if it were logistically possible to secure convictions for all offences committed online, it is not always desirable to punish individual perpetrators of hate in all but the most serious of cases;
- As a matter of general principle, the criminal law should only be used as a last resort when there are no alternative means of achieving the same end;
- When considering whether a law infringes Article 10 of the ECHR, one of the factors taken into account is the proportionality of the punishment. If behaviour is criminalised, it will need to be shown that punishing the offender was necessary in a democratic society. Given that many comments which appear online are made thoughtlessly and off-the-cuff, it is difficult to see how using the threat of imprisonment in such cases would necessarily be seen as proportionate and in compliance with Article 10;[216] and
- There is another relevant consideration, namely that online technology is not static. It is always changing and in many ways the law is inevitably several steps behind.

13.19 Governments worldwide have devoted increasing attention to the question of whether or not to impose legal responsibility on social media companies (SMCs) for the hate speech that appears on their platforms. It is argued that, given their technical know-how, they are best placed to remove offending material.

13.20 Coupled with the vast sums of money being made by such companies, the argument that they should bear some responsibility for the harms that flow from their business model seems irresistible.

[216] Jacob Rowbottom, 'To rant, vent and convert: protecting the low-level digital speech' *Cambridge Law Journal*, 71 (2) p355.

13.21 Until recently, the focus both in the European Union and internationally has been on exerting pressure on SMCs to sign up to voluntary codes of conduct to comply with notice and 24–48 hour take-down processes.

13.22 'Notice and take down' is the process by which users 'notice' offending material, report it to the platform, which then 'takes down' the material.

13.23 However, the success of these voluntary codes of conduct has been very mixed, and the trend appears to be towards creating legislation that will impose legal obligations on SMCs to comply.[217]

13.24 The second part of this chapter will focus on the liability of social media companies. The third part will focus on refining existing legislation which holds individuals liable for their online behaviour.

Regulating social media companies

13.25 This part will outline possible ways of regulating social media companies, looking first at the UK Online Harms White Paper, then examining the consultation responses before making recommendations.

The UK Government Online Harms White Paper 2019

13.26 The UK Government's 'Online Harms White Paper' published in 2019, aims to go far beyond legislating for the notice and take-down process, and puts forward a

[217] Chara Bakalis and Julia Hornle, 'The Role of Social Media Companies in the Regulation of Online Hate', *Studies in Law, Politics and Society*, (2020).

proposed extensive regulatory regime that would put it at the forefront of online regulation worldwide.[218]

13.27 The rationale underpinning the White Paper was generated by a highly critical report from the *House of Commons Home Affairs Committee* on 'Hate Crime: Abuse, Hate and Extremism Online'.[219]

13.28 The *Committee* found that there was a great deal of evidence that social media platforms are being used to spread hate, abuse and extremism.

It noted:

> That trend continues to grow at an alarming rate but it remains unchecked and, even where it is illegal, largely unpoliced. . . . It was shockingly easy to find examples of material that was intended to stir up hatred against ethnic minorities in all three of the social media platforms that we examined – *YouTube*, *Twitter* and *Facebook*.
>
> *YouTube* was awash with videos that promoted far-right racist tropes, such as anti-Semitic conspiracy theories. . . . On *Twitter*, there were numerous examples of incendiary content found using Twitter hashtags that are used by the far-right . . . A search for those hashtags identified significant numbers of racist and dehumanising tweets that were plainly intended to stir up hatred, including a cartoon of a white woman being gang raped by Muslims over the 'altar of multiculturalism'.
>
> On *Facebook* we found community pages devoted to stirring up hatred, particularly against Jews and Muslims, although much of the content that is posted on *Facebook* is done so within 'closed groups' and is not as openly available as similar content is on *Twitter*. . . . Women in particular have become targets for abuse and

[218] HM Government, *Online Harms White Paper* CP 57 (London: Her Majesty's Stationery Office, April 2019).

[219] House of Commons Home Affairs Committee, *Hate crime: abuse, hate and extremism online*, Fourteenth report of session 2016- 17, HC 609 (1 May 2017).

> misogynistic harassment on social media, particularly on *Twitter*. In a study, *Demos* found that 10,000 tweets were sent from UK accounts in three weeks aggressively attacking individuals as a 'slut' or a 'whore'. The *Fawcett Society* conducted an informal survey to examine the type and prevalence of abuse that women receive. Sexist messages were the most common type of harassment experienced, with 70% of respondents who had received abuse on *Twitter* saying they had experienced it. Around one third of women experienced 'politically extremist hate messages, unwanted sexual messages or images, stalking, threats of violence.[220]

13.29 Among many other findings and trenchant criticisms by the *Committee* were the following:

- The biggest companies have been repeatedly urged by governments, police forces, community leaders and the public, to clean up their act, and to respond quickly and proactively to identify and remove illegal content. They have repeatedly failed to do so. That should not be accepted any longer. Social media is too important to everyone – to communities, individuals, the economy and public life – to continue with such a lax approach to dangerous content that can wreck lives;
- The major social media companies are big enough, rich enough and clever enough to sort this problem out – as they have proved they can do in relation to advertising or copyright. It is shameful that they failed to use the same ingenuity to protect public safety and abide by the law as they have to protect their own income;
- Social media companies currently face almost no penalties for failing to remove illegal content. There are too many examples of social

[220] Ibid, p4-8.

media companies being made aware of illegal material yet failing to remove it, or to do so in a timely way. We recommend that the Government consult on a system of escalating sanctions to include meaningful fines for social media companies which fail to remove illegal content within a strict timeframe;

- We strongly welcome the commitment that all three social media companies (*YouTube*, *Facebook* and *Twitter*) have made to removing hate speech or graphically violent content, and their acceptance of the social responsibility towards their users and towards wider communities. . . . However, we believe that the interpretation and implementation of the community standards of practice is often too slow and haphazard;
- We have heard time and time again, from people without the platforms available to members of Parliament or journalists, that responses from social media companies to reports of unacceptable content are opaque, inconsistent or ignored altogether. It should not rely on high-level interventions for social media companies to take action; and there must be no hierarchy of service provision. We call on social media companies urgently to improve the quality and speed of their responses to reports of dangerous and illegal content, wherever those reports come from; and
- It is unacceptable that *Twitter*, *Facebook* and *YouTube* refused to reveal the number of people that they employ to safeguard users or the amount they spend on public safety initiatives because of 'commercial sensitivity'. These companies are making substantial profits at the same time as hosting illegal and often dangerous material; and then relying on taxpayers to pay for the consequences. These companies wield enormous power and influence that means that such matters are in the public interest.[221]

[221] Ibid, p15-19.

13.30 The *Committee* concluded that most legal provisions in this field predated the era of mass social media use and some predated the Internet itself.

13.31 It urged the Government to review the entire legislative framework governing online hate speech, harassment and extremism and ensure that the law was up-to-date.

It noted that:

> It is essential that the principles of free speech and open public debate on democracy are maintained – but protecting democracy also means ensuring that some voices are not drowned out by harassment and persecution, by the promotion of violence against particular groups, or by terrorism and extremism.[222]

13.32 The Online Harms White Paper of 2019 represents the Government's response to the very serious concerns raised by the *Committee*.

13.33 The White Paper proposes:

- A new duty of care to be imposed on Internet companies which will require them to take reasonable steps to keep users safe and prevent other persons being harmed as a direct consequence of activity on their services;
- Internet companies to be required to comply with this duty of care and compliance to be overseen by an independent regulator;

[222] Ibid, para 56.

- The regulator to have a suite of powers to ensure compliance with the duty of care and will have punitive powers such as the imposition of fines;
- The regulator to set out codes of conduct which will outline to companies how they can satisfy the duty of care and will also set out the expectation of how complaints procedures will work and operate;
- There will also be various other aspects to the regulator's powers such as the power to request information about how a company's algorithm works; and
- Broadly speaking, Internet companies to be required to remove material that is considered harmful.[223]

13.34 The consultation paper (at paragraph 12.26) raised a number of concerns about the detail in the White Paper, noting, for example, that the duty of care may be thought to be too wide, too vague and potentially unworkable.

13.35 However, the strength of the White Paper is its recognition of the public's growing concerns about online hate speech and the need to address these concerns in some form of legislation.

13.36 The consultation paper noted that:

> Whilst the role of SMCs is beyond the remit of this review, when analysing the current provisions for holding individual perpetrators responsible for what they post online, it is important to bear in mind that legislation does not have to solve *all* the problems of online hate, and that SMCs are likely to play a central role in regulating this area in the future. It will, therefore, become important to make a distinction between

[223] HM Government, *Online Harms White Paper,* CP57 (April 2019).

> the types of hate speech which are serious enough that individuals who use that speech should be held liable, and hate speech which is not serious enough to incur personal liability, but which is harmful enough that it should not be published online.

13.37 The question of whether and how to regulate cyber hate is a question that has resulted in many diverse responses in different countries and varied and different levels of concern about the limits and extent of the freedom of speech. There are a very broad range of opinions.

Comparative examples

13.38 At one end of the spectrum, in the United States of America (USA) where there is a long tradition of protecting freedom of speech under the First Amendment to the Constitution, the *Supreme Court* held that:

> *The constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*[224]

13.39 Professor Catherine O'Regan, *Professor of Human Rights Law and Director of the Bonavera Institute of Human Rights* at the *University of Oxford* has observed:

> The prohibition on hate speech is far narrower than in many other democratic countries. The approach to freedom of speech in the USA is particularly important, because as the home of all the giant Internet intermediaries with global

[224] Brandenburg V Ohio 395 US 444 (1969).

> reach . . . It is that approach to free speech which has informed the expectations and attitudes of those intermediaries and of many commentators in the field.[225]

13.40 In the USA, Section 230 of the Communications Decency Act 1996 (47 USC S2 30) provides that Internet service providers are not to be treated as publishers of information, or speakers, in relation to any content they publish that has been produced by another person.

13.41 In effect, this means that in the USA Internet service providers are regarded as intermediaries not publishers, and exempts them from the obligations normally imposed upon publishers of speech, like newspapers, broadcasters and publishing houses.

13.42 O'Regan notes that there are two exceptions to the exemptions provided to Internet intermediaries by Section 230. The first is a provision that relates to the publication on Internet platforms of material that infringes copyright. The second is an exemption clarifying that Section 230 does not prohibit the enforcement of federal and state criminal and civil law relating to the sexual exploitation of children against Internet intermediaries. She describes the latter provision – effective from 2018 – as having been strongly opposed by free speech and civil liberty organisations.

13.43 A different approach is evident from the German example. The German Government introduced an important law to regulate online speech including hate speech which became fully effective from January 1, 2018.

[225] Catherine O'Regan, 'Hate Speech Online: an (Intractable) Contemporary Challenge?' *Current Legal Problems*, 71 (1) (2018), p403 – 429.

13.44 This law – the Network Enforcement law – imposes a number of obligations on social media companies:

- It requires that the social media companies adopt effective and transparent procedures to handle complaints about illegal content being published on the platforms. This process provides that complaints must be considered immediately and, where the content is found to be illegal, must block or delete such content;
- So-called 'manifestly illegal' content must be removed or blocked within 24 hours of the receipt of the complaint. Other illegal content or more complex material must be blocked within a week. O'Regan notes that both complainants and content generators must immediately be informed of the decision on the complaint and reasons for the decision must be provided;
- Severe penalties for non-compliance are included. Failure to establish and implement the process for handling complaints may lead to the imposition of fines of up to €5 million; and
- A reporting duty on networks is imposed. There is an obligation that all platforms that receive more than 100 complaints per calendar year about unlawful content must publish biannual reports on their activities. This provision is designed to provide clarification on the way content is moderated and complaints handled on social networks.

13.45 O'Regan notes some difficulties with the approach adopted in Germany.

She says:

> Legitimate concerns have been raised that there is a risk of platforms will 'over block' content, that is, that they will block or delete content that is not

> unlawful, with deleterious implications for freedom of speech.[226] [227]

13.46 As the Germany Director at *Human Rights Watch* has said:

> [The law] is vague, overbroad and turns private companies into overzealous censors to avoid steep fines, leaving users with no judicial oversight or right to appeal.[228]

13.47 On the other hand, the approach taken by the German Government had an approval rate of 87% with German voters.[229]

13.48 Whatever the perceived shortcomings of the German legislation, it did at least push the platforms to eventually take action against hate speech, an achievement which should not be underestimated.[230]

13.49 A recent example is the French experience. In May 2020, the *French National Assembly* passed a new law requiring social media companies to remove certain content within one hour or face heavy fines. This regulation requires social media companies to delete hate speech and illegal content from the platforms, with potential fines capped at one million euros. Hateful content was defined as including racism, sexual discrimination and sexual harassment, while illegal content relates to child pornography and terrorism.

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[226] Ibid.

[227] See also Bakalis and Hornle, 'The role of social media'.

[228] Human Rights Watch, 'Germany: Flawed Social Media, NetzDG is Wrong response to Online Abuse', 14 February 2018. https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law

[229] See Heidi Tworek and Paddy Leerssen H, *An Analysis of Germany's NetzDG Law*, Transatlantic Work Group (15 April 2019).

[230] For a fuller discussion and critique of the legislation see Amélie Pia Heldt, 'Reading Between the Lines and the Numbers: an Analysis of the First NetzDG Reports' *Internet Policy Review,* 8 (2) (2019).

13.50 Under the new law, firms would have 24-hours to remove hateful content and one hour to remove illegal content.

13.51 A number of legal experts and activists expressed the fear that this law would grant the Government unprecedented power to censor online activities. Critics argued that it could restrict freedom of expression. The French law was criticised, as was the German law, because there are no penalties if social media networks wrongly remove content that is later found not to be in violation of any laws. *National Rally Party* President, Marine Le Pen, described the law as “a serious violation of freedom of expression”.

13.52 In June 2020, the French law was considered by the Constitutional Court.

13.53 It declared the law to be unconstitutional and in breach of the right to freedom of expression protected by Article 11 of the Declaration of Human and Citizen Rights of 1789 and Article 34 of the French Constitution. It ruled further that the law was disproportionate to the purpose pursued.

13.54 The Court acknowledged that it was open to the legislature to enact rules concerning the exercise of the right of free communication and the freedom to speak, write and print.

13.55 The legislature was also entitled to institute provisions to stop abuses of freedom of expression and communication that violates public order and the rights of third parties.

13.56 However, it concluded:

> *Freedom of expression and communication is all the more valuable because its exercise is a condition of democracy and one of the guarantees of respect for other rights and freedoms. It follows that infringements of the exercise of this freedom must be necessary, appropriate and proportionate to the objective pursued.*[231]

Responses to the consultation paper

13.57 Question 40 in the consultation paper asked *'Should social media companies be compelled under legislation to remove offensive material posted online?'*

13.58 There was strong support for this proposal from both respondent organisations (86%) and individuals (71%).

13.59 The respondents who agreed argued that there had been a significant and rapid growth in online abuse targeted at individuals from marginalised groups including women, disabled people, people of colour, trans-people and Jewish people.

13.60 It was felt that 'self-regulation' policies encouraging social media companies to sign up to voluntary codes of conduct have largely proved ineffective. A number of respondents noted their support for the proposals contained within the UK Government's white paper.

13.61 Some opposed such a move or expressed reservations about the term 'offensive'. It was felt this term was too vague, subjective and politicised.

[231] Decision number 2020 – 801 DC June 18, 2020 – Constitutional Council of the French Republic.

13.62 In Northern Ireland, the *Public Prosecution Service (PPS)*, whilst agreeing that the posting of offensive material online is a significant problem, and noting that an enhanced regulatory system may go some way to limiting the damage caused by harmful postings and will afford a much greater level of protection than that which can be provided by the criminal law alone, expressed reservations at the use of the words 'offensive material'.

13.63 I accept the criticism of the term 'offensive material posted online'. It is too subjective and too wide in its potential scope.

13.64 On reflection, I believe that the definition suggested earlier in this chapter will provide the certainty required. (see 13.8 infra)

13.65 I will revisit the issue of definition later in this chapter when examining the reach of Section 127 of the Communications Act 2003.

13.66 It will be recalled that I suggested that cyber hate encompasses the use of technology to express hatred, hostility, bias, prejudice, bigotry or contempt towards a person or persons because of a protected characteristic.

13.67 The *Church of Ireland Church and Society Commission* argued that it was important to strike a fair balance in the following terms:

> Major social media companies have proven, time and again, that when it is in their interest they are capable of swiftly and efficiently removing any content they wish to. There should be no reason why legislation cannot require a system to quickly remove any content deemed to be in breach of legislation. Care should be taken not to create overly draconian requirements which would be open to significant

> misuse, but this is true of any law. Smaller companies may require some leeway in compliance but the large social media networks, which are run by a small handful of wildly profitable companies, are well able to meet demands far in excess of what would be required. The extent of the proliferation of several social media platforms renders them almost indistinguishable from a broadcaster (excepting that most operate on a larger scale and have orders of magnitude greater reach) and they should be regulated in the same manner.

13.68 Both the *DUP* and *Sinn Féin* expressed broad agreement with the UK Government's White Paper on online harms and the regulatory system it advocates. The *DUP* added:

> This would see different approaches to legal and illegal content. For illegal content companies must remove material expeditiously and take steps to prevent it repeating. On the other hand, for legal content deemed harmful, companies will have autonomy around whether it is removed but will be expected to set out clearly what is deemed acceptable or not and to enforce that policy. Importantly users would have the right to challenge content being taken down. Again, as with thresholds for prosecutions, definitions of 'offensive' material must be narrow and precise so as not to infringe fundamental freedoms.

13.69 I began this chapter by accepting that the Internet has created unprecedented means for people to communicate and connect, providing a platform for social and political discussion, analysis and comment.

13.70 Against that positive contribution there are serious issues such as that the Internet has facilitated the spread of hate speech in the virtual world, especially in the

use of social media. The Internet has facilitated easy access both to information and disinformation.

13.71 In April 2019, the *United Nations Secretary General*, Antonio Guterres, issued a statement noting the groundswell of intolerance and hate-based violence around the world and the xenophobia aimed, not only at religious groups, but also at migrants, minorities and refugees. He specifically drew attention to the growth of hate speech pointing out that:

> Parts of the Internet are becoming hothouses of hate, as like-minded bigots find each other online, and platforms serve to inflame and enable hate to go viral . . . The world must step up to stamp out anti-Semitism, anti-Muslim hatred, persecution of Christians and all other forms of racism, xenophobia, discrimination and incitement.[232]

13.72 It is true that various social media companies have engaged with moderation schemes to monitor posts and comments. The scale of the challenge is considerable and attempts to develop electronic or artificial intelligence (AI) moderation solutions are ongoing. Human moderators are used, but achieving consistency and fairness in determinations is proving challenging.

13.73 The ***Financial Times*** reported*:*

> Experts warn that AI still falls dramatically short when it comes to policing 'grey area' content, particularly hate speech or harassment, that

[232] United Nations, *Political, Religious Leaders Have Special Duty to Promote Peaceful Coexistence, Secretary General Stresses in Statement on Intolerance, Hate-based Violence,* (29 April 2019) https://www.un.org/press/en/2019/sgsm19559.doc.htm

> requires understanding of nuance or knowledge of the latest slang.[233]

13.74 Many of the social media companies have been repeatedly criticised for their failure to address a wide range of issues on the platforms, including the online harms outlined above.

13.75 In March 2019 the *House of Lords Communications Committee* issued a paper – '*Regulation in a Digital World'*.

13.76 The *Committee* noted:

> Content moderation is often ineffective in removing content which is either illegal or breaks community standards. Major platforms have failed to invest in their moderation systems, leaving moderators overstretched and inadequately trained. There is little clarity about the expected standard of behaviour and little recourse for a user to seek to reverse a moderation decision against them. In cases where user's content is blocked or removed this can impinge on the right to freedom of expression.[234]

13.77 Some have argued that online platforms are no longer simply neutral hosts of content and should be treated more like publishers.

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[233] Hannah Murphy, 'Can Facebook really rely on artificial intelligence to spot abuse?' *Financial Times*, 8 November 2019

[234] House of Lords Select Committee on Communications, *Regulating in a Digital World,* 2nd Report of Session 2017-2019, HL Paper 299 (2019) para 222.

13.78 In a debate in the *House of Lords* on the issue in January 2018, Baroness Kidron, a crossbencher, put forward this argument in a debate on social media:

> In common with publishers and broadcasters, these companies use editorial content as bait for advertising. They aggregate and spread the news, and provide data points and keywords: behaviours that determine what is most important, how widely it should be viewed and by whom. In common with news publishers, they offer a curated view of what is going on in the world.[235]

13.79 While careful judgement must be exercised which balances harm against freedom of expression and guards against undue censorship, it is now widely accepted in the United Kingdom, and specifically in Northern Ireland, that there is a need to establish a new independent body responsible for overseeing the regulation of all online content.

13.80 A major conference was held in Belfast on 27 February 2020, facilitated by the *PSNI* and the *Policing and Community Safety Partnership (PCSP)* on the theme of online hate crime.

13.81 Speakers included the *Minister of Justice*, Naomi Long MLA: Chara Bakalis, *Principal Lecturer in Law*, *Oxford Brookes University*: Paul Giannasi, *National Police Hate Crime Advisor*, senior representatives from *Facebook*; and the present writer.

13.82 Paul Giannasi and Chara Bakalis are members of the Core Expert Group for this review.

[235] HL Hansard, 11 January 2018, column 367.

13.83 95% of respondents to a questionnaire carried out before and during the conference felt that social media companies should be subject to a statutory regime and compelled to remove hateful material posted online. The remaining 5% indicated that they were unsure.

13.84 93% of respondents to the questionnaire felt that social media users should be required to verify their identity, whilst 84% of respondents felt that material downloadable in Northern Ireland should be subject to the jurisdiction of the courts here.

13.85 In April 2019 the *Government at Westminster* published its White Paper proposing a new regulatory framework for online platforms.

13.86 Announcing those proposals, the *Secretary of State for Digital, Culture, Media and Sport*, the Rt Hon Jeremy Wright QC MP, said:

> It can no longer be right to leave online companies to decide for themselves what action should be taken, as some of them are beginning to recognise. That is why my Right Honourable friend the Home Secretary and I have concluded that the Government must act and that the era of self-regulation of the Internet must end.[236]

13.87 The White Paper proposed that the regulator be given powers to ensure effective enforcement, including the power to issue civil fines, serve notices of breach of standards, require information from companies regarding alleged breaches and publish notices of non-compliance.

[236] HC Hansard, 8 April 2019, column 55.

13.88 The White Paper proposals were generally well received, although some thought them too ambitious and others unrealistically feeble. *The Guardian* newspaper argued that the White Paper does not address the difficulties of enforcement:

> Effective enforcement would demand a great deal of money and human time, which neither the Government nor the tech companies wish to spend. The present system relies on a mixture of human reporting and algorithms. The algorithms can be fooled without too much trouble: 300,000 of the 1.5 million copies of the Christchurch terrorist videos that were uploaded to *Facebook* within 24 hours of the crime were undetected by automated systems. Meanwhile, detection of the great majority of truly offensive material relies on it being reported by human beings. The problem there is incentives: the people most likely to see such things will have sought them out deliberately, and so they have no reason to report them.[237]

13.89 The reach of the proposals was criticised by a number of commentators who argued that the tech companies would be intimidated by such strict regulation and would be tempted to remove a disproportionate amount of speech to avoid massive fines and satisfy the regulator.

13.90 The *Government* has published an **Online Harms Reduction Regulator (Report) Bill 2020 after the period of consultation.**

13.91 The Bill currently has only three sections, including an interpretation section and the commencement section. It is likely to take some time before it becomes law. Even then, it will take some time for the necessary regulatory structure to come into operation. The Bill envisages a single law for the United Kingdom as a whole.

[237] 'The Guardian view on online harms: white paper, grey areas', *The Guardian,* 8 April 2019.

13.92 The main details of the *Government* proposals for reform need to be fully developed and a lot will depend on the regulatory system. It is unclear what the regulatory system will look like or whether or not it will meet the expectations of the powerful regulatory system envisaged by the White Paper.

13.93 Rather, the Bill provides that *Ofcom* is to prepare and publish a report containing recommendations for the introduction of an online harms reduction regulator and that such a report must include recommendations for a duty on online platform service operators operating in the United Kingdom to ensure that –

> (a) Service users are free from harm arising from the service's operation or use; and
>
> (b) The service is provided so that people who are not users of that service but may be affected by it are not harmed as a result of its operation or use, as far as is reasonably practicable, and the harms are reasonably foreseeable.[238]

13.94 It is further provided that such an *Ofcom* report must include recommendations for matters to which an online platform service operator's duty may relate, including the prevention:

> [O]f racial hatred, religious hatred, hatred on the grounds of sex or hatred on the grounds of sexual orientation or discrimination against a person or persons because of a protected characteristic.[239]

[238] Clause 2 a (3) – amending the Communications act 2003, section 2
[239] Clause 2 a (4)

13.95 Such a report is to be published within one year of the legislation coming into force and each year thereafter and should be laid before both Houses of Parliament. This raises questions about future policy-making as a future government may decide to act outside the terms of the report.

13.96 Finally, it is provided that the *Secretary of State* must, within one year of the first report being laid before both Houses of Parliament, publish a draft Bill to create an online harms reduction regulator in accordance with the recommendations in the reports.

13.97 At the time of writing, the Bill has not yet received a second reading. Given the *Government's* current legislative timetable, it seems unlikely that any regulatory system will be introduced in the United Kingdom for some time to come. A great deal will depend on the *Government's* own set of priorities and how this will work out is a matter of conjecture.

13.98 In February 2020 the *Government* said it was minded to appoint *Ofcom* to regulate harmful content online – which clearly goes further than the proposals in the current bill.

13.99 This immediately led to complaints that *Ofcom* would soon be policing the web, shutting down sites and censoring content. This appointment, which has yet to be decided at the time of writing, is critical to the success or otherwise of the introduction of a new regulatory system for the Internet.

13.100 Kevin Bakhurst, *Group Content Director of Ofcom*, argues that online regulation poses no threat to freedom of speech.

13.101 In a leader in ***The Times*** on 27 February 2020 he noted:

> I believe those concerns are unfounded but I understand the basis for them. Free speech is the beating heart of our society. It is also central to our work as the U.K.'s broadcasting watchdog, thanks to three important principles. First, we never censor content. Our power to sanction broadcasters who breach our rules applies only after a programme has aired. The clear, fair and respected code that we enforce on TV and radio acts as a strong deterrent against poor behaviour. Second, we are independent from Government, free from corporate or political influence. We believe the same should be true of the online regulator. And third, we are already legally required to secure audience protection in a way that best guarantees freedom for broadcasters to transmit a range of ideas.

13.102 Bakhurst concluded:

> If given the job, we would act sensibly and proportionately, focusing on the most serious and widespread harm, especially to children, not hounding small businesses or seeking to curtail the editorial freedom of new sites. Some safeguards will come next year, when *Ofcom* takes on a specific role to address illegal content and damage to children on some video sharing services. If confirmed as the watchdog for wider online harms, we would expect to have the resources and teeth to hold companies to account. Next year's changes will allow us to fine video sharing platforms up to 5% of their relevant revenue; and tough enforcement powers would also be necessary against technology giants with billion dollar turnovers.

13.103 However, is hard to be certain if there will be a lengthy delay before such powers are given to *Ofcom* or any other regulator in the United Kingdom – if, indeed,

the proposals in the White Paper are ever put into effect given the rapidly changing nature of the Internet and technological developments.

13.104 As mentioned above, the proposed Bill applies to the whole of United Kingdom as Internet services and their regulation is a reserved matter, meaning that it is for the UK Government to legislate in this area and any new legislative framework is to be applied on a UK wide basis.

13.105 The White Paper made it clear that the scope of any UK wide changes to the law relate to offences in Scots and Northern Ireland law.

13.106 The responses to the consultation paper provide support from the overwhelming majority of respondents to introduce appropriate regulatory powers to oversee the Internet.

13.107 It is appropriate to recommend that a regulatory regime should impose legal responsibility on the social media companies for the hate that appears too frequently on their platforms and for its removal in appropriate circumstances.

13.108 The 2019 White Paper, whilst not perfect, appears to recognise the concern in relation to online hate speech and the public/private divide. It is too early to speculate whether the Bill will deliver the expectations in the White Paper.

13.109 When imposing limitations on what citizens can say, in order to avoid over-restrictive provisions, the State needs to ensure that private conversations are generally exempt from hate speech laws.

13.110 One option is to say that everything posted online is public. But that would surely cast the net of liability far too wide, and will include private conversations between individuals via email, in private messaging, Skype conversations, WhatsApp and other channels.

13.111 As such, a much more nuanced approach to outlawing speech online is necessary, but identifying the public/private divide is not easy. Although the White Paper did not offer answers to these thorny questions, it is to be welcomed that it did identify this issue as one that requires urgent consideration.

13.112 Unhappily, it may be observed that the sense of urgency appears to have become greatly diluted in the mind of legislators at Westminster if one is to judge by the Bill that was introduced in January 2020 and which still awaits its second reading at the time of writing.

Northern Ireland and the Internet

13.113 There is a widespread appetite in Northern Ireland for holding Internet companies responsible for the hate that appears on their platforms.

13.114 I fear that the current approach of the *UK Government* lacks obvious resolve to address a very serious problem and will not deal with the serious harms of hateful expression in Northern Ireland in a reasonable timescale, if at all.

13.115 There is a critical question as to what may be undertaken in Northern Ireland, pending resolution of the situation in the UK.

13.116 Clearly, any proposed new Northern Ireland hate crime legislation will be introduced into the *Northern Ireland Assembly*. Given the likely delay in the UK this may seem a feasible option in the short term. Criminal justice legislation, including the

stirring up provisions under the 1987 Order and other offences around harassment, intimidation *et cetera* are within the legislative competence of the *Assembly* by virtue of being 'transferred' matters.

13.117 'Reserved' or 'excepted' matters are those matters **usually** legislated for at Westminster.

13.118 Telecommunications is a 'reserved matter'.[240] However, this does not mean that the *Assembly* **cannot** legislate on telecommunications matters. The *Assembly* **can** do so provided there is consent from the *Secretary of State.*[241]

13.119 The **Online Harms Reduction Regulator (Report) Bill 2020** proposes to amend the Communications Act 2003.

13.120 Should that not yield satisfactory results, the *Assembly* may consider seeking the consent of the *Secretary of State* to pass such legislation in Northern Ireland, although, realistically, the *UK Government* is unlikely to approve of different regulatory regimes in different parts of the United Kingdom.

13.121 I believe that a regime broadly similar to that envisaged in the 2019 White Paper should be legislated for in Northern Ireland to regulate hate speech and harmful content online. I therefore recommend:

[240] See schedules 2 and 3 of the Northern Ireland Act 1998 – specifically paragraph 29 of schedule 3.
[241] See section 8 of the Northern Ireland Act 1998. A provision that deals with an excepted matter is also not outside the legislative competence of the Assembly if it is ancillary to other provisions in the Bill (or previously enacted provisions) that deal with reserved or transferred matters – see section 6 (2) (B) Northern Ireland Act 1998.

Recommendation 25

The proposals contained in the United Kingdom Government's 'Online Harms' White Paper (2019) should be implemented in full.

Given that legislation in this area is a reserved matter, the Assembly in Northern Ireland should consider whether or not to encourage implementation of these proposals by the Government of the United Kingdom, or, in the alternative, seek the agreement of the Secretary of State for Northern Ireland to allow the Assembly to enact appropriate legislation on this issue in Northern Ireland.

13.122 If there is support within the *Northern Ireland Assembly* in favour of this proposal, then the *Executive* might be persuaded to make representations for a speedy resolution of the regulatory system.

13.123 I also recommend:

Recommendation 26

In terms of jurisdiction for dealing with online hate speech, the law should be clarified to confirm that any online material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the courts of Northern Ireland.

13.124 However laudable the aims of the White Paper are, I believe there is good reason to suggest that it does not go far enough.

Anonymity and the Internet

13.125 One of the key areas of concern identified by the participants in the Belfast Conference on Online Hate Crime in February 2020, was the anonymity currently provided to people on the Internet. This encourages users to feel disinhibited in what they post and clearly provides cover and protection for the spreading of hate speech online.

13.126 The academic writer Sarah Rohlfing has observed that:

> The Internet allows easy access to information and can connect people who would have previously been isolated from one another… activities carried out on the Internet are largely anonymous, which reduces self-disclosure and contributes towards the formation of virtual relationships. The Internet further enables individuals with common beliefs to find and communicate with one another and build virtual communities all over the world.
>
> However, these virtual relationships also allow the reinforcement of socially unacceptable behaviours, including spreading messages of hatred.[242]

13.127 I believe that there should be procedures in place to make the detection and removal of hateful content easier and for this to be the responsibility of the service providers.

13.128 Key to such procedures should be the requirement that users who sign up for the service provide verifiable personal information including their contact details and some form of identification.

[242] Sarah Rohlfing, 'Hate on the Internet', in *The Routledge International Handbook on Hate Crime,* eds. Nathan Hall *et al.,* (Oxon: Routledge, 2014).

13.129 Rohlfing argues that such a basic requirement could lead to two advantages:

> First, the provision of this information might decrease the level of perceived anonymity, which in turn might influence and limit what information people chose to upload.
>
> Second, the information can be readily passed onto the authorities in instances where the user posts or uploads content that potentially constitutes a criminal offence.

13.130 The phenomenon of online bullying is closely associated with online hatred, causing lasting damage including high levels of depression and suicide amongst its victims. It is perhaps here that the perpetrators ability to remain anonymous is most insidious. There is a point here that many – myself included – had no idea of how ghastly this might be – it was only with the information provided by MPs and others that I realised how unsettling and upsetting this can be.

13.131 Abbee Corb, a consultant with the *Law Enforcement and Intelligence Services* in Canada, cites the following disturbing post from a racist group in the USA lauding the usefulness of anonymity online:

> The Internet is great for communication. You can send email or chat with somebody anywhere in the world on the Internet for free. You can post messages on bulletin boards where potentially millions of people can read your information. The information can be posted anonymously or with a pseudonym. You can debate with anti-racists or just post racialist ideology and information. There are no limits to free speech on the Internet, anything goes. The glory of the Internet is its openness. There are few intermediaries if any, no editors, no borders and above all, no censors. Internet users can talk to anyone, anywhere,

> anytime about anything. They can be as private as they want, as straitlaced or as unbuttoned.[243]

13.132 It seems bizarre and unacceptable that one cannot open an Internet banking account without providing comprehensive verifiable personal information, yet the SMCs make little or no effort to seek such information for those who wish to use their services.

13.133 The strength of feeling on this issue among members of the public was amply demonstrated at the Belfast conference in February 2020. A great majority of those attending felt that social media users should be required to provide evidence of identity when seeking to avail of the services of social media companies.

13.134 It is accepted that the matter is not entirely straightforward.

13.135 As Chara Bakalis - one of the principal speakers at the conference points out – the contrary argument is that anonymity online can be important to enable users to connect with people without fear of repercussions. She argues that whilst this does give racists and others a veil behind which they can hide, it also empowers people who otherwise have no voice or space.

13.136 She argues that taking away anonymity is not the answer, as it will remove much of what is beneficial about the Internet generally and social media in particular. She also questioned whether the removal of anonymity was consistent with the right to freedom of expression, arguing that it may not be a proportionate response if it cannot be shown to be necessary in a democratic society and suggests examining whether other ways could be employed to achieve the same desirable end.

[243] Abbee Corb, 'Online hate and cyber- bigotry: a glance at our radicalized online world', in *The Routledge International Handbook on Hate Crime,* eds. Nathan Hall *et al.,* (Oxon: Routledge, 2014).

13.137 Another distinguished member of the *Core Expert Group*, Dr Jennifer Schweppe, has voiced similar concerns.

13.138 Bakalis accepts that there is a case for making the process of requiring social media to hand over the Internet Protocol (IP) addresses of its users in cases where crime has potentially been committed to be strengthened.

13.139 However, it seems unlikely that this will, of itself, deal comprehensively with the problem of anonymity.

13.140 Sol Littman is a sociologist and journalist. Some 30 years ago he wrote an article predicting that the Internet, in spite of its great promise, would become an instrument of hate and confusion owing to its obliquity, anonymity and lack of editorship. He spent fifteen years as Canadian Director of the *Simon Wiesenthal Centre* during which he searched international archives for evidence against the several hundred Nazi war criminals who had taken shelter in Canada and the United States.

13.141 Whilst he accepts that the lack of agreement about what constitutes 'online hate crimes' across different countries can inhibit effective policy-making and law enforcement, he is not daunted by these complexities and challenges. He observes:

> In reality, hate utterances on the Internet can easily be blocked. Every Internet message is forwarded by a provider who has only to 'pull the plug' to silence the sender. And on occasion it has been done in response to complaints with a minimum of fuss and bother. True, the sender can then seek out another provider but he is liable to meet the same fate wherever he goes. . . . Then why doesn't it happen this way? After all, the giant providers are private companies and like newspapers they are under no obligation to print every 'letter to the editor' or every article

> submitted. They have the ultimate right of 'editorship'. They can, if they wish, pick and choose. But the providers are reluctant to play the editorial role; they would rather take refuge in the notion that there are simply 'carriers' who only deliver the package regardless of its content. They are deterred by the sheer volume of transmissions on the networks and the possibility of frivolous lawsuits launched by rejected senders.
>
> There are ready answers to both these problems. In the same way that the default computer user can eliminate spam by blocking specific words, phrases or company names, providers can be alerted to questionable material on the network. Also, given the violent nature of much of the hate material posted on the Internet, the courts are unlikely to rule in their favour.[244]

He concludes with these powerful questions*:*

> Not all restrictions are evil. Traffic laws limit our God given freedom of movement. Speed limits, traffic lights, stop signs serve to keep traffic moving and prevent us from going the wrong way up a one-way street. Surely if we can abide traffic laws that protect our lives we can abide some limits on freedom of expression in order to prevent senseless attacks on our reputations and the security of our gender, race, national origin and sexual preference . . . Surely we can find a way to keep hate material, reputation assassination and sexual predation in check on the Internet. Given the importance and rapid efflorescence of the Internet, isn't it time that we reined our enthusiasm for this new medium and take a second look to determine what is worth promoting and what is best discarded?

[244] Sol Littman 'A personal reflection on good and evil on the Internet', in *The Routledge International Handbook on Hate Crime,* eds. Nathan Hall *et al.,* (Oxon: Routledge, 2014).

13.142 I have considered the issue of anonymity very carefully, particularly given the concerns of distinguished academics such as Chara Bakalis and Dr Jennifer Schweppe.

13.143 However, I am satisfied that to do nothing, or nothing that is likely to be effective in this area, will give racists, misogynists and abusers generally free rein to do as they please and cause irreparable damage to victims, whilst taking no responsibility for their criminal actions.

13.144 I recommend that:

Recommendation 27

There should be a legal requirement on social media companies to ensure that potential users who wish to avail of their services must provide verifiable personal information before they are permitted to use those services.

As this recommendation involves legislating in respect of a reserved matter, see Recommendation 25 above.

13.145 I appreciate that this may mean that some groups, such as illegal immigrants, may be unable to access such services because of a lack of verifiable personal information. Some accommodation may need to be made to deal with this issue, but I believe that the greater good requires placing such a legal requirement on social media companies.

13.146 As with the proposed regulatory framework for social media companies, this proposal falls within reserved matters and will normally require primary legislation from the UK Parliament.

13.147 However, as indicated above, such a change in the law **could** be made in Northern Ireland with the consent of the *Secretary of State* in advance of England Wales and Scotland.

13.148 It is perhaps frustrating that crucially important reforms of the law may not be able to be changed by the *Assembly* but will rely on a similar line being taken by the *Government of the United Kingdom*.

13.149 However, there are a number of important potential changes and clarifications to the law which **are** clearly within the competence of the *Assembly*.

(3) Holding individuals liable for online hate speech

13.150 This part focus on key issues for personal criminal liability. I will examine (1) the stirring up offences; (2) harassment offences; and (3) technology-based offences.

13.151 The stirring up offences will be considered under the headings of:

(a) jurisdictional issues;

(b) meaning of publication:

(c) the dwelling defence, and

(d) private conversations.

Stirring up offences (a) – jurisdictional issues

13.152 In this respect, the case of R v Sheppard (2010) EWCA Crim. 65 is of particular importance.

13.153 That case established that offenders in criminal cases can be tried in the same jurisdiction in which they committed the offence – where the button to upload the hateful content was pressed, regardless of where the Internet servers are hosted.

13.154 As Sarah Rohlfing observes:

> The importance of the decision of this case rests with the location of the host server the accused parties used to upload their hateful materials (California, US), where the upload of these materials was not classed on offence. The parties were subsequently convicted of inciting racial hatred and their appeal dismissed on three points. First, almost everything in the case related to the UK (where the material was created, edited, uploaded and controlled). Second, the content of the material was aimed primarily at the British public with the intent of stirring up racial hatred. Third, the only foreign element was the location of the website server, which was only one stage in the transmission of the material.[245]

Stirring up offences (b) – publication

13.155 Article 10 of the Public Order (Northern Ireland) Order 1987 reads as follows:

> *Publishing or distributing written material*
>
> *10(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if –*
>
> *(a) He intends thereby to stir up hatred or arouse fear; or*
>
> *(b) Having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be arise thereby.*
>
> *(2) In proceedings for an offence under this article it is a defence for an accused who is not*

[245] Rolfing, "Hate on the Internet', p299.

shown to have intended to stir up hatred or arouse fear to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(3) References in this part of the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

13.156 Article 17 of the 1987 Order – the interpretation article – defines 'written material' as including any sign or other visible representation.

13.157 In Northern Ireland, currently, the 1987 Order does not make explicit provision for online publication. This is a serious shortcoming in the law.

13.158 Question 43 in the consultation paper asked respondents whether or not the term 'publication' in the 1987 Order should be amended to include 'posting or uploading material online'.

13.159 100% of organisational respondents agreed that it should, together with 79% of individual respondents giving an average response of 91% in favour.

13.160 Respondents argue that in the modern context, whereby a significant amount of hate speech occurs online, amendment of the term 'publication' to include 'posting or uploading material online' was reasonable, appropriate and necessary in order to bring the legislation up-to-date and ensure its efficacy.

13.161 One respondent noted that the term 'publication' has been interpreted by the *Court of Appeal* in England to include the posting of or uploading of material online but argued that, to ensure clarification and certainly in the jurisdiction of Northern Ireland, such an amendment was appropriate.

13.162 I recommend that where the term 'publication' appears in the Public Order (Northern Ireland) Order 1987 it should be amended to include 'posting or uploading material online'. I have captured this in my recommendation in Chapter 9 regarding proposed changes to the Public Order (Northern Ireland) Order 1987.

13.163 In its 2020 consultation paper on hate crime, the *Law Commission for England and Wales* noted that the current legislation in England and Wales is such that it does not make explicit provision for online publication.

13.164 However, it notes further that, in practice, the existing categories have proved flexible enough to accommodate material posted online.

13.165 The equivalent section to Article 10 of our 1987 Order – expressed in identical terms – is Section 19 of the Public Order Act 1986 .The *Commission* noted that the decision in Shepherd held that the expression 'written material' was sufficiently wide to include articles in electronic form.

13.166 The *Law Commission* points out that the publication or display of the physical media – such as science, books, magazines and sound and video recordings – for which the public order offences were drafted as dealing with a discrete event (even if that event might be repeated).

13.167 For such offences, the relevant test for mental state – in relation to the intent and knowledge of those involved in disseminating inflammatory material – is that point at which material is possessed, published, staged, played, broadcast or distributed.

13.168 However, it suggests:

> *In contrast, publication on the Internet is an ongoing process. A service provider may be unaware of the point at which material is posted or uploaded that is threatening or abusive or likely to incite hatred, but later become aware of this, while that material remains available.*
>
> *One interpretation of sections 19 to 21 and 29C to 29 E is that the act of publishing, distribution, et cetera is complete as soon as material is made available on a website or platform. On this interpretation, a hosting service would be able to use the defence in section 23 (3) that at the time of publication it was unaware of the content of the written material for recording and did not suspect, and have no reason to suspect, that it was threatening, abusive or insulting.*
>
> *Such an interpretation, however, is hard to square with the provisions on liability in the Regulations, which anticipate that a host may become liable if it feels to remove or restrict access to material expeditiously upon obtaining actual knowledge of the content of the material.*
>
> *This may be relevant in the context of article 10 of the 1987 Order.*

13.169 The *Law Commission* also considers attaching ancillary liability to those involved in hosting online content, a point made by O'Regan:

> Most traditional publications insert an editorial decision between author and publication, a decision that is normally taken by a person other than the author. In imposing civil liability for the publication of harmful speech, modern libel or defamation law often seek to constrain the editorial decision, as for example, in the defence of responsible publication.
>
> Such constraints are not available in relation to self-published online speech. It can probably be

> assumed that the editorial policy of many publications will not permit the publication of hate speech and that the insertion of an editorial decision applying a policy prior to publication will therefore often restrict the publication of hate speech. Such control is again absent in the case of direct author publication or posting on online platforms… At least for the moment, a very small group of Internet platforms or intermediaries, for want of a better description, host a very substantial portion of all Internet speech. This characteristic means that if the online intermediaries are held responsible in an effective manner for ensuring that their platforms are not used for hate speech, much online hate speech might be reached.[246]

13.170 I suggest that, if the above recommendations in relation to setting up a strong regulatory framework for social media companies and a legal requirement that those companies ensure that would-be users of their services provide verifiable personal identification are implemented in law, either at *Westminster* or in the *Assembly*, a combination of these measures may well go some considerable way to reduce hate speech on the Internet.

13.171 It has been argued that if these measures are insufficient to ensure that the platforms are not used for hate speech, then consideration might be given to requiring social media companies to identify directors based in the United Kingdom who might be made personally criminally liable for the more serious breaches of any new law.

13.172 As already noted in the introduction, the *Law Commission for England and Wales* are conducting a separate full review – outwith their review on hate crime legislation – on online harm.

[246] O'Regan, 'Hate Speech Online', p403 – 429.

13.173 It issued a consultation paper on 11 September 2020[247].

13.174 It may be preferable to await the *Law Commission's* final considered report in this complex area before making any further – and perhaps more radical – proposals in respect of the law in Northern Ireland.

Stirring up offences (c) – the dwelling defence (see further discussion in Chapter 9)

13.175 Question 42 in the consultation paper asked:

Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be amended/removed?

13.176 A similar question had already been posed in question 32 which asked:

Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be retained?

13.177 To that latter question, 50% of respondent organisations replied 'yes' and 86% of individual respondents gave the same answer. It will be noted however that only seven individuals chose to answer this question.

13.178 Only 5 individuals answered the similar query at question 42.

[247] *Law Commission*: *Harmful Online Communications: The Criminal Offences – a Consultation Paper 248*

13.179 76% of organisations felt that the dwelling defence should be amended or removed, whilst 37% of individuals (three people) agreed.

13.180 It will be recalled that, although I am recommending the addition of sections equivalent to Sections 4, 4A and 5 of the Public Order Act 1986, in their current form these sections also include a 'dwelling' defence.

13.181 Article 9(2) of the 1987 Order provides:

> *An offence under this Article may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.*

13.182 Article 9(3) of the same Order provides:

> *In proceedings for an offence under this Article it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person not heard or seen by a person outside that or any another dwelling.*

13.183 Article 17 of the 1987 Order defines a 'dwelling' as follows:

> *Dwelling means any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this*

purpose 'structure' includes a tent, caravan, vehicle, vessel or other temporary or movable structure.

13.184 The question of whether or not such a dwelling defence should be retained or removed engages Article 8 of the ECHR.

13.185 Article 8 – entitled - *'Right to Respect for Private and Family Life, Home and Correspondence'* reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There should be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13.186 It will be seen, therefore, that this is a qualified right. The wording of Article 8(2) is very similar to the qualified right of freedom of expression set out in Article 10(2).

13.187 The issues around the retention or removal of the dwelling exception have been discussed thoroughly in chapter 9 of this paper (the stirring up offences).

13.188 I do not propose to rehearse those arguments in detail at this point.

13.189 The defence first appeared in the Public Order Act 1986.

13.190 It is poorly targeted.

13.191 In England and Wales, most prosecutions involving this defence are taken under Section 5 of the 1986 Act in relation to offences committed by someone inside a dwelling relating to the deliberate communication to those outside, or the display of threatening, abusive or insulting writing or signs. One situation where the defence might arise is in relation to extremely noisy behaviour disturbing others outside the house.

13.192 If a police officer were to inform the occupants of the dwelling of the effect of their conduct and ask them to stop, they would be unlikely to be able to rely on the defence under Section 5(3)(B) of the 1986 Act in any prosecution for similar behaviour after the warning had been given.

13.193 In chapter 9 of this present paper I noted:

> There was general consensus among respondents that the dwelling defence was outdated, redundant and particularly problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media.

13.194 The *PPS* answered 'yes', to the similar (but opposite) question 32 of whether it should be retained.

13.195 In its response to question 42 it notes:

> That question (32) was proposed in the context of normal 'off-line' offending. We recognise that the dwelling defence is not a suitable/appropriate defence to online hate crime offences.
>
> However, if it is removed, there needs to be an alternative protection to avoid the criminalisation of private conversations and to preserve the right to freedom of speech.

13.196 A prominent women's group, known as the *Raise Your Voice Project*, argued that:

> This defence is especially worrisome in relation to the world we now live in, where speech that would be seen as a stirring up offence committed in a public space can now be typed in the privacy of one's home and seen the world over immediately.
>
> In addition, we are concerned that some of the speech can take place in 'private' online spaces such as individual closed forums and servers. This must not be allowed to become a place protected from the eyes of the law, giving rise to phenomena like the rise of fora where terrorist acts can be planned, but yet no crime is committed until killing begins. We see this, for example, in the rise of so-called 'incel' forums online that allow the most extreme misogynist speech and often encourages acts of violence against women. These need to be treated as public spaces for the purpose of the law.

13.197 The *Democratic Unionist Party* argued that this defence – the dwelling defence - should remain, saying that it was "particularly relevant to those of religious faith who wish to express their beliefs privately".

13.198 The *Bar of Northern Ireland* took the view that the dwelling defence should remain in place, but observed that if it was to be removed it would be essential for some form of defence for 'private' conversations to be implemented and that one which relies on the word 'dwelling' may not be entirely appropriate for the online world with regard to other forms of private communication.

13.199 *TransgenderNI* argued that:

> There is no legitimate reason for hate speech or actions perpetrated inside one's home should be regulated differently to those perpetrated outside of it, especially if the material harm/content of the actions is the same . . .
>
> For an incident to be treated differently depending on if a tweet was sent from home or sent, for instance, while using public transport or walking through the city centre, demonstrates a distinct lack of victim-centred approach and awareness of the impact of hate speech and incitement to hatred in a contemporary context…. Thus, it is clear that this defence must be removed in order to ensure that the legislation is fit for purpose.

Recommendations and Analysis

13.200 There is considerable merit in the above points and, provided genuinely private conversations are protected, I see no legitimate need for these defences.

13.201 I recommend that the dwelling exception should be removed from the stirring up offences. If my recommendation that articles equivalent to Sections 4, 4A and 5 of the Public Order 1986 are introduced into the law of Northern Ireland, similar exceptions currently existing in these sections should also be removed. I have set this out in my recommendation in Chapter 9 regarding proposed changes to the Public Order (Northern Ireland) Order 1987.

Stirring up offences (d)-private conversations

13.202 Question 44 of the consultation paper asked:

Should there be an explicit defence of 'private conversations' in the Public Order (Northern Ireland) Order 1987 to uphold privacy protection?

13.203 Respondents to the consultation paper were overwhelmingly in favour.

13.204 100% of respondent organisations supported this proposition. 83% of respondent individuals agreed.

13.205 As previously noted in chapter 9, there was general agreement among those who were supportive that the basic principle underpinning freedom of expression and the right to a private/family life, includes the right to private conversations.

13.206 As such, it was considered imperative that legislation does not criminalise genuinely private conversations between individuals.

13.207 It was further pointed out by the *Public Prosecution Service* that such an explicit defence would be necessary if the dwelling defence in Article 9(3) of the 1987 Order was removed.

13.208 A number of respondents expressed the concern that clarification would be needed as to what constitutes a 'private conversation'. This was considered particularly important in the context of the Internet and social media platforms where 'private' groups may comprise large numbers of people.

13.209 It was observed that such groups can act as a platform for people who hold extreme views to facilitate the communication of hate to potentially large audiences.

13.210 As such, there was a great deal of consensus among respondents regarding the need for a clear definition of what constitutes a 'private conversation' in the online context.

13.211 The *Northern Ireland Women's European Platform* stressed that 'private' groups on social media should not be included but instead:

> This should be limited to conversations between two or at most a very small group of individuals that are not shared beyond the group and are explicitly intended for the group only . . . In particular, it is essential to ensure that so-called 'private' groups on social media are not included, as they can involve large groups of people thus cannot be categorised as 'private' in the strictest meaning of the word. Such groups are, in addition, commonplace fora for people with extreme views of many types, and therefore act as fruitful breeding grounds for spreading hate.

13.212 Although I am attracted to this proposal, I can readily perceive considerable difficulties in defining 'private conversations'.

13.213 *TransgenderNI* drew attention to some of these significant difficulties:

> The right to privacy is one that should be respected and upheld, and within that, the right for private conversations to remain private. However, it is imperative that the legislation provides a clear and operationalisable definition of what constitutes a "private conversation".

> There are many conversations online that could be deemed theoretically 'private', but still have far-reaching harms. For instance, would inciting hatred or violence against trans-people in a 'private' group on *Facebook* or a large group chat be included within this defence?
>
> Would the radicalisation of individuals in alt-right 'private' forums through hate speech and the denigration of racialised people, LGBT+ people, disabled people be actionable?
>
> These issues and more point to the need for an explicit clarification of the criteria required to meet the definition of a 'private' conversation, to ensure this defence is not used to avoid accountability for genuinely harmful actions.

13.214 Whilst I accept that these are genuine and serious concerns, criminalising speech in the truly private sphere would be an infringement of freedom of expression.

13.215 It is worth noting that the requirement that hate speech provisions are limited to the 'public' scenario is an intrinsic requirement under international frameworks. It could be argued that the stirring up offences are currently too broad as they do allow for private conversations to be criminalised.

13.216 The *Democratic Unionist Party* indicated an interest in exploring how this could provide a reasonable defence to ministers or pastors addressing only those voluntarily attending worship.

13.217 This approach might be difficult in practice as worship in a church setting is a very public act where everyone is welcome to participate in the service.

13.218 Only three respondents did not agree. Of this group, only one offered a comment which essentially articulated their opposition to hate crime legislation generally.

13.219 One thing is clear – ‘private’ no longer means what it meant just a few years ago. The fact that online users can create so-called ‘private’ forums within which acts of violence and terrorism can be planned means that fit for purpose criteria for the concept of ‘private’ conversations will be necessary to ensure that this proper defence cannot be misused and perverted.

13.220 In the consultation paper, I proposed that it was necessary to include some form of defence for ‘private conversations’ – one that was robust enough and appropriate for the online world. I noted that trying to determine the difference between a ‘private’ and ‘public’ conversation may be difficult, but any definition must clearly identify the difference between the two.

13.221 Instead, it may work better to include a number of criteria that can be taken into account to determine whether a conversation can justifiably be labelled as private.

13.222 For example, the number of people who are privy to the conversation, whether there were ‘bystanders’ who could be affected, the intent of the parties, and whether there is a public interest to criminalise the behaviour.

13.223 Again, one might either start with an assumption that everything posted online is public unless it falls into certain exceptions. Those would be communications aimed at a small group of people provided that the comments are intended for that audience only and there is a reasonable expectation that those comments were only shared in that group.

13.224 Or, one could list what does not count as private – for example, anything that is posted online which does not come behind a pay-wall and/or password.

13.225 The former is easier to word but could be over broad. It could also be used as the basis for the private conversation defence for the offline offence. The latter will be harder to word, and therefore possibly easier for people to evade, but could be seen as less onerous.

13.226 This defence would obviously not apply to the dissemination of hateful material. So, re-tweeting a racist comment – even to a small group of people – would still be criminal.

13.227 Apart from considerations such as these, I have not been able to fully articulate a definitive list of criteria, but offer the above for the consideration of the Assembly.

Recommendations and Analysis

13.228 I recommend that there should be a specific defence of 'private conversations' in order to guarantee the right to respect for private and family life, home and correspondence and freedom as provided for in Articles 8 and 10 respectively of the European Convention on Human Rights and Fundamental Freedoms. Again, I have set this out in my recommendation in Chapter 9 regarding proposed changes to the Public Order (Northern Ireland) Order 1987.

Protected characteristics and the stirring up offences

13.229 Question 45 of the consultation paper asked:

Should gender, gender identity, age and other characteristics be included as protected characteristics under the Public Order (Northern Ireland) Order?

13.230 I accept that the question was a little infelicitous. My aim was to ask the reader to assume that, in the event that new protected characteristics – such as age, sex/gender and variations of sex characteristics – were recommended in respect of the new aggravated offences model, should the same characteristics be included for protection under the stirring up offences currently found in the 1987 Order?

13.231 I accept further that framing the question as I did may have resulted in some misunderstanding of the issue I was attempting to investigate.

13.232 The **real** issue is whether or not, once the list of protected characteristics is agreed, those protected characteristics receive identical levels of protection in hate crime law?

13.233 To date, in both the 1987 and the 2004 Orders in Northern Ireland, all protected groups have received the same levels of protection. In other words, we have never had any kind of hierarchy of hate protection.

13.234 There does not exist any kind of hierarchy of hate protection.

13.235 On the other hand, in 2010 in England and Wales the stirring up offences were extended to cover not only race and religion, but also stirring up hatred on the grounds of sexual orientation. In 2014 the *Law Commission* did not recommend the extension of stirring up hatred offences to include disability and transgender identity.

13.236 It considered that the type of hate speech typically found in relation to disability and transgender status was far less likely to satisfy the requirements for stirring up offences found in relation to race and religion.

13.237 The main responses to question 45 may be summed up as follows:

13.238 82% of respondent organisations agreed that these new potential protected characteristics should be included as protected characteristics under the 1987 Order - or its replacement.

13.239 However, only 10% of individuals agreed.

13.240 It should be noted that these results should be read with caution since this question was phrased in a way that did not give respondents the opportunity to indicate different views on the respective inclusion of each category listed (that is, gender, gender identity, age and other characteristics).

13.241 Those (mainly organisations) who were generally supportive in their views, considered that parity and consistency across all hate crime provisions in Northern Ireland was essential in order to ensure that all protected groups are given adequate protection and to avoid the creation of a hierarchy of characteristics. It was suggested that this was a logical approach, particularly in the context of the potential consolidation of hate crime legislation into a single piece of legislation.

13.242 Those respondents were opposed to the inclusion of these groups – subject to the above caveat – generally argued that the inclusion of these protected characteristics would dilute the legislation, create confusion and lead to inequality of treatment.

13.243 The *PSNI* observed that if protected characteristics were to be changed, then the legislation should be amended to ensure there is consistency. This was an approach taken by many organisations, including groups from the women's sector.

13.244 The *Equality Commission for Northern Ireland* argued that, in order to ensure a harmonised and consistent approach, particularly in the context of the hate crime

legislation being consolidated into a single piece of legislation, any additional protected grounds should also be protected in any provisions relating to incitement of hatred.

13.245 The *Department of Justice* submitted that there should be consistency as regards protected groups unless evidence advised otherwise.

13.246 In similar vein, the *PPS* considered that there were benefits in terms of clarity and consistency in the law if the protected characteristics for the purposes of hate speech mirrored those that apply in the context of hate crime.

13.247 In 2016, in its report on transgender equality, the *House of Commons Women and Equalities Select Committee* concluded that:

> The case is overwhelming for protecting all groups concerned, including trans people, on an equal basis' and urges the Government to 'introduce new hate crime legislation which extends the existing provisions on aggravated offences and stirring up hatred so they apply to all protected characteristics.[248]

13.248 In 2018, the *House of Commons Petitions Committee* issued a special report on online abuse. It called upon the Government to "amend hate crime legislation to ensure disability hate crime has parity with other hate crime offences".

13.249 In its current consultation paper on hate crime, the *Law Commission* provisionally proposes a unified scheme applying to stirring up offences across all the protected characteristics of race, religion, sexual orientation, transgender, disability

[248] House of Commons Women and Equalities Committee, *Transgender Equality*, Report of the Women and Equalities Committee, First Report of Session 2015-16 HC 390 (14 January 2016).

and sex or gender and which would be incorporated with the aggravated offences in a single Hate Crime Act.

It notes:

> In this respect it would be highly anomalous if the sentencing measures applied equally to six characteristics but the stirring up offences to only five.[249]

Recommendation and Analysis

13.250 I therefore recommend that all protected characteristics, including the new proposed characteristics of sex/gender, age and variations of sex characteristics, should be granted the same protections throughout the proposed Hate Crime and Public Order (Northern Ireland) Bill. (Recommendations 7 and 14 refer).

13.251 I consider that the argument that there should be parity between all protected characteristics is overwhelming.

13.252 As Lord Bracadale said in his final report dealing with this issue:

> It is highly undesirable to have a hierarchy of protected characteristics. I do not consider that the fact that there might be fewer convictions in respect of one characteristic rather than another to be particularly significant. I conclude that, if stirring up offences are to be extended to other protected characteristics, they should extend to

[249] Law Commission, *Hate Crime Laws*, para 18.230.

all, including any new protected characteristics.[250]

Harassment and stalking offences

13.253 As noted in the consultation paper, there are a number of offences under The Protection from Harassment (Northern Ireland) Order 1997 (PHO 1997) which could potentially be used against online hate targeted at a particular individual.[251]

13.254 The PHO 1997 makes it an offence to carry out a course of conduct which amounts to harassment.

13.255 Article 3 of the PHO 1997 provides:

> *(1) A person shall not pursue a course of conduct –*
>
> *(a) Which amounts to harassment of another;*
>
> *(b) Which he knows or ought to know, amounts to harassment of the other;*
>
> *(2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*
>
> *(3) Paragraph (1) does not apply to a course of conduct if the person who pursued it shows –*
>
> *(a) That it was pursued for the purpose of preventing or detecting crime;*
>
> *(b) That it was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or*
>
> *(c) That in the particular circumstances the pursuit of the course of conduct was reasonable.*

[250] Lord Bracadale, 'Independent Review, para 5.33.

[251] See discussion at paragraph 12.30 et seq. of the consultation paper, page 209.

13.256 Article 6 provides:

> *(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.*

13.257 Article 7 empowers the court to impose restraining orders on the defendant for a specified period or until further order.

13.258 Article 2(2) notes that *"references to harassing a person include alarming the person or causing the person distress".* 2(3) provides that *'a 'course of conduct' must involve conduct on at least two occasions and 'conduct' includes 'speech'.*

13.259 The *mens rea* is to know or ought to know that the behaviour amounts to harassment.

13.260 In England and Wales, if the defendant is motivated by or demonstrates hostility in relation to one of the protected characteristics while committing one of these offences – under the Protection from Harassment Act 1997 – this becomes an aggravated offence which increases the maximum penalty.[252]

13.261 Under the law in Northern Ireland as it currently stands, no aggravation can occur at the offence stage, although the aggravation can be taken into account at sentencing.[253]

[252] Section 32 of the Crime and Disorder Act 1998.
[253] Criminal Justice (No.2) (Northern Ireland) Order 2004.

13.262 However, among the recommendations made in this paper, it is recommended that statutory aggravation for all existing criminal offences should be the core method of prosecuting hate crimes in Northern Ireland.

13.263 If this recommendation is accepted then the aggravation will apply at the trial stage, increasing the potential maximum penalty.

13.264 These offences are result crimes which means that the victim must be identified and be shown to have suffered tangible harm.

13.265 Whilst these offences were not specifically created with the Internet in mind, they can go some way towards protecting individual victims who have been harassed online by a perpetrator.[254]

13.266 The *CPS* in England and Wales has used the Protection from Harassment Act 1997 to prosecute cases of cyber-harassment although evidence suggests that prosecutors prefer to use the technology based offences (discussed later) when dealing with cyber hate.

13.267 The consultation paper identified some obvious constraints with the PHO 1997.

13.268 This may explain why it has not been used as extensively as it could for online behaviour.

13.269 The requirement for a 'course of conduct' is a potential problem for online communications as it means that one-off communications will not count. So, for

[254] See Bakalis 'Rethinking Cyberhate Laws'.

example, an individual sending a racially abusive email to thousands of people would not be covered by the 1997 Order.

13.270 In England and Wales, there is academic disagreement about the ambit of stalking offences which means it is not clear whether or not the behaviour is covered by the offences.[255]

13.271 In England and Wales, since 2012, there has been an additional offence of stalking. A similar law is proposed for Northern Ireland.

13.272 In November 2019 the *Department of Justice (DoJ)* issued a consultation report and summary of responses entitled 'Stalking - A Serious Concern'.

13.273 The *DoJ* noted in its analysis:

> It is evident from the responses received to the *Department's* consultation that the majority of respondents strongly support the introduction of stalking legislation here in Northern Ireland.
>
> The review of the law on harassment and stalking was a ministerial priority of the previous Minister of Justice, Claire Sugden, who had indicated during the debate in the *Northern Ireland Assembly* in 2016 that she would legislate accordingly to protect and safeguard victims of stalking in Northern Ireland.
>
> Being stalked can have terrifying consequences and the *Department of Justice* is determined to do everything it can to protect victims and to stop perpetrators at the earliest opportunity. We will therefore be recommending to an incoming Justice Minister that a stalking bill with legislative

[255] Neil MacEwan, 'The new stalking offences in English law: will they provide effective protection from cyberstalking?' *Criminal Law Review*, (2013) p767 – and see A. Gillespie(2013) 'Cyberstalking and the law: a response to Neil McEwan', *Criminal Law Review,* Issue 1 (2013) p38.

> provisions to give effect to the introduction of a new specific offence of stalking, and stalking protection orders, be developed for introduction to a future *Northern Ireland Assembly*.
>
> The *Department* will also continue to raise the profile of stalking by sharing best practice models and guidance, in use in other jurisdictions, with operational partners.[256]

13.274 The *Assembly* reconvened in January 2020.

13.275 The *Department of Justice* has confirmed that the Stalking Bill is currently being drafted by the *Office of Legislative Counsel* and the present *Minister of Justice*, Naomi Long MLA, intends to introduce the Bill to the *Assembly* late in 2020.

13.276 A further difficulty with the PHO 1997 is that it cannot be used for prosecuting comments not directed at the victim themselves, such as a situation where someone has posted several aggressive and threatening Islamophobic tweets on *Twitter* which are not directed at anyone in particular.[257]

13.277 It is unlikely that such posts would be considered harassment.

13.278 In *Hayes v Willoughby (2013) UKSC 17* the Supreme Court stated that harassment is '*conduct targeted at another person'*.

13.279 This limitation of the harassment offences in relation to online behaviour indicates that the PHO 1997 may be of limited use in the online world. It is concerned

[256] Department of Justice, *Stalking - a Serious Concern: a consultation on the creation of a new offence of stalking in Northern Ireland* (1 November 2019).
[257] Ibid.

essentially with the relationship between the harasser and the person who is being harassed.

13.280 It was designed specifically to deal with situations where a person fears for their physical integrity because of a pattern of behaviour by the harasser. It is limited to this relationship and does not extend to a bystander who may have observed an interchange between the two, or to cases where the hateful comments are not directed at anyone in particular.

13.281 Given that the Internet, particularly social media, gives people access to a very large audience, most instances of cyber hate will simply not fit into the scope of this Order.

13.282 On the other hand the PHO 1997 will offer some protection for victims of cyber hate where the perpetrator can be identified and where they have targeted their hate at one person or persons directly on more than one occasion, and where the targeted victims themselves have suffered harassment, alarm or distress.

13.283 The PHO 1997 offences can be used against online behaviour that amounts to harassment. They can be effective at tackling some of the behaviour that would fall into the first category of harm referred to in this chapter, namely harm caused to an individual when the attack they experience takes place online but in a private forum.

13.284 Although the PHO 1997 offences can also be used when the harassment takes place in a public forum – such as on social media – there is nothing intrinsic to the offences themselves that would recognise the additional harm caused to the victim as a result of the attack being carried out in public.

13.285 Furthermore, there is no mechanism at present by which a victim can request that the offending material be removed from any public forum. As such, the PHO 1997 offences are only partially able to deal with the second type of harm outlined earlier – the additional harm caused to an individual when the hate is communicated on social media or another public forum.

13.286 The consultation paper noted that the PHO 1997 offences do not contain any reference to 'hate'.

13.287 In England and Wales, these offences can be aggravated under Section 32 of the Crime and Disorder Act 1998, and so the 'hate' element of the offence is recognised as part of the offence. As indicated earlier, at present this is not the case under the law in Northern Ireland where the hostility is only taken into account at the sentencing stage, thus leaving a gap in the law.

13.288 However, the key recommendation in this review is to introduce statutory aggravations for all existing criminal offences, thus allowing any criminal offence to be aggravated.

13.289 It will be recalled that among other proposals in this paper, I have recommended that Articles equivalent to Sections 4, 4A and 5 of the Public Order Act 1986 should be introduced into the law of Northern Ireland in a new Hate Crime and Public Order (Northern Ireland) Bill.

13.290 The basic structure of these offences can fill in many of the gaps left by the PHO 1997 offences.

13.291 They create a ladder of behaviour from the less serious to the more serious. They include both conduct offences (Section 4) which are less serious, and result crimes (Sections 4A–5) which are more serious to reflect the harm to the victim.

13.292 If, as proposed, the dwelling defences are removed from the Northern Ireland equivalent of those offences, this will provide further opportunities to deal with harassment. It is particularly important to note that these offences allow for one-off events and do not require a course of conduct.

13.293 Furthermore, it may be that the proposed Stalking Bill will deal with the perceived deficiencies in the PHO 1997.

13.294 If not, I make the following recommendation in relation to reform of the PHO 1997:

Recommendation 28

There should be a mechanism by which the offending behaviour must be removed from the Internet by the offender, or through a court order imposed on the relevant social media company.

13.295 In its submission, the *DoJ* observed that the proposed Stalking Bill will introduce a new offence that will capture the following conduct or acts associated with stalking and that these acts may also relate to aspects of hate crime directed by speech or via online communication:

- Following the person or any other person;
- Contacting, or attempting to contact, the person or any other person by any means;
- Publishing any statement or other material relating or purporting to relate to the person, or purporting to originate from the person or from any other person;
- Monitoring the use by a person, or any other person, of the Internet, email or any other form of electronic communication;
- Entering any premises;
- Loitering in any place (whether public or private);
- Interfering with any property in the possession of the person or any person;
- Watching or spying on the person or any person;
- Giving anything to a person or leaving anything where it may be found by, given to or brought to the attention of the person or any other person; and
- Acting in any other way that a reasonable person would expect would cause the person to suffer fear or alarm.

Technology-based offences

13.296 As we have seen in chapter 9 in dealing with the stirring up offences under the 1987 Order, important changes such as the proposed repeal of the dwelling defence – matched with the introduction of legal protection for genuinely private conversations – reflect the fact that many of the more sinister forms of hatred can now be found on the Internet.

13.297 As discussed earlier in this chapter, the Internet has now become the most used and convenient vehicle for all forms of expressing hatred and hostility online.

13.298 Indeed, the area of abusive and offensive online communications is a large and intriguing subject, worthy of a full-scale review of the law in its own right.

13.299 This has been recognised in England and Wales.

13.300 As noted earlier in this paper, the *Law Commission* is currently consulting on hate crime. As part of its remit in that exercise it has been asked to consider developments in the law since the publication of the *Law Commission* report 'Hate Crime: Should the Current Offences be Extended?' in 2014.

13.301 However, as a separate and distinct exercise, the *Law Commission* has also been tasked to consider reform of the communications offences.

13.302 This was in acknowledgement of the fact that, whilst the Internet offers much that is good, there has been an alarming growth in incidents of abusive and offensive communications online, together with a recognition that the criminal law has not kept pace with these developments.

13.303 Abusive or offensive communications falling short of stirring up hatred are commonly prosecuted as one of the 'communications offences'.

13.304 In Northern Ireland there are two main offences that can be used – Article 3 of the Malicious Communications (Northern Ireland) Order 1988 (MCO 1988) and Section 127 (1) of the Communications Act 2003 (CA 2003).

13.305 The equivalent Act dealing with malicious communications in England and Wales is the Malicious Communications Act 1988 (MCA 1988).

13.306 Article 3 of the MCO 1988 is as follows:

> *Offence of sending letters etc. with intent to cause distress or anxiety*
>
> *(1) Any person who sends to another person*
>
> *(a) A letter or other article which conveys –*
>
> *(i) A message which is indecent or grossly offensive;*
>
> *(ii) A threat; or*
>
> *(iii) Information which is false and known or believed to be false by the sender; or*
>
> *(b) Any other article which is, in whole or part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within subparagraph (a) or (b), cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.*

13.307 The MCA 1988 is identical in wording but with one **crucial** difference.

13.308 Section 1(1) refers to a letter or other article but adds 'electronic communication' to the offence.

'electronic communication' is defined in Section 1(2A) as including –

(a) Any oral or other communication by means of an electronic communications network; and

(b) Any communication (however sent) that is in electronic form.

13.309 Subsection 1(3) provides that:

> *In this section references to sending include references to delivering or transmitting and to causing to be sent, delivered or transmitted and 'sender' shall be construed accordingly.*

13.310 The CA 2003 applies to the whole of the United Kingdom.

13.311 Section 127 is the relevant section. It provides:

> *Improper use of public electronic communications network*
>
> *(1) A person is guilty of an offence if he –*
>
> *(a) Sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or*
>
> *(b) Causes any such message or matter to be so sent.*
>
> *(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he –*
>
> *(a) Sends by means of a public electronic communications network, a message that he knows to be false,*
>
> *(b) Causes such a message to be sent; or*
>
> *(c) Persistently makes use of a public electronic communications network.*

> *(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both.*

13.312 Any reform of the law will normally require legislation passed at Westminster because of the reserved status relating to electronic communications that sits outside the powers of the Stormont Assembly.

13.313 As we have seen in respect of other offences, as the law currently stands in Northern Ireland, although these communications offences can encompass hate speech, they cannot be tried as 'aggravated' offences.

13.314 They can, however, be dealt with as aggravated at the **sentencing stage** on the basis of a motivation or demonstration of hostility based on the current protected characteristics of race, religion, sexual orientation or disability in the course of a defendant committing a crime - under the provisions of the 2004 Order.

13.315 If the key proposals from this review are accepted, these offences will be able to be prosecuted at the **trial stage** of the criminal process by adding a statutory aggravation.

13.316 The MCA 1988, which applies in England and Wales, was amended in 2001 to bring electronic communications within its ambit. No similar amendment has been enacted in respect of the MCO 1988.

13.317 I have not found any obvious explanation for this significant disparity.

13.318 The practical effect is that when police in Northern Ireland wish to charge or recommend an offence under the MCO 1988 in relation to an electronic communication, they need to give consideration as to whether or not such a communication falls under other legislation – such as the CA 2003.

The Malicious Communications (Northern Ireland) Order 1988 and online harm

13.319 Question 46 in the consultation paper posed the question of whether or not the Malicious Communications (Northern Ireland) Order 1988 should be adapted to deal with online behaviour.

13.320 There was widespread agreement with this proposal among respondents. All of the organisations which responded agreed together with 88% of individual respondents.

13.321 The approach that commanded most support was to update the legislation and make it applicable to contemporary society, particularly in the growth of the use of the Internet and social media.

13.322 There was also some general support for locally-based enforcement as an effective means to address online harms.

13.323 *Victim Support NI* argued that:

> [A] specific law is needed which is designed for the online environment and how people operate therein, as opposed to using existing provisions and shoehorning them to 'fit' online hate crime.

13.324 The *Women's Policy Group NI*, for example, observed that:

> There is significant evidence of growing online abuse directed towards women because of their gender. The malicious nature of online abuse needs to be adequately dealt with by law. . . . There are many complications in applying legislation to online harms when the legislation was written before the existence of social media . . . the Malicious Communications (Northern Ireland) Order 1988 needs to be adapted to deal with growing malicious behaviour online.

13.325 Both the *Democratic Unionist Party* and *Sinn Féin* agreed with the proposal that the Northern Ireland legislation should be amended and updated to address the Internet.

13.326 The *Bar of Northern Ireland* pointed out that this was not the only change in the MCO 1988 requiring attention. It stated:

> Unlike the English legislation which carries a maximum sentence of 12 months custody on summary conviction and 2 years custody on indictment . . . the Northern Ireland legislation does not provide for trial on indictment and does not attract a custody sentence (the maximum sentence being a level 4 fine).
>
> This is not consistent either with an offence committed per Article 127 (1) (of the CA 2003), which attracts a maximum sentence of 6 months custody and/or level 5 fine on summary conviction, but also cannot be tried on indictment. Given these offences may be aggravated by hostility, per the 2004 Order, from a public policy perspective, it may be viewed that the sentencing ranges are not reflective of the offence.

13.327 The *Evangelical Alliance* welcomed the fact that the review has considered online aspects of hate crime and agreed that existing legislation should be updated to include new Internet technologies, but argued that neither should one lose sight of the purpose for which they were enacted at a time. They noted:

> No one could have envisaged, even a few years ago, the sheer amount of data and speech and language being put online every day. . . .
>
> The balance to be struck between personal freedom of speech, personal responsibility for speech, the protection of vulnerable people and corporate responsibility by social media companies is a very difficult one. We would encourage a cautious and discerning approach with a high bar on powers which limit speech which is obviously not a personal attack on an individual or community. Much of the speech on social media could be deemed unpopular, rude, nasty even, but far from criminal.

13.328 The point of principle made by this last submission has been very much to the forefront of my mind during the review process.

13.329 The right to freedom of speech, guaranteed by Article 10 ECHR, is a golden thread which must be woven seamlessly into any reforms of legislation dealing with hate crime and hate speech, whether offline or online.

13.330 As far as this review is concerned, it will be recalled that, in the remit for the review, it was noted specifically that:

> The review will take cognizance of the *Department's* review of sentencing policy and will ensure it does not cut across any options planned for consultation in this regard.

13.331 That said, I see considerable force in the argument raised by the *Bar of Northern Ireland* as regards its concern that offences under the MCO 1988 and the CA 2003 cannot be tried on indictment. This does indeed seem anomalous given the growing threat posed by cyber hate and the report sheer scale of offending.

13.332 This is an issue to which I will return in looking at the Section 127 offence under the CA 2003.

13.333 The consultation paper asked a number of questions about the operation of the MCO 1988 and the CA 2003.

13.334 These questions were:

- *Should the wording of the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 use terms such as 'grossly offensive', 'indecent' and 'obscene'?* (Question 47).
- *Are the offences under the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 too broadly drafted and require some modification to clarify and narrow their application?* (Question 48).
- *Should online harm be part of a general law applying to hate crime?* (Question 49).
- *Is the current law contained in the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 sufficiently clear to protect freedom of expression?* (Question 50).

13.335 In looking at Article 3 of the MCO 1988, it is important to note that the core of this offence lies in the sending of a communication which is indecent or grossly offensive with the requisite *mens rea*.[258]

[258] See DPP v Collins (2006) UK HL 40.

13.336 The impact on the victim is not a relevant consideration in order to prove the mental element of the offence. In fact, even if the intended victim does not receive the message at all, or if the victim does receive the message but is not in fact caused distress or anxiety the offence is still made out. It is, therefore, a conduct crime.

13.337 So, whilst the wording of the *actus reus* of the offence is very wide, the *mens rea* required limits the ability of the law to deal with certain instances of cyber hate.

13.338 The *mens rea* requires that the defendant intended to cause anxiety to whoever the communication was sent.

13.339 This means that for a defendant who posts messages without this intention – perhaps because he/she is writing on the forum to like-minded people – the offence is not made out.

13.340 Even though the MCA 1988 has been specifically adapted to deal with cyber hate, it can be argued that it is not the ideal instrument for protecting victims of online hate.

13.341 Paradoxically, the MCA 1988 – the equivalent to the MCO 1988 in England and Wales - has been said to be a useful tool in relation to online communications and social media.

13.342 Figures from the *Ministry of Justice* in England and Wales indicate that the number of prosecutions under the MCA 1988 has risen dramatically, with 122

prosecutions in 2005 rising to a high of 897 in 2014, although we do not know how many of these involved cyber hate.[259]

13.343 Section 127(1) of the CA 2003 makes it an offence to send or cause to be sent by means of a public electronic communications network a message (or other matter) that is grossly offensive or of an indecent, obscene or menacing character.

13.344 This offence has been used extensively by the *CPS* in England and Wales for online offences.[260]

13.345 In 2005, there were 355 prosecutions under Section 127(1) CA 2003, and in 2015 there were 1715.

13.346 In its current consultation paper on hate crime, the *Law Commission* observed:

> Our provisional view is that these offences (under the MCA 1988 and the CA 2003) – which are very often pursued in an online context – are amongst the most logical additions to the regime of aggravated offences. Indeed, they satisfy all the indicators for inclusion:
>
> 1. In relation to the criterion of prevalence, they are commonly charged in the context of hate crime: in the financial year from 2017 – 18, 214 offences under section 127 of the CA 2003 and 221 offences under section 1 of the MCA 1988 were flagged by prosecutors as hate crimes. This represented approximately 7% of all communications offences prosecutions.
>
> 2. Considering the need to ensure greater consistency across criminal law, inclusion would create alignment with the 'offline' equivalents of

[259] Ministry of Justice, Criminal Justice Statistics 2015, England and Wales (London: Ministry of Justice, 2016).
[260] Ibid.

these offences – Section 5 and 4A of the POA 1986, which currently have aggravated versions.

3. In assessing the adequacy of the existing penalty, the maximum penalty for the offences under Section 127 of the CA 2003 is 6 months imprisonment. This may be considered insufficient in the context of the most serious online hate crime [my underlining].

4. We have also considered how burdensome it would be for the prosecution to prove additional matters over and above the base offence. The nature of the conduct covered by these offences means that the 'hostility' towards the characteristic is likely to be apparent in the communication itself, therefore evidence of hostility is easier to obtain. We conclude that proving hostility before a jury is not likely to create significant additional complexity.[261]

13.347 In order for a communication to come under the provisions of the MCO 1988, it has to be found be 'indecent' or 'grossly offensive'.

13.348 These terms are meant to be given their everyday meaning.[262]

13.349 However the term 'grossly offensive' – a term that also features in Section 127(1) of the CA 2003 – is potentially problematic given that under the ECHR there is a right to offend.[263]

13.350 This point was discussed in the case of *DPP v Connolly (2007*) *EWHC 237 (Admin).* The court determined that the words 'grossly offensive' and 'indecent' did not represent a breach of the right to freedom of expression under Article 10 of the Convention because the courts ensure that a 'heightened' meaning is given to those

[261] Law Commission, 'Hate Crime Laws', para 16.58.
[262] See DPP v Connolly (2007) EWHC 237 (admin).
[263] Sunday Times v UK (no. 2) (1992) 14 EHRR 229.

words and, in any case, the right to freedom of expression does not justify the intention to cause distress or anxiety.[264]

13.351 This is, in effect, a balancing act based on judicial discretion.

13.352 In the consultation paper, I observed that, even if Connolly is correctly decided on this point and the wording of the MCO 1988 – and the CA 2003 – is consistent with freedom of expression, the terms 'grossly offensive' or 'indecent, seem "particularly outdated for such a modern problem. It is difficult to see how we can justify criminalising speech on the Internet on the basis of 'gross offensiveness' or 'indecency'".[265]

13.353 This assumes that such words have to be given a literal meaning – often words such as 'wilful' or 'malicious' are words that come from the 18th and 19th century as words denoting badness.

13.354 In its scoping report of 2018 – '*Abusive and Offensive Online Communications*' – the *Law Commission*, referring to the MCA 1988 and the CA 2003, observed:

> From a prosecution perspective, there are some clear advantages to the current offences. As conduct crimes, which do not require proof of any particular harm having been caused, they create fewer evidential barriers to prosecution. For example, the evidence of a victim is usually not necessary to demonstrate that the offence has been committed. The broad, flexible wording of the offences also allows their use across a

[264] However, note Broadbent, 'Malicious Communications Act: Human Rights', 71 (4) *Journal of Criminal Law (2007)* p288.
[265] Marrinan, 'Hate Crime legislation', para 12.79 (January 2020)

> wide range of conduct and means they can adapt to changing forms of communication, social media develop, and evolving forms of harm[266].

13.355 However, the *Law Commission for England and Wales* made a number of criticisms:

- In relation to the MCA 1988 offence, it noted that it was somewhat unclear whether the offence can be committed by posting on a public forum, with recent case law suggesting its scope might be limited to communications directed specifically to another.
- In relation to the CA 2003 offences, it noted that they do not include communications sent over a 'private' network, such as Bluetooth communications, suggesting that the offences have failed to adapt to this form of communication.
- A significant degree of overlap was observed between communications offences. The *Law Commission* argued that there would be benefit in consolidating and rationalising the offences to reduce confusion and ensure that they keep pace with emerging technology.
- Some of the terms of the offences – such as 'gross offensiveness' – are ambiguous, leaving significant discretion to courts and prosecutors[267].

13.356 The *Law Commission* accepted that this ambiguity could lead to uncertainty and inconsistency, making it difficult for the public to understand the line between criminal and non-criminal communications. I share their view.

13.357 As Bakalis writes;

> Another important issue here relates to identifying the mischief of this offence… The terms 'grossly offensive' or 'indecent' seem particularly outdated for such a

[266] Para 3.15

[267] (See discussion at chapter 4 of the Law commission's 2018 scoping report.)

> modern problem. It is difficult to see how we can justify criminalising speech on the Internet on the basis of 'gross offensiveness' or 'indecency'. When one considers the extent to which the incitement offences under the Public Order Act have very high thresholds in order to ensure no infringement of the right to freedom of expression, it is difficult to support, without deeper consideration, the existence of such a wide actus reus (conduct element) under the Malicious Communications Act which appears to give the State much more power to interfere with online speech[268].

13.358 It may be observed that the lack of clarity and certainty around these offences is also the experience in Northern Ireland.

13.359 Although the *PPS* in Northern Ireland have prosecution guidelines for cases involving electronic communications, they do not make such guidelines public unlike their counterparts in the *CPS* in England and Wales.

13.360 The *PPS* guidelines are designed for internal guidance only.

13.361 I see no reason for the difference in practice with their counterparts in England and Wales. I therefore recommend:

Recommendation 29

The PPS should make their prosecution guidelines for cases involving electronic communications public and disseminate them in an appropriate way.

[268] *(C Bakalis, '*Rethinking cyberhate laws' (2018) 27 (1) Information and Communications Technology Law 86, at p 99)

13.362 In the light of these concerns the *Law Commission* recommended that:

> The communications offences in Section 1 of the Malicious Communications Act 1988 and Section 127 of the Communications Act 2003 should be reformed to ensure that they are clear and understandable and provide certainty to online users and law enforcement agencies.[269]

13.363 So far as the Section 127(1) of the CA 2003 offence is concerned, it is clear that the core of this offence lies not in the protection of victims, but rather on the need to safeguard the public communication system from being abused.[270]

13.364 When this offence was originally conceived, the communication system was publicly funded, so arguably this made sense, but now that the system is privatised, the rationale for creating such an offence has largely fallen away.

13.365 It is clear from the wording of the offence that it is not designed to protect victims of the communication. In fact, there need be no victim.

13.366 As with the MCO 1988, this is a conduct crime where the *actus reus* of the offence lies in the making of the communication, irrespective of whether it was ever received by anyone.

13.367 Indeed, it is even wider than the MCO 1988 because there need be no intended victim either. Under the MCO 1988, one needs to show that the defendant intended to cause someone anxiety or distress. Section 127 (1) of the CA 2003 merely requires

[269] Law Commission, *Abusive and Offensive Online Communications: A Scoping Report,* HC1682, No 381 (2018) at para 13.23.
[270] DPP v Collins (2006) UK HL 40; but see Thomas Gibbons, 'Grossly offensive communications: DPP v Collins (2006) UK HL 40' *Communications Law,* 11 (4) (2006) p136-138.

that the defendant sends a message that is grossly offensive, indecent, obscene or menacing. The *mens rea* for this offence requires that the defendant knew or was aware that the content of the communication was grossly offensive, indecent, obscene or menacing.[271]

13.368 The comparison with public order offences under the 1987 Order is stark.

13.369 The public order offences have been carefully crafted to be compatible with freedom of speech. Thus, there are various limitations. The defendant has to be shown to have intended to stir up hatred/aroused fear, or that hatred or fear was likely to occur. At present there is a defence that the communication was made in a private dwelling and was not heard or seen except by other persons in that or another dwelling in order to ensure that private conversations are protected from criminalisation.

13.370 However, Section 127(1) of the CA 2003 gives no such protection. It allows for prosecution whenever a defendant posts anything online that is deemed to be grossly offensive or of an indecent, obscene or menacing character, even if the defendant did not intend any harm to result from this and even if the material is never read for anyone. This offence also criminalises private conversation.

13.371 It has been argued by Bakalis that Section 127(1) CA 2003 rides roughshod over any protections given to the defendant under the public order legislation.[272]

13.372 I agree.

[271] Chambers v DPP (2012) EWHC 2157 (admin).
[272] Bakalis, 'Rethinking Cyberhate Laws'.

13.373 As I indicated in the consultation paper:

> The breadth of the offence and its potential for infringing freedom of expression can also be seen in the fact that what is outlawed is communications that are 'grossly offensive' 'indecent' or 'obscene'. It is difficult to see how proscribing such words would come within the ECHR Article 10(2) exceptions, as it is unlikely to be seen as 'necessary in a democratic society' to communications simply based on their gross offensiveness, indecency or obscenity. Trying to repress ideas or outlaw language simply because we don't like them is not sufficient within a liberal western democracy.[273]

13.374 Lord Bracadale examined this issue in his review of hate crime legislation in Scotland.

13.375 He noted that the *CPS* in England and Wales has published guidelines about prosecuting cases involving communications sent by social media, in part to ensure that such offences will **only** be prosecuted where that is compatible with Convention rights. The *Crown Office and Procurator Fiscal Service (COPFS)* in Scotland has published equivalent guidance.

13.376 In its consultation response, the *COPFS* noted that there may be circumstances which would satisfy the evidential test but where given the whole circumstances, which include the nature of the comments and their context, it would not be in the public interest for a criminal prosecution to take place.

13.377 In contrast, it will be noted that the *PPS* in Northern Ireland does not make its guidelines on this topic public. Such guidelines are for internal guidance only.

[273] Marrinan, 'Hate Crime Legislation', para 12.85

13.378 Lord Bracadale concluded:

> I have considered the need to safeguard rights of freedom of expression at length elsewhere in this report . . . I conclude that, while it can be difficult in the abstract to balance rights of freedom of expression against the rights of others not to be harmed, it is generally much easier to do this once the facts, context and language of a particular instance are considered. The same analysis applies to the prosecution of an individual for sending, grossly offensive' material in terms of section 127. In deciding whether it is in the public interest to prosecute, the *COPFS* would of course need to take into account the impact of such a prosecution on the individual's rights under article 10 of the ECHR, and how those rights may be balanced against the rights of others. Likewise, the sheriff will need to article 10 rights into account in deciding whether the offence has been committed.
>
> From the evidence which I have received in the course of this review, I am satisfied that the *COPFS* and Courts are very aware of the need to do this. I do not think this points to any defect in the application of the Section 127 offence.[274]

13.379 Whilst I have seen no evidence in the course of this review to suggest that the *PPS* and courts in Northern Ireland would be any less aware of the need to take into account the individual's rights of freedom of expression, there remains the distinct possibility as the law currently stands that those rights could be threatened.

13.380 An example of this occurred in the case of *Chambers v DPP (2012) EWHC 2157 (Admin).*

[274] Lord Bracadale, *Independent Review*, para 6.16

13.381 Mr Chambers was initially convicted of the Section 127(1) offence for tweeting a message saying “Crap! Robin Hood airport is closed! You got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!

13.382 This was intended as an ongoing joke between him and his girlfriend, and was not intended to be menacing. Indeed, it was not taken to be menacing by the off duty airport manager who eventually came across the message five days after it was tweeted. The defendant was originally found guilty of the offence, but was eventually acquitted by the Divisional Court two years after his original conviction.

13.383 At paragraph 28 of his judgement, Lord Judge, the Lord Chief Justice, stated:

> *The 2003 Act did not create some newly minted interference with the first of President Roosevelt’s essential freedoms – freedom of speech and expression. Satirical, or iconoclastic, or rude comment, the expression of unpopular unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it, should and no doubt will continue at their customary level, quite undiminished by this legislation . . . we should perhaps add that for those who have the inclination to use ‘Twitter’ for the purpose, Shakespeare can be quoted unbowdlerised, and with Edgar, at the end of King Lear, they are free to speak not what they ought to say, but what they feel . . . Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent . . . understandably concerned that this message was sent at a time when there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks.*
>
> *That is plainly relevant to context, but the offence is not directed to the inconvenience which may*

> *be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on 'Twitter' for widespread reading, a conversation piece . . . although it purports to address 'you', meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or, indeed, any form of public security.*
>
> *The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or be taken as a serious warning. Moreover . . . it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did.*
>
> *Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet 'followers' in ample time for the threat to be reported and extinguished.*

13.384 The court made it clear that it was not sufficient to look only at the words of the message. Whilst, at first blush, the message might well be regarded as threatening, it was necessary to examine it in its proper context.

13.385 The *CPS* was criticised for bringing the case and Mr Chambers attracted a large level of support from the general population and a number of prominent public figures such as the comedians, Stephen Fry and Al Murray.

13.386 As a result of this case, the *CPS* published their official guidelines on prosecuting cases involving communications sent via social media.

13.387 Whilst these guidelines have been seen as a step forward, it has been argued that it is clearly unacceptable to have in existence an offence that is considered so broad that the *CPS* has to police itself.

13.388 The principle of legal certainty requires that laws are clear and give citizens the ability to regulate their lives.

13.389 It is suggested that Section 127(1) CA 2003 breaches this principle.

13.390 Arguably, this serves to highlight the need for a much clearer articulation of the harm caused by cyber hate so that offences are not only both clear and certain, but come within the Article 10(2) exceptions.[275]

Responses to the consultation paper in Northern Ireland

13.391 Respondents to the consultation paper for this review were clear in their opinion that the MCO 1988 at the CA 2003 are too broadly drafted and require modification to clarify and narrow their application.

13.392 76% of organisations and 78% of individuals agreed with this proposition.

13.393 83% of organisations and 88% of individuals were of the view that the current law was not sufficiently clear to protect freedom of expression.

[275] Peter Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information and Communication Technology Law,* 24 (1) (2015) p16-40. See also, Agate, J. and Ledward, J., 'Social media: how the net is closing in on cyber bullies' *Entertainment Law Review,* 24 (8) (2013).

13.394 The *Police Service of Northern Ireland* suggested that the review should consider recommending that the offence under the CA 2003 be amended to include a hybrid offence. This would allow applications for search warrants under Article 10 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

13.395 Another respondent referred to guidelines on prosecuting electronic communications which are being developed by the *PPS*, suggesting that they should be made public as soon as possible.

13.396 Many respondents argued that the legislation as it stands is too broad, contains vague and subjective concepts and is contradictory in some respects.

13.397 Respondents also argued that a lack of clarity on freedom of expression exposed the legislation to potential misinterpretation and abuse and hindered individuals' ability to freely express opinions and disagreement.

13.398 Particular concerns were around expression of Christian views on same-sex issues.

13.399 The *Presbyterian Church in Ireland* noted:

> The legitimate use and exposition of Scripture, even in an online environment, is a protected right in itself and does not constitute a hate crime.

13.400 Some respondents acknowledged that freedom of expression is clearly addressed by the ECHR but argue that such provisions were inadequate in the case of both the MCO 1988 and the CA 2003.

13.401 The *Northern Ireland Women's European Platform* observed that the position of the ECHR, while valued, "also adds complexity in that it does not clearly delineate between acceptable and unacceptable offensive expression".

13.402 *TransgenderNI* agreed that the terms 'grossly offensive', 'indecent' and 'obscene' have been useful in terms of addressing multiple types of harm but suggested that:

> They are also so broad as to require the *Public Prosecution Service* to self-regulate their application of them.
>
> Relying on Government self-regulation when dealing with issues of free expression and protection from harm is unwise, and as a result, these terms should be replaced with those fit for use in contemporary contexts.

13.403 Among the minority of respondents who did not agree that offences under the MCO 1988 and the CA 2003 should be modified were organisations from the legal sector.

13.404 Both the *Bar of Northern Ireland* and the *Public Prosecution Service* gave detailed explanations for their views.

13.405 The *Bar of Northern Ireland* submitted that:

> the offences are not too broadly drafted – given that there is such a range of potential offending through messages, threats, information, in communication and/or online, a broad drafting ensures a wide scope to ensure there are no 'loopholes' in the legislation . . .

> The current law contained in the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 is sufficiently clear to protect freedom of expression and this is also protected by the HRA 1998 and Article 10 ECHR too.

13.406 The *Public Prosecution Service* agreed, arguing:

> The *PPS* have not experienced any practical difficulties in prosecuting offences under the Communications Act 2003 or the Malicious Communications (Northern Ireland) Order 1998 and, therefore, do not see that there is any need to modify their application.

13.407 The *PPS* acknowledged that some of the terms used may seem a little outdated but pointed out that these terms have already received authoritative judicial consideration. It referred to the *House of Lords* decision in *DPP v Collins (2006) UK HL 40* in relation to the term 'grossly offensive'.

13.408 In relation to 'indecent' and 'obscene', the *Court of Appeal* in England in *Kirk (2006) EW CA Crim 725* confirmed that the words, indecent and obscene, are ordinary words bearing their ordinary meaning.

13.409 The *PPS* noted that:

> [A]re readily understood by members of the jury and it is unnecessary and may be misleading for the jury to be given any of the words which might narrow or enlarge their meaning. . . . It was held in Stanley (1965) 2 QB 327 that ' . . . The words 'indecent' and 'obscene' convey one idea, namely offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper

> end of the scale . . . an indecent article is not necessarily obscene, whereas an obscene article almost certainly must be indecent.

13.410 Among other important points made by the *PPS* in support of its overall position, the following were included:

- Prosecutors apply the test for prosecution as set out in the code for prosecutors when taking decisions involving offences under the Communications Act 2003 and the Malicious Communications (Northern Ireland) Order 1988;
- The legislative provisions often engage article 10 of the ECHR and prosecutors are aware that these provisions must be interpreted consistently with free speech principles under article 10;
- There is detailed internal guidance available for prosecutors in relation to how they should approach decisions in relation to such offences;
- The flexibility of these offences – in particular the 2003 Act – has been useful in terms of addressing a wide range of online hate crime, including many cases which had identified victims;
- Although the terms adopted by section 127 of the 2003 Act are potentially broad in scope, their proper application with proper recognition of the suspect's rights under article 10 – and in accordance with *PPS* internal guidance – results in prosecutions being brought only in appropriate cases;
- In this area of law there are never going to be bright lines that clearly distinguish conduct that is criminal and non-criminal. There will always be difficult cases that give rise to finely balanced judgements;
- It is not uncommon for prosecuting authorities to have guidance as to when prosecution should be brought for particular offences. This is intended to promote consistency and transparency in relation to how it approaches decision-making. It is not a matter of the authority 'limiting its own powers' or 'policing itself'; and
- Prosecuting authorities are public bodies that must act lawfully and decisions to prosecute can be challenged before the criminal courts. Decisions not to prosecute and the lawfulness of their conduct can be challenged in the High Court by way of judicial review.

13.411 A brief examination of two of the leading cases may help to illustrate that the definition of 'grossly offensive' is less clearly settled than the argument advanced by the *PPS*.

13.412 In the *Collins* case, the defendant had sent numerous telephone calls and messages to members of Parliament making a number of racist comments including references to 'Wogs', 'Pakis' and 'black bastards'.

13.413 The magistrates dismissed the charges. The case was stated for the High Court. The magistrates stated that whilst the communications were offensive, they could not be considered grossly offensive.

13.414 The Divisional Court upheld the magistrate's decision. Sedley LJ took the view that the term 'grossly' indicated some 'added value' to mere offensiveness.

13.415 However, the *House of Lords* concluded that the messages were "*grossly offensive'* saying that this was language '*beyond the pale of what is tolerable in our society".*

13.416 Their Lordships did not explicitly state the difference between 'offensive' and 'grossly offensive'.

13.417 Lord Bingham stated:

> *There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message*

is couched in terms liable to cause gross offence to those to whom it relates.[276]

13.418 The fact that so many judges at different levels disagreed about the concept and whether or not the behaviour of the defendant was lawful or unlawful points to the serious difficulties of legal interpretation.

13.419 In *Connolly v DPP (2007) EW HC 227 (Admin)* the defendant had sent photographs of aborted foetuses to three pharmacies that sold the morning after pill. She was convicted under Section 1 of the Malicious Communications Act 1988 for sending indecent and grossly offensive articles for the purpose of causing distress and anxiety.

13.420 The *High Court* noted that the words 'grossly offensive' were "*ordinary English words*", and agreed that the lower court was entitled to find that the photographs were grossly offensive. They described the photographs as "*shocking and disturbing*".

13.421 The most relevant case on this issue in Northern Ireland is the case of *DPP v McConnell (2016) NI Mag.1*.

13.422 In that case the defendant was an evangelical pastor who seriously criticised Islam in one of his sermons transmitted on the Internet and made into a DVD.

13.423 The sermon contained a statement that "Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell".

13.424 The defendant was charged under Section 127(1) of the CA 2003.

[276] DPP v Collins (2006) UK HL 40.

13.425 Prosecuting counsel accepted that the defendant was entitled to use strong language in criticising Islam, noting that such criticism was protected by Articles 9 and 10 of the ECHR.

13.426 The Crown's case was that what the defendant was saying was that he did not trust a single Muslim and characterised the followers of an entire religion in a stereotypical way that was grossly offensive and not protected by saying it from the pulpit.

13.427 In his defence, the pastor argued that he was attacking the doctrine and theology of Islam but it never entered his head to harm any Muslim when he spoke those words.

13.428 In his ruling, the District Judge was of the view that the pastor had characterised the followers of an entire religion in a stereotypical way and was making it crystal clear that he did not trust any Muslim.

13.429 The judge then went on to consider whether or not the words were 'grossly offensive' as required in the legislation.

13.430 His attention was drawn to the guidelines for the *Crown Prosecution Service* in England and Wales where the then Director of Public Prosecutions said:

> The distinction between offensive and grossly offensive is an important one and not easily made. Context and circumstances are highly relevant and, as the European Court of Human Rights observed in the case of *Handyside v UK*, the right to freedom of expression includes the right to say things or express opinions that ' . . . offend, shock or disturb the State or any section of the population.

13.431 The District Judge concluded that the words used were offensive but did not reach what he called the high threshold of being 'grossly offensive'.

13.432 He also observed that the court needed to be very careful not to criminalise speech which, however contemptible, is no more than offensive.

13.433 The Cambridge dictionary has synonyms for 'contemptible'. These include 'abominable' and 'unutterable'.

13.434 The Merriam-Webster dictionary has synonyms for 'contemptible'. These include 'despicable', 'nasty' and 'deplorable'.

13.435 Whatever else it may show, the decision in this case illustrates clearly the very high level of subjectivity involved in deciding where the line between 'offensive' and 'grossly offensive' should be drawn and the real danger to freedom of expression involved in such a semantic exercise.

13.436 The decision to prosecute in this case was not universally welcome. Criticism was not confined to those from the evangelical community.

13.437 Writing in the ***Belfast Telegraph*** on 5 August 2015 before the trial, the respected columnist and writer, Suzanne Breen, a self-confessed atheist, argued:

> There is something seriously wrong in hauling a pensioner pastor in ill-health through the courts for simply expressing his opinion….James McConnell didn't incite hatred or encourage violence against any Muslim…. He simply expressed his view about another religion. Freedom of speech should mean that he has

> every right to lambast Islam, as Islamic clerics have to lambast him and Christianity if they so choose…. Freedom of speech isn't only for polite persons of mild disposition airing their views within government policed parameters.
>
> In Britain, the *National Secular Society* and liberal Islamic scholars have voiced their support for the pastor. World famous atheist Professor Richard Dawkins has also raised the case on social media but in Northern Ireland there hasn't been a squeak out of the liberal left . . . defending Pastor McConnell's right to say what he said doesn't mean approving or embracing his sentiments . . . At a time when the *PPS* has so much on its plate and resources are stretched, it defies belief that pursuing Pastor McConnell using public funds is a priority.[277]

13.438 Doubtless, the *PPS* would disagree with this assessment, arguing that it followed its own guidelines.

13.439 In the face of such criticism, and in the interests of transparency, it may be wise for a public body such as the *PPS* to make its guidelines for prosecuting such cases public, rather than maintaining its current position of using them solely for internal guidance.

13.440 In its Scoping Report on Abusive and Offensive Online Communications in England and Wales, the *Law Commission* reviewed the current case law and application of the notion of 'gross offensiveness' in the context of communication offences.

[277] Suzanne Breen, 'It's not only Pastor McConnell in the dock, freedom of speech is there as well', *Belfast Telegraph,* 5 April 2015.

13.441 It argued that the definition of 'gross offensiveness' in the law is still not clear noting that:

> This suggests that the concept at law may be too vague and malleable, and further clarification may be required . . . The introduction of the Internet and the rise of social media introduced more problems for the notion of gross offensiveness than perhaps was foreseen when section 1 of the MCA 1988 and even section 127 of the CA 2003 were enacted. . . . . The *CPS* guidelines have attempted to deal with the malleability of the term 'gross offensiveness', however, it is difficult to achieve clarity when the law itself is vague and unclear.[278]

13.442 The *Law Commission* concluded that:

> Any further review of the communication offences as they apply online should examine whether the offences relating to the sending of grossly offensive communication remain appropriate as a basis for criminal liability in England and Wales.[279]

13.443 It will be noted that the offence under Section 127 CA 2003 includes sending by means of a public electronic communications network a message or matter that is of an 'indecent' or 'obscene' character.

13.444 The offence in Article 3 of the MCO 1988 can also be committed by sending a letter or other article which conveys a message which is 'indecent'.

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[278] Law Commission, *Abusive and Offensive Online Communications: A Scoping Report,* HC1682, No 381 (2018) p113.

[279] Law Commission, *Abusive and Offensive Online Communications: A Scoping Report,* HC1682, No 381 (2018) at para 5.96.

13.445 I would recommend:

Recommendation 30

Article 3 of the Malicious Communications (Northern Ireland) Order 1988 should be amended to explicitly bring within its ambit electronic communications. The word 'publication' should be amended to refer to 'posting' or 'uploading material online'.

13.446 If the recommendation in this chapter is taken up, Article 3 of the MCO 1988 will come into line with the law in England and Wales and refer to an electronic communication which conveys a message which is 'indecent' or an electronic communication which is, in whole or part, of an indecent nature.

13.447 The *Law Commission* observes that:

> The precise meaning of the terms 'indecent' or 'obscene' are unclear in the context of these communication offences, and is left to the jury to decide as a question of fact. Parliament thought it appropriate to leave it to the discretion of the court, however, the courts have been reluctant to define 'indecency' beyond being a question of fact for the jury or magistrates based on reasonable standards.[280]

13.448 The *Law Commission* concluded that there was vagueness and malleability in the terms 'obscene' and 'indecent'. It also noted that:

[280] Ibid, para 6.80.

> In some cases, the current law may criminalise online communications in ways that would not apply to off-line communication, potentially interfering with the right to freedom of expression . . . The elements of these offences need to be carefully considered in the context of the online world, to ensure the law is as effectively governing online communication as it would off-line communication, and achieving the right balance between protecting people from abusive or offensive content and protecting their right to freedom of expression.[281]

13.449 I respectfully agree with the *Law Commission*.

13.450 Given the wide wording of these offences, coupled with the use of arguably outdated terms such as 'grossly offensive', 'indecent' and 'obscene', there are strong grounds for urging reform.

13.451 When considering the four types of harm outlined earlier in this chapter, these offences can potentially cover all of them: harm to an individual, both in private and public forum, attacks against groups which poison the atmosphere and speech which radicalises other people.

13.452 There is no doubt that these offences are sufficiently wide to be extremely useful to prosecutors because of their catch-all ability.

13.453 However, from a rule of law point of view, it is this very breadth which arguably makes these offences untenable in their present form.

[281] Ibid, paras 6.236-6.237.

13.454 Section 127 of the CA 2003 is specifically concerned with public electronic communications networks and telecommunications and Internet services.

13.455 These are matters which are reserved to the *Westminster Parliament*.

13.456 As indicated above, the *Law Commission* for England and Wales is currently conducting a major review of abusive and offensive online communication following on from its scoping report of 2018. This review is not focused solely on prejudicial communications but will cover all forms of trolling, harassment and cyber bullying.

13.457 It will examine sentencing limitations in relation to the CA 2013.

13.458 It is noted that the offence in Section 127 of the CA 2013 may only be prosecuted summarily and is subject to a maximum penalty of six months imprisonment or a fine or both.

13.459 It has been observed that this can lead to significant limitations on its application in practice.

13.460 There is a strong argument that Section 127 should be amended to make it triable both summarily and on indictment.

13.461 In this context it should be further noted that Section 1 of the MCA 1998, which covers similar conduct in England and Wales, was amended to become triable either way by the Criminal Justice and Courts Act 2015 and is now subject to a maximum penalty of two years imprisonment or fine or both.

13.462 It is of concern that Article 3 of the MCO 1998 – the equivalent law applying in Northern Ireland – is only triable summarily with a maximum sentence of a level 4 fine.

13.463 I feel constrained by the remit of this review not to make a specific recommendation to bring the sentencing maximum penalty for this offence in line with England and Wales.

13.464 However, I see no good reason not to do so.

13.465 I suggest that it is a matter which should receive close consideration in the current review of sentencing being conducted by the *Department of Justice*.

13.466 In similar vein, there seems no good reason why the arguments for widening the prosecution options for the Section 127 offences could not have been dealt with in 2015.

13.467 There is now a strong case for bringing the sentencing provisions of the Section 127 offences into line with the provisions applicable to the MCA 1998.

13.468 This is another matter which will be addressed by the *Law Commission* in its current review of abusive and offensive online communications.

13.469 Although it would theoretically be possible to make recommendations in relation to reforming the CA 2003 in its application to Northern Ireland – with the agreement of the *Secretary of State for Northern Ireland* – I am of the view that these particular matters should be left for further consideration by the *Law Commission* which is already deeply engaged in the subject.

13.470 The *Law Commission* is likely to have reported well before any Hate Crime and Public Order Bill arising from the recommendations made in this review reaches the floor of the *Assembly*.

13.471 In its consultation paper, published on 11 September 2020, the *Law Commission* argued that:

> We are concerned that the current offences (i.e. the Malicious Communications Act 1988 and the Communications Act 2003) are sufficiently broad that they could, in certain circumstances, constitute a disproportionate interference in the right to freedom of expression under Article 10 of the ECHR. The criminalisation of grossly offensive speech is predicated on the notion that being offended is a harm that, when sufficiently serious, warrants the protection of the criminal law. This is a notion that the law should be slow to adopt. Ours is a society of many opinions; inescapably, then, there are many avenues for causing offence – even serious offence.
>
> That someone is caused to be offended is no indication of the moral standing of the behaviour causing that offence. It is therefore not clear that offence – without more – is of the nature or level of harm sufficient to invite the interference of the criminal law.[282]

13.472 The most significant proposal made in the *Law Commission's* said consultation paper is a proposed new offence to replace the offences in Section 1 of the Malicious Communications Act 1988 and Section 127(1) of the Communications Act 2003.

13.473 Rather than creating exhaustive definitions of words such as 'offensiveness', the *Law Commission* proposes an offence based on the likelihood of harm absent

[282] The Law Commission, *Harmful Online Communications: The Criminal Offences, . A Consultation Paper* (248), (September 2020) para 1.5.

reasonable excuse. Those detailed proposals are explored in Chapter 5 of the *Commission's* consultation paper – see a summary of the said proposed offence to replace the aforesaid communications offences at paragraph 5.49 of the *Commission's* consultation paper.

13.474 The consultation period closes on 18 December 2020.

13.475 It would be important for the *Department of Justice* to engage with the *Law Commission* on those proposals to identify any reforms along the lines discussed above which would be of benefit to the criminal law in Northern Ireland.

13.476 However, if the stirring up offences in Northern Ireland are amended in the way I have proposed then, arguably, from a hate speech point of view, there may be no need to maintain either article 3 of the Malicious Communications (Northern Ireland) Order 1988 or Section 127(1) of the Communications Act 2003 – albeit that repeal of the 2003 Act would require either legislation at Westminster or the consent of the *Secretary of State for Northern Ireland* if the *Assembly* took the initiative in this regard.

13.477 These communication offences are not essentially about hate speech – though some types of hate speech might be captured by them.

13.478 The *Law Commission's* online communications proposals are looking at broader harms beyond hate speech, and their recommendations about the form of these communication offences go beyond hate speech.

13.479 Arguably, the new offence proposed by the *Law Commission* of emotional distress is not really about hate speech and is dealing with an entirely different type of harm than the stirring up offences.

Online harm and the general law of hate crime

13.480 The final question in the area of online harm raised in the consultation paper asked respondents:

Should online harm be part of a general law applying to hate crime?

13.481 There was strong support for the inclusion of online harm in the general law on hate crime, both among organisations and individual respondents.

13.482 81% of organisations and 75% of individuals who responded agreed.

13.483 Increasing levels of online hate crimes and their specific impact on victims needed to be taken into account and a consistent approach to tackling hate crime and online harm needs to be adopted.

13.484 The *Committee on the Administration of Justice* stated that:

> We understand that at present the majority of proceedings the *PPS* considers for stirring up hatred offences relate to online activity. We are also mindful that for victims the removal of the offending material can be as, if not more, important to them than the apprehension of the guilty party. Hate expression also by its nature creates collective as well as individual victims.

13.485 Some respondents viewed the inclusion of online harm as particularly important to address significant and growing levels of harm experienced by women and trans people.

13.486 Respondents also called for consistency with stirring up offences, particularly in terms of definitions and protected characteristics.

13.487 It was also argued that the inclusion of online harm would send a strong message to victims, perpetrators and wider society that online hate crime is unacceptable and will be treated seriously by the criminal justice system.

13.488 In this respect, the legislation would constitute a practical tool for dealing with offending and would also encourage victims to seek justice.

13.489 It was also considered important that the specific nature of harm caused by online hate crime is recognised and addressed appropriately by legislation. Respondents argued that this type of crime not only harms victims directly, but also has a wider impact on identity groups.

13.490 The *Public Prosecution Service* stated:

> Online hate crime is arguably more damaging to the victim than off-line hate for a number of reasons. In addition to attacking victims for who they are, online hate can cause reputational damage to victims and can cause them to feel humiliated and embarrassed. Further, the permanency and reach of the Internet can mean that an online attack may never go away even when a perpetrator has been apprehended. Harm online often extends beyond the victim and can comprise general comments directed at specific groups.

13.491 One respondent suggested that although potential amendments could be made to the 1987 and 1988 Orders, it may be appropriate to create bespoke provisions that are designed specifically with online communications in mind.

13.492 A number of respondents again highlighted the importance of protecting freedom of expression in the context of provisions to address online harm.

13.493 The *Democratic Unionist Party* warned against:

> Excessive and illegitimate application of hate crime laws in respect of social media. In recent cases the High Court has found that police actions against some members of the public have been unlawful and represent 'disproportionate interference' with the right to freedom of expression.

13.494 In similar vein, the *Northern Ireland Human Rights Commission* observed that:

> When applying hate crime law to digital content, the right to freedom of expression must be safeguarded and any interference should be subject to the principles of proportionality and necessity.

13.495 A minority of respondents did not agree that online harm should be part of a general law applying to hate crime.

13.496 Among reasons offered was the contention that existing laws were adequate and online offences should be dealt with as separate offences.

13.497 There is force in this argument – the current online offences are **not** designed to deal with hate speech – although some hate speech might be captured by them.

13.498 One respondent, *Equi-law UK*, called for the experiences of men and boys to be considered within the scope of any analysis of gendered trends relating to crime, online abuse and hate speech.

13.499 This respondent made reference to a number of research studies to support its argument that "women and men experience relatively similar levels of online harms including hate speech".

13.500 It argued further that the review should reject proposals to include online harm as part of a general law applying to hate crime.

13.501 The *Church of Ireland Church and Society Commission* observed that:

> One of the most difficult aspects of existing hate crime and hate speech legislation in Northern Ireland is how fragmented it is.
>
> An ideal scenario would see fewer overall applicable statutes. Including online harms and the malicious use of online messaging would be a good first step to coordinating and combining the myriad legislation in use.
>
> Specifically, it seems appropriate that harm caused through hateful and malicious online behaviour should be considered at the same level as any other form of verbal assault or harassment which is aggravated by hate. This may indeed be the clearest and most concise manner of implementing it in law.

13.502 In chapter 14 of this paper I propose that the law in the area of hate crime should be rationalised and consolidated.

Final conclusions

13.503 The best way to achieve this – after due consideration by the *Minister of Justice a*nd the *Justice Committee* – would be to introduce a Hate Crime and Public Order Bill to the *Assembly* dealing with the recommendations made in this paper.

13.504 The most fundamental recommendation made by this review is to introduce statutory aggravations to all existing offences based largely on the Scots model as the core method of prosecuting all hate crimes and hate speech in Northern Ireland.

13.505 If this recommendation is accepted, then that one statute will become the reference point for most future prosecutions.

13.506 Such a move would fit within the existing criminal law and not necessarily mean any increase in sentencing powers in the vast majority of cases.

13.507 It will be recalled that I have drawn attention to the argument that the maximum sentence permitted under the MCO 1988 is arguably out of step with equivalent legislation in England and Wales and I have suggested this is a matter which should be considered with a degree of urgency in the course of the current review of Sentencing being undertaken separately by the *Department of Justice*.

13.508 One also has to accept the reality that measures engaging 'telecommunications' powers as provided for in the Communications Act 2003, such as proposals to create a regulatory body compelling Internet service providers to remove hate expression and further issues around whether or not offences under this Act should be capable of being tried on indictment with adjustments to maximum sentences, are matters reserved to the *United Kingdom Parliament* and, in the first instance, should be considered by that *Parliament* once the *Law Commission*

completes its current extensive review of abusive and offensive online communications.

13.509 As noted earlier, the consultation paper for that widespread review was published on 11 September 2020, with a consultation period extending to 18 December 2020.

13.510 If at a future date, the *Assembly* is not satisfied with any proposed UK legislation in this area and feels that separate and stronger legislation would be in the best interests of the people of Northern Ireland, then that would require the approval of the *Secretary of State* to make separate arrangements for Northern Ireland.

13.511 Subject to that important rider, it will be open to the *Assembly* in any future Hate Crime and Public Order Bill to consider making a number of important changes to the criminal law of Northern Ireland in line with the recommendations made in this report.

13.512 As indicated, this would involve bringing all the public order provisions currently found in the 1987 Order – with appropriate amendments as recommended in this review – into one consolidated piece of legislation.

13.513 It would be appropriate to make any necessary amendments to other laws in the same Bill, such as proposed changes to the MCO 1988 and, perhaps, to the PHO 1997 – assuming for the moment that relevant changes have not already been made to the PHO 1997 by the Stalking Bill likely to be presented to the *Assembly* before the end of 2020.

13.514 As currently envisaged, the proposed Hate Crime and Public Order Bill would not necessarily bring **all** hate crime legislation into one single piece of legislation but

it would provide the vehicle for making very significant and necessary changes to the law in Northern Ireland to provide hate crime laws which are effective for victims whilst ensuring fair labelling and certainty for defendants and guaranteeing the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms with particular regard to the right of freedom of expression.

13.515 If this approach is taken then issues around online harm and hate speech will effectively be part of a general law applying to hate crime.

Chapter 14

Hate Crime Legislation – Consolidation

CHAPTER 14

HATE CRIME LEGISLATION – CONSOLIDATION

14.1 It has been argued that a single source for hate crime legislation might be beneficial as it would provide clarification and simplification and allow the public better access to the law and understanding of what the purposes of the criminal law might be tackling hate crime. There is also an educative role for Government to publish a guide to hate crime in everyday speech to accompany the legislation.

Consolidation of legislation

14.2 As noted in previous chapters, hate crime legislation has developed in a piecemeal and uncoordinated way over many years.

14.3 The consultation paper asked respondents whether or not they believed that there would be benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation.

14.4 In his review of hate crime legislation in Scotland, Lord Bracadale was firmly of the view that all provisions relating to hate crime and hate speech should be consolidated into one piece of legislation, including all statutory aggravations and provisions relating to the stirring up of hatred under the Public Order Act 1986.

He observed:

> The review is recommending substantive amendments to some of these pieces of legislation and creating some new provisions in related subject areas in any event. If those recommendations are accepted, the

> Parliament and other relevant organisations and individuals would be devoting time to considering a bill on the topic of hate crime and hate speech. Although some additional time and resource would be required to consolidate all relevant legislation in one place, that would in my view be worthwhile in view of the advantages of consolidation . . . I do not agree that consolidation risks oversimplification and generalisation. The principles behind statutory aggravations and incitement to hatred are relatively simple and consistent across the different characteristics. Insofar as specific provisions are required to deal with how freedom of expression is to be safeguarded in relation to a particular characteristic, that can be done within the framework of a single piece of legislation without making the legislation itself unwieldy.

14.5 After further consultation, the *Scottish Government* accepted this recommendation and, in April 2020, introduced consolidated draft legislation – the Hate Crime and Public Order (Scotland) Bill.

14.6 The explanatory notes to the Bill noted that:

> *Legislation in this area has evolved over time in a fragmented manner with the result that the different elements of hate crime law are located in different statutes, there is a lack of consistency, and the relevant legislation is not as user-friendly as it could be. The new hate crime legislation will provide greater clarity, transparency and consistency.*

Consultation responses: Consolidation of hate crime legislation

14.7 The responses to the consultation paper in Northern Ireland showed strong support for producing one consolidated piece of legislation to cover hate crime/hate speech.

14.8 91% of organisations agreed with this proposal, together with 63% of individuals, giving an overall approval of 79%.

14.9 The respondents generally agreed that the current laws were considered to be outdated, underutilised, and subject to significant gaps.

14.10 Many respondents suggested that consolidation would bring about a number of potential benefits:

- It would bring clarity to the overarching purpose of the legislation, as well as transparency and consistency of approach to the law;
- It would support a more streamlined and effective process for the judicial system and make the system more accessible to the public; and
- It would help to raise public awareness and understanding of hate crime legislation, and strengthen public confidence in the judicial system.

14.11 A minority of respondents disagreed, arguing that consolidation was unnecessary and that greater emphasis should be placed on improving the current legislation, through steps to clarify definitions, strengthen the tools available and address any shortfalls in the legislation.

14.12 The *Church of Ireland Church and Society Commission* noted that:

> [C]onsolidation would lead to a more transparent and understandable system . . . given the *CASC's* impression that the vast majority of legislation involved needs to be at the very least amended and some aspects require a complete overhaul, it is also clear that such an overall consolidation and rewriting of the

> legislation is likely to be the most efficient manner of implementing the changes *CASC* recommends.

14.13 The *Equality Commission for Northern Ireland* saw clear benefits to the hate crime legislation being updated, harmonised and strengthened into a single piece of consolidated legislation, observing that:

> Such an approach will make the legislation easier to understand, provide greater clarity and certainty, and ensure a consistent approach, including addressing hate crime across a number of equality groups. . . . it makes sense to take this opportunity to consolidate the legislation at this stage in the legislation's development.

14.14 Many Women's groups were unanimous in supporting this proposal.

14.15 Most respondents agreed with the *PPS* who argued that:

> The range of legislation and the meaning and intent of the various strands, can be difficult for members of the public to comprehend, a point made to the *PPS* at outreach events. Therefore consolidation of the legislation may assist in terms of aiding public understanding.
>
> Such consolidation may also assist in reinforcing operational effectiveness and training within the criminal justice agencies. All agencies would work from a single consolidated piece of legislation which would set out a clear, consistent and comprehensive statutory scheme for tackling hate crime through the criminal law.
>
> It is also considered that having a single piece of legislation dedicated to tackling hate crime – and titled appropriately – would assist in communicating to the public how seriously such matters were taken.

14.16 It would be difficult to improve on the reasoning of the *PPS* on this issue. At the outreach events conducted throughout the country earlier this year, many people expressed frustration at the piecemeal development of hate crime laws.

14.17 Substantial changes to the law are recommended in this review. In doing so, I have sought to ensure that any new hate crime law can be simplified, rationalised and harmonised.

14.18 The arguments generated in the responses to the consultation paper are very similar to those that persuaded Lord Bracadale and the Scottish Government.

Recommendation and Analysis

14.19 I accept the validity of these arguments and accordingly recommend:

Recommendation 31

All hate crime and hate speech law – including public order legislation, apart from law dealing with reserved matters – should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.

14.20 The opportunity to consider hate crime/hate speech offences in the round should include consideration of all relevant current statutes, including the Malicious Communications (Northern Ireland) Order 1988, Section 37(3) of the Justice Act 2011 and The Protection from Harassment (Northern Ireland) Order 1997.

14.21 I acknowledge that some legislation such as the Communications Act 2003 deals with reserved matters and may not necessarily fall under the jurisdiction of the *Assembly* – at least without the consent of the *Secretary of State for Northern Ireland.*

14.22 It should also be noted that if the proposed model is adopted, i.e. by adding aggravators to existing criminal offences, then it would be unnecessary, unwieldy and unhelpful to attempt to bring **all** relevant legislation into one Bill.

Chapter 15

Legislation: Scrutiny and Oversight

CHAPTER 15

LEGISLATION: SCRUTINY AND OVERSIGHT

15.1 The consultation paper argued that there was a strong case for the provision of post-legislative scrutiny. This is a system of review to scrutinise the working of legislation and determine whether or not it is meeting its aims and objectives.

15.2 Post-legislative scrutiny is important to keep the law up to date and take account of changing circumstances and to ensure that the policy objectives of the legislation have been met, and, if so, how effectively.

15.3 If such a recommendation is accepted, it is anticipated that such a review might be conducted between Government departments and/or through the *Justice Committee of the Northern Ireland Assembly*.

15.4 It was mooted that the timescale for such scrutiny might well be three years after the legislation has been passed, to allow sufficient time for it to bed in and to be fully understood and put into practice by all stakeholders in the criminal justice system.

15.5 When the *Northern Ireland Affairs Committee* were considering the introduction of the Criminal Justice (No. 2) (Northern Ireland) Order 2004, a submission from the *Committee on the Administration of Justice* warned that:

> There is little value in amending or complementing current legislation with additional protections, if these provisions are then left unused or underused in the statute book.

15.6 The *Northern Ireland Affairs Committee* agreed, warning that*:*

> The law will be another 'dead letter' unless the enforcement authorities, primarily the *PSNI*, use it vigorously. . . . the authorities have considerable ground to make up in persuading vulnerable groups that their concerns are being addressed seriously. This legislation is an opportunity to demonstrate that such legitimate concerns will be addressed. Those involved in the criminal justice system must not fail this test. When our successor committee looks next at this subject we hope there will be a sound record of action as a result of this order.[283]

15.7 An example in point is the 2004 Order which was not subject to post-legislative review. As already noted, this review has found significant failings in the concept and operation of the 2004 Order - yet it has taken sixteen years to begin to redress these serious deficiencies which have failed and discouraged victims for many years.

15.8 If post-legislative review had been an option, this would have greatly facilitated the law and avoided many of the criticisms made in response to this review.

15.9 It has been said that those who fail to heed the lessons of history are doomed to repeat the mistakes made in the past.

15.10 In the consultation paper, and following feedback from respondents, there was little doubt that the recommendation for post-legislative scrutiny made by the *Northern Ireland Affairs Committee* in 2005 continues to have an important resonance today.

[283] *House of Commons Northern Ireland Affairs Committee* (2004), "hate crime": The draft Criminal Justice (NI) Order 2004, 5th report of session 2003-04 (HC 615) London: The Stationery Office

Consultation responses: scrutiny and oversight

15.11 Responses to the review's consultation paper provide unanimous support from respondents that any new legislation on hate crime should be subject to post-legislative scrutiny.

15.12 The consultation paper asked for any suggestions as to the best way in which post-legislative scrutiny could be provided for and the ways such scrutiny might be implemented.

15.13 Although there was complete unanimity on the desirability for providing post-legislative scrutiny of any new legislation on hate crime, views differed about how this scrutiny should be provided. Among recommendations for formal review included: through a judge led follow-up review; a review by the *Department of Justice*; an *Assembly Committee* review; or a review by the *Criminal Justice Inspection Northern Ireland*.

15.14 One respondent, the *Church of Ireland Church and Society Commission,* called for:

> [A] full comparative assessment, examining if the changes have had the intended effect, if public confidence and satisfaction in the system has improved, if victims satisfaction levels have been improved and ultimately if there has been any resulting change in hate crime statistics.

15.15 The *Equality Commission for Northern Ireland* recommended consideration of the following issues:

- An overall assessment of the impact and effectiveness of the legislative changes, so as to assess whether the policy objectives of the legislation are being met;
- The merits or otherwise of including additional protected equality grounds within the protection of hate crime legislation;
- Any review arising from the implementation of hate crime legislation in Great Britain; and
- Wider developments, for example the impact of Brexit on the instances of hate crimes and hate speech.

15.16 *Sinn Féin* argued that the *Police Service of Northern Ireland*, along with the *Policing Board*, *PPS*, *Courts and Tribunal Service*, the *Probation Board*, the *Criminal Justice Inspection Northern Ireland*, the *Department of Justice* and the *Assembly*, would all have a crucial role in closely monitoring post-legislative developments.

15.17 *Northern Ireland Women's European Platform* were among a number of respondents who argued that any reviewing agency should be independent of the criminal justice system:

> As such, the *Equality Commission for Northern Ireland* or the *Human Rights Commission for Northern Ireland* might be relevant, particularly keeping in mind the link between hate crime legislation and wider equality legislation.

15.18 *TransgenderNI* argued that there should be:

> At least two independent reviews following the implementation of any new hate crime laws, with built in extensive consultation with the community and

> voluntary sector involved in supporting and advocating for protected groups.
>
> We would support the establishment of a hate crime advisory group, including those aforementioned community organisations alongside victim representation, which would scrutinise the application of the new legislation as well as the ability of the *PSNI* and wider criminal justice system in addressing hate crime.

15.19 The *Committee on the Administration of Justice* – the same organisation which had given the prophetic warning to the *Northern Ireland Affairs Committee* in 2004 – observed*:*

> We would also support provisions obliging periodic post-legislative scrutiny of the effectiveness of the legislation after set periods of a number of years by a competent independent body such as the *Criminal Justice Inspection NI*. A link should also be made to the independent human rights adviser function of the *Policing Board*.
>
> We would urge consideration is given to a duty under the legislation for the *Department of Justice* to issue a Code of Practice, drawing on international best practice that, among other matters, sets out guidance and provisions for training on such matters.

15.20 The *Equality Commission for Northern Ireland* argued for five year reviews of the legislation so as to assess the overall effectiveness of the legislative changes in tackling hate crime. It argued that five years was an appropriate timescale for a review to allow sufficient time for the legislation to bed in, and for accompanying guidance and changes to policy to be applied.

15.21 The *Northern Ireland Housing Executive* observed:

> We would support the suggested mixed model of independent monitoring by the *CJINI* supplemented with regular scrutiny from the *Assembly* to highlight the value and importance our society places on addressing hate crime, protecting the vulnerable, and promoting and securing community cohesion.

15.22 There is a strong case from the responses to the review in favour of some form of substantive post-legislative scrutiny of any new consolidated legislation. I therefore recommend as follows:

Recommendation 32

There should be post-legislative scrutiny by the Assembly to monitor the effectiveness of any new legislation on hate crime and hate speech. It is recommended that such scrutiny should occur regularly at three-year intervals and, if possible, include an element of public consultation.

15.23 I think a period of three years should give time to allow the legislation to bed in and be fully understood and put into practice by those involved in the criminal justice system.

15.24 The *Criminal Justice Inspection Northern Ireland* would appear to be very well-placed to carry out such a review reporting to the *Justice Committee* of the *Assembly*.

15.25 One particular advantage of such scrutiny is that this may well facilitate the addition of certain new characteristics as protected groups if the evidence base is sufficient to demonstrate that targeted criminality has developed into serious social problems that serve to justify criminal proscription.

Proposals for establishing a Hate Crime Commissioner for Northern Ireland.

15.26 The idea of establishing a Hate Crime Commissioner was not at the forefront of consideration when the consultation paper was published in January 2020.

15.27 Recent Government proposals at *Westminster* and at the *Assembly* on the issue of domestic abuse have encouraged me to examine the possibility of setting up such an office, but in the context of hate crime, one that has responsibilities in that area of expertise.

15.28 It is possible to draw on some comparable examples. For example, in the draft legislation for England and Wales on domestic abuse, the Government has proposed the appointment of a Domestic Abuse Commissioner. I note that the Commissioner has been pre-emptively appointed, before the legislation has been approved by Parliament.

15.29 Although a similar Domestic Abuse and Family Proceedings Bill is before the *Assembly*, the appointment of such a Commissioner for Northern Ireland is not currently part of that proposed legislation.

15.30 The Bill for England and Wales proposes that the Domestic Abuse Commissioner will be an independent statutory officeholder appointed by the Secretary of State – in practice, the Home Secretary.

15.31 There is much to learn from the general functions of the Domestic Abuse Commissioner, which includes the encouragement of good practice in:

- The prevention of domestic abuse;
- The prevention, detection, investigation and prosecution of domestic abuse related offences;
- The identification of perpetrators, victims and children affected by domestic abuse; and
- The provision of protection and support for victims.

15.32 The Bill gives the Domestic Abuse Commissioner significant powers to request the cooperation of specified public authorities – and those authorities will be obliged to respond to the Commissioner, where the Commissioner publishes a report containing recommendations in relation to any specified public authority or Government department in the charge of a Minister.

15.33 The Commissioner will be obliged to prepare strategic plans and annual reports.

15.34 The establishment of a Hate Crime Commissioner for Northern Ireland, drawing inspiration from some of the ideas concerning the role of the Domestic Abuse Commissioner, might well complement the legislative reform options I have outlined in this Review and underscore the importance of hate crime and hate speech.

15.35 A Commissioner could have similar functions in the field of hate crime to that proposed for the Domestic Abuse Commissioner for England and Wales. It would be sensible to consider this as a workable model for the Hate Crime Commissioner.

15.36 This would be to encourage good practice in the prevention, detection, investigation and prosecution of offences associated with hate crime, as well as the identification of victims and perpetrators of those offences.

15.37 Such a proposal is under active consideration by the *Law Commission for England and Wales* in its review of hate crime legislation[284].

[284] See the *Law Commission for England and Wales,* Hate crime laws-a consultation paper(250)September 2020,chapter 20 p.502 et seq.

15.38 In its consultation paper it proposes that there are a number of functions of a Hate Crime Commissioner as follows:

- Access and monitor the provision of services to people affected by hate crime. This could capture the provision of specialist services for victims such as advocacy and emotional support across all strands of protected hate crime categories, as well as specialist provision for perpetrators, such as perpetrator education and rehabilitative programmes. The Commissioner could recommend improvements where the need for such is identified;
- Complement the work of her Majesty's *Inspectorate of Constabulary* and *Fire and Rescue Services* and monitor the consistency and effectiveness of police recording of hate crimes and incidents;
- Monitor the effectiveness of alternatives to prosecution such as restorative justice programmes being used in response to hate crime;
- Support the carrying out of research relevant to various aspects of hate crime;
- Support the development and implementation of relevant educational resources, which challenge prejudicial attitudes that underpin hate crime;
- Raise awareness of the prevalence and specific impacts of hate crime on individuals and communities more widely, through media, social media and speaking opportunities;
- Conduct centralised consultation with a diverse range of stakeholders who represent the views of affected parties across all hate crime strands; and
- Co-operate and consult with other Commissioners. In Northern Ireland this could include *the Victims Commissioner, the Commissioner for Older People and the Commissioner for Children and Young People*.

15.39 A Hate Crime Commissioner for Northern Ireland might also consider on an annual basis the working of the legislation. Such annual reports might provide an additional layer of scrutiny over the working of the legislation and facilitate its overall scrutiny.

15.40 Some examples may serve to show how important such a rule might be. For example, a Commissioner may consider whether or not the evidence supports the addition of further protected characteristics, or further changes to legislation.

15.41 The establishment of a Hate Crime Commissioner would bring considerable benefit to hate crime laws and practice, especially as an educative role and oversight of trends and occurrences, in education and in the wider community. A Commissioner might be able to provide education and training to various stakeholders in the criminal justice system as well as supporting the provision of educational programmes for young people.

15.42 So, for example, a Hate Crime Commissioner may be able to identify inconsistencies in the quality and quantity of hate crime support services for victims.

15.43 In relation to the Domestic Abuse Commissioner, the *Law Commission* noted that the Government's recent domestic abuse consultation:

> [C]ould raise awareness of domestic abuse since it remained largely hidden, with only an estimated one fifth of victims reporting it to the police.

15.44 The comparison with the serious rates of under-reporting of hate crime are obvious.

15.45 It may be suggested that the cost of a Hate Crime Commissioner might be an argument against introducing such a role.

15.46 The current proposals in the Domestic Abuse and Family Proceedings Bill (Northern Ireland) 2020 do not include provision for a Domestic Abuse Commissioner.

15.47 Introducing the Second Reading of the Bill, the Minister, Naomi Long MLA, said that she remained to be convinced of the need for a Domestic Abuse Commissioner. She noted:

> While not a reason in and of itself, Commissioners (and their staff) generally cost in the region of £1 million, money that would, in my view, be better invested in other services such as our new advocacy support service or behavioural change programmes to address abusive behaviour…. However, I am listening carefully to representations in that regard[285].

15.48 Speaking in the same debate, Mr Beattie MLA, *Ulster Unionist Party*, observed:

> There is a discussion to be had about a Commissioner, whether it is a Commissioner for Domestic Violence or a Commissioner for the Victims of Crime . . . We need a Commissioner for Victims of Crime in general. . . . So there is a place for a Commissioner, whether as a Domestic Violence Commissioner or Commissioner for the Victims of Crime; I would rather go for the latter[286].

[285] *Northern Ireland Assembly* Official Report: Second Stage: *Domestic Abuse and Family Proceedings Bill* (28 April 2020)
[286] *Northern Ireland Assembly* Official Report: Second Stage: *Domestic Abuse and Family Proceedings Bill* (28 April 2020)

15.49 Dolores Kelly MLA, *Social Democratic and Labour Party*, noted that the Bill in England and Wales proposed to establish the office of a Domestic Abuse Commissioner and said:

> I have concerns about that not being included here. A Commissioner would be not only an advocate for the sector but someone who could ensure that adequate levels of funding and training were in place to ensure implementation . . . We need to make sure that the law works in practice. A Commissioner would, therefore, play a key role in supporting the sector, the *PSNI* and the judiciary in doing that[287].

15.50 Among others who supported this idea was a *former Justice Minister*, Claire Sugden MLA.

15.51 The impact assessment accompanying the Domestic Abuse Bill for England and Wales notes that the budget for the Domestic Abuse Commissioner is likely to be around £1 million per year. This would provide for the Commissioner's salary and variable overhead costs, as well as the employment of a team of support staff. It assumes a Commissioner would be supported by up to 15 staff members.

15.52 However, in 2018/19 the *Victims Commissioner (in England and Wales)* had a budget of £500,000. The most recent annual report published by the *Independent Anti-Modern Slavery Commissioner* notes that the Commissioner's annual budget was £575,000 in 2016/17.

[287] *Northern Ireland Assembly* Official Report: Second Stage: *Domestic Abuse and Family Proceedings Bill* (28 April 2020)

15.53 Reflecting on this issue of cost, the *Law Commission* notes that:

> The budget for a Hate Crime Commissioner may be somewhat less than the Domestic Abuse Commissioner, as the scale of hate crime is lower than domestic abuse.

15.54 If the cost of a Hate Crime Commissioner is considered to be justified, it would be important to craft the Commissioner's functions to avoid any duplication of effort and to ensure that the contribution made by such a Commissioner to hate crime would provide added value to current arrangements.

15.55 Consideration could also be given to whether or not such a role would be full-time or part-time. A solution to the question of financial commitment might well be to provide for a Domestic Abuse/Hate Crime Commissioner whose responsibilities would straddle both areas of criminality.

15.56 Such a dual role should go a long way to allay concerns about the allocation of public monies especially if there is agreement that the creation of such an office is needs driven.

15.57 By way of comparison, the total running costs for the *Commissioner for Victims and Survivors in Northern Ireland* for the financial year 2018/2019 was £879,956 for this full-time post and support staff.

15.58 The total running costs for the same financial year for the *Commissioner for Older People from Northern Ireland*, another full-time post, was £873,622.

15.59 The total running costs for the same financial year for the *Prisoner Ombudsman for Northern Ireland* was £638,000 – on the basis that the office-holder committed to 4 days per week.

15.60 At the other end of the scale, the part-time post for the *Commissioner for Public Appointments Northern Ireland* had an approximate total cost for 2018/19 of £175,752.

15.61 These figures were obtained from official Government sources[288].

15.62 The conclusion of the *Law Commission* was as follows:

> It seems likely that a Hate Crime Commissioner could provide a useful function in monitoring and coordinating key bodies and agencies that work to counter and prosecute hate, and promoting best practice and supporting victims and rehabilitating offenders. The role may also help to raise the profile of hate crime and communities, and encourage confidence in victims coming forward and reporting hate crimes and incidents . . . What is less clear is whether the cost involved in the creation of such a rule is proportionate, and if the funding may better be spent in other ways, such as enhanced support for third-party victim support agencies[289].

15.63 I agree with the *Law Commission's* analysis and recommend as follows:

[288] Information was gleaned from the respective official websites for each organisation.
[289] See the *Law Commission for England and Wales,* Hate crime laws-a consultation paper(250)September 2020,chapter 20 p.502 et seq.

Recommendation 33

An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.

Recommendation 34

In the alternative, I recommend that the role of such a Commissioner could properly be shared and that therefore there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner. I believe this would work well because the remit for this post relates to specific criminal contexts which are not dissimilar.

15.64 I am confident that, in a difficult financial climate, such a dual role will provide much needed support and oversight in both areas of criminal law and will prove to be excellent value for money. Such a novel and imaginative arrangement would go a long way to raise the profile of hate crime and domestic abuse and encourage victims to come forward, report hate crimes and domestic abuse to the police and third party agencies and participate in a criminal justice process that is increasingly fit for purpose.

15.65 The importance of creating a Hate Crime Commissioner for Northern Ireland will also help to coordinate and assist bringing together the main responses to hate crime as well as engaging in a public educational function.

Chapter 16

Hate and Hate Crime in Northern Ireland: Setting the Way Forward

CHAPTER 16

HATE AND HATE CRIME IN NORTHERN IRELAND: SETTING THE WAY FORWARD

16.1 In this final chapter, the main analysis of the review is addressed including the question the future of hate crime in Northern Ireland. It explores the role of sentencing guidance in dealing with hate crime/hate speech. It then examines the wider societal issue of challenging hatred and prejudice in Northern Ireland, focusing on the key role to be played by education in encouraging the next generation to respect difference and diversity in helping to build a shared and integrated society.

16.2 As previously noted in Chapter 4 of this paper, in 2017 the *Northern Ireland Policing Board (NIPB)* observed that:

> The term 'hate crime' appears routinely in Government policy and is used frequently in public discourse but it is often applied inconsistently. Confusion often arises from the fact that there is, in fact, no specific criminal offence for 'hate crime' in Northern Ireland and no simple legal definition of it.[290]

16.3 As explained in the main chapters of the review, whilst it is correct that no specific offence of 'hate crime' currently exists, the Criminal Justice (No. 2) (Northern Ireland) Order 2004 (the 2004 Order) enables a sentence to be increased where it is proven that the basic offence for which a person has been convicted was motivated by hostility against one of the currently protected characteristics (race, religion, sexual orientation or disability), or where the offender demonstrated hostility against

[290] Northern Ireland Policing Board, *Thematic Review of Policing Race Hate Crime*, 2017, p9.

one of those characteristics, either at the time of committing the offence, or immediately before or after it.

16.4 There are also the stirring up offences under the Public Order (Northern Ireland) Order 1987 (the 1987 Order).

16.5 As we have seen, there have been very few prosecutions under the 1987 Order and this is a subject of criticism from many respondents to the review.

16.6 Respondents also expressed serious concerns about the protection of the freedom of expression and other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms. This is entirely understandable. Support for the right to freedom of expression is to be found across many groups and communities within Northern Ireland society. Put simply, if hate crime is too widely drawn, then many religious groups and others argued that they felt inhibited in expressing their religious views and beliefs.

16.7 It is also important to recognise that aside from public order offences, the *NIPB* is correct in pointing out that Northern Ireland does not have the equivalent specific aggravated offences to the offences which are to be found in the current law in Scotland, England and Wales since 1998.

16.8 The 2004 Order deals **solely** with enhanced sentencing.

16.9 The grave deficiencies in the operation of the 2004 Order are supported in the evidence and submissions received by the review from a large number of organisations in response to Chapter 6 of the consultation paper.

16.10 It will be recalled that in Chapter 6 of the consultation paper, for example, in relation to Crown Court outcomes for the year 2018/2019, the review team undertook an analysis of the transcripts of the sentencing process and found that of the sixteen cases considered by the *PPS* to have involved hate crime aggravated by hostility against protected characteristics, only four cases were prosecuted in court by the *PPS* on the basis of a hate crime. This finding was later accepted by the *PPS*.

16.11 The research also showed that in the four cases where the aggravating features of the case were accepted by the trial judges, longer sentences were not passed, or if they were, the judges did not state that they were doing so. In each of the four cases there was no explanation forthcoming from the trial judge on this important issue.

16.12 Setting out the principles of sentencing for any proposed new hate crime legislation is clearly a matter of great importance. Sentencing was regarded as such by many attendees at the various outreach events for the review as was the question of the seriousness with which hate crime would be treated by the courts.

16.13 The terms of reference of this review requires account to be taken of the *Department of Justice's (DoJ)* Review of Sentencing Policy:

> The review will take cognisance of the Department's Review of Sentencing Policy and will ensure that it does not cut across any options planned for consultation in this regard.

16.14 Issues around sentencing are, therefore, outside the substantive terms of this review. However, there are matters raised in the review that have significance for the *DoJ's* Sentencing Review.

16.15 At time of writing, the *DoJ* is considering the issue of sentencing. A consultation paper was published and the consultation process concluded in February 2020. A report on the responses was published on 30 September 2020[291].

16.16 The current position is that Northern Ireland does not have a Sentencing Guidelines Council such as currently exists in Scotland, England and Wales.

16.17 Currently, there is a group – the *Lord Chief Justice's Sentencing Group* – which considers first instance judgements and advises the *Judicial Studies Board (JSB)* as to their suitability for inclusion on the *JSB* Sentencing Guidelines and Guidance Website. Its terms of reference include, *inter alia*, liaison with the *JSB* as to the training of the judiciary on sentencing practice and the dissemination of sentencing guidelines.

16.18 With specific reference to hate crime, this Group, then chaired by Lord Justice Gillen, asked the *JSB* to draw the attention of sentencers to the *Northern Ireland Human Rights Commission's* Report: 'Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland' (2013).

16.19 The Group referred in particular to the concerns raised at pages 53–58 of the report, noting that:

> It is important that sentencers should ensure that all potential hate crimes are properly identified to allow that aspect to be adjudicated upon and taken into account in the sentencing exercise where the crime is found to have been motivated by hatred. (January 2015).

[291] https://www.justice-ni.gov.uk/publications/sentencing-policy-review-consultation-responses

16.20 As to guidance for the Crown Court, it appears that the Group, which meets once per legal term, will consider recent sentencing decisions of the Court of Appeal and decide if a particular case provides useful guidance. It will ensure that it is disseminated to the Crown Court judges.

16.21 Reservations have been expressed as to the efficacy of this structure of decision-making and its randomness in approach. This is a reactive system, largely dependent on a suitable case coming before the courts on hate crime/hate speech before any recommendations are forthcoming.

16.22 The review of sentencing referred to in paragraph 16.15 is the first review of sentencing policy in Northern Ireland for over a decade. The area of sentencing guidance is one of the topics identified for review.

16.23 Chapter 3 of the summary of responses to the sentencing review consultation deals with sentencing guidance.

16.24 Question 13 asked respondents whether or not there is sufficient transparency in sentencing in Northern Ireland. (see para 74 et seq.).

16.25 A third of respondents recorded their support for establishing an organisation similar to England and Wales or the Republic of Ireland, namely an independent Sentencing Guidelines Council to 'promote understanding of sentencing principles as the current Northern Ireland arrangements have led to a perceived lack of fairness, consistency, wide disparities in sentencing undermines public confidence.' (para 76)

16.26 Question 14 asked 'Should a sentencing guidance mechanism be established that builds on the current arrangements, namely, guideline judgements and the work

of the Sentencing Group?' (The Sentencing Group referred to is the L*ord Chief Justice's Sentencing Group* referred to above at para 16.17).

16.27 Responses to this question were as follows:

There were some who, while favouring building on the current arrangements, also expressed support for greater change. A number of respondents did not support building upon the current arrangements and specifically stated they preferred the establishment of a Sentencing Council similar to that found in neighbouring jurisdictions. General comments supporting the establishment of a Sentencing Council for Northern Ireland based on the England and Wales model was interpreted as an indication to provide for similar functions as currently discharged by the England and Wales Sentencing Council (paras 83 and 92).

16.28 The majority of respondents supported the inclusion of non-judicial members in a sentencing mechanism based on knowledge, experience and skills relevant to sentencing and criminal justice. (paras. 99 – 100).

16.29 In this regard, it is noted that the Sentencing Councils in England and Wales and in Scotland conduct a selective application process for non-judicial members following public advertisement.

16.30 The *DoJ* summary of responses to its sentencing review consultation noted that further development work and discussion with stakeholders was required including further work on reviewing the current sentencing guidance arrangements. (para. 301).

16.31 It is anticipated that the sentencing review team will be finalising its recommendations during the rest of 2020 to facilitate the *DoJ* taking decisions on the way forward and to support the development of new sentencing legislation for inclusion

in a legislative programme early in the next Northern Ireland Assembly mandate. (para. 302).

16.32 As already noted above in chapter 5, one of the key conclusions from this review is that the core legislative provision (the current Northern Ireland 2004 Order) has not been proven to be effective or fit for purpose.

16.33 I have recommended that the part of the 2004 Order dealing with enhanced sentences should be repealed and replaced with an aggravated offences model based largely on the model in Scotland.

16.34 It is hoped that the recommendations to replace the 2004 Order, if taken in the round with the other recommendations in this review, will make a real difference to the criminal law and the justice system and provide a much more effective means for dealing with criminal conduct motivated by hatred, malice, ill-will or prejudice, including hate crime and hate speech.

Legislative reforms and tackling hate and hate crime through mutual education and learning strategies

16.35 It would, however, be naïve to think that changes, even the radical changes proposed in this report, will be a panacea for all the evils of hate crime and hate speech.

16.36 Lord Bracadale argued that better criminal legislation can significantly improve the lot of the people.

16.37 In presenting his final report he observed that whilst legislation would not change attitudes on its own, it can do two things:

> First, clearly defined hate crime legislation and well-developed procedures in the criminal justice system to deal with it will increase awareness of hate crime and give victims more confidence that it will be taken seriously by the police, prosecutors and the courts. Secondly, it can *contribute* to attitudinal change.[292]

16.38 I share these sentiments and the words of Dr Martin Luther King who described the potential power of the law in the following terms:

> Well, it may be true that morality cannot be legislated but behaviour can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me but it can restrain him from lynching me; and I think that is pretty important also. And so, while the law may not change the hearts of men, it does change the habits of men if it is vigorously enforced, and through changes in habits, pretty soon attitudinal changes will take place and even the heart may be changed in the process.

16.39 The question of attitudinal change, referred to by Dr King, is a subject in itself and is worthy of a separate review.

16.40 Although there is no commonly accepted definition of hate, it appears clear that is learned rather than innate. It is not inherent in human relationships and humans do not hate from earliest childhood.[293]

[292] Lord Bracadale, Independent Review of Hate Crime Legislation in Scotland: final Report (May 2018), at (ii).
[293] Sternberg and Sternberg (2008) The nature of hate: Cambridge University Press p.125

16.41 Sternberg and Sternberg argue that hate can be acquired either as a result of our perceptions or as a result of the manipulation by others of our feelings and cognitions. They note further that:

> Stories of hate are fomented largely by socialisation through propaganda; and thus that, to a large extent, hate is learned.[294]

16.42 It is sobering to recall that 22 years after the *Good Friday Agreement* of 1998, the numbers of so-called peace walls, most usually within the Belfast area, have actually increased and been enhanced in order to curb perceived tensions.

16.43 Marian Duggan, a senior lecturer in criminology at *Sheffield Hallam University*, describes these structures in the following terms[295]:

> These barriers range from a few hundred yards to over three miles long and up to 25 feet high. They are made of iron, brick and steel and may or may not have gates in them which are open during the day but locked at night….
>
> ..enduring processes of geographical, social and political segregation enable a significant proportion of people to go about their daily business with little or no interaction with members of the 'other' community. Despite experiments with shared housing and shared education, over 92% of enrolments are in single community schools and 90% of social housing is allocated for single community groups. This segregation proves functional in that it serves to reduce fears and possibilities of sectarian victimisation or intimidation.

[294] Ibid at p.132

[295] Marian Duggan, "Sectarianism and Hate Crime in Northern Ireland published in Routledge International Handbook on Hate Crime (2018)

16.44 Senator George Mitchell, one of the architects of the peace process which led to the *Good Friday Agreement* observes in his book 'Making Peace: The Inside Story of the Making of the Good Friday Agreement':

> Northern Ireland is an advanced modern society. Its people are productive, literate and articulate. But for all its modernity and literacy, Northern Ireland has been divided by a deep and ancient hatred, into two hostile communities, their enmity burnished by centuries of conflict. They have often inflicted hurt, physical and psychological, on members of the other community, and have been quick to take offence at real or perceived slights. They have a highly developed sense of grievance…. Each is a minority…. Each sees itself as a victim community, constantly under siege, the recipient of a long litany of violent blows from the other…. I wondered how it was possible to have two such completely different views of the same society."

16.45 In 2004, Ewart and Schubotz conducted a study in Northern Ireland examining young people's views of sectarianism since the onset of the peace process. The young people identified a number of desirable changes which were:

- more formally integrated schools;
- more informal mixing between schools;
- more cross community contact schemes (or through schools and across neighbourhoods);
- better facilities and activities for them to mix in a non-sectarian atmosphere;
- the banning of territorial markers such as murals, flags and kerb painting; and

- more acknowledgement of compromises, commonalities and commitments to a peaceful future.[296]

16.46 Although the *Northern Ireland Life and Times Survey*[297] – operational since 1998 – has indicated a consistent and significant growth in optimism regarding relations between Protestants and Catholics despite political stalemates, sectarianism is still very evident albeit in a significantly less violent form.

16.47 Research carried out on the benefits of close intergroup contact since the Troubles began in 1969 suggests that individuals who have experienced positive, friendly, and co-operative contact with members of another group tend to have lower levels of prejudice, are more trusting, experience greater empathy, and are less anxious about interacting with that group.[298]

16.48 In 2013 Professor Rhiannon Turner and colleagues from the *School of Psychology, Queen's University Belfast*, undertook a cross-sectional questionnaire study among Catholic and Protestant teenagers attending integrated and non-integrated schools in Northern Ireland. Among their findings they observed that students attending integrated schools reported having greater opportunities for intergroup contact than students at non-integrated schools. In turn, they also had more friends from the other community[299].

[296] Ewart and Scholtz (2004) voices behind the statistics: young people's views of sectarianism in Northern Ireland: London: National Childrens' Bureau.
[297] https://www.ark.ac.uk/nilt/
[298] Pettigrew and Tropp (2006)
[299] Turner et al. *Contact between Catholic and Protestant schoolchildren in Northern Ireland* June 2013 Journal of Applied Social Psychology 43 (S2)

16.49 Furthermore, students at integrated schools were also more likely to self-disclose to members of the other community, sharing important aspects of themselves, and activity associated with higher levels of liking, trust and empathy.

16.50 A recent *Queen's University Belfast* and *University College Dublin* Joint Research Report, published in 2020, noted that in Northern Ireland children learn sectarian differences by the time they are five:

16.51 Children of that age were observed to have found it difficult:

> To differentiate others on the basis of non-visible social categories, including religion and nationality.
>
> Even in the post-accord generation, social divisions are reinforced by the majority of the population living in segregated housing and attending separate schools. Moreover, social life is organised along the boundaries which are demarcated by 'peace walls', murals, kerb paintings, graffiti and flags, as well as defined psychologically and culturally in terms of social activities, or sporting events.

16.52 The authors note:

> By identifying the age at which ethnic awareness is increasing, these findings suggest policymakers and practitioners target interventions to younger children before group identities become solidified or entrenched.
>
> Finally, social categorisation among a post-accord generation can have long lasting effects for the individual child and the broader society. Understanding when and how children develop a sense of social group boundaries has implications for practice and policy and conflict resolution. Ethnic awareness, however arbitrary, serves as a lens through which children perceive the social world.

> For instance, research has demonstrated that the content of children's national and ethno-political categories includes symbolic markers such as flags, street banners, coloured kerbstones and murals. Policymakers might strive to reduce such dividing markers in public settings.[300]

16.53 Commenting on this report, the writer Alex Kane observed:

> For more than 30 years, opinion poll evidence suggests that most people (a comfortable majority, in fact) believe that education – the school system, in other words – is the primary key to changing old attitudes, among the children themselves, as well as their parents and broader family circles. Yet, with the exception of the Alliance Party, there doesn't appear to be the political determination to push integrated schooling as a serious option. That is not to say that the other parties don't continue to promote the concept of educating our children together, but they ended up with the rather odd solution of 'shared education' rather than full-blown integration. The Star Trek option, if you like: 'It's integrated education, Jim, but not as we know it'.
>
> If we are serious about what may be described as a 'new-era Northern Ireland', shouldn't it begin with our children?[301]

16.54 In the *New Decade, New Approach Agreement* which led to the restoration of the Stormont Government in Northern Ireland in January 2020, the following was described as a priority of the restored Executive:

> The Executive will establish an external, independent review of education provision, with a focus on securing

[300] L. K. Taylor et al., "Symbols and Labels: Children's Awareness of Social Categories in a Divided Society" *Journal of Community Psychology* (March 2020) https://doi.org/10.1002/jcop.22344

[301] "So children in Northern Ireland learn sectarian differences by the time they are 5", *Belfast Telegraph*: 25 March 2020

> greater efficiency and delivery costs, raising standards, access to the curriculum for all pupils, and the prospects of moving towards a single education system.
>
> To help build a shared and integrated society, the Executive will support educating children and young people of different backgrounds together in the classroom.[302]

16.55 The Northern Ireland Executive's *Programme for Government* emphasised the importance of education:

> The education system has a diversity of school types, each with its own distinctive ethos and values. However it is not sustainable. The parties acknowledge the progress made in developing new models of sharing, cooperation and integration. There is a desire to build on this as a basis for delivering long-term improvements in the quality, equity and sustainability of the system. The parties agree that the Executive will commission and oversee an independent fundamental review with a focus on quality and sustainability. The educational experience and outcomes for children and young people are the most important factors.[303]

16.56 What Alex Kane referred to as the*, 'rather odd solution of shared education'* arises from the Shared Education Act (Northern Ireland) 2016.

16.57 The purpose of this Act was to embed shared education within the education system and, along with financial contributions from The Atlantic Philanthropies and the European Union's Peace IV Programme, the *Department of Education* has provided funding to pre-schools and schools to develop and embed collaborative practices in partnership with others on a cross-community and socio-economic basis.

[302] UU Government, Irish Government, *New Decade, New Approach* (January 2020), p7.
[303] Ibid, p43.

16.58 It is understood that over 583 educational settings from across all sectors have engaged in the delivery of shared education, involving more than 59,000 pupils.

16.59 However, there remain a significant number of schools that have not yet engaged.[304]

16.60 On a separate but related topic, the *DoJ* has commissioned the *Council for the Curriculum, Examinations and Assessment (CCEA)* to review the primary and post primary curriculum. The purpose of the review is to gain an understanding of the current educational system in teaching topics which contribute to reducing hate, and ensuring that issues such as disability, racism, sectarianism, homophobia, transphobia and religion are adequately addressed to increase understanding of diversity and the negative impact of prejudice-based bullying.

16.61 Although the issue of hate crime is not specifically mentioned in the Northern Ireland curriculum, topics such as disability, racism, sectarianism, homophobia, transphobia and religion are said to be addressed in the concepts of equality, diversity and inclusion, which are central to the curriculum.

16.62 However, whilst the curriculum provides a framework for addressing behaviours and attitudes associated with intolerance and hate crime, the extent to which these topics are covered within the school setting is not clear.

16.63 It is understood that it is for that reason that the *DoJ* has commissioned *CCEA* to undertake a scoping exercise to:

[304] Report by the *Department of Education* to the *Northern Ireland Assembly* - advancing shared education, May 2018

- Review existing materials/resources to establish the extent of the curriculum and responsible structures and increasing understanding and awareness of the impact of prejudice, hostility and hatred in relation to the six categories of hate crime;
- Identify gaps and improvements in current provision and how these might be addressed, including teacher training to enable awareness raising with confidence and consistency;
- Consider whether the issue of online/cyber bullying in the context of contributing to prejudice, hostility and hatred to the six categories of hate crime, is adequately addressed;
- Review existing materials/resources and consider how they might be brought together for easier access for schools; and
- Identify areas of good practice in inclusivity and developing positive attitudes.

16.64 It had originally been hoped that a report on findings could be presented to the *Department of Justice* by June 2020, but the coronavirus pandemic led to the premature closure of schools in March 2020.

16.65 It is understood that the project will recommence given that schools have reopened in September 2020.

16.66 The *New Decade, New Approach* Agreement of January 2020 acknowledged that the current education system was not sustainable, whilst recognising the diversity of school types, each with its own distinctive ethos and values.

16.67 In declaring its support for a comprehensive review of the education system, it acknowledged the importance of educating children and young people of different

backgrounds in the same classroom. Shared sports and cultural heritage is vitally important in building trust and confidence in multi-community activities.

16.68 Without straying too far from the remit of this review, I believe it is important to acknowledge the lessons from history when such a review of the education system is carried out.

16.69 There are historical moments in the past which reveal many long-standing educational debates about the future of education. One emerging theme was in favour of reform of the educational system.

16.70 A Select Committee of the House of Commons appointed in 1828 advised that the remedy for Irish discontent would lie in schools.

16.71 On October 31, 1831, the then Chief Secretary for Ireland, Edward Stanley[305], felt that it was the Government's job to help unite the whole community in Ireland at a time of great strife and conflict throughout the entire island. He introduced the Irish Education Act for interdenominational schools in Ireland through a National School system.

16.72 Stanley set up a fund to grant aid new 'national schools' across the island of Ireland – the first country to create a publicly funded school system in the English-speaking world – although, of course, most people in Ireland then were Irish speakers.

[305] Edward George Geoffrey Smith, 14th Earl of Derby Eton and Christ Church Oxford, classical scholar was Whig MP. for Stockbridge 1822-26. Under Secretary for Ireland 1830 – 3. See: Brendan Walsh, Essays in the history of Irish education Palgrave Macmillan, 2016

16.73 Stanley was a Whig who clearly wanted to build a strong united community. He made it crystal clear that he wanted a single school system for all pupils – with all denominational religious instruction rigorously separate.

16.74 For reasons too complex to develop here, the Government's attempts to create a single interdenominational school system failed. One can only speculate as to how the history of this island would have developed if it had succeeded.

16.75 The Rev Dr Doyle, Roman Catholic Bishop of Kildare and Leighlin, in 1826 observed:

> I do not know of any measure that would prepare the way for a better feeling in Ireland, than uniting children at an early age and bringing them up in the same school, leading them to commune with one another and to form those little intimacies and friendships which often subsist through life[306].

16.76 Ambassador Mitchell B Reiss, the US Special Envoy to Northern Ireland, in addressing the *National Committee on US Foreign Policy* at New York in September 2004 observed:

> Looking forward, the United States also has a role to play in supporting the shared future agenda, as our focus on integrated education shows…. I was astonished to learn that roughly 95% of Northern Ireland school children are educated in segregated schools. As Americans, we have first-hand experience with segregation, not so long ago. And we know it doesn't work. Segregation short changes the students by denying them exposure to half of their society. And it weakens the country by embedding misunderstanding and distrust.
>
> [I]f the educational system encourages more integration, so children grow up embracing the diversity of their own culture.[307]

[306] The struggle for shared schools in Northern Ireland – the history of all children together. Bardon J. page1

[307] Mitchell B Reiss, "Northern Ireland: American principles and the Peace Process", US Department of State, https://2001-2009.state.gov/s/p/rem/36749.htm

16.77 As previously noted, the *House of Commons Northern Ireland Affairs Committee* examined the issue of hate crime in 2005.

16.78 Among a number of issues referred to in its final report it observed that the role of education was central to tackling sectarianism, racism and overcoming prejudice. It expressed particular interest in the potential for integrated education for mitigating the worst excesses of sectarian hate crime.

16.79 In noting that suggested sectarian awareness in pre-school children could start as young as three years old, the Committee observed:

> This does not mean that attitudes are 'set in stone' by the age at which children start primary school, or that proactive and inspirational teaching cannot inculcate tolerance and respect for others from diverse backgrounds.
>
> Education is the most important area for action in the field of community relations generally and, in particular, a means of combating the underlying causes of hate crime. In its day-to-day activity, the Department of Education needs to keep firmly in mind the vision set out in the Belfast (Good Friday) Agreement that 'An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education'.
>
> We were struck by the evidence that, while sixty per cent of people in Northern Ireland would prefer to send their children to mixed religion schools, only five per cent can do so currently.
>
> There may be many people who would not wish to send their children to an integrated school. We respect their right not to do so. However, the evidence is that there are very many more who wish to than there are currently places in school to accommodate them. There is also evidence that integrated education can help to heal sectarian wounds. We expect the Government to look with renewed urgency at this issue, in particular, at how those who wish to take up

> integrated education for their sons and daughters may do so without undue delay.[308]

16.80 I conclude this review by observing that hate crime and hate speech are insidious bedfellows which feed on disrespect, prejudice, bias and contempt for people who are perceived to be different.

16.81 Legislation is not the only means to address hate and hate crime. The challenge of addressing hatred is best taken forward by ensuring that education and training, the foundations of any sensible policy-making, should permeate both private and public sectors. The public has a pivotal role in both the prevention and deterrence of hatred.

16.82 The *Department of Justice*, the lead central government department, should disseminate widely an easy to read guide to any new legislation including the use of appropriate public information, films and social media outlets.

16.83 Perhaps it would be fitting to leave the last word to the late John Hume, KCSG (1937–2020) who won a Nobel Peace Prize jointly with David Trimble, Baron Trimble, PC, for their work in bringing many years of sectarian hatred and bitterness to an end:

> Difference is of the essence of humanity. Difference is an accident of birth and it should therefore never be the source of hatred and conflict. The answer to difference is to respect it. Therein lies a most fundamental principle of peace – respect for diversity.

[308] Select Committee on Northern Ireland Affairs Ninth Report, (4) Central Government's Response, https://publications.parliament.uk/pa/cm200405/cmselect/cmniaf/548/54807.htm

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Hate crime legislation in Northern Ireland

Independent Review

Final Report

Volume 4

Analysis of Responses to Consultation Paper

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Analysis of Consultation Responses

Dr Arlene Robertson

August 2020

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Acknowledgements

The author expresses her sincere thanks to all Hate Crime Review team members, particularly Ciara McFall for the provision of research support and Dr Katy Radford for her helpful comments on the draft report.

Executive Summary

On 6 June 2019, the Department of Justice announced an independent review of hate crime legislation in Northern Ireland (NI), to be conducted by Judge Desmond Marrinan.

Hate crime are crimes motivated by prejudice or hostility towards people because of their perceived 'difference' or membership of a particular identity group.

The scope of the Review is to '*consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill will or prejudice, including hate crime and abuse which takes place online*.'[309]

1. The Consultation

A public consultation was undertaken to inform the Review, the main findings of which are summarised below. A detailed discussion of findings in response to individual consultation questions is included in the main body of the report.

The consultation paper gave an overview of hate crime legislation in Northern Ireland and discussed a number of areas in depth, including (but not limited to): definition and justification; operation of the Criminal Justice (no. 2) (Northern Ireland) Order 2004; protected characteristics; a new hate crime law for Northern Ireland; current thresholds; stirring up offences; online hate speech; sectarianism; restorative justice; and consolidation of hate crime legislation.

The consultation questionnaire contained 68 questions covering different aspects of hate crime legislation, including the areas referred to above. A total of 247 written responses were received, from 58 organisations and 189 individuals. Organisational respondents included third sector organisations, local government, non-departmental public bodies and other public sector organisations; statutory bodies; legal, justice and law enforcement organisations; and a range of other organisations.

2. Key Findings

***Definitions and Justification**:* Organisations and individuals frequently held contrasting views about hate crime legislation in Northern Ireland. A majority of organisations were supportive of hate crime legislation in principle, arguing that robust legislation in this area is essential to mitigate against growing levels of hate crime in Northern Ireland and to provide effective legal recourse to victims. Particularly in Northern Ireland where equality legislation for ethnic minorities is weaker than elsewhere in the United Kingdom (UK), the denunciation of hate crime through specific legislation was considered essential.

Individuals in contrast were, overall, strongly opposed to hate crime legislation in Northern Ireland. There were strong concerns that amendments or extensions to laws in this area

[309] Marrinan, D. (2020) *Hate crime Legislation in Northern Ireland: An independent Review: Consultation Paper*, pp.10

would undermine free speech, particularly religious expression, and create a hierarchy of victims by affording some groups greater protection than others. Such arguments tended to dominate submissions from individuals and were frequently reiterated in response to different questions.

Overall, organisations and individuals did not consider the working definition proposed in the consultation paper to be adequate. A recurring theme was the need for greater definitional clarity to ensure legal certainty. There were, however, contrasting views in that some (generally those more supportive of hate crime legislation) considered the definition should be expanded and/or more comprehensive, while others called for a definition that is narrower in scope. Again, a particular concern of the latter group was the protection of freedom of speech.

There were mixed views across both groups of respondents regarding whether there should be a statutory definition of the term 'hostility'. Those in opposition argued that the concept was too narrow, might not provide sufficient protection to target groups and/or viewed a statutory definition as unnecessary.

Provision for hate crime in Northern Ireland: Respondents were asked a range of questions pertaining to hate crime legislation, both in terms of currents laws in NI and the legislative approach elsewhere in the UK. There was strong support among organisations for the introduction of the statutory aggravation model as used in England and Wales and Scotland into Northern Ireland law. Some indicated a preference for the statutory aggravation model in Scotland, while others argued that over the longer term, stand-alone offences should be considered as an alternative to effectively address the dynamics of hate crime.

In terms of stirring up offences, there were mixed views overall about the addition of equivalent provisions to those contained in the Public Order Act 1986 to the Public Order (NI) Order 1987, although support among organisational respondents was high.

There was support across both groups for the consolidation of hate crime legislation in Northern Ireland. This was considered timely given the potential for amendments to the law as a result of the Review.

Protected groups and additional characteristics*:* Several of the consultation questions asked respondents for their views on whether new categories of hate crime should be created for characteristics such as gender, age and various others not covered by current legislation.

Organisations held mixed views on the inclusion of gender, while individual respondents were almost unanimous in their opposition. Some who were supportive of including gender argued that this is necessary to tackle abuse and hostility towards women, including online misogynistic abuse. There were differences in opinion in terms of how 'gender' should be defined, including whether the provision should apply to both men and women. There were also mixed views on the inclusion of 'gender identity', with some organisational respondents indicating a preference for a separate characteristic covering 'transgender' identity.

Overall, a majority of organisational respondents were supportive of the inclusion of 'transgender' and 'intersex' as additional characteristics, while individuals were strongly opposed in both cases. Many of those taking the latter position were opposed to hate crime legislation in principle and, again, concerns focused on freedom of speech and equal treatment for all under the law.

Both 'age' as a protected characteristic and the proposal to introduce a general statutory aggravation covering victim vulnerability attracted low support from respondents. In the case of 'age', some argued that further evidence is needed to establish whether its inclusion is merited. Those in favour of the introduction of a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability suggested that this would be particularly beneficial in terms of dealing with hate crimes involving victims who are not otherwise covered by the legislation, such as older people, sex workers or homeless people.

Thresholds: Those who considered the current thresholds as too high argued that this made successful prosecutions difficult to achieve. The 'demonstration of hostility' test was considered too complex, while some argued the 'motivation' test is rarely used due to being difficult to prove. The 'by reason of' test was generally viewed as holding greater potential to secure successful prosecutions and those who were supportive considered that its introduction would bring about a range of benefits. However, some respondents perceived the 'by reason of' threshold as too vague and/or too broad, with the potential to dilute the concept of hate crime.

Among those who were supportive of the introduction of a third threshold, a majority indicated that this should be in addition to the two thresholds of "demonstration of hostility" and "motivation". It was considered that this will afford greater flexibility and enhance the likelihood of achieving justice for victims.

Online hate speech and the expression of hate in public space: Respondents highlighted the significant growth in online abuse targeted at marginalised groups, particularly women, and there was strong support for compelling social media companies to remove offensive material posted online. Some respondents did, however, express concerns about the potential curtailment of freedom of speech and there were calls (from both those 'for' and 'against') for a balanced approach, as well as a clear definition of 'offensive material'.

There was general consensus that existing protection from harassment legislation in Northern Ireland is insufficient to address online hatred and that the experience from England and Wales highlights a potential way forward for legislation in Northern Ireland, provided that gaps and limitations in the legislation are addressed. Across respondents, there was strong support for adaptation of the Malicious Communications (NI) Order 1988 in order to deal with online behaviour.

There was also strong agreement that online harm should be part of a general law applying to hate crime. This was viewed as important in the context of increasing levels of online hate crimes and their specific impact on victims. Across several questions, respondents highlighted the specific nature of harm caused by hate crimes (both online and offline), both to victims and the wider identity groups. Generally, it was argued that a clear understanding of harm caused was needed by all stakeholders involved in the criminal justice process.

Some highlighted the importance of protecting freedom of expression and called for adherence to the principles of proportionality and necessity.

Respondents were also asked for their views on whether the current law contained in the Malicious Communications Act 1988, Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 is sufficiently clear to protect freedom of expression. There was general consensus that this is not the case, however there were different views on how greater clarity could be achieved. Some, for instance, called for the law to be strengthened, while others stressed the need for balance between freedom of expression and protection from online hate crime.

Respondents were also consulted for their views on the removal of hate expression from public space, in particular, whether the law relating to the duties of public authorities to intervene should be strengthened or clarified. As with other areas of the legislation, there were calls for greater clarity which it was argued would promote accountability among relevant authorities. Strengthening of the law was also considered important in the specific context of Northern Ireland where hate expression in its various forms is an issue of growing concern.

Sectarianism: In considering whether there should be a specific reference to the term 'sectarian' within any new hate crime legislation, support was considerably higher among organisational respondents. Respondents argued that this was appropriate given the high level of sectarian hate crime in Northern Ireland.

Organisations and individuals held mixed views on whether the list of indicators for sectarianism should be expanded. Several respondents advocated an understanding of sectarianism in Northern Ireland as a specific form of racism, with relevant protected grounds including 'race', language, religion, nationality (including citizenship) or national or ethnic origin. As was common across many of the questions, some respondents were opposed on the basis that they did not agree with hate crime legislation in principle or any broadening of its scope.

Restorative justice: There was strong support across both groups of respondents for the use of restorative justice as part of the criminal justice process to deal with hate crime. Some respondents considered that the effectiveness of such an approach was supported by academic evidence and there was strong consensus that restorative schemes should be placed on a statutory footing. Those with reservations expressed concerns that restorative schemes might not prove as effective as current community based schemes.

1. Introduction

On 6 June 2019 the Department of Justice announced an independent review of hate crime legislation in Northern Ireland, to be conducted by Judge Desmond Marrinan.

Hate crime are crimes motivated by prejudice or hostility towards people because of their perceived 'difference' or membership of a particular identity group. In Northern Ireland, hate crime figures have been high for a number of years with just over eight hate incidents reported every day, a higher figure than the equivalent rate in England and Wales.[310]

The scope of the Review is to '*consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill will or prejudice, including hate crime and abuse which takes place online*.'[311]

Specifically, the Review will consider and make recommendations on:

- A workable and agreed definition of what is a hate crime;
- Whether the current enhanced sentence approach is the most appropriate to take, and determine if there is an evidential basis to support the introduction of statutory aggravated offences;
- Whether new categories of hate crime should be created for characteristics such as gender and any other characteristics (which are not currently covered);
- The implementation and operation of a current legislative framework for incitement offences, in particular Part III of the Public Order (Northern Ireland) Order 1987 and make recommendations for improvements;
- How any identified gaps, anomalies and inconsistencies can be addressed in any new legislative framework for Northern Ireland ensuring this interacts effectively with other legislation guaranteeing human rights and equality; and
- Whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

1.1 Consultation Process

The public consultation was launched on 8th January 2020 and formally closed on 30th April 2020. The consultation paper and consultation questions were published on the 'Hate Crime Legislation in Northern Ireland: Independent Review' website[312]. Prior to the launch of the public consultation, Judge Marrinan and members of the hate crime review team participated in numerous fact-finding meetings with a wide range of interested parties in the community, including representatives of groups with an interest in the currently protected characteristics and/or potential additional characteristics. Six public outreach events were also held across Northern Ireland as part of the consultation process.

The consultation paper gave an overview of hate crime legislation in Northern Ireland and

[310] Criminal Justice Inspection North ern Ireland (2017) *Hate Crime: An Inspection of the Criminal Justice System's response to Hate Crime in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland, p. 7
[311] Marrinan, D. (2020) *Hate crime Legislation in Northern Ireland: An independent Review: Consultation Paper*, pp.10
[312] https://www.hatecrimereviewni.org.uk/

discussed a number of areas in depth, including: definition and justification; operation of the Criminal Justice (no. 2) (Northern Ireland) Order 2004, The Crime and Disorder Act 1998, and the Criminal Justice Act 2003 in England and Wales, and the Model in Scotland; protected groups and additional characteristics; a new hate crime law for Northern Ireland; current thresholds for proving the aggravation of prejudice; stirring up offences; online hate speech; sectarianism; removing hate expression from public space; restorative justice; consolidation and scrutiny of hate crime legislation.

Results of the analysis of responses to the public consultation are discussed in this report.

1.2 Methodology

247 written responses were received, from 189 individuals and 58 organisations (see Table 1.1). Responses were submitted by email or post.

Table 1.1: Type of Respondent

Type of respondent	Number of respondents	% of total
Individual	189	77%
Organisation/group	58	23%
Total	**247**	**100%**

Organisational respondents are summarised by type in Table 1.2. A complete list of organisational respondents/categories is included at Appendix 1.

Table 1.2: Organisational Respondents by Type

Type of respondent	Number of respondents
Third sector organisations	39
Local government, non-departmental public bodies and other public sector organisations	8
Statutory bodies	5
Legal, justice and law enforcement organisations	3
Other organisations	3
Total	**58**

It should be noted that the views presented within this report are representative only of the specific organisations and individuals who submitted consultation responses. The results presented in the forthcoming chapters can neither be generalised to the broader sectors from which organisational responses have been received (for example, women's sector, religious sector) nor to the wider public.

A majority of the organisational respondents (39 out of 58) were third sector organisations. This category included religious/faith groups; organisations with a general focus on equality, inclusion or human rights; and organisations working with or representing specific groups (such as women, ethnic minorities, LGBTI (lesbian, gay, bisexual, transgender and intersex people), older people, children and victims of crime). The remaining organisational respondents comprised local government, non-departmental public bodies and other public sector organisations; statutory bodies; legal, justice and law enforcement organisations; and other organisations (including two political parties).

Although a majority of the submitted responses were in the format of the consultation questionnaire[313], almost a fifth of submitted responses (n=44) did not follow the questionnaire structure. These responses focused on specific themes of interest and varied in length (from a few pages up to 44 pages). In the case of such responses, the document was read to establish key themes/areas covered and qualitative data was then allocated to the relevant consultation question/s for analysis purposes. In the forthcoming results section, totals specified for respondents who made comments in response to each question are inclusive of these responses.

The response rate for individual questions ranged from 4% (for the 'yes'/'no' part of Q6) up to 74% (for the comments part of Q3). Response rates for all questions are detailed at Appendix 2. Some questions attracted a relatively high response rate from individual respondents (in particular, questions 3, 11, 12, 34, 35, 36, 37, 38 and 39).

It is important to note that, overall, **individual respondents** were remarkably homogenous in their views. With a few exceptions, individual responses were of a campaign-like nature in that comments contained within them were similar (in a few cases identical) and they comprised a limited range of key points.

In the case of a small number of **organisational respondents**, it was clear there had been some collaboration in the preparation of their responses. In a few cases, respondents made reference to and/or endorsed the views of another organisational respondent as part of their answer/s. There were also a few cases whereby organisational respondents (from the same sector) submitted identical or almost identical responses, albeit separately. In the case of these 'shared' responses, verbatim quotes included in the results section name all respondents concerned. For analysis purposes, 'shared' responses were counted separately for each of the respondents.

[313] https://www.hatecrimereviewni.org.uk/sites/hcr/files/media-files/Consultation%20questions_0.pdf

Some respondents across both groups (organisations and individuals) made comments in response to questions without answering the tick-box part and vice versa. It should not therefore be assumed that the qualitative findings directly reflect the views of the group of respondents who answered the quantitative part of the question. In cases where the respondent did not complete the yes/no tick-box, but a 'yes' or 'no' response was clearly stated in the comments box, the response was imputed to the quantitative data.

Frequency analysis was completed for data provided in response to all 'yes'/'no' tick-box questions in the questionnaire. Quantitative results are presented in tables under the relevant questions throughout the report. When interpreting the overall totals presented in the tables, it is important to bear in mind both the relatively large number of individual responses (n= 189) compared to organisational responses (n=58) and the homogeneity of individuals' views (as noted earlier).

It should be noted that some questions (1, 8, 19, 38, 62, 65 and 68) asked respondents for comments only.

Thematic analysis was undertaken in the case of qualitative data (that is, narrative comments). Qualitative findings for each question are typically discussed under sub headings aligning to 'supportive' views, 'opposed' views and 'other points' (where relevant). Respondents' key points, suggestions, recommendations and caveats are highlighted as appropriate. As a guide, where reference is made to a 'few' respondents in the discussion of qualitative findings, this refers to five or less respondents. The term 'several' typically means more than five but less than ten. It is important to note, however, that the main aim of the qualitative analysis is to highlight key themes and recommendations, rather than to 'quantify' different perspectives or document all specific points made. Qualitative findings do not typically include specific case studies, anecdotal evidence or academic literature cited by respondents.

In some cases, verbatim quotes are used to elucidate key points and/or highlight the particular stance taken by different organisations. Organisational respondents, who were consulted on their publishing preferences, are named when cited verbatim and when highlighting their specific recommendations. Individual respondents were not consulted on their publishing preferences and as such quotes from this group of respondents are anonymised.

1.3 Report Outline

Chapters 2 - 14 of this report present results of the analysis for each of the 68 consultation questions.

Appendix 1 lists organisational respondents (grouped broadly by main sector) and Appendix 2 details response rates for each of the 68 questions.

2. Hate Crime: Definition and Justification (Questions 1- 4)

2.1 Question 1: What do you consider to be hate crime?

This question asked for comments only and was answered by 93 respondents (34 organisations and 59 individuals).

It should be noted that there was considerable overlap in answers provided to questions one and two; respondents' suggestions for the expansion and/or improvement of a hate crime definition will be primarily addressed under question 2.

Question 1 asked for comments on what respondents considered to be a hate crime. Answers given were generally reflective of their wider views on hate crime legislation.

Among respondents who were generally supportive of hate crime legislation, many focused on the motivation aspect in their understandings of hate crime. Key concepts identified as relevant to motivation included 'malice or ill will', 'hostility', 'prejudice', 'fear or animosity', 'hate', 'bias', 'bigotry' and 'contempt'. Respondents indicated that a crime had to be committed, and that hate crimes involved targeting victims on the basis of their membership of a marginalised, stigmatised or less powerful group. One respondent (individual) suggested that hate crimes should cover acts of violence and intimidation but exclude disagreement.

Some respondents made reference to arguments made within chapter one of the consultation paper in their answer, with several respondents (organisations) endorsing the working definition of hate crime proposed in the consultation paper:

> *"…as acts of violence, hostility and intimidation directed towards people because of their identity or perceived 'difference'* [314]

One respondent highlighted the particular strengths of this definition, suggesting that '*it highlights motive, begins to establish a threshold which must be reached, and differentiates hate crime from hate speech'* (Presbyterian Church in Ireland).

A few respondents endorsed the proposed definition in principle, but suggested that it could be more comprehensive:

> *Hate crime is not just focus on hatred or hostility, it is also about bias, prejudice, xenophobia, etc. under the equality concept, including intersectionality.*
> (Northern Ireland Council for Racial Equality)

Others suggested that the definition should include an explicit reference to acts which constitute criminal offences. One respondent (organisation) suggested that the definition

[314] Chakraborti, N. and Garland, J. (2015) Hate Crime: Impact, Causes and Responses, 2nd edn. London: Sage, p.5.

could incorporate the issue of harassment, on the basis that harassment extends beyond simply holding a belief or opinion.

2.1.1 Perry Definition.

Several organisational respondents (a majority of whom were from the women's sector) expressed a preference for Barbara Perry's definition of hate crime. According to this definition hate crime,

> *… involves acts of violence and intimidation, usually directed toward already stigmatized and marginalized groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the 'appropriate' subordinate identity of the victim's group. It is a means of marking both the Self and the Other in such a way as to re-establish their 'proper' relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.*[315]

Perry's definition was considered more comprehensive, with the potential to capture a wide range of incidents if incited or motivated by hatred, such as:

> '*Physical assault - Sexual harassment or violence - Incitement to hatred - Verbal harassment and abuse - Online harassment and abuse - Property damage - Stalking, harassment, or other forms of intimidation.'* (TransgenderNI)

Of particular importance to some respondents was the reference to power relations within Perry's definition. These respondents regarded power dynamics as fundamental to hate crime, and of particular significance to gender based and transphobic hate crimes. Regarding gender, one organisational respondent pointed out that:

> *In population terms, women are not a minority, but are disadvantaged and face significant inequalities in all areas of life from employment and social protection to personal control of life and representation in public life. The root cause of this is misogyny, a power structure and belief system that views women as inferior to men, which manifests in many forms including crime and violence against women and girls*. (Northern Ireland Women's European Platform)

Additionally, it was suggested that a reference to power relations within the definition of hate crime would help to clarify issues pertaining to online hate crime. This was viewed as important given the rise in online hate speech and its impact.

A few organisations advocated a specific reference to misogyny within Northern Ireland hate crime legislation, suggesting that this would align with an intersectional approach to hate crime. It was also considered that this would facilitate understanding of the complex links across protected characteristics where relevant.

Views on the inclusion of misogyny will be discussed in more detail at questions 11 and 17.

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[315] Perry, B. (2001) *In the Name of Hate: Understanding Hate Crimes* Oxon: Routledge, p.10

2.1.2 Macpherson definition

Criminal justice agencies, including the Public Prosecution Service for Northern Ireland (PPS), Police Service of Northern Ireland (PSNI) and Probation Board for Northern Ireland (PBNI), indicated that their understanding of hate crime was informed by the Macpherson definition, that is, *'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.'*

Probation Board for Northern Ireland, however, endorsed the working definition of hate crime as proposed in the consultation paper.

2.1.3 Views of those who <u>did not agree</u> with the concept of hate crime

Some respondents (organisations and individuals) expressed serious concerns about the creation of separate hate crime legislation. Organisations who took this position were primarily from the religious sector (predominantly from different denominations within the Christian tradition). Key arguments were that '*all crimes are hate crimes'* (individual) and that the creation of legislation aimed at the protection of certain groups was a potential source of inequality under the law. Taking this view, one individual argued that,

> *The concept that a crime is somehow 'worse' because the victim is 'different' flies in the face of the concept that all are equal before the law, which used to be the basis of British Justice.* (Individual)

Additional arguments (many of which were reiterated in answers to subsequent questions) were that the concept of hate crime was too subjective and/or emotive, and threatened freedom of speech and religious expression. Respondents stressed the importance of defining crimes objectively under the law as a means of ensuring justice for all.

2.2 Question 2: Do you consider that the working definition of a hate crime discussed in this chapter adequately covers what should be regarded as hate crime by the law of Northern Ireland?

The working definition of hate crime discussed in the consultation paper drew on Chakraborti and Garland's understanding of hate crime, that is:

> *Acts of violence, hostility and intimidation directed towards people because of their identity or perceived 'difference'.* [316]

Question 2 asked respondents for their views on whether this definition adequately covers what should be regarded as hate crime by the law of Northern Ireland.

57 respondents answered the 'yes/no' (tick box) part of question 2. Table 2.2 shows that a majority of respondents (74%) **did not consider** the proposed working definition of a hate crime to be adequate.

Table 2.2

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	6	24%	9	28%	15	26%
No	19	76%	23	72%	42	74%
Total	**25**	**100%**	**32**	**100%**	**57**	**100%**

63 respondents (38 organisations and 25 individuals) gave comments explaining their views. These are discussed below.

2.2.1 Views of those who considered the proposed working definition of a hate crime as adequate

A minority of respondents considered the proposed working definition to be adequate. In particular, respondents welcomed the clarity and scope provided by the proposed definition. Specific points included that it was '*extensively inclusive'* (Police Service of Northern Ireland), therefore offering protection to all (potential) victims. It was an individual respondent's understanding of the proposed definition that, '*there must be acts of violence hostility and intimidation, not merely the voicing or expressing of an opinion'* and, as such, this respondent welcomed its provision for legitimate freedom of expression. The definition

[316] Chakraborti, N. and Garland, J. (2015) Hate Crime: Impact, Causes and Responses, 2ndedn. London: Sage, p.5

was also perceived as sufficiently 'flexible' to cover the protected characteristics being considered as part of the Review, as well as others that might emerge in the future.

More generally, some respondents supported the wider assertion made within chapter one of the consultation paper, regarding the importance of distinguishing between hate crime and hate speech.

2.2.2 Views of those who did not consider the proposed working definition of a hate crime to be adequate

Some respondents expressed concerns about a lack of definitional clarity, with particular reference to terms such as 'identity', 'hostility', 'intimidation' and 'perceived difference'. This left the definition open to misinterpretation and subject to a lack of legal certainty. Accordingly, it was argued that any specific terms used within the definition must be clearly defined, with reference to objective criteria.

Within this group, a sub group of respondents argued that the proposed definition was 'too broad' and could therefore lead to undesirable consequences. Particular concerns were that free speech and freedom of religious expression, including the right to express hostility, would be undermined. This view was expressed by both individuals and organisations, many of whom disputed the need for and/or were fundamentally opposed to hate crime legislation.

Additionally, the motivation aspect, expressed in the proposed definition as, '*bias against people because of their identity or perceived difference*' was problematic for some respondents, on the basis that this was too broad in scope. To address this one respondent suggested that,

> *…perception should be replaced by a requirement to establish the presence of evidence of prejudice and or hatred against the identified protected groups at the time of the crime and to the standard of balance of probabilities.* (Democratic Unionist Party)

The working definition was also considered too vague in that protected groups are not specified within the definition. Accordingly, it was suggested that *'any group could potentially fall within its scope'* which, in turn, would risk diluting the function of hate crime legislation (Public Prosecution Service). Stipulating protected groups/characteristics within the definition would mitigate against this and provide greater clarity as to which groups are covered.

A contrasting view, held by another sub group of respondents, was that the proposed definition was too narrow and/or not sufficiently comprehensive. Respondents made specific suggestions for the expansion of the working definition, such as:

- Including an explicit reference to the role of power in hate crimes, both in terms of perpetrator motivation and the impact of hate crimes on victims/victim groups;

- Including the term “exploitation” among the list of “acts” that qualify as a hate crime. One respondent suggested that the definition should encompass non-violent crimes, such as financial abuse or neglect, which involve the selection of victims because of their identity or perceived difference;

- Including specific references to both online and offline hate crime within the definition.

As discussed at question 1, some respondents (organisations) expressed a clear preference for Barbara Perry’s definition of hate crime (see 2.1.1), noting that it encapsulated the concept of power they considered integral to hate crimes.

2.3 Question 3: Should we have specific hate crime legislation in Northern Ireland?

156 respondents answered the tick-box part of question 3. As shown in Table 2.3, a majority of these respondents (75%) **did not agree** that we should have specific hate crime legislation in Northern Ireland. However, individual and organisational respondents held contrasting views, with 79% of organisations in favour of hate crime legislation in Northern Ireland, compared to 13% of individuals.

Table 2.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	22	79%	17	13%	39	25%
No	6	21%	111	87%	117	75%
Total	**28**	**100%**	**128**	**100%**	**156**	**100%**

182 respondents (32 organisations and 150 individuals), made comments in response to question 3. Their views are discussed below.

2.3.1 Views of those <u>in favour</u> of specific hate crime legislation in Northern Ireland

Respondents who agreed that Northern Ireland should have specific hate crime legislation thought that this was important for the following reasons:

- Northern Ireland has higher rates of racially motivated hate crime than England and Wales and these are growing rapidly. Robust legislation in this area is essential to mitigate against this and provide effective legal recourse to victims.

- Specific legislation will send a strong societal message that hate crime is unacceptable and that members of protected groups are equal and valued members of society. This was considered particularly relevant in Northern Ireland, where equality legislation for ethnic minorities is weaker than elsewhere in the UK. One organisation commented that BME communities have "*come to accept a certain level of harassment/discrimination as 'normal' as this has not been prioritised in law"* (Belfast Islamic Centre).

- The introduction of specific legislation is appropriate, given the unique nature and consequences of hate crimes, and their wide ranging impact. Hate crime incidents are not only harmful to victims, but reinforce existing social divisions and undermine social cohesion. It was felt that Northern Ireland's particular historical and social

context made the introduction of specific legislation particularly important.

- Existing laws for dealing with hate crime incidents are ineffective and outdated. One respondent (organisation) pointed out that the current enhanced sentencing model does not act as a deterrent and fails to meet the needs of victims.

Some respondents (organisations and individuals) noted caveats to their support for specific hate crime legislation. In particular, it was stressed that hate crime legislation should be limited in terms of the number of protected characteristics, evidence based, and must not be to the detriment of freedom of expression.

Respondents also made specific suggestions and recommendations regarding legislative change in this area. One respondent argued that the successful operation of hate crime legislation should be supported by a variety of measures, including:

> *…specific safeguards in hate crimes legislation to prevent the risks of 'equality being turned on its head' and provisions being used as a tool against marginalised protected groups. In particular, provisions setting out the purpose of the legislation as being to tackle incitement to hatred and crimes of a racist, sectarian, homophobic, and disablist nature (and additional protected grounds), and definitions of such terms (including sectarianism) in line with international standards would assist in preventing abuse of the provisions. Concurrent to such provision could be a programme of work to continue to tackle institutional racism and other forms of institutional prejudice in relation to the criminal justice system.* (Committee on the Administration of Justice)

A number of additional suggestions were made by respondents, such as:

- New legislation should be designed in line with international obligations to prevent, prohibit, prosecute, protect and take into account best practice from other jurisdictions in the UK.

- Hate crime laws should be designed in a way that offers reassurance to vulnerable individuals and groups, but with appropriate thresholds.

- Hate crime legislation in Northern Ireland should be comprehensive and offer protection to all potential victims.

- Any new hate crime law should reflect the principle of legal certainty and be subject to mandatory recording of 'signal incidents' which fall short of hate crime. Appropriate support should be provided to victims of 'signal incidents'.

2.3.2 Views of those opposed to specific hate crime legislation in Northern Ireland

Recurring arguments made by respondents who answered 'no' to question 3 were that the introduction of specific legislation would: undermine free speech, particularly religious expression, create a hierarchy of victims by affording some groups greater protection than others, and related to this, contravene basic principles of human rights legislation:

> *The Christian Institute has consistently expressed concerns about the concept of hate crime. Article 7 of the Universal Declaration of Human Rights (UDHR) states that: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Hate crime legislation contradicts this basic principle by creating a hierarchy of victims. This means groups not listed are discriminated against, compared to groups that are.* (The Christian Institute)

Additionally, some respondents questioned the need for hate crime legislation in Northern Ireland, arguing that there are already laws and provisions in place, including enhanced sentencing provisions, to protect vulnerable groups. Some respondents suggested that a preferred approach would be to address the inadequacies of existing law, rather than to over-complicate the system with the introduction of new legislation.

Another key argument related to the function of the law. A recurring theme was that the law should not be used to make political statements or as a means to achieve social harmony. Some felt that the introduction of hate crime could create tensions and new divisions between groups that hold conflicting views.

2.4. Question 4: Should hate crimes be punished more severely than non-hate crimes?

81 respondents answered the tick-box part of question 4. As shown in Table 2.4, a majority of respondents (68%) who answered question 4 **did not agree** that hate crimes should be punished more severely than non-hate crimes. Again, however, individual and organisational respondents held contrasting views. 95% of organisations agreed that hate crimes should be punished more severely than non-hate crimes, compared to 10% of individuals.

Table 2.4

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	20	95%	6	10%	26	32%
No	1	5%	54	90%	55	68%
Total	**21**	**100%**	**60**	**100%**	**81**	**100%**

Comments were made by 80 respondents (28 organisations and 52 individuals). These are discussed below.

2.4.1 Views of those who <u>agreed</u> that hate crimes should be punished more severely than non-hate crimes

Respondents who indicated their support for more severe punishment of hate crimes focused on two main themes: (1) the consequences/impact of hate crimes, and (2) the denunciatory function of hate crime legislation. Each of these themes are discussed below.

2.4.2 **Consequences of hate crimes:** Respondents argued that hate crimes have particular consequences that distinguish them from other crimes. Due to the specific nature of hate crimes, for example, the harm caused to victims is more likely to be greater than that which occurs in the case of their non-hate equivalent. Some respondents cited specific research evidence or used in-depth case studies to highlight the harm caused to victims. Additionally, many respondents agreed with arguments set out in the consultation paper that the impact of hate crimes can extend to other members of the identity group, who might also experience feelings of fear, anxiety and intimidation. The potential consequences for wider society were also highlighted:

Damage is not limited just to the direct victim but radiates outward by signalling to wider society that members of certain groups are, or are at least perceived by some,

> *to be "less than": less worthy of respect, compassion, empathy and, ultimately, less worthy of an equal place in society* (Church of Ireland Church and Society Commission)

2.4.3 Denunciatory function of hate crime law: more severe punishments for hate crimes communicate to perpetrators and society the seriousness with which the State regards such crimes, and conveys an important message to victims (and members of the identity group) that they are valued members of society:

> *Maximum penalties should send a societal message that hate crimes are abhorrent, and compel stronger denunciation and community support for victims over time* (PSNI)

Some respondents suggested that more severe punishment for hate crimes could also act as a powerful deterrent but only if the legislation was effectively utilised and enforced. Another respondent argued that the deterrent effect would only prove effective if '*the scope of crimes legislated for is narrow and well-defined'* (Democratic Unionist Party).

One respondent was of the view that more severe punishments could be dealt with through enhanced sentencing, noting that additional steps should be considered to ensure further improvements of recording in this area.

2.4.4 Views of those opposed to more severe punishment

The majority of respondents who took this view expressed 'equality' based arguments. These respondents argued that perpetrators of crime should be treated equally in terms of punishment, while victims of crime should be equally protected.

One respondent argued that an educative/restorative approach was preferable to more severe punishments.

3. Operation of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 (Questions 5 - 6)

3.1 Question 5: Do you think the enhanced sentencing model set out in the Criminal Justice (No. 2) (Northern Ireland) Order 2004 should continue to be the core method of prosecuting hate crimes in Northern Ireland?

40 respondents answered the tick-box part of question 5. As shown in Table 3.1, a majority of respondents (72%) **did not agree** that the enhanced sentencing model set out in the Criminal Justice (No. 2) (Northern Ireland) Order 2004 should continue to be the core method of prosecuting hate crimes in Northern Ireland.

Table 3.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	4	17%	7	44%	11	28%
No	20	83%	9	56%	29	72%
Total	**24**	**100%**	**16**	**100%**	**40**	**100%**

40 respondents (30 organisations and 10 individuals) made comments, as discussed below.

3.1.1 Views of those in favour

Comments provided by those who agreed that the Enhanced Sentencing Model (ESM) should continue to be the core method of prosecuting hate crimes in Northern Ireland were limited in length and explanatory detail.

A few respondents argued that the existing sentencing model in the Criminal Justice (No. 2) (Northern Ireland) Order 2004 provided an effective framework for prosecuting hate crime, making the introduction of new legislation unnecessary. Additionally, one respondent argued that it could be of benefit to apply the model in specific circumstances:

> *'retaining the current mechanisms could allow lower level criminality, not adjudged to accrue a specific aggravated offence, to still be considered for enhanced penalties at the sentencing stage'* (Democratic Unionist Party)

Another respondent advocated continuing with the ESM on the basis that the introduction of new legislation could erode freedom of expression of beliefs.

One respondent (organisation) caveated their support with the requirement that certain criteria should be met, stating that:

….greater awareness and training for prosecutors and court staff – and all criminal justice agencies - may be required to enable prosecutions to be brought before a judge with identified aggravating factors, clearly set out in the facts and evidence, and court clerks then should correctly record court findings including proven findings of aggravating features. Judges should clearly state the factors that impacted on their decision and this should be accurately recorded. (Law Society of Northern Ireland)

3.1.2 Views of those in opposition

A majority of respondents did not agree that the enhanced sentencing model should continue to be the core method of prosecuting hate crimes in Northern Ireland. Many respondents who took this view, drew on evidence and arguments presented in the consultation paper, although a few respondents (particularly legal, justice or law enforcement organisations) drew on their direct experience of the law.

A commonly held view was that the ESM, in its current form, is ineffective and not fit for purpose. Several respondents made reference to the low number of cases in which the hate crime element of an offence has been brought to the courts' attention. Limited application of the model was, in part, attributed to failures in terms of the identification and investigation of hostility at the appropriate stage in proceedings. It was the view of one respondent that,

..not all relevant cases from the PPS are always being marked prominently to indicate to the prosecutor at court that there is evidence that the offence has been aggravated by hostility. (The Bar of Northern Ireland)

Respondents also highlighted issues with the recording of enhanced sentencing, arguing that this undermines the reliability of statistics.

Additional issues identified by respondents included inconsistency in sentencing practices and the imposition of unduly lenient sentences. Some argued that the ESM had both failed to operate as an effective deterrent and to provide adequate recourse for justice to victims. One respondent (organisation) pointed out that low application of enhanced sentencing had left victims with the impression that the hate element of the offence has been overlooked.

3.2 Question 6: If you think the enhanced sentencing model should continue to be the core method of prosecuting hate crimes in Northern Ireland, do you think it requires amendment?

11 respondents answered the tick-box part of question 6. As shown in Table 3.2, a majority of these respondents (64%) **agreed** that the enhanced sentencing model requires amendment.

Table 3.2

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	4	80%	3	50%	7	64%
No	1	20%	3	50%	4	36%
Total	**5**	**100%**	**6**	**100%**	**11**	**100%**

13 respondents (9 organisations and 4 individuals) made comments in response to question 6. Most of these comments were limited in detail - key points are discussed below.

3.2.1 Those who **supported** amendment of the ESM highlighted the need for greater definitional clarity and more precise language, particularly in terms of the concepts applicable to hate crime. This, in turn, would enable more consistent enforcement of the law. One respondent suggested that greater clarity might be achieved by replacing concepts such as 'hostility' with more precise terminology, for example, 'evincing malice and ill-will', as had been the approach in Scotland.

It was also suggested that greater awareness of enhanced sentencing was needed, particularly by the courts. One respondent (Ulster Human Rights Watch) recommended that new guidelines for the investigation and prosecution of crimes motivated by hate should be introduced.

A particular point made by individuals, was that any amendment to the model should provide further protections for those with faith based beliefs.

3.2.2 Among those **opposed** to amendment of the ESM, one respondent (Law Society of Northern Ireland) argued that limited effectiveness of the model was primarily due to the ineffective processing of crimes that are reported and prepared for prosecution.

4. Operation of the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 in England and Wales and the model in Scotland (Questions 7 - 10)

4.1 Question 7: Do you think the statutory aggravation model as used in England and Wales and Scotland should be introduced into Northern Ireland law?

42 respondents answered the tick-box part of question 7. Table 4.1 shows that a majority of respondents (62%) **supported** the introduction of the statutory aggravation model, as used in England and Wales and Scotland, into Northern Ireland law. A majority of (88%) organisations were in favour, compared to a minority (24%) of individuals.

Table 4.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	22	88%	4	24%	26	62%
No	3	12%	13	76%	16	38%
Total	**25**	**100%**	**17**	**100%**	**42**	**100%**

34 respondents (23 organisations and 11 individuals) made comments, as discussed below.

4.1.1 Support for the introduction of the statutory aggravation model into Northern Ireland law

Respondents who agreed that the statutory aggravation model should be introduced into Northern Ireland law highlighted a number of potential benefits:

- It would help to ensure that hate motivation is recorded and taken into account when sentencing. The requirement to record would allow for greater transparency of the justice system, as well as more consistency in sentencing. Recording on criminal records would also allow hate crime trends to be identified and monitored, while providing a record of any repeat offences at the individual level.

- Related to the above, 'flagging' in criminal justice records would help to ensure that statutory agencies are aware of the hostility element of an individual's criminal history. This, in turn, would help criminal justice agencies to tailor re-offending programmes as appropriate.

- It would ensure that the hate crime element of the offence is considered throughout the criminal justice process, rather than at the point of sentencing only. Integration

of a hate motivation throughout the trial would also permit a greater emphasis on the power dynamics specific to hate crime.

- It would mitigate the risk of added complexity that might otherwise be the case with the creation of new offences.

Respondents also highlighted a number of additional issues for consideration. A few respondents indicated a preference for the aggravated offences model as it has been implemented in Scotland (rather than England and Wales). Some highlighted the Scottish model's provision for returning a verdict of guilty under deletion of the reference to the aggravation, in cases where the court is satisfied that the offence, but not the aggravation, is proved.

One respondent argued that the scope of application of an aggravated offence model should be restricted, pointing out that '*the range of offences where an aggravation can be applied should be evidenced-based and narrow enough in scope to maintain the tool's effectiveness'* (Democratic Unionist Party).

Others highlighted limitations of the statutory aggravation model, particularly in relation to gender. Accordingly, it was argued that stand-alone offences should be considered as a longer term alternative to effectively address the dynamics of hate crime. Stand-alone 'aggravated' offences would convey a strong societal message that hate crime offences are not acceptable, increase public awareness of hate crime, encourage reporting and promote public confidence in the criminal justice system's capacity to deal with hate crime. One respondent recommended that *'the enhanced sentencing regime should be replaced with a single, consolidated aggravated offence, which applies to all protected characteristics and is applicable to all offences'* (Victim Support NI).

Some respondents argued that, regardless of which particular approach is taken, there should be robust training across the criminal justice system to promote understanding hate crime among stakeholders and ensure that it is tackled effectively.

4.1.2 Opposition to the introduction of the statutory aggravation model into Northern Ireland law

Most of those who were against the introduction of the statutory aggravation model were individual respondents. Many of these respondents were opposed to hate crime legislation in principle and their comments were general, rather than focused on the statutory aggravation model *per se*.

Some respondents expressed concerns that the statutory aggravation model would be '*used against'* specific groups, for example, to curtail freedom of speech, and could potentially exacerbate existing tensions between different identity groups.

Another argument was that the statutory aggravation model is unduly complex and could therefore lead to similar ineffective outcomes as experienced with the enhanced sentencing model.

In response to whether the statutory aggravation model should be introduced, one organisational respondent noted that *'there was opportunity to do so during the passage of*

the Act but a decision was made not to.' (The Law Society of Northern Ireland). Another organisation questioned whether this model was appropriate for the Northern Ireland context, stating:

> *Considering that the law in England and Wales centres around the concept of hostility, it is crucial to explore whether this is the right approach and would not create uncertainly and confusion. It is reasonable to consider similar provisions in Scotland where the language of the provisions is more precise and refers to 'evincing malice and ill-will' rather than 'hostility.'* (CARE NI)

4.2 Question 8: If you think that the statutory aggravation model used in England and Wales and Scotland should be introduced into Northern Ireland law, should it be introduced as well as or instead of the enhanced sentencing model?

This question asked respondents for comments only – there was no tick box option in the questionnaire. 29 respondents (25 organisations and 4 individuals) answered question 8. In many of the answers provided, there was an overlap with points made in response to earlier questions (particularly questions 5 and 7).

4.2.1 'Instead of'

The majority of respondents indicated a preference for introduction of the statutory aggravation model **instead of** the enhanced sentencing model. Answers focused on two main themes; perceived weaknesses of the enhanced sentencing model and perceived benefits of the statutory aggravation model.

- **Weaknesses of the enhanced sentencing model**: many respondents argued that, due to its limitations and weakness, the enhanced sentencing model was 'not working' and failed to provide victims with an adequate route to justice. Key criticisms were that the model was:

    - Under-utilised and ineffective in practice.
    - Failed to investigate hostility at the appropriate stage.
    - Gave rise to inconsistent sentencing.
    - Involved the imposition of unduly lenient sentences.

  Notably, some respondents were of the view that many of the weakness were inherent to the model itself, rather than its implementation, and thus an entirely new approach was warranted.

- **Benefits of the statutory aggravation model**: despite some consensus that this model was 'not perfect', it was thought that it was a comparatively stronger and comprehensive approach. Respondents referred to the model's key perceived benefits in their answers (as discussed in Q7). These can be summarised as:
    - Symbolic effects of offences carrying an aggravated label and higher maximum sentences.
    - Deterrent effects of extending aggravated offences.
    - Increased public awareness, confidence and reporting.
    - Improved investigative and prosecution approaches.
    - Higher maximum sentences.
    - Improved recording and monitoring of hate crime.
    - Greater "fair labelling" potential than enhanced sentencing.
    - Acknowledgement of the hate element of the crime throughout the trial.

4.2.2 'As Well As'

A minority of respondents (one individual and one organisation) indicated a preference for the statutory aggravation model to be introduced **as well as** the enhanced sentencing model. One of these respondents (organisation) felt that the latter model would be beneficial under particular circumstances:

> *Enhanced sentencing should continue to be a useful deterrent for low level criminality motivated by malice and to which a statutory aggravation may not be as easily applied.* (Democratic Unionist Party)

4.2.3 Other comments

- Some respondents expressed concerns that irrespective of the approach selected, any piece of legislation would be rendered ineffective in the absence of measures to ensure proper implementation and utilisation.

- Related to the above, several respondents stressed the importance of incorporating more transparency into the model selected, as well as taking steps to ensure that all relevant stakeholders are adequately trained and aware of their responsibilities.

- A small number of respondents (including organisations and individuals from both categories above) indicated a preference for hate crime law to be unified under a single consolidated piece of legislation.

4.3 Question 9: Irrespective of whichever model is used (aggravated offences or enhanced sentencing), should there be specific sentencing guidelines for hate crimes in Northern Ireland?

43 respondents answered the tick-box part of question 9. Table 4.3 shows that a majority of respondents (65%) **agreed** that there should be specific sentencing guidelines for hate crimes in Northern Ireland. There was strong support for the introduction of sentencing guidelines among organisations (90%), while individuals were more divided in their views (41% answered 'yes' and 59% answered 'no').

Table 4.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	19	90%	9	41%	28	65%
No	2	10%	13	59%	15	35%
Total	**21**	**100%**	**22**	**100%**	**43**	**100%**

47 respondents (29 organisations and 18 individuals) made comments, as discussed below.

4.3.1 Views of those <u>in favour</u> of specific sentencing guidelines for hate crimes in Northern Ireland:

Those in favour stressed that specific sentencing guidelines were necessary to ensure uniformity of practice by courts, as well as greater clarity and certainty for the judiciary and criminal justice agencies. Respondents considered it important to set out a standard approach to sentencing in order to ensure appropriate, consistent and equitable sentencing in hate crime cases. One respondent suggested the need for greater clarity and understanding of the nuances pertaining to hate crimes, for example, around perceived vulnerability and hostility in the prosecution of cases involving disability hate crimes.

There were some suggestions regarding specific issues the guidelines might consider, such as:

- the severity of the crime (to ensure uniformity in sentencing)
- the impact of the offence on the victim and the wider community impact
- different manifestations of hate and bias against protected characteristics
- how courts should take into account statutory aggravations related to a protected ground

Respondents also thought specific sentencing guidelines would bring important benefits, including greater recourse to justice for victims and enhanced public confidence in the sentencing of hate crimes. Additionally, it was argued that strong, consistent, messaging around sentences for hate crimes would have a potential deterrent effect.

One respondent argued that while sentencing guidelines could offer significant benefits, there was a risk that strict adherence to these could lead judges to lose the exceptionality of a case. As such, they argued that:

> *Sentencing therefore requires a balance of fairness based on consistency and room for discretion that accounts for mitigating circumstances, for example vulnerabilities of the defendant, and person victimised.* (Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO))

The same respondent recommended that a Sentencing Guidelines Council should be established, with responsibility for commissioning and undertaking research into effective sentencing, with findings made available to sentencers and the wider public.

Another respondent suggested the establishment of a sentencing guidance mechanism, with a focus on functions such as *'the preparation and publication of draft sentencing guidelines, the monitoring of the operation of these and the collation and dissemination of information on sentences imposed by the courts'* (The Bar of Northern Ireland). This respondent caveated their support with the requirement for flexibility and discretion on the part of sentencing judges to depart from guidelines as appropriate and justified by the circumstances of individual cases.

4.3.2 Views of those who did not think there should be specific sentencing guidelines for hate crimes in Northern Ireland:

A few respondents who were opposed to specific sentencing guidelines made comments in response to this question. Answers were relatively brief and most drew on the importance of 'equality' within the law, for both victims and offenders:

> *All victims of crime should be treated equally. Specific sentencing risks creating a situation where some victims are more protected than others.* (Individual)

Another respondent stated that:

> *The LCJ Sentencing Group can adequately consider such guidance and ensure that trial judges are aware and fully informed*. (The Law Society of Northern Ireland)

4.4 Question 10: Irrespective of which model is used (aggravated offences or enhanced sentencing provisions), do you think that courts should be required to state in open court the extent to which the aggravation altered the length of sentence?

42 respondents answered the tick-box part question 10. Table 4.4 shows that a majority of respondents (90%) **agreed** that courts should be required to state in open court the extent to which the aggravation altered the length of sentence. There was high support by both individuals (83%) and organisations (96%).

Table 4.4

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	23	96%	15	83%	38	90%
No	1	4%	3	17%	4	10%
Total	**24**	**100%**	**18**	**100%**	**42**	**100%**

43 respondents (26 organisations and 17 individuals) made comments in response to question 10.

4.4.1 Respondents expressed general support in their comments for the requirement on courts to openly state in open court the extent to which the aggravation altered the length of sentence and most answers focused on reasons for doing so. There was some overlap with points raised in response to question nine.

Main reasons offered by respondents included that this would:

- Increase transparency of decision-making and related to this, provide clarity in terms of the application of the legislation. This, in turn, would help to expose any disparity of treatment between different groups within the judicial system.

- Contribute to increased awareness of the frequency and severity of hate crimes, improved record keeping and monitoring, as well as the seriousness with which they are viewed by the criminal justice system.

- Send a clear message to the offender, the victim and the public, that the judicial system takes hate crimes seriously and highlight the significance attached to the 'hate' aspect of the crime.

- Provide reassurance to victims who have been targeted because of their specific characteristics or identity, that the impact of this has been recognised by the courts. More broadly, it can enhance confidence among marginalised groups regarding the application of the legislation and encourage reporting of hate crime.

- Serve as a deterrent and educational tool.

Notably, one respondent (organisation) argued that punitive measures alone are insufficient to address hate crime and its impact, and stressed the importance of complementing any legislation with restorative measures. Another advocated adopting a similar approach to the Scottish system, as detailed at 9.13 in the consultation paper.

4.4.2 A few respondents **did not agree** with the proposal to openly state in court the extent to which the aggravation altered the length of sentence. Their comments indicated their disagreement with hate crime legislation in principle and did not detail arguments specific to the question.

5. Protected Groups - should additional characteristics be added? (Questions 11- 19)

5.1 Question 11: Should gender and gender identity be included as protected characteristics in NI hate crime legislation?

168 respondents answered the tick-box part of question 11. As shown in Table 5.1, a majority of respondents (92%) **did not agree** that gender and gender identity should be included as protected characteristics in NI hate crime legislation. Organisations were split in their views, with 55% 'for' and 45% 'against' the inclusion of 'gender' and 'gender identity. In contrast, a strong majority (92%) of individuals were opposed to the inclusion of gender and gender identity.

It is important to note that some respondents indicated in their narrative comments that they held differing views regarding the inclusion of 'gender' and 'gender identity'. For instance, some were supportive of 'gender' but did not agree that 'gender identity' should be included as a protected characteristic. Since question 11 was asked in a way that did not give respondents the opportunity to select separate 'yes'/ 'no' options for (1) 'gender' and (2) 'gender identity', the quantitative results presented in Table 5.1 should be read with caution.

Table 5.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	12	55%	1	1%	13	8%
No	10	45%	145	99%	155	92%
Total	**22**	**100%**	**146**	**100%**	**168**	**100%**

173 respondents (45 organisations and 128 individuals) made comments in response to question 11.

It should be noted that, particularly in the case of organisational respondents, some held differing views on the inclusion of 'gender' and 'gender identity', while others focused heavily on 'misogyny' in their comments. Furthermore, among those supportive of 'gender', there were differing views on whether this should cover both men and women. For clarity, therefore, supportive comments will be discussed under the following themes:

- Support for the inclusion of gender and/or gender identity (overarching points)
- Views on the inclusion of gender identity
- Misogyny
- Definition of gender

5.1.1 Support for the inclusion of gender and/or gender identity

Respondents made a number of overarching points regarding the inclusion of gender and gender identity.

In addition to arguments for the inclusion of gender/gender identity highlighted at 8.20 in the consultation paper (which several respondents concurred with in their comments), inclusion of these characteristics was considered important for the following reasons:

- The inclusion of gender and gender identity is necessary to tackle misogyny and transphobia. There is a clear evidence base indicating that women and trans people are subjected to hate and hostility on these grounds, and more must be done to protect and support victims.

- Their inclusion will avoid the creation of a 'hierarchy' of equality grounds and afford protection under the law to all equality groups who experience hate crime are granted protection under the law.

- Their inclusion is consistent with the legislative approach taken in relation to other equality grounds, including disability, race, sexual orientation, and religion.

- Their inclusion is consistent with legislative approaches in other jurisdictions. For example, a number of other European countries have included 'gender' and 'gender identity' as categories of hate crime. Thirteen EU Member States include 'gender identity' as a protected ground and hate crime legislation in all other parts of the UK covers transphobic hate crime. It was also noted that The Scottish Review (2018) has recommended the creation of a new statutory aggravation based on gender hostility, while a review (2018) of sex discrimination law across the UK has recommended that misogyny should be legally introduced as a hate crime.

Respondents further argued that the inclusion of gender and gender identity would bring about the following benefits:

- It will assist in tackling gender-based violence experienced by women (and men).

- It will encourage victims to report crimes based on these grounds.

- It will encourage an increased focus by the criminal justice agencies, including efforts to encourage reporting of hate crimes.

- It will help to ensure the provision of services to support victims of these forms of hate crimes.

- It will help to ensure consistency in sentencing and recording, and related to this, the collection of accurate statistics and monitoring of trends.

- It will assist in combatting hate crime experienced by people due to their multiple identities.

- It will assist in tackling negative stereotyping, prejudicial attitudes and stigmatisation on these additional grounds.

5.1.2 Views on the inclusion of Gender Identity

Among respondents who indicated general support for the inclusion of 'gender', there were mixed views regarding the inclusion of 'gender identity' as a protected characteristic. Those who endorsed the inclusion of 'gender identity' indicated that this would provide protection to minority/vulnerable groups and, in particular, would provide a means of tackling 'transphobia'. One respondent (Equality Commission for Northern Ireland), offered a comparatively detailed rationale for its inclusion, including the following key points:

> - There is a need for the hate crime legislation to cover gender identity beyond a traditional binary model;
> - The Council of Europe ECRI (2015) definition of hate speech includes 'gender identity' as part of its non-exhaustive list of personal characteristics or status.
> - Although not currently a protected ground under hate crime legislation, the transphobic hate crime is monitored by the PSNI;
> - Thirteen EU Member States have included "gender identity" as a protected ground, and hate crime law in all other parts of the UK provides protection against transphobic hate crime;
> - Research (2013) has highlighted that trans people, particularly young trans people, are subjected to significant harassment and abuse due to their gender identity, and are the victims of hate crimes.
>
> (Equality Commission for Northern Ireland)

This respondent recommended a definition of 'gender identity' within hate crime legislation that is sufficiently wide to cover '*a range of people whose gender identity differ in some way from traditional gender assumptions, including those made about them when they are born'* and *'all forms of hate crime experienced by trans people'* (Equality Commission for Northern Ireland). Additionally, it was recommended that the definition should be informed by key stakeholders, particularly trans people and organisations representing trans people, to ensure that it is up-to-date and reflective of best practice.

Those who were opposed to the inclusion of 'gender identity', but supportive of 'gender' (TransgenderNI and women's sector organisations) pointed out that 'gender' and 'gender identity' are synonymous in meaning. Accordingly, the inclusion of both these terms could create confusion in the application of the law and, at worst, may be taken to imply that trans people '*have something lesser than a gender'* (TransgenderNI). It was noted that, in a UK legal context, 'transgender' is an accepted term and as such this sub group of respondents endorsed TransgenderNI's recommendation that:

The term 'transgender status'/'transgender identity' provides for a more readily understood and easily operationalised term, and one which persists with trans people as a legal tool should they access legal gender recognition. (TransgenderNI)

These respondents took the position, therefore, that 'gender identity' should not be included as a protected characteristic.

5.1.3 Misogyny

Several respondents (organisations) were of the view that there is a substantial evidence base verifying the prevalence of gender based hate crimes, including online abuse, targeted at women specifically. Against this context, some called for the incorporation of the term 'misogyny' into the definition of gender, arguing that this was imperative for the following reasons:

- It would help to clarify the intention of the legislation and safeguard against it being used subversively, as might be the case for the inclusion of 'gender' alone.

- It would address concerns that hate crime legislation would no longer be targeted at marginalised or vulnerable groups, but would be applicable to everyone should gender be included as a protected characteristic.

- It would help to ensure that trans women are able to report misogynistic hate crime.

- It would allow for recognition of perpetrator's motivation, and accurate recording of the frequency and severity of crimes motivated by hatred of women.

- It would improve statistical recording and the availability of data on these crimes will help to determine the size and nature of the problem and the actions that need to be taken.

- It will also allow for these crimes to show up on background checks of perpetrators including in checks under the Domestic Violence Disclosure Scheme which will help to protect potential victims.

- It would help to capture the intersectional nature of hate crimes, where applicable, as well as a more accurate assessment of harm caused to the victim.

- It would help to address the 'normalisation' of misogynistic hate crime and related to this, encourage reporting of such crimes.

- To name misogyny as a hate crime would reinforce its seriousness, with potential deterrent effects.

- Evidence from other jurisdictions indicates that such an approach is beneficial, particularly in terms of reporting/enhancing victims' confidence in the police.

5.1.4 Definition of Gender

As stated earlier, respondents who were broadly supportive about the inclusion of 'gender' held varying views on how this category should be defined/categorised. Some argued that a broad definition is appropriate to ensure protection is afforded to all who are potentially vulnerable:

> *We believe that a broad and expansive characteristic of gender and sex should be included as a protected characteristic which includes; sex, gender, gender identity and gendered expression to include as many vulnerable people as possible.* (The Rainbow Project)

A few respondents endorsed the inclusion of both men and women in the definition of gender:

> *We recommend that the hate crime legislation should equally protect both men and women. Where a man or woman has been subjected to a crime due to hostility or prejudice due to their gender, then this scenario should be protected within the legal framework….. …We recommend protections under the hate crime legislation for individuals who are presumed to have a characteristic, or who have an association with an individual with that particular identity, should also be extended to the grounds of age, gender, gender identity, and intersex.* (Equality Commission for Northern Ireland)

> ***…*** *it should be 'Sex' rather than 'Gender' as transgender is separately included and should be 'Sex' rather than 'Misogyny' because it I believe that hate crime has its validity in society as a way of upholding human rights and not primarily to protect restricted groups. In other words, the provision should apply both to men and women or males and females.* (National Police Chiefs Council)

In contrast, several respondents advocated a narrower definition of gender. One of these respondents pointed out that:

> *There is a danger that by simply including the blanket term 'gender' without context in the legislation, that the hate crime law will be applicable to everyone and no longer be about specific, protected characteristics of marginalised or vulnerable groups.*

Accordingly, this respondent suggested that:

> *It may be prudent therefore to either replace 'gender' with the term 'misogyny' and separately specify trans and intersex identities, or include a definition of gender*

within legal notation which specifies that gender applies to specifically marginalised groups such as women and trans / intersex folks. (Victim Support NI)

Several respondents (women's sector and other groups) argued that, in recognition of the disproportionate abuse targeted at women, the definition of gender must incorporate a clear link to 'misogyny'. These respondents advocated use of the term 'gender' as a protected characteristic, but with an interpretive clause linking 'gender' specifically to 'misogyny'. One respondent stressed the importance of using clear and accessible language, noting that the term 'misogyny' may not be well understood by the general public. As such, 'gender' rather than 'misogyny' was considered the appropriate indicator, however the definition should clarify '*that hate crimes based on 'gender' refer to misogyny specifically'* (Women's Regional Consortium).

Another respondent (Committee on the Administration of Justice) shared the view that the addition of 'gender' was imperative to address misogyny specifically, but recommended that this should be done through the indicator of 'sex', which it was noted is the relevant protected category in current anti-discrimination law.

5.1.5 Views of those opposed to the inclusion of gender and gender identity as protected characteristics in NI hate crime legislation

Respondents who were **opposed to** the inclusion of gender and gender identity as protected characteristics in NI hate crime legislation offered a number of reasons. A key argument was that the inclusion of gender and gender identity as protected characteristics would pose a serious threat to freedom of speech and religious expression. This view was particularly prevalent among faith sector organisations and individual respondents. These respondents argued that the inclusion of the proposed characteristics would further undermine meaningful discussion and debate, and related to this, expressed concerns about the potential criminalisation of the expression of religious beliefs and opinions:

> *To do so takes away the right of individuals to have their own thoughts and beliefs of what is gender, and what is gender identity. Bible believing Christians are bound in conscience to what God says, to make these issues a matter of "hate" criminalises our beliefs and our religion.* (Evangelical Presbyterian Church - Public Morals Committee)

> *There is a serious risk that disagreement will be labelled hatred by ideologically and politically motivated complainants.* (Individual)

Another argument was that the inclusion of gender and gender identity as protected characteristics would lead to inequality of treatment between people of different genders. A few respondents expressed concerns that this would create a hierarchy of protected characteristics.

Some also suggested that the inclusion of gender would have the counterproductive effect of diluting the legislation and, consequently, diminish its original function to protect vulnerable/minority groups. One respondent was of the view that gender is not a minority issue and therefore should not be included as a protected group.

It should be noted that, with a few exceptions, most respondents within this group did not distinguish between gender and gender identity in their narrative comments. One respondent did, however, specify that their opposition was on the basis that '*gender or gender identity would cover transgender identity*' (The Christian Institute). This respondent drew attention to what was perceived as significant debate and policy shifts at a UK level around '*transgenderism, as well as ongoing investigations concerning police handling of allegations of transgender hate crimes'*. As such, it was suggested that these matters must be resolved prior to any undertaking steps to protect transgender within hate crime law.

In another case, a respondent (Equi-Law UK) provided a detailed and lengthy answer to this question, covering a number of issues that included 'gendered hate crime', 'gendered violence' and 'misogyny as a standalone category'. It is not possible to discuss the arguments made by this respondent in detail, or to present the range of research and statistical evidence they referenced in support of their arguments. However, it is important to note that this respondent expressed significant concerns about the research evidence (particularly in relation to gendered crime trends, online abuse and hate speech) included within the Review consultation paper. It was their perception that experiences of boys and men were viewed as irrelevant and, consequently, not sufficiently represented within the scope of the Review's investigation. The overall view of this respondent was that the Review had not established sufficient evidence to merit *'legislating against hatred towards men, women (or persons of different ages)'* and they therefore did not support the inclusion of gender and gender identity as a protected characteristic.

A few respondents who were 'opposed' offered alternative suggestions. One respondent suggested that as an alternative to gender and gender identity, '*there may be merit in adding criteria that cover victim vulnerability and/or exploitation of that vulnerability*' (Presbyterian Church in Ireland). Another noted that '*if further protection of gender was required, it might be best dealt with by way of a separate offence of misogynistic harassment*' (The Law Society of Northern Ireland).

A few respondents (legal sector) took a **neutral** position on the inclusion of new characteristics, including gender and gender identity. One of these respondents (The Bar of Northern Ireland) suggested that it may be helpful to review the findings of the Law Commission's forthcoming review of the legislation's operation in England and Wales.

5.2 Question 12: Should Transgender identity be included as a protected characteristic in NI hate crime legislation?

167 respondents answered the tick-box part of question 12. As shown in Table 5.2, a majority of these respondents (86%) **did not agree** that transgender identity should be included as a protected characteristic in NI hate crime legislation. However, individual and organisational respondents held contrasting views, with 73% of organisations in favour of this proposal, compared to 3% of individuals.

Table 5.2

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	19	73%	4	3%	23	14%
No	7	27%	137	97%	144	86%
Total	**26**	**100%**	**141**	**100%**	**167**	**100%**

166 respondents (35 organisations and 131 individuals) made comments in response to question 12. Their views are discussed below.

5.2.1 Support for the inclusion of transgender identity as a protected characteristic in NI hate crime legislation

Among organisational respondents, in particular, there was widespread support for the inclusion of transgender identity as a protected characteristic. Key themes given were as follows:

Evidence base: respondents noted that evidence indicated trans individuals are frequently targets of hate and hostility, although this is not necessarily reflected in statistics due to under-reporting. Echoing the views of several respondents, it was argued that:

> *….the evidence base is present to include transgender within the list of protected characteristics. The PPS have undertaken significant work with the LGBTQ community in recent months and the feedback at public engagement events and from key stakeholders is that a significant amount of transphobic motivated hate crime is going unreported to police. This covers a wide spectrum of offending, ranging from verbal abuse to physical assault*. (Public Prosecution Service)

> *Transgender relates to a particularly vulnerable group. Transgender issues and transgender persons are much more visible now. Hate crime based on this identity has increased during 2018 and 2019 according to reporting statistics*. *Transgender*

might be included as a separate protected characteristic under Hate Crime legislation in this jurisdiction. (The Law Society of Northern Ireland)

5.2.2 Current policy and legislation is unsatisfactory: there was consensus among this group of respondents of a gap in the current legislative framework. One respondent expressed concern at what was regarded as 'the *flagrant inability of the criminal justice system to adequately recognise, address and prosecute transphobic hate crime and hate speech.*' (TransgenderNI).

Specifically, it was noted that, although transphobic hate crimes are recorded by the PSNI, in cases that proceed through the criminal justice system, the hate motivation is often dropped or misreported as sexual orientation, due to the exclusion of transgender identity as a protected characteristic under current legislation. Accordingly, respondents reported a lack of confidence among transgender people about how complaints would be dealt with, with negative impacts on levels of reporting. Respondents called for a clear legislative approach to address these issues.

5.2.3 Consistency across jurisdictions and with other domestic and international policies: the addition of transgender as a protected characteristic in NI legislation would bring this in line with legislation in all other parts the UK and the Republic of Ireland.

Respondents also referenced various international institutions that have highlighted discrimination faced by transgender people and/or called for their enhanced protection, including the Parliamentary Assembly of the Council of Europe, the UN High Commissioner for Human Rights, and the UN ICESCR Committee.

An additional point was that the inclusion of transgender as a protected characteristic would ensure parity for victims and safeguard against a 'hierarchy' of equality grounds, that is, where certain equality groups are granted protection under the law while others are excluded without justification. It would also help to address the issue of under-reporting and assist in tackling negative stereotyping, prejudicial attitudes and stigmatisation of transgender people. Some also suggested that it would promote consistency in recording and sentencing and help to ensure the provision of adequate support services to victims.

5.2.4 Definition of transgender

Respondents highlighted the importance of an appropriate and up-to-date definition, which should be reflective of international standards. Specific suggestions were that a definition should be sufficiently wide to cover all forms of hate crime experienced by trans people, be informed by the views of key stakeholders, particularly trans people and organisations representing trans people, and reflect best practice. One respondent recommended that transgender should be defined as:

….any individual whose gender is different from that which they were assigned at birth. This includes all those who identify as non-binary or otherwise gender diverse, and avoids the use of outdated or pathologizing language. (TransgenderNI)

Another organisation (Focus: The Identity Trust) pointed out that intersex identity should not be confused with transgender identity. This respondent concurred with the Stonewall definition[317] which distinguishes between transgender, gender fluid, non-binary and other identities, but excludes reference to intersex identity.

5.2.5 Transgender as a separate characteristic

Several respondents agreed that transgender should be included in hate crime legislation as a separate characteristic (distinct from gender and gender identity). Organisations that endorsed this approach argued that this was necessary to avoid confusion with other identities and to ensure the unambiguous protection of transgender identity. It would also encourage reporting by victims, allow for specific recording and accurate data collection on hate crimes against transgender people. One organisation (TransgenderNI) called for the inclusion of an interpretation clause *'to recognise and include the experiences of non-binary and gender diverse individuals'.*

Additionally, it was suggested that separate characteristics for gender and transgender identity would allow for protection on the basis of intersectionality, thus permitting the experience of victims to be fully captured and represented throughout the reporting and judicial process. It would also enable a clear rationale for protection to be set out in the legislation, and related to this, provide an important symbolic message.

Notably, a few respondents took the view that transgender identity should be included within the broader category of gender and gender identity. This was perceived as more "future-proof" and the most up-to-date approach. Another respondent (Victim Support NI) caveated that should this approach be adopted, the definition of gender should include a legal notation specifying its application to marginalised groups, including trans/intersex people and women.

It should be noted that not all respondents indicated whether transgender identity should be included as a separate category, or otherwise, in their answers.

5.2.6 Opposition to the inclusion of transgender identity as a protected characteristic

Respondents who took this view made a number of common arguments. These were centred on freedom of speech and religious expression, equal protection for all under the

[317] https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms#:~:text=T-,Trans,they%20were%20assigned%20at%20birth.

law, and in a few cases, repudiation of 'transgenderism'. Such arguments were made by both individual and organisational respondents (mainly faith groups), as illustrated below:

> *We strongly oppose these proposals, for their incorporation would merely further threaten freedom of expression.* (Evangelical Protestant Society)

> *Bible believing Christians believe that God has made humanity as male and female only. Transgender is outside of God's good will for the world, and to seek to protect something that is anti-God in our view, is not good for our society.* (Evangelical Presbyterian Church - Public Morals Committee)

> *One of the most controversial characteristics is unnatural sexual practice. These practices cannot identify a person definitively, since the same person can abandon them and consequently revert from their so-called chosen identity. The same goes for transgenderism. ….. This should not therefore be a protected characteristic.* (Ulster Human Rights Watch)

> *Doing so would give special consideration to transgender individuals, making them more esteemed than others. The very basis of the law within a free society is that everyone is treated equally and protected against those who are intent on harming them.* (Individual)

5.3 Question 13: Should Intersex status be included as a protected characteristic in Northern Ireland hate crime legislation?

65 respondents answered the tick-box part of question 13. Table 5.3 shows that a majority of respondents (69%) were **opposed** to the inclusion of intersex status as a protected characteristic in Northern Ireland hate crime legislation. However, individuals and organisations held contrasting views, with 71% of organisations in favour, compared to 11% of individuals.

Table 5.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	15	71%	5	11%	20	31%
No	6	29%	39	89%	45	69%
Total	**21**	**100%**	**44**	**100%**	**65**	**100%**

62 respondents (28 organisations and 34 individuals) made comments in response to question 13. Their views are discussed below.

5.3.1 Support for the inclusion of intersex status as a protected characteristic

Those in favour of the inclusion of intersex status as a protected characteristic in NI hate crime legislation argued that this was important in order to provide parity for victims and recognition of the specific harm of hate crime on grounds of being intersex. One respondent (organisation) suggested that enhanced protection was appropriate and necessary, given the historical abuse faced by intersex people. Also noted, was that the inclusion of intersex within hate crime legislation would be consistent with legislation in Scotland, where provision is made under 'transgender identity', as well as recommendations made by the Council of Europe[318]. Additionally it was pointed out, by an organisational respondent (Police Service of Northern Ireland), that hate crimes were already recorded against this characteristic by the PSNI and inclusion was therefore appropriate.

There were mixed views among those who were supportive regarding whether intersex status should be included as a distinct category, or alternatively, within the broader category of gender/gender identity. Several organisational respondents (women's sector) deferred to the position of TransgenderNI in their views about this, who stated that:

[318] Council of Europe, (2015), *Issue Paper: Human rights and intersex people*.

> *Trans and intersex communities are overlapping and interconnected but still maintain distinct identities, experiences and needs. Many intersex people would not identify themselves as transgender, and it is important therefore to be able to capture the nuanced and diverse experiences of interphobia in hate crime law.* (TransgenderNI)

Similarly, other respondents (organisations) stressed the importance of distinguishing between transgender and intersex identities and therefore agreed that separate categories were appropriate:

> *… intersex people should be covered separately, as this is not the same thing as trans or non-binary identity, and the law should be clear and factually accurate in this regard. While it may be rarer for such types of hate crime to exist, this is nonetheless a vulnerable group who are often marginalised within society, and therefore it would be prudent to legislate for those circumstances where hate is directed at intersex folks on the grounds of their identity.* (Victim Support NI)

This view was not shared by all respondents and a few suggested that intersex status should be included within a broad sex/gender characteristic. These respondents highlighted the importance of an adequate definition of gender/gender identity to ensure that intersex status could be adequately covered.

5.3.2 Opposition to the inclusion of intersex status as a protected characteristic

The majority of those who took this position were individual respondents. Many were opposed to hate crime legislation generally and gave reasons that were similar to those given in response to other questions. For example, it was common for respondents to focus on the importance of freedom of speech in their answers, as well as equal treatment for all under the law:

> *Selecting certain characteristics as being more entitled to special treatment under the law is discriminatory. All people are entitled to respect and equal treatment – thus creating special categories is not giving equal respect or treatment under the law. Such legislation restricts freedom of speech which is a fundamental right.* (Individual)

Additionally, it was argued by an organisational respondent that intersex status as a medical condition was already covered by other legislation.

A few respondents who answered this question noted that they did not take a specific view on the inclusion of intersex status as a protected characteristic. Respondents who took this position pointed to a lack of evidence, knowledge and understanding of this issue.

5.4 Question 14: Should age be included as a protected characteristic in Northern Ireland hate crime legislation?

52 respondents answered the tick-box part of question 14. Table 5.4 shows that a majority of respondents (85%) were **opposed** to the inclusion of age as a protected characteristic in Northern Ireland hate crime legislation.

Organisational respondents, in particular, held mixed views with 38% of those who answered question 14 supportive of the inclusion of age and 62% against this proposal.

Table 5.4

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	5	38%	3	8%	8	15%
No	8	62%	36	92%	44	85%
Total	**13**	**100%**	**39**	**100%**	**52**	**100%**

64 respondents (33 organisations and 31 individuals) made comments in response to question 14.

Some respondents who answered this question indicated that they did not take a specific position on the inclusion of age. It is worth noting that many respondents (both 'supportive' and 'against') focused on 'older' people, in their answers. Respondents' comments are discussed below.

5.4.1 Support for the inclusion of age as a protected characteristic in Northern Ireland hate crime legislation

Those in favour argued that the inclusion of age as a protected characteristic was justified for a number of reasons:

- This approach was consistent with hate crime legislation in several European and international countries (including Austria, Latvia, Lithuania and Belgium, Canada, New Zealand and some US states).
- Age is included as a protected ground in wider legislation, including the Charter of Fundamental Rights, under Article 4 of the European Convention of Human Rights (ECHR) and under the EU Victims Directive.
- Research shows that older people are particularly vulnerable to the effects of crime,

in part due to the fact that certain offences against older people are less likely to be prosecuted. This points to the need for increased protection of older people.

- The inclusion of age as a protected characteristic is in line with academic research that advocates the utilization of characteristics already present in anti-discrimination legislation.

In relation to the last point, one respondent noted that:

> *Clearly, 'age' is a protected ground under the anti-discrimination legislation in Northern Ireland[319], as well as being a ground on which due regard to the need to promote equality of opportunity must be provided under Section 75 of the NI Act 1998.* (Equality Commission for Northern Ireland)

Another organisation, a strong advocate for the inclusion of age, highlighted what were perceived as pervasive levels of negativity about ageing and discriminatory attitudes toward older people in the UK, noting that:

> *This sort of hostility, contempt and prejudice can foster an environment that allows ageism, age discrimination and crimes against older people to grow, become permissible and lead to a "dehumanising" of older people.* (Age NI)

This respondent also noted that, in contrast to Ireland and other areas of the UK, older people are not protected from discrimination in the provision of goods, facilities and services.

Respondents identified a number of perceived benefits that would be achieved through the inclusion of 'age' as a protected characteristic, including:

- Strong deterrent effects arising from the denunciation of hate crimes against older people.
- Improved reporting and greater recognition of crimes against older people.
- Increased awareness and rejection of ageism.
- An improved evidence base of crimes against older people, including the nature and extent of age based hate crimes.
- Increased focus by criminal justice agencies on age based hate crime and improved outcomes of such crimes.

5.4.2 Vulnerability

A few respondents acknowledged that older people are often targeted due to their perceived vulnerability rather than motivated by hostility or bias towards them. One respondent argued

[319] In the area of employment and vocational training.

this form of targeting was akin to contempt or hatred against older people, thus falling within the definition of hate crime:

> *Targeting a group due to an actual or perceived weakness is a form of contempt or hatred for that group. An individual who commits an offence against an older person wholly or partially because they consider that older person to be 'easy-pickings' on the basis of their age, evidences an attitude of hostility based on an active disdain for members of this group.* (Commissioner for Older people for Northern Ireland)

Another respondent (organisation) suggested that expanding the definition of hate crime to incorporate the term 'contempt', would provide adequate legal provision to include age as a protected characteristic.

5.4.3 Definition

Most respondents indicated a preference for the inclusion of 'age', rather than 'older' people, 'young' people or a specific age range. It was argued that this approach would align with legislation taken in most other countries where age has been included as a protected category.

One respondent, the Northern Ireland Commissioner for Children and Young People (NICCY), expressed the view that the inclusion of children as a protected group would be of limited benefit given the protections afforded to them by existing legislation in Northern Ireland. However, in the context of age being included as a protected category with a view to enhancing protections for older people, it was noted that:

> *Children must not be excluded from the protections of this legislation and if victimised due to other characteristics such as race, gender, transgender identity and sexual orientation than the hate crime legislation must apply to them.* (NICCY)

An additional point made by one respondent (Age NI) was the recommendation of the development and resourcing of advocacy support services for older people who believe they have experienced hate crime.

5.4.4 Opposition to the inclusion of age as a protected characteristic

Some respondents argued that 'age' and particularly crimes against older people, did not fall within the definition of hate crime. Key arguments were that:

- Age is primarily a factor in opportunistic forms of crime rather than hate motivated crime. Particularly in the case of 'older' people, it was thought that the majority of crimes do not fit within the 'stranger danger' model of hate crime, that is, where victims are targeted due to their perceived membership of an 'outgroup'.

- ‘Age’ is applicable to everyone and therefore cannot be considered as an ‘identity’.

- Unlike other minority groups, ‘older’ people have not historically suffered disadvantage, prejudice, discrimination, and a lack of political power or recourse.

- Older people are targeted because of their perceived vulnerability, rather than because of hate or hostility about their age. The conflation of hate and vulnerability risks undermining the meaning and impact of hate crime legislation.

In terms of this latter point, a few organisational respondents noted their views had been informed by direct experience of working with ‘older’ victims of crime. They were of the view that crimes against older people were primarily due to their perceived vulnerability and thus did not consider the addition of ‘age’ as a protected characteristic as appropriate. One respondent, a UK-wide charity that supports vulnerable older people, indicated a preference for the introduction of separate legislation to prosecute crimes against older people. They stated that:

> *In relation to crimes such as theft, fraud or assault (and many more), we know that older people are often specifically targeted due to their actual or perceived vulnerability. This may be based on physical frailty, mental capacity, memory difficulties, loneliness and isolation, or dependency on others for basic care needs. The vast majority of crimes against older people are driven by the perpetrator's perception of the victim's vulnerability due to their age.* (Hourglass NI)

Another respondent did not take a specific position but questioned whether the inclusion of age was merited:

> *As a police service we deal with crimes against older persons under the wider category of vulnerability. There is a dedicated lead in PSNI for crime against older persons and this approach appears to meet the needs both of the victims and the police service.* (Police Service of Northern Ireland)

A similar view was held by another respondent who stated that:

> *We are not convinced that age should be included specifically as a characteristic within the hate crime law, and believe that further exploration of whether crimes against people on the basis of hatred of their age take place. While there is no doubt that older people are often the targets and victims of crime, in our experience this is due to their vulnerability, not hatred of their age per se.* (Victim Support NI)

Respondents also argued that the inclusion of age as a protected characteristic could unnecessarily broaden the scope of the legislation, with detrimental effects on its efficacy:

> *Adding the general characteristics of 'gender' and 'age' has the potential to dilute the effectiveness of any new legislative proposals and, with that, losing its purpose in protecting those who may be vulnerable and disadvantaged.* (Presbyterian Church in Ireland)

> *By aiming to protect everyone under hate crime framework there is an inherent risk that no one will benefit.* (Democratic Unionist Party)

An additional argument was that the inclusion of age was not consistent with international human rights standards. However, this respondent did acknowledge the need for appropriate legal and policy responses to address the harm caused to younger and older victims of crime.

As an alternative, a few respondents suggested that some crimes against older people could be captured under the existing disability characteristic.

5.4.5 Evidence Base

A few respondents argued that there was insufficient evidence of a substantive nature to support the inclusion of age as protected characteristic.

One respondent noted that in the Scottish Review, Lord Bracadale considered there to be sufficient evidence of hostility based offences to recommend the inclusion of age as a protected characteristic.

Generally, it was felt that further exploration in this area was needed in order to establish the extent to which crimes against people on the basis of hostility towards their age, rather than actual or perceived vulnerability, take place. Although it was noted that '*crime data shows that older persons are less likely to be victims of crime'* (Police Service of Northern Ireland), this refers to crime more broadly, rather than hate crime *per se*. Indeed, it was pointed out by another respondent that,

> ..*as the Police Service of Northern Ireland ('PSNI') does not currently record separate 'age based hate crimes', this limits the available evidence on the extent of such hate crimes*. (Equality Commission for Northern Ireland)

Notably, a few organisations, including Victim Support NI and Committee on the Administration of Justice (CAJ), did concede that, should sufficient evidence be established in this area, they would consider that age could be included as a protected characteristic. CAJ stated that:

> *This would be evidence relating to criminal offences being committed motivated by hatred etc. against older persons and/or children & young persons as a group, and*

also whether there is an evidence base of hate expression consisting of incitement to hatred against either group. (Committee on the Administration of Justice)

Respondents acknowledged that crime against older people and young people was a significant issue and recommended a number of measures to tackle this as an alternative to introducing age as a protected characteristic. Namely:

- Introduce a separate model for aggravating offences regarding crimes and exploitation that target particularly vulnerable members of society, as discussed in the Scottish Hate Crime Review. (Church of Ireland Church and Society Commission)

- Mandatory minimum sentences for attacks against older people regardless of whether the criminal act is motivated by hatred, prejudice or simply the victim's vulnerability. (Democratic Unionist Party)

- Steps be taken to ensure better understanding of how judges take vulnerability of the victim into account in sentencing. (Victim Support NI)

- Action be taken to increase public knowledge that targeting someone because of real or perceived vulnerability will be punished more severely. (Victim Support NI)

- The use of hate crime legislation to strengthen legal protections for older people, through a definition of hate crime that allows for the consideration of 'vulnerability. (Hourglass NI)

5.5 Question 15: Should a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability be introduced into Northern Ireland hate crime legislation?

32 respondents answered the tick-box part of question 15. Table 5.5 shows that a majority of respondents (81%) **did not agree** with the introduction of a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability into Northern Ireland hate crime legislation.

Table 5.5

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	3	33%	3	13%	6	19%
No	6	67%	20	87%	26	81%
Total	**9**	**100%**	**23**	**100%**	**32**	**100%**

48 respondents (30 organisations and 18 individuals) made comments in response to question 15. Their views are discussed below.

5.5.1 Support for the introduction of a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability

Among those that made comments, a minority of respondents agreed that a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability should be introduced into Northern Ireland hate crime legislation. Explanatory comments by these respondents were limited.

One key argument was that a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability would be particularly beneficial in terms of dealing with hate crimes involving victims, such as 'older people', who do not fall within a particular identity group. Similar to earlier questions, a few respondents (individuals) argued that a general statutory aggravation was merited on the basis that all victims should be treated 'equally' by the law.

One respondent (Church of Ireland Church and Society Commission) suggested following the approach recommended by Lord Bracadale[320], that is, the introduction of a general aggravation covering exploitation and vulnerability separate from hate crime legislation.

[320] Lord Bracadale (2018), *Independent Review of Hate Crime Legislation in Scotland: Final Report*, Scottish Government.

5.5.2 Opposition to the introduction of a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability

A majority of respondents were not supportive of the introduction of a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability, although many acknowledged the importance of providing protection to vulnerable individuals through some form of legislation.

One respondent (organisation) expressed concern that the introduction of a statutory aggravation might lead to, or reinforce, existing negative stereotyping of equality groups, including older people and disabled people. As such, this respondent indicated a preference for the introduction of a 'by reason of test', to '*ensure that crimes committed because of perceived vulnerability of an individual due to being a member of a particular equality group are covered within the hate crime legislation' (*Equality Commission Northern Ireland).

Other key points made by this group of respondents were that:

- The inclusion of such a statutory aggravation in hate crime legislation would serve to dilute its purpose, broaden its scope and diminish its impact.

- The concept of vulnerability itself is too vague and potentially difficult to prove. The introduction of a general statutory aggravation might therefore be counter-productive.

- Vulnerability is distinct from hostility, and as such separate legislation may be more appropriate.

- Vulnerability can already be considered and dealt with in sentencing, under current legislation.

One respondent (organisation) made reference to international human rights standards, noting that these standards do not specifically call on States to cover 'victim vulnerability' as a particular characteristic, but instead encourage States to address harm caused by hostility towards vulnerable people through appropriate legal and policy responses. Another respondent (individual) suggested that restorative mechanisms could prove effective in some cases involving the exploitation of vulnerability as a motivating factor.

5.5.3 Key points made by those who did not take a specific view

Several respondents (organisations) stated that they did not take a specific view due to general uncertainty about the appropriate response to dealing with 'vulnerability' (which it was acknowledged could apply to a range of characteristics including age, disability and incapacity.) Additionally, respondents cited a lack of evidence, as well as the risk of potential added complexity, as discussed in the consultation paper. However, if introduced,

one respondent argued for a '*shared and agreed definition/understanding of what vulnerability is to ensure a consistency of approach'* (Police Service Northern Ireland).

Another respondent (organisation) indicated that a statutory aggravation covering people with 'low social status' or 'low power' would be preferable to 'vulnerability'. It was felt that such terminology was more consistent with a definition of hate crime that took account of power dynamics.

5.6 Question 16: Should homeless status be included as a protected characteristic in Northern Ireland hate crime legislation?

49 respondents answered the tick-box part of question 16. Table 5.6 shows that a majority of these respondents (80%) **did not agree** with the inclusion of homeless status as a protected characteristic in Northern Ireland hate crime legislation. A majority of organisations (62%) were in favour, while individual respondents were unanimously opposed to the inclusion of homeless status.

Table 5.6

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	10	62%	0	0%	10	20%
No	6	38%	33	100%	39	80%
Total	**16**	**100%**	**33**	**100%**	**49**	**100%**

41 respondents (18 organisations and 23 individuals) made comments in response to question 16. Their views are discussed below.

5.6.1 Main arguments made by those **supportive** of the inclusion of homeless status as a protected characteristic were that homelessness was a growing problem in society and that people with homeless status were vulnerable to hate crime and therefore in need of protection. One respondent (Northern Ireland Human Rights Commission) recommended a broad definition of 'homeless' such that it encompassed the inclusion of people without a secure home.

One respondent noted that, although evidence indicates homeless people are subject to violence and abuse, targeting of homeless people is not due to a characteristic inherent to their identity. As such, a few respondents felt that it was more appropriate to provide protection to people with homeless status through the inclusion of a 'vulnerability' category:

> *…homelessness and sex work would be more effectively prosecuted under the category of vulnerability. Much like attacks on elderly people, we believe that such crimes should fall under a 'vulnerability' category, and carry enhanced sentences because of the exploitative element of crime against them.* (Victim Support NI)

Alternatively, it was suggested that the inclusion of a statutory aggravation that covered targeting of people with 'low social status' or 'low power' would be more appropriate, particularly given the influence of power dynamics.

5.6.2 Those **opposed** to the inclusion of homeless status as a protected category gave the following main reasons:

- There was insufficient evidence to justify the inclusion of homeless status as a protected category.

- There was a risk that this would lead to the inclusion of other socio-economically disadvantaged groups, in turn, diluting the legislation and its deterrent effects.

- The law should apply equally to all, rather than any specific selected group/s. This argument was primarily (although not exclusively) made by individual respondents.

- Homeless status is not an identity, but rather is a vulnerability that should be addressed through mechanisms other than hate crime legislation.

Notably, some organisational respondents indicated that they did not take a specific position on the inclusion of homeless status as a protected category. However, a few of these respondents did express concerns that the legislation might be diluted by the inclusion of homeless status as a protected characteristic.

5.7 Question 17: Do you consider any other new characteristics should be protected in NI hate crime legislation other than those mentioned above?

52 respondents answer the tick-box part of question 17. As shown in Table 5.7, a **minority** of these respondents (31%) were in agreement that other new characteristics should be protected in NI hate crime legislation.

Table 5.7

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	8	42%	8	24%	16	31%
No	11	58%	25	76%	36	69%
Total	**19**	**100%**	**33**	**100%**	**52**	**100%**

52 respondents (28 organisations and 24 individuals) made comments. Suggested new protected characteristics are discussed below.

5.7.1 Sex workers

The most common suggestion was 'sex workers', which was mainly (but not exclusively) made by organisations from the women's sector. Respondents argued that sex workers are subject to particular forms of violence, prejudice, abuse and intimidation, which should be treated as hate crime. Additionally, it was noted that sex workers' particular vulnerabilities can prevent them from accessing the criminal justice system. They may be reluctant to report abuse, due to the perception that the relevant authorities will not process their complaints appropriately.

Some respondents pointed out that the current legislative approach governing sex work does not offer adequate support to sex workers. In particular, they highlighted the ineffectiveness of current legislation, which focuses on reducing demand for sex work rather than enhancing protections for sex workers. Some suggested that with the introduction of this legislation, there had been an increase in reported violence against sex workers in Northern Ireland.

Accordingly, the addition of 'sex work' as a protected characteristic was viewed as offering crucial protection to sex workers, while it would also increase confidence in the reporting of crimes. It was also suggested that it would be helpful for the Review to consider how the treatment of crimes against sex workers has been implemented in other services. A few respondents drew attention to the approach taken by Merseyside Police, whereby crimes committed against sex workers are viewed as being underpinned by discrimination, hostility and prejudice, and therefore treated as hate crime.

Respondents made a number of additional suggestions, such as:

- Given that sex worker status is 'transitory' rather than an identity characteristic, crimes committed against sex workers should fall under a 'vulnerability' or 'exploitation of vulnerability' category. Such crimes should carry enhanced sentences because of their exploitative element.

- Alternatively, it was suggested that the inclusion of a statutory aggravation to cover targeting people with 'low social status' or 'low power' could be considered. This would be consistent with an emphasis on the influence of power dynamics in the legal definition of hate crime.

- It would be appropriate to term the characteristic in terms that minimise the risk of stigmatising individuals and unintentionally excluding any groups. One respondent suggested that the term 'unconventional employment status' could be considered.

- Alternative measures such as standalone offences may be more effective, particularly given the potential risk of diluting hate crime legislation.

- Further consultation with sex worker led groups such as the Sex Workers Alliance, was advised.

5.7.2 Other characteristics suggested (by a few) respondents

Migrant Status: one respondent (Northern Ireland Women's European Platform) argued that the characteristics of race and religion do not cover all migrants, particularly migrants from European countries. Given the context of the UK's departure from the European Union, migrants were perceived as facing an increasing risk of xenophobic attacks. However, it was acknowledged that it might be possible to include 'migrant status' under the broader category of race.

Travellers, Roma and other non-settled people: one respondent recommended the inclusion of Travellers, Roma and other non-settled people, arguing that this was warranted on the basis of the '*acute levels of anti-Traveller racism and to ensure the recording of disaggregated data.' (Northern Ireland Human Rights Commission)*. It was pointed out that Travellers are a particularly vulnerable group in Northern Ireland, as highlighted by The Race Equality Strategy 2015-2025[321] and the NIHRC's 'Out of Sight, Out of Mind' (2018) Report[322].

Islamophobia: a few respondents (including Belfast Islamic Centre) advocated the inclusion of Islamophobia. It was felt that this was merited given the harmful impact of

[321] Office of the First Minister and Deputy First Minister (2015) 'Racial Equality Strategy 2015-2025'.

[322] NI Human Rights Commission (2018) 'Out of Sight, Out of Mind – Traveller Accommodation in Northern Ireland'.

Islamophobia, as highlighted in 2019 by the then UN Special rapporteur on Racism. It was also pointed out that the inclusion of Islamophobia would help to ensure the recording of disaggregated data.

Anti-Semitism: one respondent (Northern Ireland Human Rights Commission) called for the inclusion of anti-Semitism, with similar arguments as those given for Islamophobia (above). The respondent indicated particular concerns were around hate speech, as noted by the UN CERD Committee[323].

Low socio-economic status: it was suggested that people of low socio-economic status are vulnerable to victimisation due to power structures, which it was argued falls within the scope of potential hate crimes.

Humanists: one respondent (Northern Ireland Humanists and Faith to Faithless) called for the protection of humanists under hate crime legislation.

Misogyny

As discussed in more depth at question 11, some respondents recommended the inclusion of 'misogyny' as a protected characteristic. These respondents highlighted the prevalence of misogynistic abuse online, as well as what was described as the 'normalisation' of misogynistic hate crime. In this context, misogyny rather than sex or gender was preferred as a protected characteristic.

5.7.3 Other points

Respondents made specific recommendations, such as:

> *We suggest the protected characteristics should be reviewed automatically every three years under Statutory Instruments in affirmative procedures* (Northern Ireland Council for Racial Equality)

> *…..the hate crime legislation establishes a clear list of particular characteristics that reflects the needs for specific protections for protected groups in international human rights law and that the residual clause of other "analogous protected characteristics" is included in the hate crime law to allow the law to reflect the need for evolution.'* (Northern Ireland Human Rights Commission)

[323] United Nations Committee on the Elimination of Racial Discrimination

5.8 Question 18: Do you consider that intersectionality is an important factor to be taken into consideration in any new hate crime legislation?

35 respondents answered the tick-box part of question 18. Table 5.8 shows that just under half (49%) of those respondents **agreed** that intersectionality is an important factor to be considered in any new hate crime legislation. However, individuals and organisations held contrasting views, with a majority of organisations (83%) and a minority of individuals (12%) answering positively.

Table 5.8

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	15	83%	2	12%	17	49%
No	3	17%	15	88%	18	51%
Total	**18**	**100%**	**17**	**100%**	**35**	**100%**

37 respondents (26 organisations and 11 individuals) made comments, as discussed below.

5.8.1 Views of those who <u>agreed</u> that intersectionality should be considered in any new hate crime legislation

Some respondents indicated that they strongly felt that intersectionality should be considered, arguing that this was crucial to gaining a comprehensive understanding of the victim's experiences of hostility, prejudice and violence, and of the nuances of harm suffered. One respondent acknowledged that intersectionality did not necessarily imply greater harm, but rather that intersecting identities placed some individuals at a greater risk of victimisation than others. Another highlighted the significance of intersectionality in cases involving islamophobia, noting that:

> *It is often a gendered crime, with Muslim women facing racial, religious hate and misogyny combined. Therefore an understanding of intersectionality is important in drafting of any new legislation.* (Belfast Islamic Centre)

Additionally, it was suggested that taking intersectionality into account in legal responses to hate crime would:

- Allow for greater visibility and understanding for the multiple factors motivating hostility.

- Reassure victims that their nuanced experience would be taken seriously by the judicial system, which, in turn, would encourage reporting.

- Allow for specific harm on the grounds of two or more particular characteristics to be considered and addressed.

One respondent pointed out that, although international rights law did not specifically call for hate crime legislation to cover intersectional harms, it did acknowledge the specific harm of hostility on the grounds of two or more particular characteristics, with calls for such harms to be addressed through appropriate legal and policy responses.

Respondents also referred to specific studies indicating that intersectionality places some groups at a higher risk of hate crime, with several respondents citing findings from the All Party Parliamentary Group (APPG) on Hate Crime[324] (as discussed in the consultation paper). One respondent made reference to The Citizens Hate Crime Commission[325] which found that intersectionality disproportionality increases the risk of women being the subject of hate crime, particularly those involving islamophobia, anti-Semitism, sexual orientation, and transphobia.

Respondents also argued that intersectionality is an important factor to be taken into account by courts when determining sentencing. One respondent (organisation) suggested extended sentences should be considered in cases involving more than one protected characteristic. Another pointed out that, without the capacity to take account of two or more characteristics, the victim's ability to achieve effective legal redress would be undermined.

There was strong consensus on the need for more comprehensive monitoring of hate crime, including the recording of disaggregated data by the Police Service of Northern Ireland, Public Prosecution Service and criminal justice system. This was viewed as imperative in order to '*better understand, monitor and identify trends in hate crime, including online crime, experienced by people with multiple identities'* (Equality Commission for Northern Ireland).

5.8.2 Additional points

- Police officers and other service providers should receive training in the concept of intersectionality and how it relates to their work.

- The inclusion of additional protected characteristics under hate crime legislation would assist in combatting hate crime experienced by people due to their multiple identities.

[324] All Party Parliamentary Group on Hate Crime (2019) –*"How do we Build Community Cohesion when Hate Crime is on the Rise?"*
[325] https://www.citizensuk.org/notts_commission

- Taking intersectionality into consideration in hate crime legislation is not a 'quick fix' but rather a first step for ensuring that marginalised groups engage in hate crime reporting and mechanisms.

5.8.3 Views of those who did not agree that intersectionality should be considered in any new hate crime legislation

Many respondents who took this position indicated that they disagreed with hate crime legislation in principle and their comments did not specifically address the issue of intersectionality.

Specific reasons given by those who did address the question included concerns that to consider intersectionality could '*create complexities for legislators and the justice system'* (Police Service of Northern Ireland). Other concerns were that legislating for multiple aggravations could pose a risk to successful outcomes, with questions around how intersectionality could be reflected in sentencing. Some respondents (organisations) caveated that intersectionality should be captured in reporting, and acknowledged that it was relevant to supporting victims and challenging actions through restorative practices.

5.9 Question 19: If you consider intersectionality to be an important factor to be taken into consideration in any new hate crime legislation, what is the best way to achieve this?

This question asked respondents for comments only. 28 respondents (25 organisations and 3 individuals) made comments, as discussed below.

Respondents stressed the importance of reflecting intersectionality within any new hate crime legislation, particularly if its remit is to protect all acknowledged characteristics equally. Specific suggestions regarding its incorporation included the addition of an option for 'multiple group hostility' (along with other new protected characteristics), as discussed in the consultation paper. Such an approach would allow courts to address intersectionality *throughout* the trial, and accordingly, promote understanding among stakeholders involved of the dynamics of intersectionality. Several respondents stressed the importance of considering intersectionality at different stages of the legal process, including sentencing, recording and provision of victim support.

Another suggestion was the identification of a 'leading motivation' that could be proven within courts, with the '*intersectional element recorded in the judgment for the purposes of record keeping and greater understanding'* (Northern Ireland Women's European Platform).

Additionally, it was argued that consideration should be given to 'additional sentencing' in cases involving multiple protected characteristics.

Some respondents suggested that consolidation of hate crime legislation into a single piece of legislation would assist with the introduction of measures to tackle hate crimes involving intersecting identities.

Generally, it was acknowledged that the inclusion of intersectionality in hate crime legislation could prove to be complex. However, respondents suggested that detailed guidance and training, drawing on academic and legal theory on intersectionality, could help to overcome any such complexities.

6. Towards a New Hate Crime Law for Northern Ireland: (Questions 20 – 26)

6.1 Question 20: If the enhanced sentencing model remains as the core provision for dealing with hate crime in Northern Ireland, should it be amended to provide for the recording of convictions on the criminal record viewer?

35 respondents answered the tick-box part of question 20. Table 6.1 shows that a majority (71%) of these respondents **agreed** that the enhanced sentencing model should be amended to provide for recording of convictions on the criminal record viewer, should it remain the core provision for dealing with hate crime. A strong majority (81%) of organisations were in favour, while individuals were relatively balanced in their views, with 57% and 43% answering 'yes' and 'no' respectively.

Table 6.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	17	81%	8	57%	25	71%
No	4	19%	6	43%	10	29%
Total	**21**	**100%**	**14**	**100%**	**35**	**100%**

26 respondents (19 organisations and 7 individuals) made comments, as discussed below.

6.1.1 Many respondents who answered this question felt very strongly that the enhanced sentencing model (ESM) should not remain as the core provision for dealing with hate crime in Northern Ireland. However, should the ESM continue as the core provision, it was considered essential to amend the model to provide for recording of convictions on the criminal record viewer.

The recording of convictions in this way was viewed as particularly important for monitoring purposes. Respondents argued that this would support the accurate collection of hate crime statistics which, in turn, would enable greater understanding of the nature and scale of hate crime, and allow for the development of relevant policy responses. It would also allow for the identification of repeat offenders, inform appropriate responses to recidivism, and help to ensure that appropriate resources could be put in place to address hate crime and its impact. The importance of accuracy of recording was highlighted, with one respondent suggesting that data collection should be approached in a way that:

> ….*is consistent, extensive and disaggregated across all stages of the criminal justice process, including sentencing and on the criminal record viewer.* (Northern Ireland Human Rights Commission)

An additional argument was that recording on the criminal record viewer was necessary for the protection of victims, both potential victims, and those who had experienced hate crime. Failure to record hate crime accurately was viewed as both increasing the risk of victimisation and denying justice to victims and their communities. A specific suggestion, by a women's organisation, was that hate crime offences should be made available via the Domestic Abuse Disclosure Scheme. Another respondent suggested that recording would enable 'vetting' by prospective employers and volunteer hosts, as might be required for work involving contact with vulnerable individuals.

Some also considered the recording of convictions as necessary for the development of tailored restorative and educational programmes. One respondent (organisation) viewed a lack of relevant data under the current model as an impediment to taking steps to educate, rehabilitate and reintegrate' perpetrators of hate crime into society. Another respondent (organisation), with direct experience in the delivery of restorative programmes, highlighted the lack of referrals received from statutory partners over the course of the organisation's project.

A few respondents noted that recording of convictions could have a deterrent effect, particularly if this was made public knowledge.

Notably, there were some caveats to support for recording in this way. One respondent noted that organisations' access to information on hate crime convictions on the criminal record viewer must be managed *'in a fair and proportionate way and for legitimate business reasons'* (Democratic Unionist Party). Another argued that recording should be limited to cases involving offenders deemed as a risk to the public, and in such cases, that this be subject to certain limitations (no suggestions were offered).

6.1.2 A few respondents indicated in their answers that they **did not agree** with provisions for recording under the enhanced sentencing model. In most cases, this was attributed to the problematic nature of the enhanced sentencing model itself rather than recording provisions *per se*.

In one case, the respondent was strongly against this proposal on the basis that it infringed upon the rights of the offender:

> *The sentencing should not appear on a record that can disadvantage the guilty beyond their punishment. Once the sentence is served the person should have all rights and freedoms restored without prejudice. No register or record should be used to follow the guilty for "Hate Crime".* (Individual)

6.2 Question 21: Do you believe there is a need to introduce a statutory aggravation model of hate crime law similar to that which exists in Scotland and in England and Wales under the Crime and Disorder Act 1998?

39 respondents answered the tick-box part of question 21. Table 6.2 shows that a majority (62%) of these respondents **agreed** that there is a need to introduce a statutory aggravation model of hate crime law. However, organisations and individuals held contrasting views, with a strong majority (90%) of organisations in favour, compared to a minority (28%) of individuals.

Table 6.2

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	19	90%	5	28%	24	62%
No	2	10%	13	72%	15	38%
Total	**21**	**100%**	**18**	**100%**	**39**	**100%**

39 respondents (27 organisations and 12 individuals) made comments in response to question 21. It should be noted that there was overlap with responses to earlier questions (particularly question 7).

Comments are discussed below.

6.2.1 A commonly held view among those in **agreement** was that the enhanced sentencing model was neither working effectively nor meeting the needs of victims. One respondent (organisation) suggested that this had been evidenced by the low number of enhanced sentences received by offenders in Northern Ireland. A particular criticism was its failure to address the hate element of a crime throughout the trial process.

Within this context, the statutory aggravation model was perceived as a more effective approach, for the following main reasons:

- It provides a more comprehensive, system-wide approach and therefore holds greater potential to address hate crime effectively.
- It allows for the flagging of offences and for the delivery of tailored rehabilitation interventions post-sentencing.
- It enables the hate crime element to be addressed throughout all aspects of criminal proceedings, from the point of recording through to sentencing. As such, it is more effective than the ESM, in terms of criminalising hateful motivations and ensuring victims' experiences are adequately reflected.
- It provides greater potential to deal with hate crime and its causes outside the criminal justice system.

A few respondents (organisations) indicated a preference for the statutory aggravation model as implemented in Scotland. One of these respondents stated:

> *PPS have had an opportunity to view an example of how the instrument of complaint is marked in Scotland. It is considered that the flexibility that this approach offers is very attractive and a similar framework should be adopted in this jurisdiction where the prosecution are alleging that an offence is aggravated by hostility. Adopting such an approach would also resolve most of the practical difficulties around, for example, recording which have undermined efforts to operate the current provisions effectively.* (Public Prosecution Service)

A few respondents (including those who took a neutral view) proposed that there should be a requirement for specific limitations to the application of the statutory aggravation model, should it be introduced. These respondents recommended that new aggravations should be carefully worded, *'to ensure freedoms of speech and expression are not weakened'* (Democratic Unionist Party) and to *'minimise the risk of such provisions being abused'* (CARE NI). In particular, it was suggested that the use of vague concepts, such as hostility and bias, should be avoided.

6.2.2 A minority of respondents (mainly individuals) indicated in their comments that they **did not agree** with the proposal to introduce a statutory aggravation model of hate crime law. Some of these respondents viewed changes to legislation as unnecessary and/or were concerned that freedom of expression could be negatively impacted by changes.

6.2.3 Additional Points

Additional points were that the introduction of a statutory aggravation model would be time-consuming, create increased confusion and ultimately result in the dismissal of prosecutions.

6.3 Question 22: In dealing with an aggravated offence, should the court state on conviction that the offence was aggravated?

33 respondents answered the tick-box part of question 22. Table 6.3 shows that a majority (88%) of these respondents **agreed** that in dealing with an aggravated offence, the court should state on conviction that the offence was aggravated. There was strong support among organisations in particular, with 95% in favour of this proposal.

Table 6.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	21	95%	8	73%	29	88%
No	1	5%	3	27%	4	12%
Total	**22**	**100%**	**11**	**100%**	**33**	**100%**

27 respondents (18 organisations and 9 individuals) made comments in response to question 22. These are discussed below.

6.3.1 Several respondents argued that it was of particular importance to victims that courts state on conviction that the offence was aggravated. This would affirm to victims that the hate motivation and its impact was recognised by the judicial system:

> *…it shows clearly to the victim that it was not simply the basic offence for which the perpetrator was convicted but that the hateful motivation is considered important and relevant also and that the justice system understands the importance of that distinction to the victim.* (Church of Ireland Church and Society Commission)

Additionally, it was suggested that it could promote greater confidence in the justice system, and related to this, encourage both reporting of hate crime incidents and cooperation with the justice system.

A few respondents also considered that such an approach would serve as an important denunciatory function, by communicating to perpetrators, victims, and wider society that hate crimes are not acceptable in Northern Ireland. One respondent (organisation) suggested that declaring the aggravating factor would reinforce to offenders that hate crimes are considered both serious and morally unacceptable.

It was also suggested that this approach could act as a deterrent to potential offenders, and lead to increased access to appropriate educational interventions for offenders. Additionally, respondents considered that it would help to ensure transparency of decision making,

enable greater scrutiny of how courts address the issue of hate crime and was essential for monitoring purposes. One organisational respondent suggested that greater clarity would be attained by adopting a similar approach to the Scottish system, as outlined in the consultation paper at paragraph 9.13.

6.3.2 One respondent (individual) who answered 'no' to question 22 made comments. This respondent argued that the current legislation did not require amendment.

6.4 Question 23: In dealing with an aggravated offence, should the court record the conviction in a way that shows that the offence was aggravated?

31 respondents answered the tick-box part of question 23. Table 6.4 shows that a strong majority (84%) of these respondents **agreed** that in dealing with an aggravated offence, the court should record the conviction in a way that shows that the offence was aggravated. There was particularly high support among organisations (95%) for this proposal.

Table 6.4

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	20	95%	6	60%	26	84%
No	1	5%	4	40%	5	16%
Total	**21**	**100%**	**10**	**100%**	**31**	**100%**

29 respondents (22 organisations and 7 individuals) made comments in response to question 23.

There was considerable overlap in the comments provided to questions 22 and 23, with some respondents giving the same answer for both questions. Any repeated points are highlighted in brief below.

6.4.1 Those who were **supportive** of courts recording the conviction in a way that shows that the offence was aggravated, argued that this was merited on the basis that it would**:**

- Have important deterrent effects, both in terms of potential perpetrators and re-offending.
- Symbolically denounce hate crime.
- Provide reassurance to victims that the hate element has been taken seriously by courts.
- Help to ensure transparency in decision making and enable scrutiny of how courts approach hate crime.
- Contribute to improved monitoring of trends and statistics on hate crime, which can inform different types of interventions, including capacity building, prevention measures and policy responses.

- Inform rehabilitation and educational programmes to be developed in collaboration with groups affected by hate crimes.

An additional point was that recording would help with 'safeguarding', however, no further detail was given by the respondent.

Another respondent suggested that recorded data could be used to inform decision making about the allocation of resources:

> *Additional publicly available information regarding the extent of the aggravated or enhanced sentence would assist the Housing Executive in decisions in relation to eligibility for Housing and Homelessness.* (Northern Ireland Housing Executive)

6.4.2 Comments offered by those **opposed** to courts recording the conviction in a way that shows that the offence was aggravated comprised general points that were not specific to the question.

6.5 Question 24: In dealing with an aggravated offence, should the court take the aggravation into account in determining the appropriate sentence?

30 respondents answered the tick-box part of question 24. Table 6.5 shows that a majority (80%) of these respondents **agreed** that in dealing with an aggravated offence, the court should take the aggravation into account in determining the appropriate sentence. There was strong support among organisations in particular, with 95% in favour of this proposal.

Table 6.5

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	20	95%	4	44%	24	80%
No	1	5%	5	56%	6	20%
Total	**21**	**100%**	**9**	**100%**	**30**	**100%**

25 respondents (18 organisations and 7 individuals) made comments in response to question 24. Their views are discussed below.

6.5.1 Those in favour of the court taking the aggravation into account in determining the appropriate sentence

Respondents argued that it was 'fair' and 'appropriate' to take the aggravation into account in determining the appropriate sentence. In particular, some suggested that this was an appropriate response given both the purpose of the 'aggravated label' and hate crime legislation itself.

Additionally, it was argued that this would highlight the particular seriousness with which the offence is considered, and send a clear message to victims and wider society that hate crime is unacceptable.

One organisational respondent was supportive of the proposal however did point out that '*the judiciary already treat hostility as an aggravating factor when determining the appropriate sentence for an offender*.' (The Bar of Northern Ireland)

6.5.2 Additional points

One respondent suggested that the aggravation could be used to:

> *…signal that a partially or entirely different form of justice, such as a restorative approach, could be used in certain cases where it is considered that it may have a*

more positive impact in rehabilitating the offender and bringing a sense of justice to the victim. (Church of Ireland Church and Society Commission)

Others highlighted the importance of clear sentencing guidelines, in order to ensure consistency, clarity and transparency for all stakeholders.

6.5.3 Comments made by those **opposed** to the court taking the aggravation into account in determining the appropriate sentence were comparatively limited. Respondents indicated that all offences should carry the same penalty, regardless of motivation.

6.6 Question 25 (Part 1): In dealing with an aggravated offence, should the court state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference?

31 respondents answered the tick-box part of question 25 (part 1). Table 6.6 shows that a majority (87%) of these respondents **agreed** that in dealing with an aggravated offence, the court should state where the sentence (in respect of the offence) is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference.

Table 6.6

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	20	91%	7	78%	27	87%
No	2	9%	2	22%	4	13%
Total	**22**	**100%**	**9**	**100%**	**31**	**100%**

24 respondents (17 organisations and 7 individuals) made comments in response to question 25 (part 1). These are discussed below.

6.6.1 Those **in favour** of the proposal gave the following reasons:

- It was essential for clarity, transparency and to ensure the effective implementation of the statutory aggravation model.

- It was important to ensure clear understanding of the reasoning behind sentencing decisions, and specifically, '*why the punishment is handed down'* (individual). One respondent stressed the importance of this for victims in particular.

- It was important that the approach taken by courts acknowledged the impact of hate crime offences on victims, the seriousness with which they are regarded and, more generally, that a clear message of denunciation is conveyed. This in turn would help victims feel more protected, promote confidence among the wider public (particularly protected groups) that the legislation is being taken seriously, and, act as a potential deterrent to future offending.

- It would help to address problems with current hate crime legislation, particularly the issues of under-utilisation and under-reporting by courts when used.

One respondent (organisation) caveated that, unless used in combination with educational and rehabilitation programmes, the aggravated offence approach '*runs the risk of further radicalising perpetrators through the flawed prison system in Northern Ireland'* (TransgenderNI).

6.6.2 Those **opposed** to the proposal gave limited explanation in their comments. One organisation argued that a detailed explanation was unnecessary and could detract from other aspects of the legal process:

> *It is the experience of the Bar that the judiciary do treat hostility as an aggravating factor when sentencing and state this in open court. As stated above, the judiciary conduct a careful and weighted assessment of aggravating and mitigating factors when assessing the starting point of a sentence. However, we take the view that to indicate precisely how the hostility affected the sentence could disturb this careful assessment.* (The Bar of Northern Ireland)

A few individuals made comments but these tended to focus on hate crime legislation generally, with some expressing concerns about issues of impartiality and discrimination in the justice system, such that some groups or individuals would be placed at an 'advantage ' over others.

6.7 Question 25 (Part 2): In dealing with an aggravated offence, should the court otherwise state the reasons for there being no such difference?

23 respondents answered the tick-box part of question 25 (part 2). Table 6.7 shows that a majority (87%) of these respondents **agreed** that in dealing with an aggravated offence, the court should otherwise state the reasons for there being no such difference. This question attracted a low number of responses from individuals (n=5), who were unanimous in their support. There was also a high level of support (83%) among organisations.

Table 6.7

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	15	83%	5	100%	20	87%
No	3	17%	0	-	3	13%
Total	**18**	**100%**	**5**	**100%**	**23**	**100%**

19 respondents (15 organisations and 4 individuals) made comments. There was considerable overlap in reasons given for question 25 part 1 and part 2, with many respondents giving identical answers for both questions.

6.7.1 Those in **favour** gave the following main reasons:

- There was a strong consensus that this was essential for transparency of decision making. A few respondents argued that this was particularly important for victims, to ensure understanding, 'closure' and promote confidence in the justice system.

- It was considered important in terms of scrutiny of how the legislation operates and is understood by courts.

- Unlike the current legislation, which does not consider the hate element of the crime until sentencing, such an approach would ensure that the hate motivation remains central to the case throughout, regardless of the outcome at sentencing.

- One respondent (individual) suggested that it could provide protection against confirmation bias.

One respondent caveated that stating the reasons for their being no such reason was appropriate in circumstances where ' *the trial judge deems it appropriate'* (The Law Society of Northern Ireland).

6.7.2 A few respondents were **opposed** to the proposed approach. Main reasons given were as discussed at question 25 (part 1).

6.8. Question 26: Do you consider that aggravated offences should be recorded as such in criminal justice records so that statutory agencies and others are aware of the hostility element of an individual's criminal history?

39 respondents answered the tick-box part of question 26. As shown in Table 6.8, a majority of these respondents (77%) **agreed** that aggravated offences should be recorded as such in criminal justice records so that statutory agencies and others are aware of the hostility element of an individual's criminal history. There was particularly strong support (91%) among organisational respondents, while individual respondents were comparatively mixed in their views.

Table 6.8

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	21	91%	9	56%	30	77%
No	2	9%	7	44%	9	23%
Total	**23**	**100%**	**16**	**100%**	**39**	**100%**

32 respondents (23 organisations and 9 individuals) made comments, as discussed below.

6.8.1 Support for aggravated offences being recorded as such in criminal justice records so that statutory agencies and others are aware of the hostility element of an individual's criminal history

Many respondents agreed that it was essential to make statutory agencies aware of the hostility element of an individual's criminal history, arguing that such information could be utilised in a number of ways:

- **To inform decision making by relevant stakeholders working within the criminal justice system.** One respondent who considered improved recording essential to deal with individual cases of repeat offending effectively, stated that:

  'A judge should be informed that the offender's previous convictions have the aggravating characteristics. It will also be relevant to bail applications, to enable the prosecution to take an informed view as to whether or not bail is opposed and, if so, on what grounds.' (The Bar of Northern Ireland)

- **For safeguarding purposes.** One respondent who felt very strongly that statutory agencies should be aware of the hostility aspect of an individual's criminal behaviour, noted that:

  Ensuring that the PSNI and social services are aware of a perpetrator's criminal history is extremely important to keep women and their children safe. (Women's Aid Federation Northern Ireland)

  Additionally, the same respondent recommended that:

  Should gender become a protected characteristic, any conviction of gender as an aggravating factor be placed on that person's record and disclosed to a woman should she request that information. (Women's Aid Federation Northern Ireland)

  Another respondent (individual) argued that information about the aggravated offence should only be disclosed in cases where there are valid safeguarding concerns.

- **To ensure that perpetrators can access relevant rehabilitation support.** The provision of relevant information to statutory agencies would enable probation and rehabilitation programmes to be tailored in a way that offending could be addressed effectively post-sentence. This was viewed as important for changing attitudes and, accordingly, to reduce re-offending behaviours. One respondent suggested that information on aggravated offences at an individual level should not be held indefinitely:

  > *It should be removed when there is evidence the offender has shown a change in attitudes and sustained this over some time.* (Individual)

- **For information and monitoring purposes**, particularly regarding patterns of re-offending behaviours in individuals. One respondent (organisation) suggested that information held could be utilised by police to identify potential triggers (such as demonstrations or parades) to individual re-offending. Another suggested that it could be used to inform vetting processes undertaken by potential employers and volunteer hosts.

6.8.2 Opposition to aggravated offences being recorded as such in criminal justice records:

Comments made by those opposed to aggravated offences being recorded as such in criminal justice records were comparatively limited. One respondent argued that recording aggravated offences as suggested would unfairly stigmatise offenders post-sentence and infringe upon their human rights.

7. Adequacy of the Current Thresholds for Proving the Aggravation of Prejudice (Questions 27 – 30)

7.1 Question 27: If any new hate crime law in NI follows the statutory aggravation model as in Section 28(1) of the Crime and Disorder Act (CDA)1998, do you consider that the current thresholds of (a) demonstration of hostility, and (b) motivation are appropriate or should there be a third threshold: the "by reason of" threshold?

22 respondents answered the tick-box part of question 27. Since respondents were given more than one choice in this question, the disaggregation of 'yes' and 'no' in response to question 27 was not viable. Consequently, only the results from the analysis of respondents' narrative comments are discussed below.

35 respondents (24 organisations and 11 individuals) made comments in response to question 27, as discussed below.

7.1.1 Views on the current thresholds

Respondents who did not consider the current thresholds of (a) demonstration of hostility, and (b) motivation to be appropriate, made the following key points:

- The thresholds were too high, making it difficult to achieve a successful prosecution. In particular, it was argued that the demonstration test was too complex, while the motivation test was rarely used due to being difficult to prove.

- The thresholds failed to recognise and account for unconscious bias and/or the victimisation of individuals based on their perceived ''vulnerability' or 'weakness. Accordingly, certain types of incidents were not covered by current legislation.

One respondent (organisation) considered the current thresholds as appropriate. The reason given focused on the shortfalls of the 'by reason of' test.

7.1.2 Support for a 'by reason of' threshold

The following inter-related points were made by those who were supportive of a 'by reason of' threshold:

- Its introduction would strengthen hate crime legislation and help to ensure successful prosecutions and convictions.

- It would enable incidents currently not covered by existing thresholds to be captured by hate crime legislation, particularly those where there is '*no outward visible manifestation of hostility or evidence to show the person was motivated by hostility*' (Equality Commission for Northern Ireland). Specific examples were given of incidents involving disabled and transgender victims of hate crime, where victims were selected on the basis of their perceived identity or vulnerability and incidents did not involve the explicit use of hostile or prejudicial language.

- It would support improved understanding by the judicial system of the power dynamics involved in hate crime and enable this to be addressed more readily by the legislation.

- It would bring about multiple benefits, including greater confidence among victims, in hate crime reporting mechanisms, and in the criminal justice system. Additionally, it would send a clear denunciatory message; lead to better recording of hate crimes; and, consistency of approach in terms of sentencing. Recording on criminal records will allow a judge to take past offences into account when dealing with repeat offenders. It would also help to ensure that the impact of such crimes on equality groups who are not necessarily targeted due to hostility is recognised.

Additionally, the following suggestions were made by respondents who were supportive of a 'by reason of' threshold:

- The inclusion of a specific reference to power dynamics would support effective functioning of the threshold.

- In response to concerns expressed in the consultation paper about the threshold being 'too broad' in relation to gender, a few respondents (women's sector) stressed the importance of distinguishing between hate crime and domestic violence, in order to mitigate the risk of diluting the legislation. This could be achieved through the inclusion of '*specific wording in the legislation setting out the critical differences'* (Northern Ireland Women's European Platform).

- A few respondents suggested that training and education on gender bias and/or a motivation against a perceived identity in the context of violence against women should be provided across the criminal justice system.

- The 'by reason of' threshold should apply equally to equality groups covered by hate crime legislation and should cover situations where people are targeted due to their multiple identities.

- Changes to the thresholds should be clearly explained in order to ensure effective practical application by different stakeholders operating within the criminal justice system.

- A few respondents agreed (as suggested in the consultation paper) that the animus model might be considered as a way to avoid issues presented by gender.

7.1.3 Views of those who did not agree that there should be a 'by reason of' threshold

Respondents who were opposed to the introduction of a 'by reason of' threshold argued that the threshold was perceived as 'too vague' and/or 'too broad', particularly since many offenders will select their victims 'by reason of' vulnerability or convenience.

One respondent (The Bar of Northern Ireland) was of the view that the consultation paper did not present evidence to demonstrate that a 'by reason of' threshold is necessary. This respondent suggested it may be helpful to review the findings of the Law Commission's review of the legislation's operation in England and Wales.

Another made reference to Lord Bracadale's report[326], noting that:

> *We consider that there is some force in Lord Bracadale's conclusion that the addition of a "by reason of" test has the potential to dilute the concept of hate crime, causing it to lose some of its "symbolic power". The targeting of particular victims by reason of their difference or vulnerability (without hostility being present) can still be explicitly treated as an aggravating factor when sentencing. Proof of the "reason" for any crime may, like proof of motivation, be difficult and it is unlikely that any such change to the legislation would see any significant increase in its use. (Public Prosecution Service)*

One respondent (an organisation who did not specify 'for' or 'against') expressed concerns that the introduction of a third threshold might unintentionally include domestic or sexual violence cases and suggested appropriate safeguards would be necessary in this respect.

[326] Lord Bracadale (2018), *Independent Review of Hate Crime Legislation in Scotland: Final Report*, Scottish Government.

7.2 Question 28: If you consider that there should be a third threshold, do you consider that this should be in addition to the two thresholds of "demonstration of hostility" and "motivation", or should there be a third threshold to replace the motivation threshold?

Similar to question 27, this question offered respondents two choices – '*in addition to*' or '*to replace'* – the meaning of a 'yes' or a 'no' response is therefore not clear. Consequently, the results from the analysis of respondents' narrative comments only are discussed.

26 respondents (20 organisations and 6 individuals) made comments in response to question 28. It should be noted that several respondents provided identical or similar comments in response to both questions 27 and 28.

7.2.1 Support for an additional threshold

Analysis of narrative comments indicated that a majority of respondents (both individuals and organisations) were **supportive** of an additional threshold.

It was suggested that taking this approach would improve existing legislation and provide greater scope for the successful prosecution of hate crime. In particular, it would:

- Provide flexibility for certain forms of prejudice based crimes that cannot be dealt with under current thresholds, particularly those involving selection based on prejudice or perceived vulnerability, to be pursued by prosecutors.
- Improve the likelihood of an effective prosecution and conviction, and, related to this, achieve justice for victims.
- Convey a symbolic message that all protected groups 'have a right to feel safe in society'.

Some respondents pointed out that despite the addition of this threshold, it was expected that the majority of cases would fall within Section 28 (1) (a) of the CDA 1998, which would therefore continue as an 'important tool' for dealing with hate crimes. Additionally, one respondent (organisation) suggested that consideration should be given to whether sentencing should differ depending on which particular threshold is met. This should be clarified within sentencing guidelines as appropriate.

A few respondents disputed the suggestion that an additional threshold would 'dilute' the symbolic power of hate crime.

7.2.2 Support for replacement of the motivation threshold

Relatively few respondents advocated the replacement of the motivation threshold and comments were limited. One respondent (organisation) suggested that this approach would lead to improved prosecutions and justice for victims. Another respondent (organisation), while open to the possibility of an additional threshold, was of the view that replacement would be the most appropriate approach in the case of a mixed selection/animus phrasing. Replacement would also ensure greater clarity and understanding of the legislation by prosecutors.

7.3 Question 29: Do you consider that there should be a statutory definition of the term "hostility"?

34 respondents answered the tick-box part of question 29. Table 7.3 shows that over half (56%) of these respondents **agreed** that there should be a statutory definition of the term 'hostility'. A majority of organisations answered positively (60%) while individuals were evenly split (with 50% both 'for' and 'against').

Table 7.3

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	12	60%	7	50%	19	56%
No	8	40%	7	50%	15	44%
Total	**20**	**100%**	**14**	**100%**	**34**	**100%**

36 respondents (25 organisations and 11 individuals) made comments in response to question 29, as discussed below.

7.3.1 Support for a statutory definition of the term 'hostility':

Respondents who agreed that there should be a statutory definition of the term 'hostility' offered several reasons. Some suggested that it would help to ensure clarity and legal certainty, such that those involved in the criminal justice process (including victims, police officers, prosecutors and enforcement agencies) would have a clear understanding of what constitutes hostility. Respondents argued that reliance on a dictionary definition of hostility was open to ambiguity and subjectivity, and consequently inappropriate. Drawing on their experience of providing support to older people, one respondent considered the dictionary definition of hostility as too limited in terms of its application:

> *The literal (dictionary) definition of hostility does not fit well with cases that involve a pre-existing relationship with the victim or cases that are likely to involve: some form of grooming and faux friendships; a carer's role; or 'taking advantage'. Accounts of the abuse of older people we receive through our helpline occur in relationships of trust where this literal definition of hostility would be incorrect.* (Hourglass NI)

Another respondent (organisation) suggested that greater clarity around what constitutes hostility in the context of hate crime legislation would help to ensure that those involved in the prosecution of offences could select the most applicable threshold to apply for each individual case. This was viewed as imperative for the delivery of justice in such cases.

Several respondents suggested terms for inclusion in a statutory definition of 'hostility'. There was some consensus (particularly among women's organisations) that the definition should encompass a wide range of attitudes including '*bias, prejudice, bigotry and contempt'*. Such an approach was considered particularly important to support a clear basis for utilising the proposed 'by reason of' threshold.

One respondent specified that the terms 'prejudice' and 'hatred' should be captured in the definition. In the case of 'prejudice', in particular, it was argued that the inclusion of this term in the definition would '*provide legal clarity and certainty that prejudice is considered a form of hostility within the hate crime legislation'* (Equality Commission for Northern Ireland).

It was also suggested, by an individual respondent, that a statutory definition of the term hostility should take account of the negative impact on others. Another argued that, while a precise definition of hostility within law was necessary, care should be taken to ensure that the definition does not impinge upon the principle of freedom of speech.

7.3.2 Views of those opposed to a statutory definition of the term "hostility"

Those opposed to a statutory definition of the term 'hostility' considered the concept to be 'too vague', 'confusing', 'subjective', 'emotive', 'too narrow', potentially 'misleading', and/or difficult to define. A particular concern was that it might not provide sufficient protection to targeted groups.

One respondent took the view that a statutory definition of 'hostility' was unnecessary, given that the current everyday understanding in courts was sufficiently broad to encompass concepts such as '*ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike'* (The Bar of Northern Ireland).

A few respondents argued that a statutory definition of hostility would pose risks to freedom of speech. Additional concerns were that, if defined broadly, it could be used '*to target persons or groups in a politically motivated way (Individual),* or more generally, that it would prove '*ineffective*' (CARE NI).

One respondent expressed concerns that a strictly defined term could undermine the purpose of hate crime legislation. Accordingly, it was argued that:

It would be better to work to reflect the importance of what the experience and impact of the crime on the victim was in the statute than to attempt to define hostility.
*(*Church of Ireland Church and Society Commission)

7.4 Question 30: Whether or not you believe that the term "hostility" should be defined or not, do you consider that this term should be expanded to include other terms such as "bias, prejudice, bigotry or contempt"?

36 respondents answered the tick-box part of question 30. Table 7.4 shows that less than half of these respondents (44%) **agreed** that the term 'hostility' should be expanded to include other terms such as "bias, prejudice, bigotry or contempt". Support was considerably more prevalent among organisations (68%) than among individuals (18%).

Table 7.4

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	13	68%	3	18%	16	44%
No	6	32%	14	82%	20	56%
Total	**19**	**100%**	**17**	**100%**	**36**	**100%**

39 respondents (26 organisations and 13 individuals) made comments in response to question 30. There was considerable overlap with comments given in response to question 29.

7.4.1 Support for expansion of the term 'hostility' to include other terms such as 'bias, prejudice, bigotry or contempt'

Respondents who agreed with the expansion of the term 'hostility' made the following key points:

- It is appropriate to include these terms given that they are all considered to be motivating factors and/or bases of hate crimes.

- Expansion as suggested would provide greater clarity and understanding about the nature of hate crime, including the particular dynamics, power structures and beliefs that underpin this type of offending behaviour. Greater clarity was considered important both for successful prosecutions and to enable 'preventative' aims of hate crime legislation to be met.

- Related to the previous point, one respondent highlighted the importance of conveying the 'intent of the law' to enable its effective application by courts. It was suggested that this would be better achieved through a group of reference terms, rather than 'hostility' alone.

- The inclusion of the terms 'bias', 'hostility', 'prejudice', 'bigotry' or 'contempt' was in alignment with the approach taken under the EU Framework Decision on Racism[327] and therefore considered appropriate.

- Expanding the definition as suggested will ensure that all forms of hate crime, in all of their manifestations, can be effectively addressed by legislation. However, respondents caveated that such terms would require definition and would need to align as appropriate with relevant ECHR articles.

One respondent (organisation) was of the view that to include several terms within a single blanket term would create confusion. This respondent further noted that the term hostility would generally be considered to encompass concepts such as anger and aggression.

Some respondents expressed concerns that there could be unintended consequences of the hostility threshold becoming too broad, specifically when relating to gender. Accordingly, it was therefore suggested that,

> *…. It is possible to adopt the concept that the "offender selected the victim by reason of a bias towards the victim's "group identity". This would allow for a broader group selection test and remove the need for the word "hostility" and instead, include only cases where there is some element of bias towards the victim because of their identity.* (Women's Resource and Development Agency / Women's Policy Group NI/ HERe NI)

7.4.2 Opposition to expansion of the term 'hostility' to include other terms such as 'bias, prejudice, bigotry or contempt'

This approach was considered too 'broad' and consequently created a greater risk of confusion, misinterpretation and/or abuse:

> *It is our opinion that the term hostility is too loose and open-ended and could feasibly result in legal actions which are unfriendly or antagonistic being criminalised unfairly.* (Democratic Unionist Party)

> *Adding additional loose terms such as those listed will only increase the likelihood of repressive action against individuals maintaining a witness to the teachings held by orthodox Christians.* (Reformed Presbyterian Church of Ireland – Public Morals Committee)

[327] EU Council, 'Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', 28 November 2008.

Some respondents also expressed concerns about potential negative impacts on freedom of speech.

Accordingly, it was argued that a more precise or narrow definition was appropriate for legal purposes. However, one respondent (organisation) felt that agreement on such a definition might prove difficult to achieve and suggested that alternative (but not lower) thresholds for prosecution should be considered instead.

8. Stirring Up Offences (Questions 31 – 39)

8.1 Question 31: Do you consider there is merit in adding equivalent provisions to Sections 4, 4A & 5 of the Public Order Act 1986 to the Public Order (NI) Order 1987?

27 respondents answered the tick-box part of question 31. Table 8.1 shows that over half (57%) of these respondents **agreed** that there is merit in adding equivalent provisions to Sections 4, 4A & 5 of the POA 1986 to the PO (NI) Order 1987. However, while a strong majority (89%) of organisations were in favour, individual respondents were unanimously opposed.

Table 8.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	16	89%	0	-	16	57%
No	2	11%	10	100%	12	43%
Total	**18**	**100%**	**10**	**100%**	**28**	**100%**

30 respondents (25 organisations and 5 individuals) provided comments to question 31.

8.1.1 Support for adding equivalent provisions to Sections 4, 4A & 5 of the POA 1986 to the PO (NI) Order 1987:

Respondents who were supportive of this proposal considered it important to provide a consistent approach across the jurisdictions within the UK. Some argued that this was essential both at a practical level, in terms of the legislation's implementation, and at a symbolic level, in terms of signalling consistency of social norms across jurisdictions. One respondent (organisation) suggested that amended provisions could be incorporated into consolidated hate crime legislation.

Respondents also considered it essential to address any legislative gaps in protection against hate crime under the Public Order legislation (as detailed in the consultation paper), which would effectively strengthen legislation in Northern Ireland. Of particular interest to respondents from the women's sector was how the provisions might be used '*to strengthen action taken to address harassment of women and pregnant people accessing abortion clinics'* (Women's Regional Consortium/ Northern Ireland Women's European Platform). A general recommendation for addressing legislative gaps was to ensure that '*they have the effect in practice of appropriately and effectively tackling the specific nature and extent of*

hate crime experienced by a range of equality groups, in the particular context of Northern Ireland' (Equality Commission for Northern Ireland).

It was also argued for the addition of equivalent provisions essential to ensure efficacy of the law in dealing with the issue of stirring up offences. This was considered to be particularly important given the inadequacies of current pieces of legislation in terms of being able to address offensive or hateful conduct. Respondents highlighted the importance of recognising the harm caused by stirring up offences by criminalising this type of conduct.

Several respondents (mainly women's sector and voluntary sector organisations) highlighted the need for legislation to adequately address hate speech. This was considered of particular importance given the rise in incidents of hate speech (especially racist hate speech) and its impact on victims. These respondents called for legislation to address the severity of this, and considered the provisions of the Public Order Act 1986 to hold greater potential than existing provisions. One respondent did caution, however, that:

> *…for this to be operationalised, the police, judiciary and wider criminal justice system must have a comprehensive understanding of the different types of hate speech and incitement to hatred experienced by different protected groups (TransgenderNI)*

Another was of the view that there would be merit in dealing with hate speech incidents '*under specific and bespoke legislation, rather than by means of a more general offence such as disorderly behaviour or breach of the peace'* (Public Prosecution Service).

Some within this group expressed concerns that expanding provisions in this area might have detrimental impacts on freedom of speech. Against this context, one of these respondents recommended that '*Any Section 5 equivalent for Northern Ireland should not cover insulting words or behaviour, but only what is threatening or abusive'* (The Christian Institute). This respondent also suggested that the addition of equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 would help to address *'lower-level conduct*'.

Another respondent (organisation) considered provisions of the Public Order Act 1986 were preferable on the basis that they have a higher threshold, with a requirement for the prosecution to prove that the individual acted with intent.

An overall recommendation was that any changes to legislation in Northern Ireland should '*take account of lessons learnt from the operation of this legislation in Great Britain, as well as reflect best practice and international equality and human rights standards*' (Equality Commission for Northern Ireland).

8.1.2 Comments made by those **opposed** to adding equivalent provisions the PO (NI) Order 1987 were comparatively limited. Most of these respondents expressed concerns about freedom of speech being curtailed and legitimate criticism or opinion being interpreted as stirring up hatred. One respondent (organisation) viewed Sections 4, 4A & 5 of the POA 1986 as 'highly problematic' due to their reliance on vague concepts and consequently open to abuse.

8.2 Question 32: Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be retained?

25 respondents answered the tick-box part of question 32. Table 8.2 shows that a majority (60%) of these respondents **agreed** that the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) 1987 should be retained. There was strong support among individuals (86%), while organisations were evenly split in their views (with 50% 'for' and 50% 'against').

Table 8.2

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	9	50%	6	86%	15	60%
No	9	50%	1	14%	10	40%
Total	**18**	**100%**	**7**	**100%**	**25**	**100%**

26 respondents (21 organisations and 5 individuals) offered brief comments in response to this question. Key points are presented below.

8.2.1 Support for retention of the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987

Among those who indicated support for retention of the dwelling defence, few respondents gave specific reasons for their views. General points were that it was considered a reasonable defence and that freedom of expression within the private domain should be protected, on the condition that material is not made available to a public audience:

> *This provision ensures that no offence is committed where behaviour or written material displayed inside a dwelling and are not heard by other persons external to this.* (Democratic Unionist Party)

> *The freedom to write thoughts, not intended for public viewing in the privacy of a person's home should be protected.* (Individual)

One respondent (organisation) highlighted potential legal implications should the defence be removed:

> *If the dwelling defence was removed and the offence was widened to include private places, this would also create issues engaging Article 8.* (The Bar of Northern Ireland)

Two respondents (organisations) called for further review of this issue, specifically '*whether and to what extent to have the dwelling defence in light of advance of technology in terms of communication'* (Belfast Islamic Centre/Northern Ireland Council for Racial Equality).

8.2.2 Views of those who thought the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should be removed

Respondents who took this position argued that the dwelling defence under Article 9(3) of the PO (NI) Order 1987 was 'out-dated', 'inappropriate', and 'unreasonable in its current form'. This was mainly attributed to developments in online communication technology, which had made it possible for individuals to reach large public audiences from a private dwelling, effectively blurring the boundaries between private and public domains:

> *… particularly with the advent of the Internet it is clear that one can stir up hatred, arouse fear and incite dangerous behaviour from the comfort of one's own home. Especially with the Internet providing the potential for private individuals to broadcast their writing and speech to a potentially unlimited audience instantaneously and with little to no barrier to entry and no required middle-men.* (Church of Ireland Church and Society Commission)

Several respondents questioned the rationale of differentiating between conduct that was designed to stir up hatred from within the private dwelling, with that which took place in the public sphere. These respondents argued that the potential to incite hatred and violence towards protected groups was relevant to both settings. Furthermore, online forms of incitement to hatred from within a private dwelling, including hostility towards BME people and women, was perceived as an issue of growing concern, thereby justifying consideration of removal of the defence:

> *We would question the necessity for a dwelling defence and advocate that it is removed. Such a defence is arguably redundant in the age of online hate crime, which is very much public yet mostly committed from within one's home.* (Victim Support NI)

The same respondent recommended further attention to privacy rights, with particular consideration of what constitutes 'private' in an online context. This was considered pertinent given that 'private' groups online may comprise '*over a thousand members'*.

8.2.3 Additional Comments

Several respondents, including those both 'for' and 'against', acknowledged the need for balance between measures to address hate behaviours/hate crime with the protection of legitimate free speech. Respondents argued that this should be grounded in international human rights standards, in order to mitigate against any unintended consequences, such as utilisation of the law to silence dissent.

It was also suggested that social media companies had a role to play in tackling this issue, but this was not discussed in detail.

8.3 Question 33: Do you consider the requirement that the Director of Public Prosecutions (DPP) gives consent to any prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 to be necessary and appropriate?

31 respondents answered the tick-box part of question 33. Table 8.3 shows that a majority (74%) of these respondents considered the requirement that the Director of Public Prosecutions gives consent to any prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 to be necessary and appropriate.

Table 8.3

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	14	78%	9	69%	23	74%
No	4	22%	4	31%	8	26%
Total	**18**	**100%**	**13**	**100%**	**31**	**100%**

28 respondents (21 organisations and 7 individuals) made comments, as discussed below.

8.3.1 Views of those who considered the requirement that the DPP gives consent to any prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 to be necessary and appropriate

There was strong consensus among respondents that this was necessary to safeguard against potential misuse of the legislation. Specific concerns focused on freedom of speech and the need to ensure that individuals were sufficiently protected from prosecution of trivial or unfounded allegations:

> *This is an important additional check on the use of a serious offence. It reflects the weighty consideration that should be given to bringing a prosecution under this provision, particularly given the potential impact on freedom of speech.* (The Christian Institute)

> *The requirement should stay to continue protecting individuals from prosecutions based on trivial disputes or grievances and to ensure consistency.* (CARE NI)

> *It is vital that checks against prosecution of unfounded, vexatious or frivolous allegations are upheld and even strengthened.* (Democratic Unionist Party)

Prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 should be consented to by the DPP, in order to ensure that there are not frivolous or vexatious private prosecutions taken. (The Bar of Northern Ireland)

We understand the rationale for this provision in order to protect people from trivial disputes and cases without merit going to court. (Women's Regional Consortium)

It was also argued that consent by the Director of Public Prosecutions would ensure consistency in application of prosecution policy. However, several respondents stressed the need for effective review of this process to ensure accountability and understanding of issues pertaining to incitement to hatred by those involved. One respondent (organisation) called for the views of victims groups and other stakeholders to be consulted in the case of a review process in order to enhance understanding of the impact of different kinds of hate speech/incitement to hatred on different groups.

Additionally, respondents suggested the need for:

- safeguarding checks to be strengthened;
- a robust system of recording and monitoring to facilitate assessment of the impact of hate crime legislation on freedom of speech;
- provisions for freedom of speech, similar to those available under hate crime legislation in England and Wales.

8.3.2 Views of those who did not consider the requirement that the DPP gives consent to any prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 to be necessary and appropriate.

Comments made by those that took this position were comparatively limited. A few respondents (organisations) viewed the requirement for DPP consent as a significant barrier to the process of obtaining justice for victims of hate crime. One of these respondents considered it to be outdated, pointing out that *'the UN Committee on Racial Discrimination in 2000 had strong criticism on the DPP consent as it is infringe international human rights standards* (Northern Ireland Council for Racial Equality). Another organisation (Victim Support NI) expressed concerns that such a provision would be rendered untenable in the context of a large volume of cases. The same respondent suggested that, on balance, sufficient guides were already in place (for example, existing evidential and public interest tests), to support effective decision-making about whether or not to prosecute.

More general points were that the provision was unnecessary, inappropriate and could act as a deterrent to the uptake of cases.

Notably, there was a divergence in views held by women's sector organisations, in that only one of these respondents did not support the requirement for consent. Specifically, it was argued that this was 'unjustified' and potentially detrimental to the judicial process. The respondent further stated that:

> *There is also a risk that retaining the provision leads to concerns or accusations about less than objective judgement, which is unhelpful for the effective functioning of the judicial system. Clear guidelines relating to prosecuting offences, with an appeal process that may well involve the Attorney General, would appear sufficient to meet the threshold of ensuring the case is in the public interest and has merit.*
>
> (Northern Ireland Women's European Platform)

8.4 Question 34: Do you consider the term "hatred" as the appropriate test to use in the Public Order (Northern Ireland) Order 1987?

128 respondents answered the tick-box part of question 34. Table 8.4 shows that a majority (92%) of these respondents **did not consider** the term "hatred" as the appropriate test to use in the PO (NI) Order 1987. Opposition was more prevalent among individuals (97%) than organisations (65%).

Table 8.4

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	7	35%	3	3%	10	8%
No	13	65%	105	97%	118	92%
Total	**20**	**100%**	**108**	**100%**	**128**	**100%**

157 respondents (29 organisations and 128 individuals) made comments in response to question 34, as discussed below.

8.4.1 Views of those who <u>agreed</u> that the term "hatred" was the appropriate test to use

Respondents who took this view made a number of disparate points. One respondent viewed the emotiveness of the term 'hate' as helpful in terms of capturing the significance and severity of the acts involving hate. This respondent did note, however, that:

> ..*what a victim, the police and the PPS regard as being evidence of 'others encouraged to hate a particular group' is not always the same and impacts on public confidence in the legislation.* (Police Service of Northern Ireland)

Another respondent (Public Prosecution Service) advocated retention of the word 'hatred' on the basis that this was perceived to meet legislative obligations in accordance with international standards. This respondent considered the term hatred to set a very high threshold for the prosecution of offences and argued that this was appropriate given the seriousness of offences and their potential impact on freedom of speech.

A few respondents caveated their support for the term 'hate', such as:

> *…provided it is defined as a high-threshold test so that there cannot be misinterpretation with a controversial expression of opinions in relation to societal and behavioural issues.* (Ulster Human Rights Watch)

So long as hatred is properly defined and again does not undermine freedom of speech. (Individual)

8.4.2 Views of those who did not consider the term "hatred" as the appropriate test to use

Those who did not consider the term 'hatred' as the appropriate test gave the following main reasons:

The concept of hatred was considered too subjective and therefore 'problematic', 'unhelpful' and 'easily abused'. A common view among respondents, both individuals and organisations was that this exposes the term 'hatred' to misinterpretation, such that 'disagreement' is often labeled as hatred, and freedom of speech is undermined:

> '*Hatred' is already too subjective a term to be used in the criminal law, especially for issues like religion and sexual orientation. Disagreement is often labelled hatred. It encourages vexatious and politically motivated complaints that waste police time and chill freedom of speech.* (Individual)

Several respondents pointed out that the criminalisation of emotions does not fall within the role of the law.

A few respondents among this group suggested alternatives to the term 'hate', including '*intent to cause harm',* and '*malice and ill-will'* (as used in Scottish hate crime legislation).

The use of the term "hatred" sets the bar too high: this view was primarily taken by organisational respondents, with the exclusion of those who fell within the sub group referred to above (faith/religious groups and one political party). It was argued that, with the bar set 'high', many cases do not meet the threshold even though they display the characteristics of a stirring up offence. This, in turn, makes it difficult for the criminal justice system to successfully tackle the rise in hate crimes. One respondent further argued that:

> *The bar is high for offences under Part III of the Public Order (NI) Order 1987, but police tend to interpret this as if the bar were even higher. As a result, police tend not to use this provision even when it could be used.* (Sinn Féin)

Another respondent highlighted what were perceived as negative implications for minority groups:

> *This high threshold is ostensibly to 'protect free speech', when in reality it leads to minorities and marginalised groups struggling to speak out, participate in society and contribute to public discourse due to fear of unchecked harassment or violence.* (TransgenderNI)

Generally, respondents among this group concurred with the definition proposed in the consultation paper, namely, that '*hatred should be defined by reference to concepts such as hostility, bias, prejudice, bigotry or contempt or that it should be replaced altogether by terms such as those*'[328]. It was thought that this definition provided clarification of 'hate' and would support successful prosecutions.

A few respondents indicated a preference for 'hostility' specifically, on the basis that this term encompasses other terms considered relevant.

One respondent (organisation) advocated strengthening the current legislation in line with international human rights standards:

> *Such revised legislation would cover hate expression on protected grounds that is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination and occurs in a public context.* (Committee on the Administration of Justice)

The threshold for committing this offence should be high/higher: in contrast to the above, another sub group of respondents (comprising mainly individuals) argued that the threshold should be set high/higher. Several of these respondents emphasised that whichever test is used should not make the offence easier to commit.

Notably, there was some consensus across both groups of respondents (that is, those 'for' and 'against'), regarding the importance of protecting freedom of speech/expression. For instance, one respondent stated that:

> *The Bar would caution that from a human rights perspective there is a genuine danger that expanding provisions in this area will also impact adversely on freedom of speech and a danger that legitimate criticism could be construed as "stirring up hatred".* (The Bar of Northern Ireland)

[328] Marrinan, D. (2020) *Hate crime Legislation in Northern Ireland: An independent Review: Consultation Paper*, Belfast: Department of Justice. pp.180-181.

8.5 Question 35: If gender, gender identity, age or other groups are included in the protected groups, should they also be included under the groups protected by the stirring up provisions in Pt III of the Public Order (Northern Ireland) Order 1987?

143 respondents answered the tick-box part of question 35. Table 8.5 shows that a minority (12%) of these respondents **agreed** that, if gender, gender identity, age or other groups are included in the protected groups, they should also be included under the groups protected by the stirring up provisions in Pt III of the PO (NI) Order 1987. However, organisations and individuals held contrasting views, with 74% of organisations in favour of their inclusion, compared to 2% of individual respondents.

Table 8.5

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	14	74%	3	2%	17	12%
No	5	26%	121	98%	126	88%
Total	**19**	**100%**	**124**	**100%**	**143**	**100%**

168 respondents (42 organisations and 126 individuals) made comments in response to question 35, as discussed below.

8.5.1 Support for inclusion of all protected groups (including any new groups) under the groups protected by the stirring up provisions in Pt III of the Public Order (Northern Ireland) Order 1987

It should be noted that the views discussed below primarily reflect those of organisational respondents, with these respondents contributing the majority of supportive comments.

Those who agreed that all protected groups, including any newly added groups, should be included in the stirring up offences, gave the following main reasons:

- Parity and consistency across all hate crime provisions is essential in order to ensure the provision of equal protection to each of the protected groups. Consistency will also help to ensure accurate interpretation of the law and to enhance operational effectiveness.

- The exclusion of some groups could create a 'hierarchy of characteristics' across hate crime legislation, with the implication that some forms of hate crime are considered more or less acceptable than others.

- Their inclusion across all legislation would also convey a clear message to protected groups and wider society that their protection is merited.

One respondent caveated that consistency across protected groups was appropriate, as per recommendations made in the consultation paper, unless available evidence indicated otherwise.

A few respondents made specific recommendations, including that:

> *…a list of personal characteristics or protected grounds is enumerated and applied across all hate related offences to ensure the law reflects the international human rights obligations to prevent, prohibit, prosecute and protect.* (Northern Ireland Human Rights Commission)

There were also some recommendations in terms of which groups that should be covered:

> *Protected grounds for the incitement to hatred offence should cover: religious belief, colour, race, nationality (including citizenship), ethnic or national origins, language, sexual orientation, disability, sex and transgender identity.* (Committee on the Administration of Justice)

> *We recommend that the Public Order incitement to hatred provisions are extended to cover the additional grounds of age, gender, gender identity and intersex.* (Equality Commission for Northern Ireland)

Both Belfast City Council and Lisburn & Castlereagh City Council recommended the inclusion of '*misogyny as a standalone offence and as a category of hate crime, recognising crimes targeted at women, including transwomen, as hate crimes based on misogyny*.

Finally, a few respondents (women's sector) recommended that the issue of harassment of women accessing abortion services should be considered in relation to stirring up offences. Although it was acknowledged that some protection is offered by 'Protection from Harassment' legislation, this was considered inadequate. Respondents suggested that any gaps in existing legislation could be addressed through updated legislation for stirring up offences. These respondents further suggested that:

> *The amendment of legislation should also consider additional obligations under international treaties and bodies such as the Istanbul Convention and the outcome of the CEDAW inquiry to create a robust form of legislation to adequately protect these additional groups from harassment, fear and hatred. This includes the offences of stalking, and harassment of a sexual nature (as required by the Istanbul Convention) and provisions to prevent the harassment of women and pregnant people accessing abortion services.*
>
> (Women's Resource and Development Agency/ Women's Policy Group NI/Raise Your Voice Project)

8.5.2 Opposition to the inclusion of all protected groups (including any new groups) under the groups protected by the stirring up provisions in Pt III of the Public Order (Northern Ireland) Order 1987

Although a large number of respondents were 'opposed' to the protection of all groups by the stirring up provisions, their respective comments tended to cover similar/ a limited range of points, as reflected in the discussion below.

Many of those who were 'opposed' argued that stirring up provisions threatened freedom of speech and religious expression. As such, the inclusion of all protected groups was generally viewed as inappropriate. The comments presented below reflect the main arguments made by individuals and organisations:

> *Stirring up hatred offences have great potential to do harm when they cover areas of contentious public debate. This includes transgenderism. No stirring up offence should cover this issue, whether through gender, gender identity or transgender identity.* (The Christian Institute)

> *There should be no extension of the groups to which Part III applies. The offence criminalises insulting words even where they were not intended to stir up hatred or fear. It would be too easy for someone to be punished just for offending another person. There is no right not to be offended.* (Democratic Unionist Party)

> *There is no need for the groups to which Part III applies to be extended. There is an ongoing threat to religious beliefs with allegations of hatred being the primary focus. People must be free to express their beliefs without fear of arrest whether they are atheist, agnostic or religious.* (Individual)

8.6 Question 36: Should the defences of freedom of expression present in the Public Order Act 1986 for religion & sexual orientation be specifically added as defences to Pt III of the Public Order (Northern Ireland) Order 1987?

35 respondents answered the tick-box part of question 36. Table 8.6 shows that a majority (90%) of these respondents **agreed** that the defences of freedom of expression present in the POA 1986 for religion & sexual orientation should be specifically added as defences to Pt III of the PO (NI) Order. A strong majority (97%) of individuals were in favour, while organisations were relatively balanced in their views, with 48% and 52% answering 'yes' and 'no' respectively.

Table 8.6

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	11	48%	143	97%	154	90%
No	12	52%	5	3%	17	10%
Total	**23**	**100%**	**148**	**100%**	**171**	**100%**

166 respondents (35 organisations and 131 individuals) made comments, as discussed below.

8.6.1 Support for addition of the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation as defences to Pt III of the Public Order (Northern Ireland) Order 1987

Respondents' comments indicated that they felt very strongly about the protection of freedom of expression, with some expressing concerns that this would be curtailed by any expansion and/or modifications to Northern Ireland hate crime legislation. One respondent (organisation) argued that hate crime legislation encourages individuals to self-censor, due to fears of committing an offence, thereby impacting freedom of expression beyond the formal scope of the legislation.

Addition of the defences was viewed as imperative, with respondents (individuals and organisations) citing the following reasons:

- Freedom of speech is subject to growing challenges and should therefore be protected as far as possible. Individuals should be free to express their opinions or make comments about religion and/or sexual orientation, free from potential allegations of hate speech or hate crime.

- Addition of the defences will indicate that free speech is valued in public debate.

- There should be parity between hate crime legislation in Northern Ireland and legislation in England and Wales. The current formation of the defences of freedom of expression under the Public Order Act 1986 was viewed as striking an appropriate balance between protecting racial or religious groups from threats or incitements to violence, and protecting the right to dissent and express ideas contrary to the beliefs of those groups.

- The protection of freedom of expression is in accordance with Human Rights legislation, in particular, Articles 18 and 19 of the Universal Declaration of Human Rights, Articles 9 and 10 of the European Convention on Human Rights, and the International Covenant on Civil and Political Rights.

- Prohibiting 'dissenting' speech against religion promotes religious intolerance, as highlighted by the UN's Special Rapporteur on Freedom of Religion or Belief, Dr Ahmed Shaheed, in his report to the UN General Assembly in 2017 on the elimination of all forms of religious intolerance.

Respondents also identified some specific issues that should be protected by the defences, related to religion and sexual orientation. Echoing the views of several other respondents, one organisation argued that:

> *'…there should be a defence to a charge of stirring up religious hatred that protects freedom to: urge people to change religion, call a religion false, and say that a particular religion is the only true faith. The defence covering sexual orientation must protect freedom to: disagree with same-sex marriage, urge people to change their sexual behaviour, and call such behaviour sinful. If, contrary to our submissions above, a stirring up hatred offence is created covering transgender issues, then a free speech clause will be essential on this ground too.'* (The Christian Institute)

8.6.2 Opposition to the addition of the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation as defences to Pt III of the Public Order (Northern Ireland) Order 1987

A common view among those opposed to this proposal was that the addition of the defences was unnecessary. Several respondents considered that the defences are sufficiently covered by free speech provisions included within the Human Rights Act/ Article 10 of the European Convention of Human Rights (ECHR). This legislation places an obligation on all other legislation to be interpreted and comply with ECHR rights and as such negates the need to introduce similar provisions within the 1987 Order. One respondent stated that:

> *The PPS, as a public body, has a duty under the Human Rights Act, not to act inconsistently with an individual's right to freedom of expression. It does this through a proper application of both the evidential and public interest tests for prosecution. There is no suggestion that too many prosecutions are brought under this legislation*

such that Article 10 rights require greater recognition or protection. It is not considered that such an amendment would bring any greater clarity for prosecutors or the public as to what type of speech or behaviour should be prosecuted under these provisions. (Public Prosecution Service)

Additionally, there were strong concerns among this group about the potential impact of the proposed addition of the defences to the 1987 Order. Particular concerns were that the legislative provisions would be used to justify homophobia, sectarianism and anti-religious discourse. This view was shared by a range of organisations (women's organisations, political groups, voluntary and human rights organisations). One organisation cautioned that the inclusion of a freedom of expression defence '*could allow serious crime within society at large to go unchecked'* (Northern Ireland Women's European Platform).

While those in support of the defences argued for parity with legislation in England and Wales, respondents within this group questioned the validity of this. It was the view of one respondent that '*the decision to include these 'defences' was made politically, not backed up by evidence of need, and did not provide meaningful additional protections to free expression'* (TransgenderNI). Another respondent (Equality Commission for Northern Ireland) noted the low number of prosecutions and lack of judicial interpretation post-introduction of the defences in England and Wales, as highlighted by the Law Commission in 2013[329]. Additionally, this respondent argued that the introduction of defences, which apply only to certain equality areas - freedom of expression for religion and sexual orientation, and for same-sex marriage - would effectively create a '*hierarchy*'.

8.6.3 Recommendations

Although opposed to addition of the defences, respondents called for the following, should they be introduced:

- '*that such defences are narrowly defined and objectively justifiable, and are in compliance with equality and human rights law.'* (Equality Commission for Northern Ireland)

- That any defences protecting freedom of expression, '*should not permit individuals to express words or behaviour that would amount to discrimination or harassment prohibited under the equality legislation, including relating to employment or the provision of goods and services.'* (Equality Commission for Northern Ireland)

And more broadly,

- *'Consideration should be given to the removal of specific defences for categories of hate expression from any incitement law, as their inclusion could have the*

[329] Law Commission (2013), *Hate Crime: The case for extending the existing offences (2013), Consultation Paper No 213*.

unintended consequence of protecting hate speech that reaches the threshold of incitement targeted against specific individuals or communities.' (Northern Ireland Human Rights Commission)

- '…*strengthening the current legislation dealing with Incitement to hatred in line with international human rights standards. Such revised legislation would cover hate expression on protected grounds that is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination and occurs in a public context.'* (The Committee on the Administration of Justice)

8.7 Question 37: Should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the Public Order (Northern Ireland) Order 1987 be retained in law or repealed?

168 respondents answered the tick-box part of question 37. Since respondents were given more than one choice in this question, the meaning of 'yes' and 'no' in response to question 37 was not clear. Consequently, results from the analysis of respondents' narrative comments only are discussed below.

158 respondents (30 organisations and 128 individuals) made comments at question 37. There was considerable overlap with comments made in response to question 36. Respondents' views are summarised below.

8.7.1 Views of those who thought the express defence of freedom of expression for same-sex marriage should be retained

Respondent's comments indicated that they strongly endorsed retention of the express defence of freedom of expression for same-sex marriage. This view was taken by the majority of individual respondents and some organisational respondents.

It was argued that retention of the express defence was important for the following reasons:

- Freedom of expression is a fundamental right in modern-day society. As such, the right to freedom of expression, including freedom of expression regarding marriage, should be protected as far as possible. Individual respondents, in particular, stressed that disagreement with same-sex marriage is not equivalent to hatred.

- The rights of people in Northern Ireland should be subject to equal protection as provided in England and Wales, particularly given that same-sex marriage is a more controversial issue in Northern Ireland.

- Protections under the European Convention on Human Rights are insufficient on their own, due to the wide margin of appreciation provided to Member States by the Convention.

- Provisions made within the defence ensure that it strikes an appropriate balance between protection from abuse and freedom of expression. This includes a specific note which makes provisions for the Order to be applied only in cases where comments are made in a particularly threatening, abusive or insulting manner.

Two organisational respondents called for the strengthening of this provision, through the addition of a similar provision, allowing for the discussion of sexual conduct, as included within the Public Order Act 1986 which states that:

> ''In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or

practices shall not be taken of itself to be threatening or intended to stir up hatred."[330]

8.7.2 Views of those who thought the express defence of freedom of expression for same-sex marriage should be repealed

Respondents who took this view gave the following main reasons:

- The defence provides justification for, and implicit endorsement of, homophobia, which is contradictory to the purpose of hate crime legislation. One respondent suggested that it could be interpreted as '*a green light for homophobic discourse*' (Committee on the Administration of Justice).

- Repeal of the defence would not prevent all debate given that most regular debate does not meet the threshold of stirring up offences.

- Legislation pertaining to hate speech should be reflective of the legalisation of same-sex marriage which took effect in January 2020.

- It is inappropriate for the law to make express reference to freedom of expression in the context of hate crime against certain protected groups to the exclusion of others.

- Explicit statement of the protection of freedom of expression within the legislation is unnecessary. The Public Prosecution Service pointed out that, '*in legal terms, Article 8(2) is a statement of the obvious*.' Similarly, the Committee for the Administration of Justice considered the provision as '*legally redundant'*.

- The defences are sufficiently covered by free speech provisions included within the Human Rights Act/ Article 10 of the European Convention of Human Rights (ECHR).

8.7.3 Recommendations

A few respondents made specific recommendations as follows:

- The recently added qualification to the existing local incitement to hatred legislation which states that criticism of same-sex marriage in itself is not to be taken as incitement should be removed (Committee on the Administration of Justice).

- The Department of Justice should assess the degree to which any proposed defences on freedom of expression, including on same-sex marriage (as well as religion and sexual orientation), are objectively justifiable. Assessment should take into account the views of protected groups (including Lesbian, Gay and Bisexual individuals and religious organisations) obtained through the review consultation process, and through reviewing the impact of the operation of these provisions in

[330] https://www.legislation.gov.uk/ukpga/1986/64/section/29JA/data.xht?view=snippet&wrap=true

other jurisdictions, including other parts of the UK (Equality Commission for Northern Ireland).

- The Equality Commission for Northern Ireland also noted that the defence in Northern Ireland legislation pertaining to the discussion or criticism of same-sex marriage has comparatively wider scope than the provision in England and Wales. As such, it was suggested that *'it is important that account is taken of any potential impact arising from those differences'* when considering the defence as it applies in Northern Ireland.

8.7.4 Other Points

A few respondents across both groups ('retained' and 'repealed') concurred with paragraph 11.21 of the consultation paper, where it was stated that '*It is unfortunate that the work of the review has been to this extent pre-empted by this change in the law without awaiting the results of the consultation process and final report of the review.*'

8.8 Question 38: Under Article 9(1) of the PO (NI) Order 1987, should the test remain referring to a person using "threatening, abusive or insulting words or behaviour or displaying any similar written material which is threatening, abusive or insulting" or should the words "abusive" or "insulting" be removed from the test for the commission of the offence?

This question asked respondents for comments only.

168 respondents (29 organisations and 139 individuals) made comments.

Notably, a strong majority of individual respondents advocated for the words "abusive" or "insulting" to be removed from the test for the commission of the offence. The views of organisational respondents were relatively mixed, although a majority agreed that the test should remain.

8.8.1 Views of those who thought that the words "abusive" or "insulting" should be <u>removed</u> from the test for the commission of the offence

A commonly held view was that the words 'insulting' and 'abusive' were too subjective and therefore 'difficult to judge' and open to misinterpretation. The terms were considered particularly problematic in the case of stirring up hatred offences, since these offences do not require identification of actual harm caused for the crime to be proved. One respondent drew attention to what were considered as '*pointless prosecutions*' which had occurred as a result of misinterpretation of these terms in other jurisdictions. It was argued that the law should be limited to cover threatening conduct that is intended to stir up hatred, and as such, the terms 'abusive' and 'insulting' should be removed.

Additionally, many respondents (individuals and organisations) expressed concerns about freedom of expression and particularly, that the terms 'insulting' and 'abusive' could be used in a censorial manner in the application of hate crime legislation. Respondents argued that the law should differentiate between stirring up hatred, and causing offence to others through criticism or communication of their specific beliefs. The higher threshold of 'threatening' words or behaviour was considered more appropriate in this context. Several respondents also made distinctions between race and other protected characteristics in their arguments for the protection of freedom of expression:

> *The offence should be amended so that it does not prohibit abusive or insulting words or behaviour in relation to religion or belief and sexual orientation. The different thresholds for these compared to race in England and Wales are because of the controversy and debate that often surrounds them. Belief and sexual orientation can be debated and changed. Race cannot. Any new stirring up hatred offences should only cover threatening conduct. "Abusive" and "insulting" are more subjective words and therefore more unpredictable in the hands of police and prosecutors*. (Individual)

> *Race is a neutral, inherited physical trait. Sexuality and transgenderism manifest in behaviour. The morality of the latter can be debated in a way that the former cannot. It is well established in case law that the view that homosexuality is sinful is worthy of respect in a democratic society. A very wide range of different religious beliefs meet this threshold. They are matters that it should be possible to openly debate. The same is not true of racist views.* (The Christian Institute)

A further argument for the removal of the terms was that this would ensure consistency with the legislative approach in England and Wales, where the word 'insulting' had been removed from Section 5 of the Public Order Act 1986, in 2012, due to problems caused to freedom of speech.

One respondent (The Christian Institute) drew attention to the *mens rea*, arguing that only conduct that is *intended* to stir up hatred should be covered, should stirring up hatred offences apply to areas of controversy like sexual orientation, religion or transgender identity. Additionally, this respondent argued that the *mens rea* should only apply to hatred and the concept of arousing fear. Another respondent (Democratic Unionist Party) argued that '*malicious intent'* should be the appropriate test.

8.8.2 Views of those who <u>agreed</u> that the test referring to a person using "threatening, abusive or insulting words or behaviour, or displaying any similar written material which is threatening, abusive or insulting", should <u>remain</u>

There was general agreement among this group of respondents that to remove the terms *'abusive'* and/or '*insulting'* would set the threshold at an unreasonably high level. Reflecting the comments of a range of organisational respondents who took this view, the Public Prosecution Service argued that:

> *The removal of the terms "abusive" and/or "insulting" would have the effect of raising the threshold for these offences. The threshold is already high having regard to the other elements of the offence and the number of prosecutions for these offences is already at a low level. We do not consider that a narrowing of these offences is necessary or appropriate.* (Public Prosecution Service)

A few respondents pointed out that narrowing offences in this way would mean that serious hate speech would be largely unrestricted, with potentially significant negative impacts on individuals and groups targeted.

One respondent argued that, rather than raising the threshold for hate speech in this way, low prosecution rates indicated the need for a more expansive approach. This respondent called for greater efforts to educate the public on how to report hate speech and incitement to hatred, and ensure that victims are adequately covered by provisions.

Another respondent drew attention to what was perceived as an '*increasing tendency for hate groups to use so-called "dog whistles"*[331] *and otherwise couch hateful and even violent rhetoric in seemingly inoffensive terms, symbols and phrases'* (Church of Ireland Church and Society Commission). In this context, the respondent considered that retention of the terms 'abusive' and 'insulting' would allow for incitement of sufficient extremity to be considered as stirring up hatred and appropriately charged, and was therefore appropriate.

An additional argument was that the Article 9 offence includes an important *mens rea* element. As one respondent (The Bar of Northern Ireland) highlighted, this requires that the terms must be used with an *intent* to stir up hatred or arouse fear. Given this specific condition, the retention of these terms were considered as appropriate.

Finally, a few respondents suggested that retention of the terms was in line with international standards, including the Council of Europe European Commission against Racism and Intolerance hate expression definition, and therefore appropriate.

8.8.3 Recommendations

With reference to paragraph 11.75 in the consultation paper, a few organisational respondents (women's sector) suggested that the provision of additional guidance on interpreting the provisions of Part III of the PO (NI) Order 1987 would be helpful.

Additionally, one respondent recommended a legal definition of incitement to hatred that is:

> *….comprehensive and reflects the need to balance freedom of expression with `the rights of others, taking into account the limitation imposed by Article 17 of the ECHR, that Article 10 of the ECHR cannot be used to protect hate speech and incitement that seeks to undermine the purpose of the ECHR and to extinguish the enjoyment of rights of others.* (Northern Ireland Human Rights Commission)

Another organisation (Committee on the Administration of Justice) argued that the offence should be revised in accordance with the requirements of international human rights standards, with specific attention to the Regional Council of Europe standard, as set out in the ECRI Hate Speech standard. It was further suggested that:

[331] A form of communicating using coded language which, to the general populace has one meaning but which carries an altered/additional/more specific meaning to a target group. These are widely used in politics (see, for example, those who state their commitment to "family values" in United States politics to signal a traditional, conservative viewpoint, opposing ideas such as same-sex marriage without outright stating support for any particular conservative policy that could be argued against) and among hate groups can act as both a way of communicating ideas which would not be welcome in public discussions and as a furtive shibboleth of sorts.

A provision should make clear that the Incitement to Hatred offence encompasses the matters covered by the existing legislation, including the various forms of conduct listed (words or behaviour, publication etc.); that the offence includes conduct that 'stirs up hatred' or 'arouses fear'; and that the offence encompasses conduct either when committed with intent to incite hatred or that having regard to all the circumstances hatred will likely be incited. (Committee on the Administration of Justice)

8.9 Question 39: If there are to be offences dealing with the stirring up of hatred against protected groups, do you consider that there needs to be any specific provision protecting freedom of expression?

165 respondents answered the tick-box part of question 39. As shown in table 8.9, a majority of these respondents (93%) **agreed** that, if there are to be offences dealing with the stirring up of hatred against protected groups, there would need to be a specific provision protecting freedom of expression. This question attracted a high response rate from individuals, who were unanimous in their support for specific provisions protecting freedom of expression. Views among organisational respondents were mixed (with 56% 'for' and 44% 'against').

Table 8.9

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	14	56%	140	100%	154	93%
No	11	44%	0	-	11	7%
Total	**25**	**100%**	**140**	**100%**	**165**	**100%**

162 respondents (35 organisations and 127 individuals) made comments, as discussed below.

8.9.1Support for specific provision protecting freedom of expression, if there are offences dealing with the stirring up of hatred against protected groups

Many respondents noted that they were against the idea of introducing new stirring up hatred offences in principle (particularly in relation to transgender identity). However, if implemented, specific provisions protecting freedom of expression were viewed as imperative for the following reasons:

- They were necessary to ensure that hate crime laws are not used to curtail freedom of expression in contexts where statements cause offence, or are in opposition to others' views.

- The protection of freedom of expression is essential for equality, the preservation of democracy and to ensure that the obligations of human rights legislation are met. Respondents argued that freedom of expression is a basic human right that is protected by international human rights law, including Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

- The legislation should be consistent with protections provided in respect of same-sex marriage and make it clear that '*any discussion or criticism of religion is not to be taken*

of itself to be – (a) threatening, abusive or insulting or (b) intended to stir up hatred or arouse fear' (Iveagh Presbytery of the Presbyterian Church in Ireland).

- The proposed legislation should include equivalent protections as those provided in England and Wales, where free speech provisions have been incorporated within offences on the grounds of religion and sexual orientation.

There was some divergence among respondents who answered 'yes' to this question, particularly in terms of the appropriate scope of protection of freedom of expression (although a majority appeared to support extensive coverage). Some made specific suggestions, such as:

> *If new protected groups are added, then free speech clauses would be necessary to cover any areas where there are contested views in society.* (The Christian Institute)

> *There should be a fine balance between prosecution of hate crime and specific provision protection freedom of expression. We suggest use this unique opportunity to identify such a need and limited to a narrow scope of protection on freedom of expression* (Northern Ireland Council for Racial Equality)

> *All the existing protected characteristics are not of the same nature. Some are undeniable like race, but others are absolutely and lawfully debatable, such as 'sexual orientation'. Anybody who disagrees with homosexuality, transgenderism and other unnatural sexual practices should have the right to say so and to provide reasons for their opinion and beliefs.* (Ulster Human Rights Watch)

8.9.2 Opposition to specific provision protecting freedom of expression, if there are offences dealing with the stirring up of hatred against protected groups

All comments 'opposed' to this provision were made by organisational respondents. The views discussed therefore reflect those of organisational respondents only.

A key argument was that specific provisions were unnecessary since all legislation is interpreted and applied in accordance with freedom of expression defences set out in the European Convention on Human Rights and the Human Rights Act. Accordingly, it is '*not essential to reiterate the freedom in every relevant piece of legislation – rather the courts should be trusted to judge the law in an individual case against the inherent right to expression of the individual.*' (Church of Ireland Church and Society Commission)

Respondents acknowledged that existing legislation which provides a range of freedoms in terms of expression, in particular, Article 10 of the European Convention on Human Rights and Fundamental Freedoms, may require improvement. However, this was considered to be a matter to be addressed by national courts, rather than through hate crime legislation. One respondent suggested that *'perhaps what needs to be clearer is where the line is in terms of freedom of expression and the competing concerns about victims and hate speech'* (Women's Regional Consortium).

Another respondent argued that the inclusion of freedom of expression provisions within hate crime legislation was equivalent to an endorsement of hate speech, and thus conveyed a message that some forms of discrimination or abuse are acceptable. This respondent suggested alternative means of protecting freedom of speech such as '*reforming libel laws and creating a cultural environment which respects and includes voices and perspectives from all backgrounds*' (TransgenderNI).

A few respondents made specific recommendations. One organisation (Committee on the Administration of Justice) recommended that, as opposed to the addition of specific provision protecting freedom of expression, there should be reference to existing ECHR defences of freedom of expression, as set out in the Human Rights Act, and that these defences apply to offences against all protected groups. This was endorsed by another organisation (Victim Support NI) who agreed that such an approach would negate the need for any further 'free expression' defences within the legislation.

9. Online Hate Speech (Questions 40 – 50)

9.1 Question 40: Should social media companies be compelled under legislation to remove offensive material posted online?

38 respondents answered the tick-box part of question 40. Table 9.1 shows that a majority (79%) of these respondents **agreed** that social media companies should be compelled under legislation to remove offensive material posted online. There was strong support among both organisations (86%) and individuals (71%).

Table 9.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	18	86%	12	71%	30	79%
No	3	14%	5	29%	8	21%
Total	**21**	**100%**	**17**	**100%**	**38**	**100%**

50 respondents (31 organisations and 19 individuals) made comments in response to question 40. These are discussed below.

9.1.1 Views of those in favour

Respondents who agreed that social media companies should be compelled under legislation to remove offensive material posted online gave the following main reasons:

- **This was appropriate given the significant and rapid growth in online abuse** targeted at individuals from marginalised groups, including women, disabled people, people of colour, trans people and Jewish people. Organisations from the women's sector expressed strong concerns about online abuse, particularly in relation to gender:

  > *Social media can be an extremely toxic space for women and recent studies have found alarming levels of abuse towards women; something that worsens for intersectional groups such as women of colour, trans women, migrant women etc.* (Women's Policy Group Northern Ireland)

- **Offensive material posted online has a broad range of negative consequences** for individuals, their family/community and for wider society. Beyond the immediate psychological harm and reputational damage that may be experienced by victims,

respondents identified a wider range of potential consequences including detrimental effects on their relationships, career and ability to maintain a presence online. It was argued that social media companies, and particularly large corporations, should take some responsibility for content published on their platforms that may be potentially harmful.

Additionally, some respondents (predominantly women's sector) highlighted the negative implications of online abuse for gender equality and the presence of women and other equality groups online, including the restriction of their freedom to participate in public discourse. One respondent (organisation) noted that, for the Northern Ireland Jewish community, concerns about online anti-Semitism has led to their restricted use of social media, such that members of this community '*no longer have equal and equitable access to public spaces'* as a means to express, celebrate and commemorate their identity (Belfast Jewish Community).

Other wide ranging impacts include an '*identifiable transference of harm' (*Individual) whereby online hate translates into acts of violence in the offline context, as well as the potential radicalisation of individuals as part of global hate movements.

- **Current 'self-regulation' policies encouraging social media companies to sign up to voluntary codes of conduct have proved ineffective.** Although respondents acknowledged that voluntary regulation policies had experienced some (limited) success, it was felt that stronger regulation was needed in order to ensure the removal of offensive content within a reasonable timeframe. Accordingly, this would afford greater protection to victims and limit the scope of harm caused by offensive postings.

Other key points and recommendations

- One respondent (The Bar of Northern Ireland) suggested that a dual approach, involving the prosecution of individuals and the regulation of social media companies, was needed to tackle online hate offences.

- A few organisational respondents noted their support for proposals contained within the UK Government's "online harms' White paper, which puts forward an extensive regulatory regime, including a duty on the part of Internet companies to remove material that is considered 'harmful'.

- One organisational respondent recommended that any subsequent provision must be *'a clear regulatory regime with clear roles, responsibilities and sanctions, rather than a voluntary code of conduct'* (Northern Ireland Women's European Platform).

- Another advocated '*a high bar on powers which limit speech which is obviously not a personal attack on an individual or community'* (Democratic Unionist Party).

- Some respondents made reference to other legislation (e.g. Protection from Harassment and Malicious Communications legislation; Public Order Act 1986; and the introduction of a new offence under the Stalking Bill), suggesting these may be a source of learning or additional legislative provision.

9.1.2 Views of those who were opposed to or expressed reservations

Respondents argued that the term *'*offensive*'* was *'too vague'*, '*subjective*' and *'politicised'*. Some also expressed concerns that the legislation could be misused, and that freedom of speech would be negatively impacted:

> *We are concerned that such actions would create a significant chilling factor in relation to public discourse and significantly restrict open and honest adult dialogue which is crucial for maintaining a functional democracy and supporting the mental well-being of all citizens (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability).* (Equi-Law UK)

Across both groups of respondents ('for' and 'against') there were calls for a clear definition of what constitutes 'offensive material', as well a balanced approach that takes account of the protection of vulnerable people, personal freedom of speech and corporate responsibility by social media companies.

9.2 Question 41: Are there lessons from the English and Welsh experience of the Public Order Act 1986 that may apply for NI?

38 respondents answered the tick-box part of question 41. Table 9.2 shows that a majority (97%) of these respondents **agreed** that there are there lessons from the English & Welsh experience of the POA 1986 that may apply for NI. Support was strong among both organisations (100%) and individuals (94%).

Table 9.2

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	13	100%	17	94%	30	97%
No	0	-	1	6%	1	3%
Total	**13**	**100%**	**18**	**100%**	**31**	**100%**

33 respondents (18 organisations and 15 individuals) made comments in response to question 41. It should be noted that many of these respondents (particularly those outside the legal sector) reiterated arguments presented in the consultation paper in their comments.

9.2.1 There was general consensus that existing Protection from Harassment legislation in Northern Ireland is insufficient to address online hatred and that the experience from England and Wales highlights a potential way forward for legislation in Northern Ireland. In particular, it was considered as providing a clear structure of offences that could be integrated into legislation.

However, many respondents pointed out that the Public Order Act 1986 was not designed with online hate in mind and as such gaps in the legislation have led to inconsistent application of the provisions across England & Wales. Furthermore, elements of the Act were considered to create certain difficulties for the prosecution of online hate speech.

It was therefore suggested that if Public Order Act offences were to be introduced to Northern Ireland, careful consideration must be given to amendments that would make them more suitable for prosecuting online hate. Several respondents agreed with amendments and clarifications to the Act proposed at paragraph 12.71 of the consultation paper. However, one respondent cautioned that any lessons learned from the legislation's application '*must be balanced with the particular circumstances which they were introduced to govern as well as the complexion of the society they exist in' (*Law Society of Northern Ireland). Another respondent, while generally supportive, suggested that, as an alternative*:*

….they should be introduced with a recognition that they will be applied primarily in the case of offline conduct; and that online conduct will be addressed through other provisions, such as the Communications Act 2003. (Public Prosecution Service)

9.2.2 Some respondents made **additional points** including that the consolidation of hate crime legislation into one piece of legislation to avoid gaps and oversight should be considered. Another respondent called for '*equally, if not stronger*', freedom of speech protections in Northern Ireland (Democratic Unionist Party).

9.3 Question 42: Should the dwelling defence under Article 9(3) of the Public Order (NI) Order 1987 be amended/removed?

25 respondents answered question 42. Table 9.3 shows that a majority of these respondents (64%) **agreed** that the dwelling defence under Article 9(3) of the PO (NI) Order 1987 should be amended or removed. Support was more prevalent among organisations, with 76% of organisations in favour, compared to 37% of individuals.

Table 9.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	13	76%	3	37%	16	64%
No	4	24%	5	63%	9	36%
Total	**17**	**100%**	**8**	**100%**	**25**	**100%**

25 respondents (20 organisations and 5 individuals) made comments in response to question 42.

9.3.1 Support for amendment/removal

As was discussed earlier in the report (question 32), there was general consensus among respondents that the dwelling defence was outdated, redundant, and particular problematic in a context where individuals can reach large and potentially global audiences via the Internet and social media. One respondent argued that:

> *Given the advent and proliferation of the Internet and social media, it is no longer reasonable to argue that being within ones dwelling can be reasonably believed to have had "no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling". (*Church of Ireland Church and Society Commission)

The dominant view among respondents was that the dwelling defence should be **removed.** Respondents argued that there is no justification for the differential regulation of hate speech/incident that occurs from within a private space with that which is perpetrated in a public space, particularly if the material harm/content of the actions is the same. Such an approach is reflective of limited awareness of the impact of hate speech/incitement to hatred and is not consistent with a victim centred approach. The defence must therefore be removed in order to ensure that the legislation is fit-for-purpose.

It was further argued that removal of the dwelling defence would facilitate application of Article 9 to online material. One respondent caveated that, if removed, an alternative protection would have to be implemented in order to preserve the right to freedom of speech and prevent the criminalisation of private conversation.

A few respondents were of the view that the dwelling defence should be amended. One respondent argued that it was not compatible with Article 17 of the ECHR on the abuse of rights provision. Another respondent suggested that:

> *The order should be amended to include online harm. Further, whilst the NI legislation applies to disability; gender, gender identity and age need to be included in the list of protected characteristics.* (Probation Board for Northern Ireland)

9.3.2 Comments offered by those **opposed** to amendment/removal of the dwelling defence were made by a few respondents and were limited in detail. A key concern across both categories of respondents (organisations and individuals) was the protection of freedom of expression. One respondent suggested that, should the dwelling defence be removed, alternative measures would be required:

> *… the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 should remain in place. However, if it is to be removed then we recognise that it would be essential for some form of defence for 'private' conversations to be implemented and that one which relies on the word 'dwelling' may not be entirely appropriate for the online world with regard to other forms of private communication.* (The Bar of Northern Ireland)

9.4 Question 43: Should the term "publication" in the Public Order (NI) Order 1987 be amended to include "posting or uploading material online"?

34 respondents answered the tick-box part of question 43. Table 9.4 shows that a strong majority (91%) of these respondents **agreed** that the term "publication" in the Public Order (NI) Order 1987 should be amended to include "posting or uploading material online". There was unanimous support among organisations (100%), while individuals were strongly in favour (79%).

Table 9.4

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	20	100%	11	79%	31	91%
No	0	-	3	21%	3	9%
Total	**20**	**100%**	**14**	**100%**	**34**	**100%**

32 respondents (23 organisations and 9 individuals) made comments in response to question 43.

Comments, many of which were brief/limited in detail, are discussed below.

9.4.1 Support for amendment of the term "publication" in the Public Order (NI) Order 1987 to include "posting or uploading material online"

Respondents argued that in the modern context whereby a significant amount of hate speech occurs online, amendment of the term "publication" to include "posting or uploading material online" was reasonable, appropriate and necessary, in order to bring the legislation up to date and ensure its efficacy. A few respondents called for this to be taken forward in line with intentions of the UK Government White Paper on online harms.

One respondent (organisation) highlighted the importance of dealing with concerns around private conversations, through clarification that the offence does not apply in such cases. Another respondent (organisation) noted that the term 'publication' had been interpreted by the English Court of Appeal to include the posting or uploading of material online. This respondent was of the view, however, that to ensure clarification and certainty in the jurisdiction of Northern Ireland, amendment was appropriate.

9.4.2 Views of those opposed to amending the term "publication" in the Public Order (NI) Order 1987 to include "posting or uploading material online"

Comments by those who were '**opposed'** to amending the term 'publication' in the PO (NI) Order 1987 were provided by few respondents and were limited in detail. General points were that the term 'publication' was an adequate description and that any amendment could create a situation where police resources would be *'wasted'* investigating conduct online. One respondent was opposed on the basis of freedom of speech concerns.

9.5 Question 44: Should there be an explicit defence of "private conversations" in the Public Order (NI) Order 1987 to uphold privacy protection?

32 respondents answered the tick-box part of question 44. Table 9.5 shows that a strong majority (91%) of these respondents **agreed** that there should be an explicit defence of "private conversations" in the PO (NI) Order 1987 to uphold privacy protection. There was unanimous support among organisations (100%) and strong support (83%) among individual respondents.

Table 9.5

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	14	100%	15	83%	29	91%
No	0	-	3	17%	3	9%
Total	**14**	**100%**	**18**	**100%**	**32**	**100%**

30 respondents (19 organisations and 11 individuals) made comments, as discussed below.

9.5.1 There was general agreement among those who were **supportive** that a basic principle underpinning freedom of expression and the right to a private/family life, is the right to private conversations. As such, it was considered imperative that legislation does not criminalise genuinely private conversations between individuals. It was further pointed out by one respondent (Public Prosecution Service) that an explicit defence would be necessary upon removal of the "dwelling" defence in Article 9(3) of the PO (NI) Order 1987.

Some respondents stressed that clarification was needed around what constitutes a 'private' conversation. This was considered particularly important in the context of the Internet and social media platforms, where 'private' groups may comprise large numbers of people. Respondents noted that such groups can act as a platform for people who hold extreme views, to facilitate the communication of hate to potentially large audiences. As such, there was a great deal of consensus among respondents regarding the need for a clear definition of what constitutes a 'private' conversation in the online context. One respondent stressed that 'private' groups on social media should not be included, but instead '*this should be limited to conversations between two or at most a very small group of individuals that are not shared beyond the group and are explicitly intended for the group only'* (Northern Ireland Women's European Platform).

Additional points made by respondents were that the defence of 'private conversations' should be limited/narrow in scope and a 'reasonableness test' should be applied to

determine whether or not the perpetrator had a reasonable expectation of privacy. One respondent (Democratic Unionist Party) indicated an interest in exploring how this could provide a reasonable defence to ministers or pastors addressing only those voluntarily attending worship.

9.5.2 Only one respondent who **did not agree** that there should be an explicit defence of "private conversations" in the PO (NI) Order 1987 offered a comment. This was a general comment articulating their opposition to hate crime legislation generally, and did not make specific reference to private conversations.

9.6 Question 45: Should gender, gender identity, age and other characteristics be included as protected characteristics under the Public Order (NI) Order 1987?

38 respondents answered the tick-box part of question 45. Table 9.6 shows that, overall, respondents held mixed views on whether gender, gender identity, age and other characteristics should be included as protected characteristics under the PO (NI) Order 1987. However, organisations and individuals generally held contrasting views, with 82% of organisations in favour, compared to 10% of individual respondents.

Please note that these results should be read with caution since this question was phrased in a way that did not give respondents the opportunity to indicate different views on the respective inclusion of each category listed (that is, gender, gender identity, age and other characteristics).

Table 9.6

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	14	82%	2	10%	16	42%
No	3	18%	19	90%	22	58%
Total	**17**	**100%**	**21**	**100%**	**38**	**100%**

55 respondents (38 organisations and 17 individuals) made comments. It should be noted that similar questions to Q45 were asked in Chapters 8 and 11 and many respondents, when answering Q45, referred back to these earlier questions (in particular Q11, Q12, Q14, and Q35). Key points identified below are drawn from the comments provided in response to Q45 only.

9.6.1 Support for the inclusion of gender, gender identity, age and other characteristics as protected characteristics under the PO (NI) Order 1987

The majority of supportive comments were made by organisational respondents. The discussion below is therefore mainly reflective of the views of this category of respondents.

Those who were generally supportive in their views considered parity and consistency across all hate crime provisions in Northern Ireland legislation as essential in order to ensure that all protected groups are given adequate protection, and to avoid the creation of a hierarchy of characteristics. It was suggested that this was a logical approach, particularly in the context of the potential consolidation of hate crime legislation into a single piece of legislation. One respondent (individual) also noted that amending the Order would also promote consistency with other jurisdictions in the UK.

Several respondents (including, but not limited to, those cited below) made reference to what was described as '*substantial evidence*' of online abuse targeted at women and trans people (and to a lesser extent other minority groups), and called for their enhanced protection:

> *NIWEP would also like to emphasise that women and trans people are more likely to face online hate, with significant and serious consequences to the mental and physical wellbeing and safety of affected individuals and an overall sense that women are an acceptable target for online hate simply by reason of being women.* (Northern Ireland Women's European Platform)

> *The Council would support a framework for a reformulation of the rules on cyber hate and welcomes the inclusion of gender as a protected characteristic for online hate offences given the increasing evidence that women are particularly targeted by online hate speech.* (Mid and East Antrim Borough Council)

Against this context, the extension of protection for these characteristics to online hate was considered vital. Some respondents did not specify particular characteristics for inclusion, but argued that 'vulnerable' groups, those with 'multiple identities', and/or 'all' protected groups, should be offered adequate and comprehensive protection.

Respondents also highlighted a range of potential impacts of online hate on targeted groups, including poor mental and physical health, and self-exclusion from public spaces (both online and physical spaces) as a result of safety fears. One respondent argued that misogynistic abuse online was '*massively widespread'* and pointed out that this was '*hugely damaging to society'* (Police Authority organisation). Given the level of online hate abuse and incitement to hatred, its impact on victims/targeted groups and also that anonymity ensures that such behaviour is currently subject to few (if any) ramifications, this was considered as an area in need of urgent attention through appropriate legislation.

In addition to the points outlined above, a few respondents made specific suggestions, including the need for provisions that are sufficiently 'flexible' to deal with the intersectional nature that characterises some online offences. In terms of incitement to hatred offences more broadly, one respondent recommended that "*the 'incitement to hatred' legislation should prohibit 'incitement to discriminate' on the protected grounds*' (Equality Commission for Northern Ireland).

9.6.2 Opposition to the inclusion of gender, gender identity, age and other characteristics as protected characteristics under the Public Order (NI) Order 1987

Many respondents who were opposed to the inclusion of gender, gender identity, age and other characteristics as protected characteristics referred back to earlier questions (in particular, Q11, Q12, Q14 and/or Q35). Please refer to these questions for a detailed discussion that relates specifically to: gender and gender identity (Q11), transgender identity (Q12), age (Q14), and 'gender, gender identity, age or other groups' (Q35).

General points made by respondents were that the inclusion of these protected characteristics would dilute the legislation, create confusion and lead to inequality of treatment.

9.7 Question 46: Should the Malicious Communications (NI) Order 1988 be adapted to deal with online behaviour?

35 respondents answered the tick-box part of question 46. Table 9.7 shows that a strong majority (94%) of these respondents **agreed** that the Malicious Communications (NI) Order 1988 should be adapted to deal with online behaviour. There was unanimous support among organisations (100%), while individuals were strongly in favour (88%).

Table 9.7

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	18	100%	15	88%	33	94%
No	0	-	2	12%	2	6%
Total	**18**	**100%**	**17**	**100%**	**35**	**100%**

34 respondents (24 organisations and 10 individuals) made comments in response to question 46. These are discussed below.

9.7.1 There was strong consensus among respondents who answered question 46 that the Malicious Communications (NI) Order 1988 should be adapted to deal with online behaviour. Generally, it was argued that the legislation required updating to make it relevant to the modern context, and, in particular, to bring electronic communications within its scope. Respondents argued that it was appropriate for the NI Executive to take any necessary steps within its remit in this area to ensure that growing malicious behaviour online can be dealt with effectively.

Several respondents highlighted growing levels of online abuse, arguing this has a disproportionate impact on marginalised groups. A few organisational respondents (women's sector) argued that there had been a growth in misogyny and transphobia online especially, such that these forms of online abuse had become '*normalised*'.

A few respondents made reference to the modernisation of the Malicious Communications Act 1988 and the Communications Act 2003 in England and Wales, and called for a similar legislative approach in Northern Ireland.

Respondents called for strong legislation in this area, with some arguing that this would act as an important deterrent. It was also suggested that adapting the Malicious Communications (NI) Order 1988 was necessary to allow local enforcement and prosecution to tackle online hate crimes effectively. One respondent suggested that this Order was a potential means for dealing with threatening behaviour, such as revenge porn, which it is not possible to address through other legislation.

A few respondents recommended that the reference to "sending another person a 'letter or other article'" within the Malicious Communications (NI) Order 1988 should, as a minimum step, be amended to include electronic communications and online behaviour. One respondent felt that measures that went beyond the adaptation of this Order were called for, arguing that:

> *…a specific law is needed which is designed for the online environment and how people operate therein, as opposed to using existing provisions and shoehorning them to 'fit' online hate crime.* (Victim Support NI)

9.7.2 A few respondents (individuals and organisations) caveated that the right to freedom of speech/expression must be safeguarded, with reference to the principles of proportionality and necessity.

9.7.3 Other points

Additional points offered by respondents included:

- There should be reciprocity with other legislative tools, including the present bill on online harms being progressed in the UK Parliament.

- Consolidation of relevant legislation into a single piece of legislation will create transparency, clarity and certainty within the process.

- The Stalking Bill will introduce a new offence that will capture conduct or acts associated with stalking. These acts may also relate to aspects of hate crime directed by speech or via online communication.

- Given that offences may be aggravated by hostility, from a public policy perspective, it may be viewed that the sentencing ranges within Northern Ireland legislation are not reflective of the offence. Reference was made to English legislation which carries longer maximum sentences.

9.8 Question 47: Should the wording of the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 use terms such as "grossly offensive", "indecent" and "obscene"?

31 respondents answered the tick-box part of question 47. Table 9.8 shows that over half (58%) of those respondents **agreed** that the wording of the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 should use terms such as "grossly offensive", "indecent" and "obscene". Organisations were evenly split in their views (with 50% 'for' and 50% 'against'), while a majority of individuals (67%) answered positively.

Table 9.8

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	8	50%	10	67%	18	58%
No	8	50%	5	33%	13	42%
Total	**16**	**100%**	**15**	**100%**	**31**	**100%**

34 respondents (23 organisations and 11 individuals) made comments in response to question 47, as discussed below.

9.8.1 There was general agreement among respondents who were **opposed** that the terms "grossly offensive", "indecent" and "obscene" were outdated and therefore inappropriate for dealing with contemporary issues such as cyber hate.

Respondents made a number of specific points, including:

- The terms 'indecent' and 'obscene' are increasingly associated with sexual and other crimes against children. It may be necessary therefore to assess the effectiveness of these in the context of hate crime and to distinguish between online harms with a hate element and those with another motivation.
- More precise language is needed to protect from the risk of abuse.
- The current wording is too subjective, open to interpretation, and may act as a barrier to consistent and effective prosecution.
- The term 'grossly offensive' is particularly problematic given that the right to offend is permitted under the ECHR.

- It is inappropriate to rely on government self-regulation when dealing with issues of freedom of expression and protection from harm.

Generally, it was argued that they should be replaced with terms fit for use in contemporary contexts. One respondent suggested that greater emphasis should be placed on the need for malicious intent. Another suggestion was to use alternative terms such as 'abusive', 'insulting' or 'threatening behaviour'.

9.8.2 Among those who were **supportive**, few respondents offered detailed comments. The following points were made:

- Practitioners had not indicated that the use of these terms presented a particular area of concern in terms of their operation in Northern Ireland. There were also questions around appropriate replacement terms for the words 'grossly offensive', 'indecent' and 'obscene' (The Bar of Northern Ireland).

- It was important that the wording should be sufficiently broad to cover multiple forms of abuse experienced by women, particularly in the context of online hate (Northern Ireland Women's European Platform).

- The MCA 1988, The MC (NI) Order 1988, and the CA 2003 should adopt the same wording and the same definitions for the behaviours and activities envisaged to be captured within their scope (Individual).

Despite general support for the continued use of the terms "grossly offensive", "indecent" and "obscene", some respondents acknowledged that the legislation itself was outdated, particularly in the context of online hate, and therefore required updating. It was also recognised that use of the terms could be problematic, including a tendency towards their narrow interpretation. Accordingly, respondents suggested that the terms should be clearly defined and their thresholds reconsidered.

9.9 Question 48: Are the offences under the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 too broadly drafted and require some modification to clarify and narrow their application?

26 respondents answered the tick-box part of question 48. As shown in table 9.9, a majority of respondents (77%) **agreed** that the offences under the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 require some modification to clarify and narrow their application.

Table 9.9

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	13	76%	7	78%	20	77%
No	4	24%	2	22%	6	23%
Total	**17**	**100%**	**9**	**100%**	**26**	**100%**

28 respondents (21 organisations and 7 individuals) made comments in response to question 48.

There was considerable overlap in the comments provided in response to questions 47 and 48. The answers below will focus on points deemed most relevant to Q48 in order to avoid repetition.

9.9.1 Views of those who agreed that some modification was needed

Respondents who agreed that the offences required modification in order to clarify and narrow their application argued that:

- This would make the legislation more functional and limit its unintended application. One respondent referred to guidelines on prosecuting electronic communications, which had been developed by the Public Prosecution Service, suggesting that these should be made public as soon as possible.

- A related point was that the current wording was too vague and should be amended in a way that ensured greater clarity. This, in turn, would help to ensure the successful prosecution of offences.

- Additionally, it was suggested that the legislation should be reviewed with a view to ensuring that enforcement agencies, particularly the Police Service of Northern Ireland, can effectively address offending, including online offending.

Again, a few respondents stressed the importance of protecting freedom of speech in their answers.

Finally, one respondent (Police Service of Northern Ireland) suggested that the Review consider recommending that the offence(s) under the Communications Act is amended to a hybrid offence. This would allow applications for search warrants under Article 10 of the Police and Criminal Evidence (NI) Order 1989.

9.9.2 Views of those who did not agree that some modification was needed

A minority of respondents **did not agree** that offences under the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 should be modified in order to clarify and narrow their application. Among the few comments offered, two respondents, the Public Prosecution Service and The Bar of Northern Ireland, gave detailed explanations for their views:

> *The offences are not too broadly drafted - given that there is such a range of potential offending through messages, threats, information, in communication and/or online, a broad drafting ensures a wide scope to ensure there are no 'loopholes' in the legislation. …… The current law contained in the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 is sufficiently clear to protect freedom of expression and this is also protected by the HRA 1998 and Article 10 ECHR too.* (The Bar of Northern Ireland)

> *The PPS have not experienced any practical difficulties in prosecuting offences under the Communications Act 2003 or the Malicious Communications (NI) Order 1988 and therefore, do not see that there is any need to modify their application*. (Public Prosecution Service)

The Public Prosecution Service made a number of additional points in support of its overall position, including that:

- Prosecutors apply the Test for Prosecution as set out in the Code for Prosecutors when taking decisions involving offences under the Communications Act 2003 and the Malicious Communications (Northern Ireland) Order 1988.

- The legislative provisions often engage Article 10 of the European Convention on Human Rights and prosecutors are aware that these provisions must be interpreted consistently with free speech principles under Article 10.

- There is detailed internal guidance available to prosecutors in relation to how they should approach decisions in relation to such offences.

- The flexibility of these offences (in particular the 2003 Act) has been useful in terms of addressing a wide range of online hate crime, including many cases which had identified victims

- Although the terms adopted by section 127 of the 2003 Act are potentially broad in scope, their proper application with proper recognition of the suspect's rights under Article 10 (and in accordance with Public Prosecution Service internal guidance), results in prosecutions being brought only in appropriate cases.

9.10 Question 49: Should online harm be part of a general law applying to hate crime?

33 respondents answered the tick-box part of question 49. Table 9.10 shows that a majority (79%) of those respondents **agreed** that online harm should be part of a general law applying to hate crime. There was high support among both organisations (81%) and individual respondents (75%).

Table 9.10

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	17	81%	9	75%	26	79%
No	4	19%	3	25%	7	21%
Total	21	100%	12	100%	33	100%

38 (29 organisations and 9 individuals) made comments in response to question 49, as discussed below.

9.10.1 Views of those who <u>agreed</u> that online harm should be part of a general law applying to hate crime

There was general agreement among respondents who answered positively that this was increasingly important in the context of increasing levels of online hate crimes and their specific impact on victims. This was underlined in the response of one respondent who stated that:

> *We understand that at present the majority of proceedings the PPS considers for stirring up hatred offences relate to online activity. We are also mindful that for victims the removal of the offending material can be as, if not more, important to them than the apprehension of the guilty party. Hate expression also by its nature creates collective as well as individual victims.* (Committee on the Administration of Justice)

Some respondents viewed the inclusion of online harm as particularly important to address the significant and growing levels of harm experienced by women and trans people. Respondents also called for consistency with stirring up offences, particularly in terms of definitions and protected groups.

It was also argued that the inclusion of online harm would send a strong message, to victims, perpetrators and wider society, that online hate crime is unacceptable and will be treated seriously by the criminal justice system. In this respect, the legislation would

constitute a practical tool for dealing with offending, but also encourage victims to seek justice. Two respondents (Individuals) argued that '*although the vast majority of reported instances of online hate involve celebrities and public figures, it is crucial that a clear message is sent through the legal system that online hate can affect anyone, irrespective of their public status*.'

It was also considered important that the specific nature of harm caused by online hate crime is recognised and addressed appropriately by legislation. Respondents noted that this type of crime not only harms victims directly, but also has a wider impact on identity groups, and is distinct in terms of the relative longevity of harm caused:

> *Online hate crime is arguably more damaging to the victim than offline hate for a number of reasons. In addition to attacking victims for who they are, online hate can cause reputational damage to victims and can cause them to feel humiliated and embarrassed. Further, the permanency and reach of the Internet can mean that an online attack may never go away, even when a perpetrator has been apprehended. Harm online often extends beyond the victim and can comprise general comments directed at specific groups.* (Public Prosecution Service)

One respondent (Northern Ireland Women's European Platform) stressed that understanding of the concept of harm particularly would encourage effective implementation of the legislation throughout the criminal justice process. Another respondent (Women's Aid Federation Northern Ireland) recommended that any legislation should be complemented by training provision on online abuse for stakeholders across the criminal justice system.

A few respondents made reference to existing legislation, noting that this was out-dated and insufficient to deal effectively with online harm, with the effect of potentially denying victims' access to justice. One respondent (organisation) suggested that although potential amendments could be made to the 1987 and 1988 Orders, it may be appropriate to create bespoke provisions that are designed specifically with online communications in mind. The same respondent noted the relevance and value of offences under the Communications Act 2003 for dealing with online hate crime.

A few respondents highlighted the importance of protecting freedom of expression in the context of provisions to address online harm:

> *We would also warn against excessive and illegitimate application of hate crime laws in respect of social media. In recent cases the High Court has found that police actions against some members of the public have been unlawful and represent 'disproportionate interference' with the right to freedom of expression.* (Democratic Unionist Party)

When applying hate crime law to digital content, the right to freedom of expression must be safeguarded and any interference should be subject to the principles of proportionality and necessity. (Northern Ireland Human Rights Commission)

Some respondents viewed provisions under other pieces of legislation, namely, the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 as sufficient in this respect. Additionally, it was noted that freedom of expression is covered by the HRA 1998 and Article 10 of the ECHR.

Finally, one respondent (organisation) called for the Independent Review to consider '*the feasibility of a Northern Ireland specific model regarding the regulation of online hate that could be included in any consolidated hate crimes legislation (with required consent of the Secretary of State)'* (Committee on the Administration of Justice).

9.10.2 Views of those who <u>did not agree</u> that online harm should be part of a general law applying to hate crime

A minority of respondents (individuals and organisations) did not agree that online harm should be part of a general law applying to Hate Crime. With the exception of one organisational respondent, comments provided by these respondents were limited in detail. Main reasons offered were that existing laws were adequate and that online offences should be dealt with as separate offences.

One respondent (Equi-Law UK), in a more detailed response to this question, called for the experiences of boys and men to be considered within the scope of any analysis of 'gendered' trends relating to crime, online abuse and 'hate speech'. This respondent made reference to a number of research studies to support their argument that '*women and men experience relatively similar levels of online harms, including hate speech'*. The respondent expressed concerns at the proposed inclusion of the concept of 'hate speech' in legislation and, specifically, called on the Independent Review to reject proposals to include online harm as part of a general law applying to hate crime**.**

9.11 Question 50: Is the current law contained in the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 sufficiently clear to protect freedom of expression?

26 respondents answered the tick-box part of question 50. Table 9.11 shows that a strong majority (85%) of these respondents **did not agree** that the current law contained in the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 is sufficiently clear to protect freedom of expression.

Table 9.11

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	3	17%	1	12%	4	15%
No	15	83%	7	88%	22	85%
Total	**18**	**100%**	**8**	**100%**	**26**	**100%**

30 (24 organisations and 6 individuals) made comments in response to question 50. These are discussed below.

9.11.1 Views of those who agreed that the current law contained in the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 is sufficiently clear to protect freedom of expression

A small minority of respondents considered current law contained in the MCA 1988, MC (NI) Order 1988 & the CA 2003 as sufficiently clear to protect freedom of expression. Explanatory comments by these respondents were comparatively limited. Generally, it was argued that the current law was sufficiently clear and that freedom of expression is protected by the HRA 1998 and ECHR, Article 10.

In a more detailed comment, one respondent pointed out that:

> *….there will always be finely balanced judgments in relation to whether certain conduct oversteps the boundary of what is acceptable and engages the criminal law. This occurs in other areas of the criminal law where objective standards apply to, for example, whether conduct is grossly negligent or whether a defendant is acting with a reasonable excuse. ……...we do not consider that express reference within the legislation to the freedom of expression or to what (quite clearly) will not constitute an offence will be effective in bringing greater clarity as to where the balance will be struck in individual fact sensitive cases.* (Public Prosecution Service).

9.11.2 Views of those who <u>did not agree</u> that the current law contained the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 is sufficiently clear to protect freedom of expression

These respondents argued that the legislation was too broad, out-dated, contained vague and subjective concepts and was contradictory in some respects. Several respondents concurred with arguments presented in the consultation paper, particularly those detailed in paragraph 12.86.

Respondents argued that a lack of clarity on freedom of expression exposed the legislation to potential misinterpretation and abuse, and hindered individuals' ability to freely express opinions and disagreement. Particular concerns, highlighted by an individual respondent, were around the expression of Christian views on same sex issues. An organisational respondent highlighted the need for clarity '*that the legitimate use and exposition of scripture, even in an online environment, is a protected right in itself and does not constitute a hate crime'* (Presbyterian Church in Ireland).

Some respondents acknowledged that freedom of expression is addressed by ECHR legislation but argued that provisions were inadequate in the case of both the MCA 1998 and CA 2003. One organisation argued that the position of the ECHR, while valued, '*also adds complexity in that it does not clearly delineate between acceptable and unacceptable offensive expression'* (Northern Ireland Women's European Platform). Several respondents highlighted section 127(1) of the CA 2003 as particularly in need of clarification.

Notably, respondents differed somewhat in their views on what the provision of greater clarity should entail. A few suggested that this would be achieved through strengthening the legislation, and in particular, the pursuit of maximum or high protections of freedom of expression. Other respondents, in contrast, expressed strong support for clarification of the law, but stressed the need for balance between freedom of expression and protection from online hate crime. One respondent (organisation) suggested that greater clarity of the law would enable criminal justice agencies, including the Police Service of Northern Ireland, the Public Prosecution Service and the courts, to deal more effectively with offending. The same respondent recommended the inclusion of a clause within the legislation, or alternatively, the provision of guidance, to clarify '*what is understood in Northern Ireland as offensive but acceptable expression, and what goes beyond this'* (Northern Ireland Women's European Platform).

10. Sectarianism and Hate Crime Legislation in Northern Ireland (Questions 51 - 52)

10.1 Question 51: Would you support a specific reference to the term 'sectarian' within any new hate crime legislation?

37 respondents answered the tick-box part of question 51. Table 10.1 shows that over half (57%) of those respondents were **supportive** of a specific reference to the term 'sectarian' within any new hate crime legislation. However, support was considerably less prevalent among individuals (35%) than among organisations (75%).

Table 10.1

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	15	75%	6	35%	21	57%
No	5	25%	11	65%	16	43%
Total	**20**	**100%**	**17**	**100%**	**37**	**100%**

39 (28 organisations and 11 individuals) made comments in response to question 51.

10.1.1 Support for a specific reference to the term 'sectarian' within any new hate crime legislation

Respondents who **agreed** that there should be a specific reference to the term 'sectarian' within any new hate crime legislation gave the following reasons:

- Sectarianism continues to be a significant problem in Northern Ireland. In order to address this, robust legislation, including a specific reference to sectarianism within any new hate crime legislation is essential. This would provide recognition of the high level of sectarian hate crime and incidents in Northern Ireland, as well as the damaging impact on individuals and communities.

- The absence of an agreed definition of sectarianism within law, as is currently the case, is problematic in terms of recording and dealing with 'sectarian' crime.

- Inclusion of the term 'sectarianism' would be consistent with other legislation, including fair employment legislation, and align with the NI Executive's focus on tackling sectarianism, as outlined in the New Decade New Approach framework

(2020).

- The current religious group indicator does not adequately capture the meaning (and impact) of sectarianism, which extends beyond religion to include aspects of nationality and political identity. In particular, the intersectional nature of sectarianism was highlighted, such that '*it does not fall easily into a single categorisation, but has evolved over time to be present within the religious, racial, cultural and political spheres'* (Public Prosecution Service)

  Additionally, it was pointed out that the current approach to categorisation '*ignores the nuances of the issue and creates potential issues in the form of a defence that argues that an incident was not driven by ethnic or religious hatred but instead cites an aggravation related to political/sporting/class animosity'* (Church of Ireland Church and Society Commission). Another respondent argued that it should be recognised that sectarianism *'is not only an issue in Christianity but also in Muslim and other faith groups'* (South Belfast Round Table).

Respondents also considered that a specific reference to sectarianism within hate crime legislation would bring about important benefits, such as:

- Clarification that a specific purpose of hate crime legislation is protection against sectarian hate crime.
- Provision of a more accurate picture of the level and nature of sectarian hate crime in Northern Ireland, including disaggregated data on sectarian incidents and non-sectarian religion based incidents.
- More effective targeting of specific interventions to address sectarianism.
- It would contribute to the enhanced protection of women (who some respondents argued are affected by sectarianism in gender specific ways).
- It would be of symbolic value, by conveying a denunciatory message to victims, perpetrators and wider society.

In terms of legal definition of sectarianism, several respondents made reference to the United Nations and Council of Europe expert treaty bodies who advocate that sectarianism should be treated as a specific form of racism. Further, respondents noted the position of the Northern Ireland Human Rights Commission who have argued that this understanding does not imply that sectarianism should not be explicitly named as such, as in the case of other specific forms of racism (e.g. anti-Semitism or Islamophobia). One organisation called for a broader definition that draws on this understanding of sectarianism, that is:

> … *as a specific form of racism based on the expressions of the Council of Europe, United Nations, and the Human Rights Commission – whose list of indicators would be expanded to include race, religious beliefs, nationality (including citizenship), ethnicity, cultural background, and language.* (Sinn Féin)

With reference to this issue in Scotland and the Final Report of the Working Group on Defining Sectarianism in Scots Law (August 2018), one respondent (Public Prosecution Service) recommended that consideration should be given to placing the aggravating nature of sectarian crime on a statutory basis. Their response noted the conclusions of the Working Group, in particular, that *'the principle of 'fair labelling' should apply so that criminal acts of prejudice can be named for what they are whether that be anti-Catholicism; anti-Protestantism; sectarianism or any other descriptor'* (Public Prosecution Service).

Another general recommendation by an organisation (Sinn Féin) was that any legal definition should be complemented with adequate training and educational resources across sectors, including police officers and prosecutors.

10.1.2 Views of those who did not support a specific reference to the term 'sectarian' within any new hate crime legislation

Comments offered by those **opposed** to the inclusion of a specific reference to the term 'sectarian' were comparatively less detailed. A few respondents questioned whether amending the law in this way was justified or would lead to better outcomes:

> *Whilst the legislative framework may be complex and could be consolidated to provide more consistent and effective protection, we see no evidence to suggest that the current provisions are not operating as intended to properly protect against sectarianism.* (The Bar of Northern Ireland)

> *We are not, convinced, however that inserting a reference to sectarianism into hate crime law in Northern Ireland would aid better enforcement or application.* (Democratic Unionist Party)

Two respondents (organisations) advocated an alternative approach, that is, use of the Mandla v Lee principle on the definition of "ethnicity" which they argued applies to racial groups. One of these respondents expressed concerns that reference to 'sectarianism' within hate crime law could detract from protections available to minority groups.

One respondent (DUP, cited above) suggested that, in the short-term, consideration should be given to providing improved explanation of current provisions. This respondent further argued that current provisions on stirring up hatred in Northern Ireland extend to nationality and ethnic background, and noted that such provisions cover criminality in public processions and sporting matches which it was argued account for '*much of the volume'* of sectarian behaviour related to such events.

10.2 Question 52: Should the list of indicators for sectarianism (i.e. religious belief and political opinion) be expanded?

31 respondents answered the tick-box part of question 52. Table 10.2 shows that over half of these respondents (58%) **did not agree** that the list of indicators for sectarianism (religious belief and political opinion) should be expanded. Organisations were evenly split on this issue (with 50% 'for' and 50% 'against'), while a majority of individuals (65%) answered negatively.

Table 10.2

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	7	50%	6	35%	13	42%
No	7	50%	11	65%	18	58%
Total	**14**	**100%**	**17**	**100%**	**31**	**100%**

35 (26 organisations and 9 individuals) made comments in response to question 52.

10.2.1 Views of those who agreed the list of indicators for sectarianism (i.e. religious belief and political opinion) should be expanded:

Respondents who **agreed** the list of indicators for sectarianism should be expanded gave a number of reasons:

- The range of current indicators is too narrow and therefore fails to capture the meaning and consequence of sectarianism. In particular, current indicators may not apply to some expressions of hatred (for example, hatred in response to hearing a person speaking Irish, wearing an NI football jersey, or incidents motivated by perceived community background). Expansion of the indicators is therefore needed to address current legislative gaps in protection.

- Expansion will also support an approach that recognises that victims of sectarian hate crime may be targeted due to their multiple identities.

- The current narrow range of indicators is problematic in terms of the monitoring of sectarian crimes/incidents, particularly given the inconsistencies between how sectarian is defined by the Police Service of Northern Ireland and under hate crime legislation.

- A wider range of indicators is in keeping with a definition of sectarianism as a specific form of racism, based on the expressions of the Council of Europe, United Nations, and the Human Rights Commission.

As per the last bullet point, several respondents advocated an understanding of sectarianism in Northern Ireland as a specific form of racism, with relevant protected grounds including 'race', language, religion, nationality (including citizenship) or national or ethnic origin.

One organisation (Equality Commission for Northern Ireland) recommended a 'fair labelling' approach, which takes into consideration general understanding of what constitutes sectarian motivated offences in the context of Northern Ireland. As such, this respondent recommended religious belief, national identity, nationality and citizenship as indicators for sectarianism. More generally, this respondent stressed that any proposed provisions relating to tackling sectarian hate crime should comply with human rights legislation.

Among those who were generally supportive of the expansion of the indicators, some argued that the inclusion of '*political opinion'* as an indicator was not appropriate. In particular, it was argued that this would risk capturing legitimate political speech, and conflict with human rights obligations on freedom of speech, such as ECHR Article 10.

10.2.2 Views of those who <u>did not agree</u> that the list of indicators for sectarianism (i.e. religious belief and political opinion) should be expanded:

Many respondents who did not agree that the list of indicators for sectarianism should be expanded gave similar or identical answers to those provided in response to Q51.

As discussed at Q51, two respondents indicated preference for use of the Mandla v Lee principle on the definition of "ethnicity" as an alternative to the term 'sectarian'.

A number of additional points were made by respondents who answered 'no' to question 51, including that:

- Current indicators are adequate and/or are a reflection of how sectarianism is widely understood at present, particularly within the context of Northern Ireland.

- Additional indicators could lead to an increased risk of innocent people being accused of violations by politically motivated actors.

- Subject to amendments suggested in response to Q51 (i.e. placing the aggravating nature of sectarian crime on a statutory basis), expansion of the indicators is unnecessary

As in earlier questions, a few respondents were opposed on the basis that they were not generally supportive of the need for hate crime legislation.

11. Removing Hate Expression from Public Space (Question 53)

11.1 Question 53: Should the law relating to the duties of public authorities to intervene to tackle hate expression in public space be strengthened or further clarified?

36 respondents answered the tick-box part of question 53. Table 11.1 shows that a majority (67%) of these respondents **agreed** that the law relating to the duties of public authorities to intervene to tackle hate expression in public space should be strengthened or further clarified. However, support was considerably less prevalent among individuals (47%) than organisations (88%).

Table 11.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	15	88%	9	47%	24	67%
No	2	12%	10	53%	12	33%
Total	**17**	**100%**	**19**	**100%**	**36**	**100%**

42 respondents (28 organisations and 14 individuals) made comments in response to question 53.

11.1.1 Views of those who agreed the law relating to the duties of public authorities to intervene to tackle hate expression in public space should be strengthened or further clarified:

Those who agreed that further clarification was needed, felt this was important for various reasons. A few respondents suggested that a lack of clarity around the legal obligations and roles/responsibilities of public authorities had led to difficulties such as addressing/tackling hate expression in public space being inadequately resourced and or/dealt with. It was also argued that further clarification was needed to ensure that public authorities did not curtail freedom of speech unnecessarily:

> *Some clarification may be useful. There is danger that public authorities take it upon themselves to quash legitimate comment and free speech. There have already been cases of such in the UK.* (Individual)

One respondent highlighted the importance of clarity for different stakeholders:

> *..so that victims understand what avenues of redress and protection are available to them…..and to support prompt action by the relevant authority and relevant accountability.* (Police Service of Northern Ireland)

Another called for '*consistency of approach'*, and advised that '*the powers and duties in respect of the removal of the material should be clearly outlined and codified*' (Public Prosecution Service).

Some respondents agreed that the law should be strengthened. This was considered of particular importance given that public expression of hate is an issue of growing concern in Northern Ireland. This includes racist, sectarian, anti-Semitic and homophobic hate expressions in public spaces, which take various forms including graffiti, slogans, the sale of Nazi memorabilia, burning flags and other emblems in Northern Ireland:

> *….examples can be found across Belfast, and NI more generally, of graffiti or slogans that advocate genocide against certain communities (for example, 'Kill all Taigs, Kill all Huns) or homophobic and racist messages of a threatening nature (for example, 'gays out', 'no blacks', 'locals only' and 'Romas out'). Other forms of hate expressions in public spaces includes the extremely complicated nature of burning flags and other emblems in Northern Ireland.* (Women's Policy Group NI /Women's Resource and Development Agency)

> *The Belfast Jewish Community urges the outlawing of the sale of Nazi memorabilia at auctions which is an accepted practice in Northern Ireland. It is however outlawed in Germany and other European countries and while there is no legislation in GB, it is not undertaken by reputable auction houses there. It is considered by Jewish Communities throughout the world that activities such as this are both profiteering from the perpetuation of hostility and incitement to hatred of Jews and it is our concern that the capacity to curtail this falls outside the law.* (Belfast Jewish Community)

Some were of the view that strengthening the law would enable agencies to tackle the issue of hate expression in public space in a more effective and timely manner:

> *Strengthening the duties of public authorities would enable such authorities to more appropriately deal with the issue and ensure such expression is curtailed more effectively than at present. It would also provide a means for dealing with potential concerns regarding retribution or difficulties if material is removed.* (Northern Ireland Women's European Platform)

> *There is also a perception in the community that the law is ineffective as there are many examples of hate expression in public places which the PSNI and District Councils are unable to move, due to offences this legislation is trying to address (i.e. sectarianism, intimidation). In my opinion the law needs to be strengthened and enforced.* (Individual)

Hate expressions should be removed as quickly as possible to avoid further harm and distress being caused to protected groups. (Public Prosecution Service)

Some respondents called for the creation of a statutory duty on public authorities to remove hate expression (including flags and emblems that reach the threshold of constituting hate expression) from public spaces. One respondent (organisation) stressed that this issue was separate to wider policy debates around flags and bonfires, which do not fall within the scope of expressions of hatred. Another highlighted the importance of continued work with The Executive Office on this issue, as well as to consider '*the operability of any recommendations with the relevant bodies'* (Department of Justice). Greater leadership by public bodies, particularly regarding their existing equality duties, was also called for.

11.1.2 Views of those who <u>did not agree</u> that the law relating to the duties of public authorities to intervene to tackle hate expression in public space should be strengthened or further clarified:

Comments provided by those opposed were relatively limited. Some respondents, particularly individuals, expressed concerns that strengthening the law would impact negatively on freedom of speech/religious expression. One individual suggested that such an approach might intensify civil unrest in some areas.

A few respondents (organisations and individuals) agreed on the importance of tackling hate expression effectively, but considered current legislation to be sufficiently robust. These respondents argued that more consistent implementation of the current law was needed.

12. Restorative Justice (Questions 54 - 58)

12.1 Question 54: Should restorative justice be part of the criminal justice process in dealing with hate crime in NI?

35 respondents answered the tick-box part of question 54. Table 12.1 shows that a majority (83%) of those respondents **agreed** that restorative justice should be part of the criminal justice process in dealing with hate crime in NI. Support was high both among organisations (90%) and individuals (73%).

Table 12.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	18	90%	11	73%	29	83%
No	2	10%	4	27%	6	17%
Total	**20**	**100%**	**15**	**100%**	**35**	**100%**

43 respondents (32 organisations and 11 individuals) made comments, as discussed below.

12.1.1 Views of those who <u>agreed</u> that restorative justice should be part of the criminal justice process in dealing with hate crime in NI

Respondents who were supportive of restorative justice argued that the efficacy of such an approach is validated by academic evidence. One respondent made reference to evidence by Professor Mark Walters[332], which highlights the importance of restorative justice in hate crime cases. Additionally, respondents noted growing acceptance of restorative justice interventions within the criminal justice system.

It was further suggested that the use of restorative justice practices could bring about a number of benefits. Several respondents considered that this would meet the needs of victims more effectively, by giving them '*a voice'*, allowing them greater involvement, confidence and trust in the criminal justice process, and in some cases, through swifter outcomes than the court process. As such, in appropriate cases, restorative justice was viewed as a viable and/or preferred alternative to more conventional processes of criminal justice:

[332] Professor of Criminal Law and Criminology at the University of Sussex and Co-Director of the International Network for Hate Studies

> *Not all victims want to go through a trial or seek a custodial sentence for their perpetrators. For some victims, they want recognition of the harm that has been caused, and for the abusive behaviour to stop…… We are therefore of the view that a range of restorative options should be made available to those who wish to go down that route, as such options may be more suited to matching the victim's idea of what justice looks like and more effectively challenge the prejudices underpinning such offences.* (Victim Support NI)

A further perceived benefit of restorative justice was that it holds the potential to tackle the root causes of hate crime and thereby reduce the risk of re-offending. Particularly so if offenders are compelled to take responsibility for the harm caused to victims, and their prejudices are challenged in a way that leads to a change in beliefs/behaviours:

> *It is in our experience, delivering Get Real that we see better outcomes for those who engage during a diversion from prosecution. They are enabled to feel empowered and involved, and therefore more willing to understand the impacts of the harm they caused and to move away from this damaging thinking and behaviour.* (Northern Ireland Association for the Care and Resettlement of Offenders)

Similarly, other respondents viewed the use of conventional punitive approaches alone as insufficient to tackle hate crime and called for the complementary use of restorative approaches:

> *Until there are educational programmes and other supports in place to address the root causes of hate crime, amending the criminal and legislative framework for dealing with such incidents, while important, can never prevent them from happening or reoccurring.* (Northern Ireland Catholic Council on Social Affairs)

> *…when a young or vulnerable person enters the criminal justice system it is often a revolving door to reoffending. We acknowledge the benefits of bringing offenders and victims together to prevent further harm and educate people on the impact of their actions toward others…..we reiterate the view that dealing with hate crime means more than simply a system of enhanced offences or sentences.* (Democratic Unionist Party)

While there was a great deal of consensus that restorative justice approaches held considerable potential to address hate crime, respondents cautioned that this would not be appropriate or practical in all cases. A few suggested that it might be appropriate in cases involving 'low-level' crime and/or crime involving young perpetrators. It was argued that clear guidance should specify the particular circumstances in which restorative justice should be considered, as well as appropriate steps should an agreeable outcome not be reached following the use of such interventions.

Some respondents argued that among the criteria that should apply to restorative justice interventions, these should include willingness of victims to participate and an assessment of suitability for the specific offence/offender:

> *If it is of central concern that any restorative justice program is victim centred, it must be clear that participation is wholly voluntary. The victim should not feel that his/her participation results from implied pressure and that their concerns and expectations regarding the restorative justice process are fully understood and built into any such program. If these elements are not properly determined then it would be difficult to see merit in any such scheme.* (The Law Society of Northern Ireland)

> *NIWEP would also welcome inclusion of a criterion that the perpetrator is capable of learning and benefitting from restorative justice, more profoundly than in terms of escaping prosecution and potentially conviction. This would ideally include a test of some kind, and monitoring over time to assess the effectiveness of the approach.* (Northern Ireland Women's European Platform)

Respondents also recommended that consideration should be given to:

- Production of clear guidelines detailing why restorative justice may not be an appropriate option, particularly in relation to victims of gender-based violence.

- Further evaluation and potentially wider piloting to assess the full potential of the approach in the context of hate crime.

- Acknowledgement by the Review of the underlying factors (such as socio-economic deprivation) behind hate crime incidents and recommendations to the appropriate bodies in this respect.

- The provision of a range of restorative options to willing parties.

- Both restorative justice and training on cultural awareness/unconscious bias to perpetrators or those at risk of perpetrating hate incidents. Training should be delivered by those with first-hand experience of relevant issues.

- The use of restorative justice processes should be based on international best practice, with appropriate safeguards for the victim built in to the system, including any safety considerations and ensuring the free and informed consent of the victim, which may be withdrawn at any time.

- The use of a partnership approach, involving existing restorative justice organisations that are based in communities, in the development of restorative justice programmes for hate crimes.

12.1.2 Views of those who opposed that restorative justice should be part of the criminal justice process in dealing with hate crime in NI.

Only two respondents (individuals) who were **opposed** to the use of restorative justice as part of the criminal justice process in dealing with hate crime made comments. These comments were brief and irrelevant to the question.

12.2 Question 55: Should restorative justice schemes be placed on a statutory footing?

31 respondents answered the tick-box part of question 55. Table 12.2 shows that a majority (87%) of these respondents **agreed** that restorative justice schemes should be placed on a statutory footing. Support was high both among organisations (94%) and individual (79%) respondents.

Table 12.2

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	16	94%	11	79%	27	87%
No	1	6%	3	21%	4	13%
Total	**17**	**100%**	**14**	**100%**	**31**	**100%**

32 respondents (24 organisations and 8 individuals) made comments in response to question 55. These are discussed below.

12.2.1 Views of those who <u>agreed</u> restorative justice schemes should be placed on a statutory footing:

Respondents suggested that the provision of adult restorative justice at a statutory level could bring a number of benefits. Specifically, it would:

- help to ensure consistency of application of restorative justice processes, quality of provision and a co-ordinated and strategic approach;
- enable the development of a system with clear criteria and guidelines, which is victim led/focused;
- help to ensure the process has credibility and is not considered as a 'soft' option by those working within the judiciary;
- help to secure long-term funding.

Some respondents made reference to existing schemes, applicable to young people, which were viewed as 'very successful'.

In terms of the operation/delivery of the service, one organisation (Probation Board for Northern Ireland) with experience in this area suggested that their trained practitioners could

assist in delivery of the service. Their involvement was endorsed by another respondent, who suggested they may be '*well placed to coordinate this and any collaborative engagement with accredited community based restorative justice organisations'* (The Bar of Northern Ireland).

Additional suggestions were that the system should be closely monitored, to ensure offender compliance, and in addition to statutory services, the service should involve voluntary and community organisations, including those currently working in restorative justice. One respondent (NIACRO) recommended that the work should be informed by the Sentencing Review and on-going work on the Adult Restorative Justice Strategy. Individual respondents suggested a review of best practice models used in other countries, including Norway, Belgium and State of Colorado.

Although most respondents expressed strong support for the placement of restorative schemes on a statutory footing, two respondents caveated that further research was needed. A particular concern was that the provision of restorative schemes at a statutory level could compromise the integrity of the process, especially since restorative justice is based on the principle of voluntarism.

12.2.2 Views of those who <u>did not agree</u> restorative justice schemes should be placed on a statutory footing:

Comments by those **opposed** to placing restorative justice schemes on a statutory footing were made by only two respondents (one organisation and one individual). The Department of Justice's response indicated they considered that to place restorative justice schemes on a statutory footing might not prove as effective as current community based schemes:

> *Restorative justice groups are important in terms of community engagement and linkages between the police and the community. Community based restoratives justice organisations work closely with people in local communities, with the purpose of building and recognising the desired behaviours within communities, with the key outcome to be securing acceptable behaviour identified and agreed, by communities, for communities, in order that people respect and adhere to the behaviours expected in their community. Communities currently engage more positively with the two accredited groups as they are not on statutory footing and are responsive to emerging issues within communities*. (Department of Justice)

Similarly, an individual respondent argued that restorative schemes should remain voluntary and that offenders should not be compelled to participate.

Two respondents (organisations) indicated that they held significant reservations about such an approach. One of these respondents argued that placing schemes on a statutory footing could undermine the trust of community members, but agreed that there should be a role for

statutory agencies in restorative schemes. The other respondent expressed concerns that the needs of victims would not be a priority in a system that is primarily offender focused.

12.3 Question 56: Should there be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime?

32 respondents answered the tick-box part of question 56. As shown in table 12.3, a majority of these respondents (81%) **agreed** there should be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime. Support was particularly high (95%) among organisational respondents.

Table 12.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	18	95%	8	62%	26	81%
No	1	5%	5	38%	6	19%
Total	**19**	**100%**	**13**	**100%**	**32**	**100%**

27 respondents (20 organisations and 7 individuals) made comments, as discussed below.

12.3.1 Respondents who **agreed** that there should be a formal justice system agency with responsibility for the delivery of adult restorative justice for hate crime, gave the following main reasons:

- The current system is available to certain geographical areas of Northern Ireland only. A formal agency would help to ensure consistency of provision for victims and offenders.
- A formal justice system agency could lead to greater sustainability of funding, which in turn would add credibility and help to ensure quality of provision.
- A formal agency with strong community links would ensure confidence in the process, accountability and consistency of approach.
- Such an approach would be in line with findings from a Feasibility Study on the potential for a Centre of Restorative Excellence for Northern Ireland.

Several respondents (organisations) agreed that Probation Board for Northern Ireland (PBNI) would be well placed to assume this role, as suggested in the consultation paper. It was noted that this organisation has experience in this area and the acceptance/confidence of all parts of the community. Probation Board for Northern Ireland, in their response,

highlighted their experience in the delivery of restorative interventions, in response to growing levels of hate crime:

> *We fully understand the benefits of restorative practice and have trained key staff to deliver restorative practices. Our staff are both social work qualified and trained in restorative practices. Our in house Psychology staff provide oversight of research and evaluation of a range of interventions including our restorative work.* (Probation Board for Northern Ireland)

Respondents stressed that the appointed agency must ensure that victim groups and representative organisations are involved in the establishment and delivery of restorative justice programmes. Furthermore, in the case of new protected characteristics, relevant representative groups should be consulted to ascertain their needs and ensure that these are provided for.

One respondent (organisation) suggested that a formal agency could also assist with development of a restorative justice strategy for Northern Ireland.

12.3.2 A few respondents **did not agree** that there should be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime. Main reasons given by individuals were that the current system is sufficient, additional bureaucracy should be avoided, and formalisation of restorative justice could detract from the voluntary nature of this process.

One respondent in particular was strongly opposed to placing responsibility with one formal justice agency. It was argued that this could curtail delivery capacity, limit options available and also restrict the involvement of independent victims' organisations to provide expertise-driven restorative practice in Northern Ireland. In the absence of the correct expertise, there was also a risk that victims would face secondary or repeat victimisation. As such, this respondent recommended that:

> *… restorative justice provision should be grassroots-based, and be able to be both flexible and innovative. We believe it would be difficult to achieve these aims if sole responsibility for delivery was placed with a formal justice agency.* (Victim Support NI)

12.4 Question 57: What role do you envisage for the accredited community based restorative justice organisations in the delivery of adult restorative justice for hate crime?

Question 57 asked for comments only. Respondents were asked for their views on the particular role that accredited community based restorative justice organisations might take in the delivery of adult restorative justice for hate crime. 31 respondents (24 organisations and 7 individuals) gave their views, as discussed below.

12.4.1 Respondents' views

Respondents noted the wealth of expertise and relevant experience of accredited community based restorative justice organisations, which placed them in a strong position to contribute to the effective delivery of adult restorative justice for hate crime. One respondent suggested that the involvement of community based organisations was particularly important in Northern Ireland where levels of trust and confidence in the police and criminal justice system to tackle hate crime are low. Another view was that such organisations should have a '*limited role, as appropriate funding and accountability should be directed to the established agency*' (Law Society of Northern Ireland).

Regarding the specific role that such organisations might take, the following key suggestions were made:

- To work alongside, in partnership with, or in an advisory role to a formal justice system agency.
- To inform and support the development and design of any new model.
- To take responsibility for the delivery of community restorative interventions, under the umbrella of a formal agency.
- To lead restorative justice practice in the community, ensure community engagement and that the specific needs of victims (protected groups) are met.

Respondents recommended that statutory backing of restorative justice should be introduced as a component of the judicial process, rather than as a separate element. One respondent also noted that while the involvement of community-based organisations would be of value, the appointment of a lead formal justice agency was imperative for public confidence and to ensure transparency. Individual respondents called for a collaborative approach, which should be co-designed' and 'not tendered'.

12.5 Question 58: Do you consider diversion from prosecution is an appropriate method of dealing with low level hate crimes as per the practice in Scotland?

31 respondents answered the tick-box part of question 58. As shown in table 12.5, a majority of these respondents (84%) considered that diversion from prosecution is an appropriate method of dealing with low level hate crimes as per the practice in Scotland. Support was particularly high (94%) among organisational respondents.

Table 12.5

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	16	94%	10	71%	26	84%
No	1	6%	4	29%	5	16%
Total	**17**	**100%**	**14**	**100%**	**31**	**100%**

34 respondents (24 organisations and 10 individuals) made comments in response to question 58, as discussed below.

12.5.1 Views of those who agreed diversion from prosecution is an appropriate method of dealing with low level hate crimes

Respondents who answered positively, associated diversion and restorative justice schemes with a range of benefits, as follows:

- It constitutes an effective educational tool to support rehabilitation, address the root causes of offending behaviour and reduce the risk of re-offending. One respondent, with direct experience in the delivery of restorative programmes, reported better outcomes for participating offenders.

- The use of restorative programmes centres on the experience of the victim and gives victims an opportunity to articulate the harm caused by their experience of hate crime.

- Such an approach would enable the prosecution service to focus on more severe hate crime cases.

- Particularly for first time offenders, diversion offers an opportunity for both reparation and exit from the criminal justice system at the earliest possible stage.

Respondents noted some caveats to their support. Some suggested that victims should have the option to choose, while others thought that decisions to use diversion should be taken on a 'case-by-case' basis. It was also suggested that the 'level' of the crime should

not be the sole determining factor in the application of such an approach. One respondent considered that, in cases involving perpetrators who hold deeply ingrained beliefs, diversion may not be appropriate regardless of the 'level' of the crime. This respondent also stressed the importance of taking account of victims' perspective in determining whether a crime qualifies as 'low level':

> *….each victim will have their own experience and identifying their trauma as 'low level' may serve to further traumatise some victims. The normal assessment of whether a crime is 'high' or 'low' level ceases to reasonably apply.* (Victim Support NI)

Respondents also qualified their support with a number of criteria and conditions that should be met in the use of diversion and restorative justice:

- Provision of clear guidelines on the threshold for diversion. These should take into consideration emotional harm caused by hate crime.

- Appropriate safeguards, risk assessments and support structures for victims should be built into the system, with voluntary withdrawal an option for victims at any stage in the process.

- As per the Scottish system, should the victim or perpetrator decide at any stage of the process that they do not wish to engage, the matter should be referred back to the courts.

- Provision of training for professionals in the criminal justice system, by community organisations working with protected groups, to ensure understanding of the power dynamics between victims and perpetrators.

Other general points were that the use of diversion and restorative schemes should be proportionate and should be delivered in a way that does not lead to certain types of crime viewed as 'acceptable' by potential perpetrators and/or have the effect of helping individuals evade justice. The design and implementation of such an approach should draw on international best practice.

12.5.2 Relatively few comments were made by those who **did not agree** with the use of diversion to deal with low hate level crime. The main reason given was that prosecution should be required for all crimes.

13. Victims (Questions 59 - 65)

It should be noted that there was considerable overlap in the answers given to questions contained within this chapter, particularly questions 60, 61, 62 and 63.

13.1 Question 59: Do you have any views as to how levels of under-reporting might be improved?

This question asked for comments only and was answered by 43 respondents (35 organisations and 8 individuals).

There was strong consensus among respondents who answered this question that under-reporting of hate-crime in Northern Ireland was a significant issue. In order to identify effective solutions, it was suggested that greater knowledge and understanding of the barriers to reporting is required, through in-depth research on this issue in a Northern Ireland context.

Respondents identified a number of barriers to reporting in their answers, including:

- Lack of trust in the Police Service of Northern Ireland (PSNI) and in some areas a reluctance to be seen to engage with them. A few respondents (third sector organisations) expressed specific concerns about the response to hate crime by the PSNI. Issues highlighted included discriminatory attitudes, such as transphobia, and inadequate recording/unsatisfactory response, when crimes are reported by victims.

- General lack of knowledge and awareness of hate crime legislation.

- Lack of confidence in the criminal justice system, including the perception that complaints will not be taken seriously/dealt with effectively and that prosecution/conviction is unlikely.

- Fear of further victimisation, violence or attacks on property.

- Concerns about expenses that may be incurred during the legal process.

- Geographical barriers, such as distance from an effective PSNI response, particularly in rural communities.

- Barriers specific to some groups, including language barriers and insecure immigration status.

Respondents stressed that legislation alone was insufficient to tackle under-reporting and called for a multi-agency approach to work in conjunction with the criminal justice system. Specific suggestions to improve levels of reporting included:

- **Training, education and capacity building,** across the criminal justice system, community organisations, schools and the wider public. This should focus on improving understanding and knowledge of hate crime, the dynamics involved, support mechanisms available, and how to report. Some suggested that there should be increased training provision to those working in the criminal justice system in how to deal with and take statements from traumatised people, and ongoing training for all first responding police officers.

- **The creation of robust legislation** that can be effectively operationalised to address all forms of hate crimes. New hate crime laws and policies convey a symbolic message that hate crime is unacceptable, however, communities must also be aware of convictions to be persuaded that the reporting of hate crime is worthwhile.

- **A wide range of accessible reporting mechanisms.** Specific suggestions included the introduction of a multi-agency app, the development of which should be undertaken in collaboration with civil society organisations who represent/advocate for protected groups. Further investment in third party reporting mechanisms was considered essential, and it was suggested that learning from successful third-party schemes in other areas would help to improve levels of reporting.

  One respondent called for measures to improve accessibility of reporting, particularly for victims with English as an additional language. Related to this, it was suggested that steps to increase ethnic minority representation among police and criminal justice staff would be helpful.

- **Media campaign** to raise awareness of the updated legislation and the work being done to tackle hate crime more generally**.** Respondents also suggested that the media could play an important role in raising awareness of the impact of the legislation by reporting on successful convictions.

- **Partnership and collaborative working** will help to ensure that victims have the necessary information and support to report hate crimes. Community organisations may be able to identify specific reasons for under-reporting and make recommendations for actions that can be taken to increase the confidence of victims.

- **The implementation of policy measures,** including the introduction of a justice communications and engagement strategy to tackle hate crime. This strategy should aim to build greater awareness and understanding of work being done by justice agencies and to encourage engagement with minority groups. One respondent (individual) suggested that a 'volunteerism in policing strategy' should be considered as a cost effective way of adding significant resources to measures to address under reporting.

- **Better support mechanisms** for victims, including an increased number of full-time advocates and greater use of special measures by the PSNI and the Public Prosecution Service to make victims feel more supported in criminal justice

environments.

- **Relationship building** between specific communities and enforcement agencies, with a view to building trust in the criminal justice system. The PSNI should continue its work on improving confidence within communities so that those who have been victimised trust their experience will be responded to and taken seriously if reported. The importance of preventing false expectations on the part of victims was also noted.

13.2 Question 60: Do you consider that the Hate Crime Advocacy Scheme is valuable in encouraging the reporting of hate crime?

30 respondents answered the tick-box part of question 60. As shown in table 13.2, a majority of these respondents (73%) considered the Hate Crime Advocacy Scheme to be of value in encouraging the reporting of hate crime. However, while a majority of organisations answered positively (89%), a minority of individuals (45%) considered the Scheme to be of value in encouraging the reporting of hate crime.

Table 13.2

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	17	89%	5	45%	22	73%
No	2	11%	6	55%	8	27%
Total	**19**	**100%**	**11**	**100%**	**30**	**100%**

34 respondents (25 organisations and 9 individuals) made comments in response to question 60. These are discussed below.

13.2.1 Views of those who <u>agreed</u> that the Hate Crime Advocacy Scheme is valuable in encouraging the reporting of hate crime

Many respondents agreed that the Hate Crime Advocacy Scheme is an invaluable resource, particularly in terms of the reporting of hate crime. Provision of this service by community organisations was viewed as encouraging engagement by those who might otherwise be reluctant to report due to a lack of confidence in the police. The scheme was viewed as an essential source of support to victims, and community organisations were considered well placed to deliver this, particularly where there are existing relationships with protected groups. Respondents noted that advocates within these organisations can help victims to understand reporting systems and guide them through the process as required. A few respondents (organisations) noted that the Advocacy Scheme had led to reporting by victims that they did not consider would have otherwise taken place.

One respondent (organisation) considered the current scheme as ineffective in meeting the specific and complex needs of migrants. This respondent reported a range of issues faced by refugee victims, in particular, including a lack of awareness of the hate crime advocacy service with a specialist race advocate, an inability to access the service due to language and communication barriers, and a reluctance to engage because of cultural insensitivity issues in service provision. As such, it was argued that significant improvements were

needed to ensure the Scheme effectively meets the needs of victims from ethnic and linguistic minority groups.

13.2.2 Views of those who did not agree that the Hate Crime Advocacy Scheme is valuable in encouraging the reporting of hate crime

A minority of respondents did not consider the Hate Crime Advocacy Scheme as valuable in terms of encouraging the reporting of hate crime. One respondent (organisation) noted the 'reactive' nature of the scheme, pointing out that its main remit is to keep victims on-board with the criminal justice process, rather than to proactively encourage reporting. As such, it was argued that despite being operational for a number of years, *'levels of reporting have not significantly increased over that time'* (Police Service of Northern Ireland). Others, argued that further investigation was needed to determine whether under-reporting was in fact an issue, and more generally, that the scheme did not constitute an appropriate use of public funds.

There was general agreement (across both 'for and 'against' groups) that the Scheme requires further improvement, in order to improve levels of reporting and ensure more victims are supported through the criminal justice process. Some respondents made specific recommendations, such as:

> *…… placing the right to advocacy on a statutory footing, though such a provision would need to have the flexibility to allow a service to evolve to meet victim needs on an evidence-driven basis.* (Equality Commission for Northern Ireland)

> *…to review the role and ownership of the scheme, to explore a wider cross departmental ownership and funding arrangements, as it is evident through the lifetime of the scheme to date that needs of minority communities are beyond criminal justice issues.* (Police Service Northern Ireland)

> *… that it be expanded in scope and placed on a permanent footing with specialist advocates appointed to support victims from each of the particular characteristics covered in the hate crime legislation and across all parts of NI, especially in rural areas where victims can feel especially isolated.* (Northern Ireland Human Rights Commission)

In addition, respondents suggested a number of specific actions that should be taken to improve/enhance the service, including:

- Continued evaluation of the Scheme, including assessment of the resources and development needed to improve engagement and support provided to victims.

- Additional financial investment to ensure sustainability of services provided and enhance the capacity for more pro-active work to be undertaken.

- Significant medium to long term investment in education and training for hate crime advocates and PSNI and a focus on relationship building/partnership working between stakeholders.

- An education campaign to highlight the purpose of the Scheme and ensure awareness of specialised information, advice and support services available to victims of hate crime.

Suggestions for improvements to the scheme will be discussed in more detail at question 62.

13.3 Question 61: Do you consider that the Hate Crime Advocacy Scheme is valuable in supporting victims of hate crime through the criminal justice process?

26 respondents answered the tick-box part of question 61. As shown in Table 13.3, a majority of these respondents (81%) considered that the Hate Crime Advocacy Scheme is valuable in supporting victims of hate crime through the criminal justice process. Support was more prevalent among organisations (89%) than individuals (63%).

Table 13.3

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	16	89%	5	63%	21	81%
No	2	11%	3	37%	5	19%
Total	**18**	**100%**	**8**	**100%**	**26**	**100%**

29 respondents (21 organisations and 8 individuals) made comments in response to question 61. These are discussed below.

13.3.1 Those who '**agreed'** viewed support provided to hate crime victims through the Hate Crime Advocacy Scheme as essential, particularly given the complexity of the justice system. Support was considered vital for '*all victims'*, but especially those facing language or other barriers. Without adequate support, there was a substantial risk that individuals would choose not to continue with the process, which, in turn, would impact the prospect of cases going to trial:

> *Victims are often afraid of facing their perpetrator in the community, and can be afraid to report a hate crime or incident, or follow through with criminal justice processes for that reason. Having an advocate to guide them through the process and respond to any fears they may have may be the difference between seeking justice and withdrawing a complaint.* (Victim Support NI)

Respondents also considered the Scheme to be of importance in terms of enhancing public confidence in the criminal justice system and better outcomes for victims overall.

The specific nature of support provided by advocates was highlighted by the Public Prosecution Service, who stated that:

> *Acting as intermediaries on their behalf, the advocate can make inquiries and obtain updates on the victim's case, as well as raising any questions they may have of police. They also provide information and support for victims giving evidence in court. The service is invaluable to victims of hate crime who are often vulnerable and frightened.* (Public Prosecution Service)

However, this respondent (and individual respondents) noted that one criticism of the Scheme is that it is subject to inadequate resources to cope with demand. Related to this point, another respondent (organisation) highlighted what was perceived as an overall shortage of personnel, leading to untenable workloads faced by advocates, which in turn undermines the quality of service provided to victims and capacity for outreach work.

Some respondents (individuals and organisations) also suggested potential improvements to the Scheme – these will be discussed at Q62.

13.3.2 A minority of respondents **did not** consider the Hate Crime Advocacy Scheme to be of value in supporting victims of hate crime through the criminal justice process. Few comments of relevance were provided, however, one respondent did suggest that the Scheme would represent greater value if victims were referred on to other projects/specialists.

13.4 Question 62: How might the current Hate Crime Advocacy Scheme be improved?

This question asked respondents for comments only and was answered by 30 respondents (24 organisations and 6 individuals).

13.4.1 Respondents' views

Respondents were asked to comment on how the current Hate Crime Advocacy Scheme might be improved. Key suggestions for improvement are discussed below.

- **Permanent funding/more sustainable funding model:** a common suggestion was that improvement would be attained through the provision of a more sustainable model of funding. The current funding approach was associated with various difficulties, related to forward planning, effective service delivery and staff retention. Some respondents suggested that permanent or multi-year sustainable funding would lead to improvements, including enhanced staff retention (particularly advocates) due to greater job security. Increased financial resources would enable the creation of additional advocate posts as required across the community sector, as well as to enhance quality of service provision/victim support, long-term planning, and work within an Outcomes Based Accountability framework.

- **The appointment of more advocates:** respondents considered that, in order to address gaps in reporting, the overall number of advocates in post should be increased. Staffing, generally, should reflect the cultural and linguistic diversity of the racial/ethnic/religious groups experiencing hate crime. A few respondents suggested an urgent need for an increased number of race advocates, including a dedicated advocate for the Muslim community. Another respondent called for the appointment of a trans community advocate, which it was argued would help to address the issue of under-reporting among this group.

  Several organisational respondents noted that the addition of any new protected characteristics to hate crime legislation should be reflected in the recruitment of additional advocates, preferably based within community organisations with experience of supporting the relevant protected groups. More generally, the Scheme should seek to involve and engage with new organisations with relevant expertise in the provision of support to individuals from any newly added protected groups.

  Additional suggestions were for wider geographical coverage of advocacy support provision (including rural areas), for the appointment of advocates on a permanent basis, and for the inclusion of representatives from faith-based organisations.
- **Measures to raise awareness and accessibility of the Scheme:** respondents highlighted the need for greater awareness of the Scheme, which would be achieved through public awareness campaigns, advertising, the provisions of one-stop community hubs and resources in multiple languages. This was important to ensure that victims, including those from any new protected groups, had knowledge of and were able to access the support available. One respondent (organisation), called for pro-active engagement with community groups as part of any steps to raise awareness. Another respondent (organisation) noted that the necessary steps

should be taken to ensure accessibility for all groups, including special needs, mental capacity, age-appropriateness, gendered and other particular characteristics.

Additionally, it was suggested that steps (such as additional training provision) should be taken to ensure police officers refer all potential hate crime victims to the Scheme.

- **Expand and/or restructure delivery of the scheme**: Respondents highlighted the scheme's narrow criminal justice focus and called for a review of the role and ownership of the scheme. The review should explore a wider cross-departmental ownership and funding arrangements, with a view to meeting the needs of victims (which are not limited to criminal justice issues) more effectively. One respondent (organisation) suggested that, as an alternative to a standalone scheme, consideration could be given to a delivery model involving Victim Support and/or the Victim and Witness Care Scheme, whereby the service delivery model includes a dedicated resource for victims of hate crimes. This would help to ensure consistency of approach and constitute a more sustainable delivery method. More generally, wider collaborative and partnership working was called for as a means of improving support for victims.
  A few respondents suggested that the Scheme should be placed on a statutory footing. This would improve consistency of service provision and enable greater joined up working across advocacy services for victims who have faced more than one form of prejudice.

  Another specific suggestion, made by an individual respondent, was the implementation of Volunteerism in Policing Strategy by the Northern Ireland Policing Board/Police Service of Northern Ireland (similar to the Citizens in Policing National Strategy in England). This was viewed as a low cost option that would generate significant resource to tackle under reporting of hate crime, community engagement and create additional capacity to address other areas of policing not related to hate crime.

  In terms of the delivery of support, a few respondents (individuals) suggested that advocates should be given a more generic role, involving the provision of support to individuals from all protected groups, rather than tailored support (to specific groups) as is currently the case.

- **Evaluation of the scheme with service users** would be helpful to identify how the Scheme could be improved. Additionally, clear demonstrable outcomes should be established.

13.5 Question 63: Do you consider that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis as opposed to the present annual rolling contract model?

27 respondents answered the tick-box part of question 63. As shown in Table 13.5, a majority of these respondents (81%) considered that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis as opposed to the present annual rolling contract model. There was particularly strong support (94%) among organisational respondents, while 60% of individuals answered positively.

Table 13.5

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	16	94%	6	60%	22	81%
No	1	6%	4	40%	5	19%
Total	**17**	**100%**	**10**	**100%**	**27**	**100%**

28 respondents (21 organisations and 7 individuals) made comments in response to question 63. These are discussed below.

13.5.1 Respondents who **agreed** that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis considered this essential to ensure the Scheme is able to reach its full potential. It would also contribute to effective implementation of any new hate crime legislation and help to ensure redress for victims. Additionally, permanent funding would bring about the following benefits:

- It would enable long-term strategic planning and development to take place.
- It would enable the provision of full time/permanent advocacy roles. This would have a positive impact on staff recruitment and retention, in turn, contributing to retention of skills and expertise within the Scheme.
- Overall, it would lead to improved quality of service provision and help to ensure consistency of advocacy support for victims.

Some respondents (organisations) suggested that the level of funding should be increased substantially to take account of new protected characteristics.

It was also stressed that funding provision should be protected from future reductions in response to decreased budgets/austerity measures. One respondent noted their desire to

'*see the New Decade New Approach commitment to multi-year budgets honoured in order to allow long-term planning'* (Democratic Unionist Party)

A few individual respondents caveated their support with the requirement for a full review of '*evidence of need'*.

13.5.2 A minority of respondents **did not agree** that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis. Few gave reasons for their opposition, however lack of knowledge of the Scheme itself or of any specific problems with the current funding model were noted.

13.6 Question 64: Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?

29 respondents answered the tick-box part of question 64. As shown in Table 13.6, a majority of respondents (83%) considered that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted.

Table 13.6

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	16	89%	8	73%	24	83%
No	2	11%	3	27%	5	17%
Total	**18**	**100%**	**11**	**100%**	**29**	**100%**

28 respondents (20 organisations and 8 individuals) made comments in response to question 64.

Respondents who answered 'yes' to question 64 were directed to question 65, which asked:

13.7 Question 65: In what circumstances should a restriction on press reporting of the identity of the complainant in a hate crime be permissible?

31 respondents (24 organisations and 7 respondents) made comments in response to question 65.

Given the significant overlap in narrative comments provided by respondents, **supportive** comments for both questions will be presented together. The views of those who did not agree are first discussed below:

13.7.1: Views of those who <u>did not agree</u> that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted:

Those **in opposition** offered various reasons for their views. One respondent (The Bar of Northern Ireland) pointed out that the current system already made provisions for restrictions on press reporting to be considered by a judge on a case-by-case basis. This respondent highlighted the importance of '*open justice*' and suggested that, given the role of the media in conveying information to the public about court proceedings, restrictions should not generally be permissible.

A few individual respondents questioned the need for such protections in formal prosecution cases. One of these respondents did note however that *'press organisations should be held accountable by law if any person, victim or offender (not found guilty) is maligned or harmed in any way because of inaccurate media reports'*. (Individual)

Another respondent (organisation) suggested that, if such an approach is taken, consideration must also be given to protecting the identity of the defendant.

13.7.2 Views of those who agreed that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted (in response to Q64 and Q65)

Respondents gave the following main reasons for their views:

- This approach is consistent with victim protection. Identification can place victims (and their families) at significant risk of further hate incidents, reprisals, re-traumatisation and public 'outing' (in cases involving LGBT individuals).
- It could help to address the issue of under-reporting by giving victims more confidence to report offences.
- It could encourage complainants' participation in court proceedings.

Respondents made some suggestions regarding the specific circumstances and conditions under which press reporting restrictions might apply. Several respondents suggested that restrictions in some sectarian hate crime cases may be appropriate, particularly if there are concerns about reprisals. More generally, it was argued that restrictions should apply in circumstances '*where public reporting could result in the withdrawal of a complaint on the grounds of fear of the consequences of the case being reported in the press'* (Victim Support NI).

One respondent was of the view that there should be '*express provision'* in hate crime legislation for courts to restrict reporting in some circumstances. Such provision might take into account:

> *….. whether the disclosure of a person's identity will make the complainant or witness, due to an equality characteristic(s), more susceptible to victimisation or retaliation, or result in that characteristic, such as sexual orientation, being made public without their permission.* (Equality Commission for Northern Ireland)

Some respondents argued that all victims should be able to request anonymity, while decisions about restrictions should be at a judge's discretion. One respondent (organisation) recommended that restrictions should be subject to two main criteria: (1) relevant statutory criteria are met and (2) the victim indicates their desire to restrict reporting. This respondent

also noted the distinction between a 'reporting restriction' and an 'order for anonymity', with the latter being subject to a much higher threshold.

A further assertion, made by an individual, was that press restrictions were particularly important in hate crime cases involving a low threshold of prosecution. This respondent offered the rationale that such cases risk '*criminalising innocent, law-abiding members of the public'* (Individual).

One respondent (Probation Board for Northern Ireland) recommended that media guidelines should be developed to inform decision-making, as has been the approach in other areas (e.g. reporting of cases of child sexual abuse). This would provide greater clarity and certainty for courts, complainants and the wider public, and help to increase the confidence of marginalised communities in the criminal justice system.

One respondent suggested further consultation, with victims, was required, to determine why anonymity is needed and the impact that this might have on reporting levels.

14. Legislation: Consolidation and Scrutiny (Questions 66 – 68)

14.1 Question 66: Do you believe that there is benefit in bringing all hate crime/hate speech legislation in NI together in one consolidated piece of legislation?

38 respondents answered the tick-box part of question 66. As shown in Table 14.1, a majority of respondents (79%) **agreed** that there is benefit in bringing all hate crime/hate speech legislation in NI together in one consolidated piece of legislation. Support was more prevalent among organisations (91%) than individuals (63%).

Table 14.1

	Organisations		**Individuals**		**Total**	
	n	%	n	%	n	%
Yes	20	91%	10	63%	30	79%
No	2	9%	6	37%	8	21%
Total	**22**	**100%**	**16**	**100%**	**38**	**100%**

41 respondents (26 organisations and 15 individuals) made comments, as discussed below.

14.1.1 Those who were **supportive** of the consolidation of hate crime legislation viewed the 'patchwork' nature of hate crime/hate speech legislation in Northern Ireland as problematic in a number of ways. Current laws were considered to be out-dated, under-utilised, and subject to significant gaps. It was further suggested that public understanding of current legislation is low, while there are also some difficulties with its implementation.

Against this context, many respondents viewed consolidation into a single piece of legislation as essential. Consolidation would constitute an opportunity for the legislation to address existing gaps and anomalies with the legislative framework, take account of learning from other jurisdictions and to be specifically tailored to the Northern Ireland context. Respondents considered it timely and appropriate to consolidate the legislation, particularly given the potential for amendments to the legislation as a result of the Review.

Respondents suggested that consolidation it would bring about a number of potential benefits:

- It would bring clarity to the overarching purpose of the legislation, as well as transparency and consistency of approach to the law.

- It would support a more streamlined and effective process for the judicial system and make this system more accessible to the public.

- It would help to raise public awareness and understanding of hate crime legislation and, related to this, strengthen public confidence in the judicial system.

14.1.2 A minority of respondents **did not agree** that there would be benefit in bringing all hate crime/hate speech legislation in NI together in one consolidated piece of legislation. Main reasons given were that consolidation is unnecessary and that greater emphasis should instead be placed on improving the legislation as it stands, through steps to clarify definitions, strengthen the tools available and address any shortfalls in the legislation. A few respondents reiterated concerns about freedom of expression and stressed that this should not be curtailed by any amendments to the legislation.

14.2 Question 67: Should any new legislation on hate crime be subject to post-legislative scrutiny?

37 respondents answered the tick-box part of question 67. As shown in Table 14.2, there was **unanimous agreement** among these respondents that any new legislation on hate crime should be subject to post-legislative scrutiny.

Table 14.2

	Organisations		Individuals		Total	
	n	%	n	%	n	%
Yes	21	100%	16	100%	37	100%
No	0	-	0	-	0	-
Total	**21**	**100%**	**16**	**100%**	**37**	**100%**

25 respondents (18 organisations and 7 individuals) made comments in response to question 67.

Respondents who answered 'yes' to question 67 were directed to Q68, which asked:

14.3 Question 68: In what way should post-legislative scrutiny be provided for?

39 respondents (25 organisations and 14 individuals) made comments in response to question 68.

Due to the considerable overlap in the narrative comments made in response to questions 67 and 68, the following section will discuss the results for these questions together.

Respondents who agreed that post-legislative scrutiny was appropriate, argued that this was essential to ensure the legislation's effective implementation and enforcement, and to identify any changes needed to improve the legislation. It would also allow for assessment of operational effectiveness and overall impact of the legislation.

Post-legislative scrutiny was also considered important to build and maintain the confidence of different stakeholders in the legislation:

> *It reinforces to all parties, victims as well as all aspects of the criminal justice system that this legislation is important and that it must work effectively. It also reinforces the fact that if it is not working as it should that this will be identified and changes will be made.* (Women's Regional Consortium)

A few respondents called for any future evaluations to take account of on-going hate crime trends/statistics. One respondent argued that there should be evaluation '*in terms of provision for freedom of speech, expression and religion'* (individual).

In terms of timescale of review, the most common suggestions were that this was appropriate after a period of three or five years, with periodic reviews thereafter. Respondents noted the importance of allowing sufficient time for the legislation to 'bed in' prior to its review, to ensure public understanding and so that any related policy changes could be implemented. One respondent (organisation) pointed out that a five-year review period was in line with the approach in other areas (e.g. gender pay reporting regulations in Great Britain).

There were differing views about who should take responsibility for post-legislative scrutiny, both in terms of formal review and on-going monitoring. Recommendations for formal review included: through a judge-led follow up review, by the Department of Justice; an Assembly Committee, such as the Justice Committee of the N I Assembly; or by an independent body such as Her Majesty's Inspectorate of Constabularies and/or Criminal Justice Inspectorate NI. One respondent (organisation) suggested that more than one independent body should be involved in the process of legislative scrutiny in order to ensure balance. Specific suggestions from individual respondents included '*qualitative research by independent cross-section of public volunteers'* and '*Under the authority and scrutiny of the UN Courts of Justice by the terms of the UN Bill of Human Rights'*.

A few respondents made specific suggestions for the remit of a formal review. One respondent recommended:

> *…a full comparative assessment (examining if the changes have had the intended effect, if public confidence and satisfaction in the system has improved, if victims satisfaction levels have been improved and ultimately if there has been any resultant change in hate crime statistics).*(Church of Ireland Church and Society Commission)

Another recommended consideration of the following:

- an overall assessment of the impact and effectiveness of the legislative changes, so as to assess whether the policy objectives of the legislation are being met;
- the merits or otherwise of including additional protected equality grounds within the protection of the hate crime legislation;
- any review arising out of the implementation of hate crime legislation in GB;
- wider developments, for example, the impact of Brexit.

(Equality Commission for Northern Ireland)

Additionally, respondents suggested that a specific role for monitoring the legislation should be given to relevant agencies. Again, there were differing views about which agencies would be best placed to take responsibility for this:

> *They [PSNI], along with the Policing Board, PPS, Courts and Tribunal Service, Probation Board, the Criminal Justice Inspection, the Department of Justice and the Assembly will have a crucial role in closely monitoring post-legislative developments*. (Sinn Féin)

Alternatively, it was argued that the agency responsible should be independent of the judicial process:

> *As such, the Equality Commission for Northern Ireland or the Human Rights Commission for Northern Ireland might be relevant, particularly keeping in mind the link between hate crime legislation and wider equality legislation.* (Northern Ireland Women's European Platform)

One respondent made specific suggestions regarding the process of monitoring, suggesting that there should be,

> *…an obligation to record at every stage of the process and for these trends to be reported on, on a cross-agency basis – when reported to police, when files are forwarded to PPS, when decisions to prosecute /not to prosecute are made (and reasons why), when the hate element is dropped from a case and why, and where a sentence was aggravated / enhanced due to hate element.* (Victim Support NI)

Respondents also stressed the importance of involving community and voluntary sector organisations in the process of scrutiny. Some advocated involvement of working groups already formed to support the review process, as well as other voluntary/community sector organisations that provide services to victims and marginalised groups. One respondent (Police Service of Northern Ireland) recommended that there should be representation from the Victims and Witness Unit, as well as those who have been through the justice process as victims and offenders. Any evidence gathered as part of this process should be made accessible to all groups.

Finally, respondents argued that training should be put in place to ensure awareness of any new hate crime legislation and upskilling of all relevant professionals throughout the criminal justice process.

Appendix 1: Organisational Respondents (58 in total)

Third Sector Organisations (39)

Age NI

Belfast Islamic Centre

Belfast Jewish Community

Caleb Foundation

CARE NI

Church of Ireland Church and Society Commission

Committee on the Administration of Justice

Equi-Law UK

Evangelical Alliance

Evangelical Presbyterian Church (Public Morals Committee)

Evangelical Protestant Society

Focus: the Identity Trust

Grand Orange Lodge of Ireland

HERe NI

Hourglass NI

Iveagh Presbytery of the Presbyterian Church in Ireland

Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)

Northern Ireland Catholic Council on Social Affairs

Northern Ireland Council for Racial Equality

Northern Ireland Humanists and Faith to Faithless

Northern Ireland Women's European Platform

Participation and the Practice of Rights

Presbyterian Church in Ireland

Presbytery of Tyrone

Raise Your Voice Project

Reformed Presbyterian Church of Ireland (Public Morals Committee)

Rural Community Network

South Belfast Round Table

The Christian Institute

The Rainbow Project

Trans Pride NI

TransgenderNI

Ulster Human Rights Watch

UNISON Northern Ireland

Victim Support NI

Women's Aid Federation Northern Ireland

Women's Policy Group NI

Women's Regional Consortium

Women's Resource and Development Agency

Local government, non-departmental public bodies and other public sector organisations (8)

Belfast City Council

Commissioner for Older People for Northern Ireland

Equality Commission for Northern Ireland

Lisburn and Castlereagh City Council

Mid and East Antrim Borough Council

Northern Ireland Commissioner for Children and Young People

Northern Ireland Housing Executive

Northern Ireland Human Rights Commission

Statutory Bodies (5)

Department of Justice

Northern Ireland Policing Board

Probation Board for Northern Ireland

Police Service of Northern Ireland

Public Prosecution Service Northern Ireland

Legal, justice and law enforcement (3)

National Police Chiefs Council

The Bar of Northern Ireland

The Law Society of Northern Ireland

Other organisations (3)

Democratic Unionist Party

Sinn Féin

Starfish Consulting

Appendix 2: Response rates for consultation questions

Definition and Justification	**Total responses**	**% of total (247)**
Q1: What do you consider to be hate crime?	93	38%
Q2: Do you consider that the working definition of a hate crime discussed in this chapter adequately covers what should be regarded as hate crime by the law of Northern Ireland? [Yes/No]	57	23%
Please give reasons for your answer	64	25%
Q3: Should we have specific hate crime legislation in Northern Ireland? [Yes/No]	156	63%
Please give reasons for your answer	182	74%
Q4: Should hate crimes be punished more severely than non-hate crimes? [Yes/No]	81	33%
Please give reasons for your answer	80	32%

Operation of the Criminal Justice (No. 2) (Northern Ireland) Order 2004		
Q5: Do you think the enhanced sentencing model set out in the Criminal Justice (No. 2) (Northern Ireland) Order 2004 should continue to be the core method of prosecuting hate crimes in Northern Ireland? [Yes/No]	40	16%
Please give reasons for your answer	40	16%
Q6: If you think the enhanced sentencing model should continue to be the core method of prosecuting hate crimes in Northern Ireland, do you think it requires amendment? [Yes/No]	11	4%
Please give reasons for your answer	13	5%

Operation of the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 in England and Wales and the model in Scotland		
Q7: Do you think the statutory aggravation model as used in England and Wales and Scotland should be introduced into Northern Ireland law? [Yes/No]	42	17%
Please give reasons for your answer	34	14%
Q8: If you think that the statutory aggravation model used in England and Wales and Scotland should be introduced into Northern Ireland law, should it be introduced as well as or instead of the enhanced sentencing model? Please give reasons for your answer.	29	12%
Q9: Irrespective of whichever model is used (aggravated offences or enhanced sentencing), should there be specific sentencing guidelines for hate crimes in Northern Ireland? [Yes/No]	43	17%
Please give reasons for your answer	47	19%

Q10: Irrespective of which model is used (aggravated offences or enhanced sentencing provisions), do you think that courts should be required to state in open court the extent to which the aggravation altered the length of sentence? [Yes/No]	42	17%
Please give reasons for your answer	43	17%

Protected Groups - should additional characteristics be added?

Q11: Should gender and gender identity be included as protected characteristics in NI hate crime legislation? [Yes/No]	168	68%
Please give reasons for your answer.	173	70%
Q12: Should Transgender identity be included as a protected characteristic in NI hate crime legislation? [Yes/No]	167	68%
Please give reasons for your answer.	166	67%
Q13: Should Intersex status be included as a protected characteristic in Northern Ireland hate crime legislation? [Yes/No]	65	26%
Please give reasons for your answer.	62	25%
Q14: Should age be included as a protected characteristic in Northern Ireland hate crime legislation? [Yes/No]	52	21%
Please give reasons for your answer.	64	26%
Q15: Should a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability be introduced into Northern Ireland hate crime legislation? [Yes/No]	32	13%
Please give reasons for your answer.	48	19%
Q16: Should homeless status be included as a protected characteristic in Northern Ireland hate crime legislation? [Yes/No]	49	20%
Please give reasons for your answer.	41	17%
Q17: Do you consider any other new characteristics should be protected in NI hate crime legislation other than those mentioned above? [Yes/No]	52	21%
Please give reasons for your answer.	52	21%
Q18: Do you consider that intersectionality is an important factor to be taken into consideration in any new hate crime legislation? [Yes/No]	35	14%
Please give reasons for your answer.	37	15%
Q19: If you consider intersectionality to be an important factor to be taken into consideration in any new hate crime legislation, what is the best way to achieve this? Please give reasons for your answer.	28	11%

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Q20: If the enhanced sentencing model remains as the core provision for dealing with hate crime in Northern Ireland, should it be amended to provide for the recording of convictions on the criminal record viewer? [Yes/No]	35	14%
Please give reasons for your answer.	26	10%

Q21: Do you believe there is a need to introduce a statutory aggravation model of hate crime law similar to that which exists in Scotland and in England and Wales under the Crime and Disorder Act 1998? [Yes/No]	39	16%
Please give reasons for your answer.	39	16%
Q22: In dealing with an aggravated offence, should the court state on conviction that the offence was aggravated? [Yes/No]	33	13%
Please give reasons for your answer.	27	11%
Q23: In dealing with an aggravated offence, should the court record the conviction in a way that shows that the offence was aggravated? [Yes/No]	31	12%
Please give reasons for your answer.	29	12%
Q24: In dealing with an aggravated offence, should the court take the aggravation into account in determining the appropriate sentence? [Yes/No]	30	12%
Please give reasons for your answer.	25	10%
Q25 (Part 1): In dealing with an aggravated offence, should the court state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference? [Yes/No]	31	12%
Please give reasons for your answer.	24	10%
Q25 (Part 2): In dealing with an aggravated offence, should the court otherwise state the reasons for there being no such difference? [Yes/No]	23	9%
Please give reasons for your answer.	19	8%
Q26: Do you consider that aggravated offences should be recorded as such in criminal justice records so that statutory agencies and others are aware of the hostility element of an individual's criminal history? [Yes/No]	39	16%
Please give reasons for your answer.	32	13%

Adequacy of the Current Thresholds for Proving the Aggravation of Prejudice

Q27: If any new hate crime law in NI follows the statutory aggravation model as in Section 28(1) of the CDA 1998, do you consider that the current thresholds of (a) demonstration of hostility, and (b) motivation are appropriate or should there be a third threshold: the "by reason of" threshold? [Yes/No]	22	9%
Please give reasons for your answer.	35	14%
Q28: If you consider that there should be a third threshold, do you consider that this should be in addition to the two thresholds of "demonstration of hostility" and "motivation", or should there be a third threshold to replace the motivation threshold? [Yes/No]	15	6%

Please give reasons for your answer.	26	10%
Q29: Do you consider that there should be a statutory definition of the term “hostility”? [Yes/No]	34	14%
Please give reasons for your answer.	36	15%
Q30: Whether or not you believe that the term “hostility” should be defined or not, do you consider that this term should be expanded to include other terms such as “bias, prejudice, bigotry or contempt”? [Yes/No]	36	15%
Please give reasons for your answer.	39	16%

Stirring Up Offences

Q31: Do you consider there is merit in adding equivalent provisions to Sections 4, 4A & 5 of the POA 1986 to the PO (NI) Order 1987? [Yes/No]	28	11%
Please give reasons for your answer.	30	12%
Q32: Should the dwelling defence under Article 9(3) of the PO (NI) Order 1987 be retained? [Yes/No]	25	10%
Please give reasons for your answer.	26	10%
Q33: Do you consider the requirement that the DPP gives consent to any prosecutions taken under Part III of the PO (NI) Order 1987 to be necessary and appropriate? [Yes/No]	31	12%
Please give reasons for your answer.	28	11%
Q34: Do you consider the term “hatred” as the appropriate test to use in the PO (NI) Order 1987? [Yes/No]	128	52%
Please give reasons for your answer.	157	64%
Q35: If gender, gender identity, age or other groups are included in the protected groups, should they also be included under the groups protected by the stirring up provisions in Pt III of the PO (NI) Order 1987? [Yes/No]	143	58%
Please give reasons for your answer.	168	68%
Q36: Should the defences of freedom of expression present in the POA 1986 for religion & sexual orientation be specifically added as defences to Pt III of the PO (NI) Order 1987? [Yes/No]	171	69%
Please give reasons for your answer.	166	67%
Q37: Should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the PO (NI) Order 1987 be retained in law or repealed? [Yes/No]	168	68%
Please give reasons for your answer.	158	64%
Q38: Under Article 9(1) of the PO (NI) order 1987, should the test remain referring to a person using “threatening, abusive or insulting words or behaviour or displaying any similar written material which is	168	68%

threatening, abusive or insulting" or should the words "abusive" or "insulting" be removed from the test for the commission of the offence? Please give reasons for your answer.		
Q39: If there are to be offences dealing with the stirring up of hatred against protected groups, do you consider that there needs to be any specific provision protecting freedom of expression? [Yes/No] Please give reasons for your answer.	165 162	67% 66%

Online Hate Speech

Q40: Should social media companies be compelled under legislation to remove offensive material posted online? [Yes/No] Please give reasons for your answer.	38 50	15% 20%
Q41: Are there lessons from the English & Welsh experience of the POA 1986 that may apply for NI? [Yes/No] Please give reasons for your answer.	31 33	12% 13%
Q42: Should the dwelling defence under Article 9(3) of the PO (NI) Order 1987 be amended/removed? [Yes/No] Please give reasons for your answer.	25 25	10% 10%
Q43: Should the term "publication" in the PO (NI) Order 1987 be amended to include "posting or uploading material online"? [Yes/No] Please give reasons for your answer.	34 32	14% 13%
Q44: Should there be an explicit defence of "private conversations" in the PO (NI) Order 1987 to uphold privacy protection? [Yes/No] Please give reasons for your answer.	32 30	13% 12%
Q45: Should gender, gender identity, age and other characteristics be included as protected characteristics under the PO (NI) Order 1987? [Yes/No] Please give reasons for your answer.	38 55	15% 22%
Q46: Should the Malicious Communications (NI) Order 1988 be adapted to deal with online behaviour? [Yes/No] Please give reasons for your answer.	35 34	14% 14%
Q47: Should the wording of the MCA 1988, the MC (NI) Order 1988 & the CA 2003 use terms such as "grossly offensive", "indecent" and "obscene"? [Yes/No] Please give reasons for your answer.	31 34	12% 14%
Q48: Are the offences under the MCA 1988, the MC (NI) Order 1988 & the CA 2003 too broadly drafted and require some modification to clarify and narrow their application? [Yes/No] Please give reasons for your answer.	26 28	10% 11%

Q49: Should online harm be part of a general law applying to hate crime? [Yes/No]	33	13%
Please give reasons for your answer.	38	15%
Q50: Is the current law contained in the MCA 1988, MC (NI) Order 1988 & the CA 2003 is sufficiently clear to protect freedom of expression? [Yes/No]	26	10%
Please give reasons for your answer.	30	12%

Sectarianism and Hate Crime Legislation in Northern Ireland

Q51: Would you support a specific reference to the term 'sectarian' within any new hate crime legislation? [Yes/No]	37	15%
Please give reasons for your answer.	39	16%
Q52: Should the list of indicators for sectarianism (i.e. religious belief and political opinion) be expanded? [Yes/No]	31	12%
Please give reasons for your answer.	35	14%

Removing Hate Expression from Public Space

Q53: Should the law relating to the duties of public authorities to intervene to tackle hate expression in public space be strengthened or further clarified? [Yes/No]	36	15%
Please give reasons for your answer.	42	17%

Restorative Justice

Q54: Should restorative justice be part of the criminal justice process in dealing with hate crime in NI? [Yes/No]	35	14%
Please give reasons for your answer.	43	17%
Q55: Should restorative justice schemes be placed on a statutory footing? [Yes/No]	31	12%
Please give reasons for your answer.	32	13%
Q56: Should there be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime? [Yes/No]	32	13%
Please give reasons for your answer.	27	11%
Q57: What role do you envisage for the accredited community based restorative justice organisations in the delivery of adult restorative justice for hate crime? Please give reasons for your answer.	31	12%
Please give reasons for your answer.		
Q58: Do you consider diversion from prosecution is an appropriate method of dealing with low level hate crimes as per the practice in Scotland? [Yes/No]	31	12%
Please give reasons for your answer.	34	14%

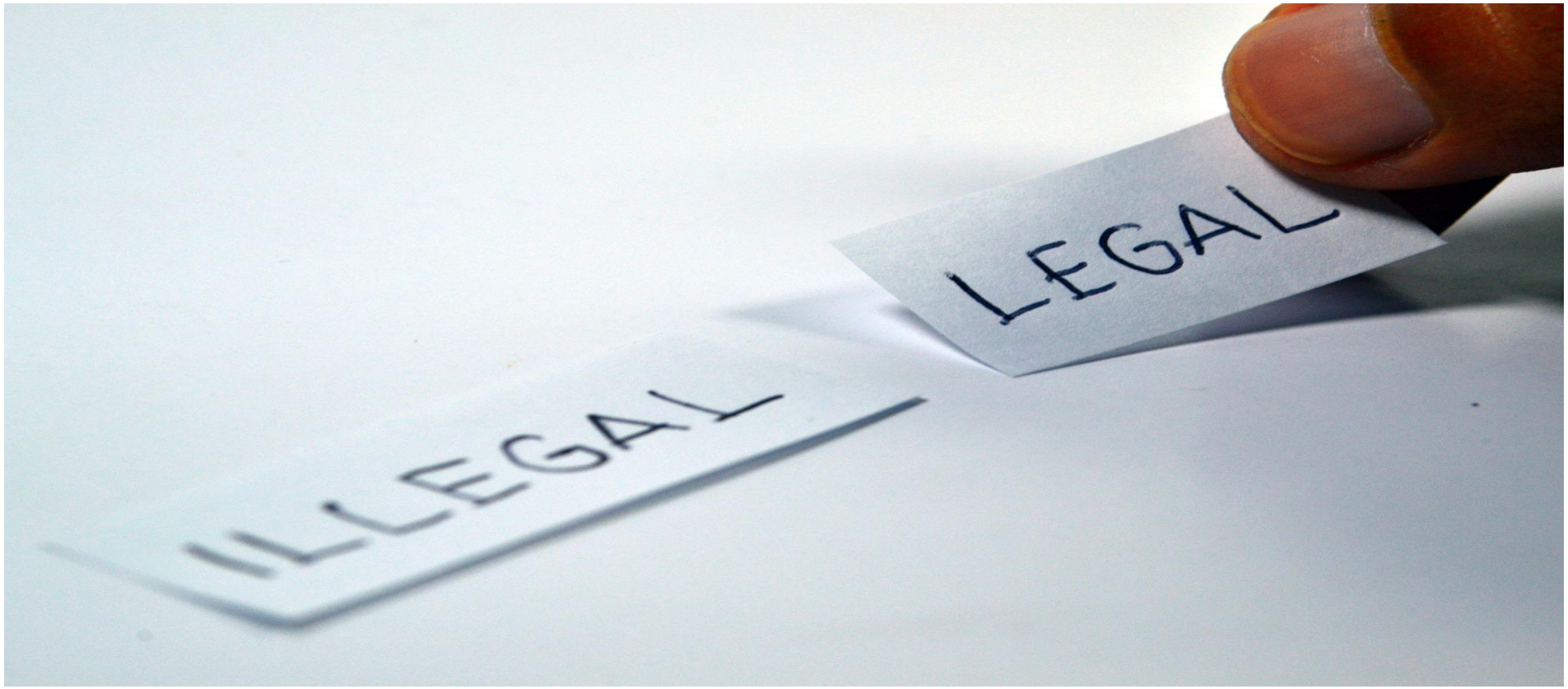
Victims

Q59: Do you have any views as to how levels of under-reporting might be improved?	43	17%
Q60: Do you consider that the Hate Crime Advocacy Scheme is valuable in encouraging the reporting of hate crime? [Yes/No] Please give reasons for your answer.	30 34	12% 14%
Q61: Do you consider that the Hate Crime Advocacy Scheme is valuable in supporting victims of hate crime through the criminal justice process? [Yes/No] Please give reasons for your answer.	26 29	10% 12%
Q62: How might the current Hate Crime Advocacy Scheme be improved? Please give reasons for your answer.	30	12%
Q63: Do you consider that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis as opposed to the present annual rolling contract model? [Yes/No] Please give reasons for your answer.	27 28	11% 11%
Q64: Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted? [Yes/No] Please give reasons for your answer.	29 28	12% 11%
Q65: In what circumstances should a restriction on press reporting of the identity of the complainant in a hate crime be permissible? Please give reasons for your answer.	31	12%

Legislation: Consolidation and Scrutiny

Q66: Do you believe that there is benefit in bringing all hate crime/hate speech legislation in NI together in one consolidated piece of legislation? [Yes/No] Please give reasons for your answer.	38 41	15% 17%
Q67: Should any new legislation on hate crime be subject to post-legislative scrutiny? [Yes/No] Please give reasons for your answer.	37 25	15% 10%
Q68: In what way should post-legislative scrutiny be provided for? Please give reasons for your answer.	39	16%

Summary of the data to the Online Hate Crime Survey prepared by the Northern Ireland Statistics and Research Agency



NISRA
Northern Ireland Statistics and Research Agency

HATE CRIME SURVEY SUMMARY DATA

MAY 2020

Department of Justice

Hate Crime Legislation Review

Hate Crime violates equality between members of society

Hate Crime normally falls into two main categories:

- *A criminal offence committed with a prejudice, hostile, or hateful motivation towards a victim*
- *An incitement offence where certain actions are intended, or likely to stir-up hatred or arouse fear*

The independent Hate Crime Legislation Review team, led by Judge Desmond Marrinan is working to:

- Define an agreed definition of Hate Crime
- Determine if the current enhanced sentencing approach in Northern Ireland is appropriate
- Review and if necessary expand the current protected categories of Hate Crime
- Examine and review the current legislative framework for incitement offences
- Identify any gaps in our current legal system and recommend improvements to guarantee everyone's human rights are protected
- Examine the potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending

The Hate Crime Survey was conducted from 3 January to 30 April 2020 contained 20 questions with additional opportunity for respondents to add comments.

Survey Questions

1. Question 1: Hate crimes have been defined as “acts of violence, hostility and intimidation directed towards people because of their identity or perceived difference”. Do you agree or disagree with this definition?
2. Question 2: Do you agree or disagree that a statutory definition for the term “hostility” should be included in any hate crime legislation?
3. Queston 3: Should the term "hostility" in legislation be expanded to include offences in relation to: bias, prejudice, bigotry, contempt, Other (please specify)?
4. Question 4: The Public Order (Northern Ireland) Order 1987 defines "hatred" as "hatred against a group of persons…defined by reference to religious belief, sexual orientation, disability, colour, race, nationality or ethnic or national origins". At a minimum "hatred" means intense dislike, enmity or animosity. In law, it is generally accepted that it is a much stronger term than words like "hostility " or "bias". As a consequence, prosecutions under the 1987 Order are very rare, as proving hatred is a very high bar. Do you agree or disagree that the term "hatred " is the appropriate test to use in the Public Order (Northern Ireland) Order 1987?
5. Question 5: Do you agree or disagree that – The term sectarian should be included in any new hate crime legislation? If included, Sectarianism should be defined in this legislation?
6. Question 6: The characteristics currently protected under hate crime law in Northern Ireland are "race, religion, sexual orientation and disability". The consultation document suggests additional categories be considered. Please indicate which of the following, if any, should be included as a protected characteristic in Northern Ireland hate crime legislation?
7. Question 7: It has been argued that hate crimes should be punished more severely than non-hate crimes. Do you agree, or disagree, with this argument?
8. Question 8: In Northern Ireland, a sentence may be enhanced (for example by a longer sentence or higher fine) if the offence was aggravated by hostility towards the victim’s disability, race, religion or sexual orientation. Research has shown there are relatively small numbers of cases where an enhanced sentence is given. This may be due, in part, to the lack of any requirement to record that a crime has been prosecuted and sentenced as a hate crime, or it may be that the hate crime element of an offence is frequently not considered or, if considered, does not result in an enhanced sentence. Do you agree or disagree that the enhanced sentencing model described above should continue to be the core method of prosecuting hate crimes in Northern Ireland?

Survey Questions

9. Questions 9: In England and Wales, if a person commits certain offences and, in so doing, demonstrates, or was motivated by hostility on the grounds of race or religion, the offence can be prosecuted as a specific racially or religiously aggravated offence punishable by a higher sentence. In Scotland, any offence may be aggravated by prejudice and prosecuted as such, in respect of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. Again, these are punishable by a higher sentence. In both jurisdictions the crime is recorded as a hate crime on the offender's criminal record. Do you think that the law, as outlined above, should be introduced into Northern Ireland law?
10. Question 10: In dealing with an aggravated offence, do you agree or disagree that the court should: Explain how the aggravation has affected the sentence imposed? Explain the reasons for there being no difference in sentencing as a result of the aggravation?
11. Question 11: Should aggravated offences always be recorded on criminal justice records?
12. Question 12: Restorative justice is a process of independent facilitated contact, which supports constructive dialogue between a victim and a person who has harmed, arising from an offence or alleged offence. Should restorative justice be part of the criminal justice process in dealing with hate crime in Northern Ireland?
13. Question 13: Should restorative justice schemes for adults (over 18s) be placed on a statutory footing (restorative justice is currently used in some cases involving individuals under the age of 18)?
14. Question 14: With regard to tackling hate crime in public spaces, do you think that the law relating to the duties of public authorities to intervene should be strengthened or clarified?
15. Question 15: Should the media be allowed to report the identity of the person affected by a hate crime?

Survey Questions

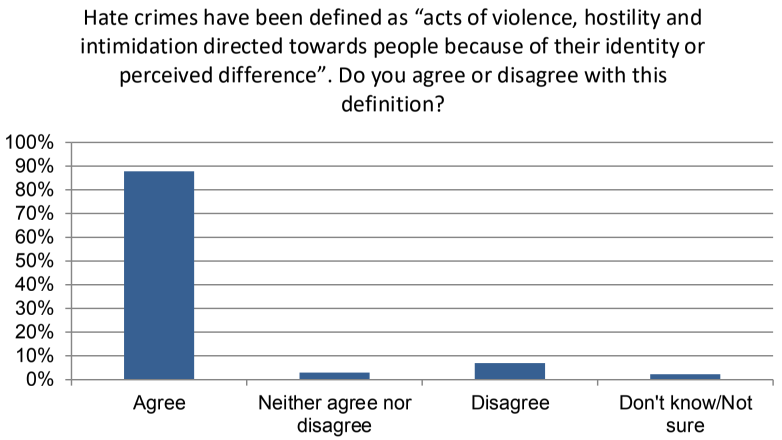
16. Question 16: In relation to freedom of expression (the right to hold your own opinions and to express them freely without interference) for religion and sexual orientation under the Public Order Act 1986 in England and Wales, there are express provisions protecting freedom of expression dealing with criticism of religious beliefs or sexual orientation. Until 13 January 2019, no such defence existed in Northern Ireland. However, under the Marriage (Same–sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland Regulations) 2019, the following defence was inserted into Article 8 of Part III of the Public Order (Northern Ireland) Order 1987:"(2) for the purposes of this Part, any discussion or criticism of marriage which concerns the sex of the parties to marriage is not to be taken of itself to be – Threatening, abusive or insulting or intended to stir up hatred or arouse fear". Do you agree or disagree that such defences should be added to, or remain an express defence, under Part III of the Public Order (Northern Ireland) Order 1987?
17. Question 17: Should social media companies be subject to a statutory regulatory regime and compelled to remove hateful material posted online?
18. Question 18: Please indicate which of the following, if any, should be included in criminal law to deal with hate speech online: Material downloadable in Northern Ireland should be subject to the jurisdiction of the courts here. Online harm should be part of a general law applying to hate crime. To deal with the problem of anonymous posts online, social media users should be required to verify their identity.
19. Question 19: Do you think that there is benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation?
20. Question 20: Do you agree or disagree that any new legislation on hate crime should be subject to post–legislative scrutiny (reviewed every three years)?
21. Other Comments
22. Breakdown of Respondents
23. Organisations Identified

1 Question 1

Hate crimes have been defined as "acts of violence, hostility and intimidation directed towards people because of their identity or perceived difference". Do you agree or disagree with this definition?

There were 791 responses to this question with 8 respondents choosing not to answer.
From those who responded, 88% (695) agreed with the definition of hate crimes as "acts of violence, hostility and intimidation directed towards people because of their identity or perceived difference". 7% (55) of respondents disagreed with the definition.

	Responses	
Agree	87.86%	695
Neither agree nor disagree	2.91%	23
Disagree	6.95%	55
Don't know/Not sure	2.28%	18

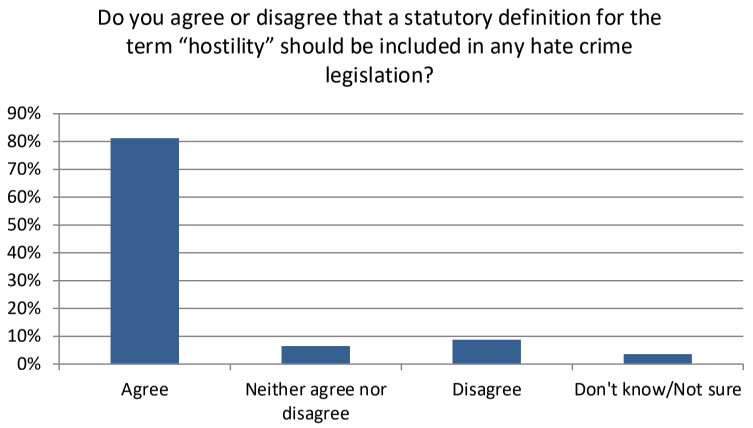


2 Question 2

Do you agree or disagree that a statutory definition for the term "hostility" should be included in any hate crime legislation?

There were 786 responses to this question with 13 respondents choosing not to answer.
From those who responded, 81% (638) agreed that the statutory definition for the term hostility should be included in any hate crime legislation. 9% (69) respondents disagreed and 10% (79) of respondents indicated they neither agreed nor disagreed or did not know.

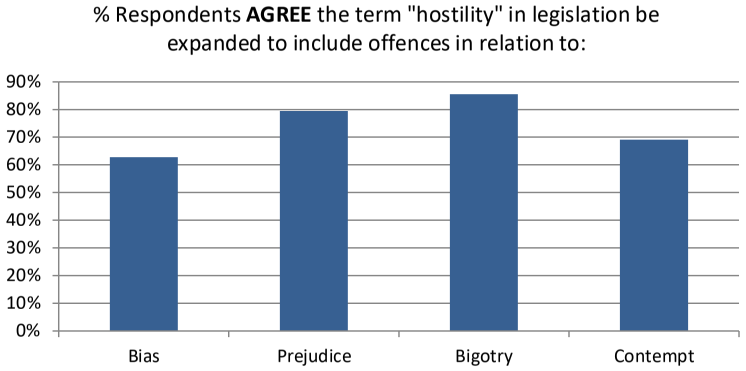
	Responses	
Agree	81.17%	638
Neither agree nor disagree	6.49%	51
Disagree	8.78%	69
Don't know/Not sure	3.56%	28



3 Question 3

Should the term "hostility" in legislation be expanded to include offences in relation to: bias, prejudice, bigotry, contempt, Other (please specify)?

There were 786 respondents who answered this question in full or in part with 13 respondents choosing not to answer.
From those who responded, the majority (over 62%) in each case, agreed that the term hostility should be expanded to include bias, prejudice, bigotry and contempt.
Of those who specified 'Other', the suggestions included:
Misogyny, perceived difference, gender, threats of violence, hate speech, discrimination, bullying, mental health bullying, criminal damage to property, inflammatory rhetoric, antagonism, malevolence, threats online and verbal, threats implicit or explicit, denigration of essential elements of cultural identity, psychological/emotional abuse, malice, disability, stereotyping and language spoken.



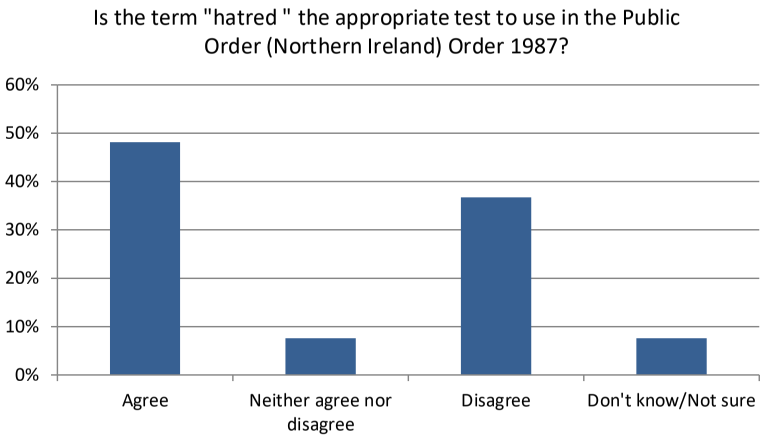
	Agree		Disagree		Don't know/Not sure		Total
Bias	62.80%	476	19.00%	144	18.21%	138	758
Prejudice	79.46%	615	12.14%	94	8.40%	65	774
Bigotry	85.55%	663	9.29%	72	5.16%	40	775
Contempt	69.12%	526	15.24%	116	15.64%	119	761
Other	21.99%	93	13.24%	56	64.78%	274	423

4 Question 4

The Public Order (Northern Ireland) Order 1987 defines "hatred" as "hatred against a group of persons…defined by reference to religious belief, sexual orientation, disability, colour, race, nationality or ethnic or national origins". At a minimum "hatred" means intense dislike, enmity or animosity. In law, it is generally accepted that it is a much stronger term than words like "hostility " or "bias". As a consequence, prosecutions under the 1987 Order are very rare, as proving hatred is a very high bar. Do you agree or disagree that the term "hatred " is the appropriate test to use in the Public Order (Northern Ireland) Order 1987?

There were 779 responses to this question with 20 respondents choosing not to answer.
From those who responded, 48% (375) agreed while 37% (286) of respondents disagreed. 15% (118) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	48.14%	375
Neither agree nor disagree	7.57%	59
Disagree	36.71%	286
Don't know/Not sure	7.57%	59

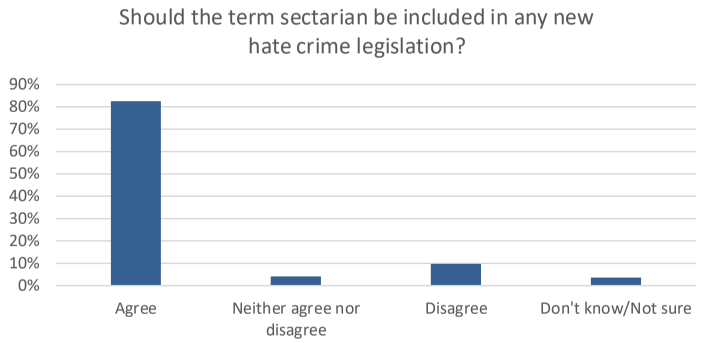


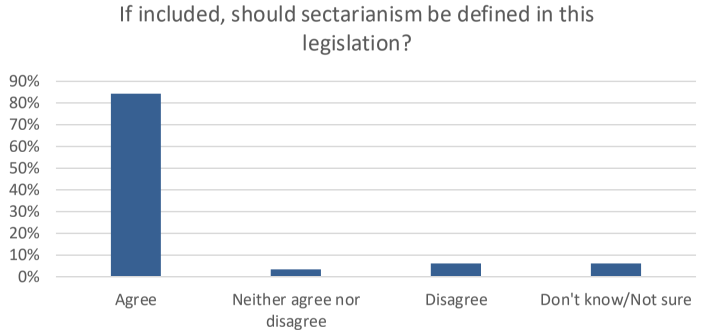
5 Question 5

Do you agree or disagree that –
The term sectarian should be included in any new hate crime legislation?
If included, Sectarianism should be defined in this legislation?

780 respondents chose to answer at least one part of this question with 19 respondents choosing not to answer.
From those who responded, 83% (644) and 84% (643) respectively agreed that the term sectarian should be included in any new hate crime legislation and it should be defined. Of the responses received, 10% disagreed that the term sectarian should be included and 6% (47) disagreed that the term should be defined. Overall 9% (133) of total responses received to these questions indicated they neither agreed nor disagreed or did not know.

	Agree		Neither agree nor disagree		Disagree		Don't know/ Not sure		Total
The term sectarian should be included	82.56%	644	4.10%	32	9.74%	76	3.59%	28	780
If included, sectarianism should be defined	84.27%	643	3.41%	26	6.16%	47	6.16%	47	763

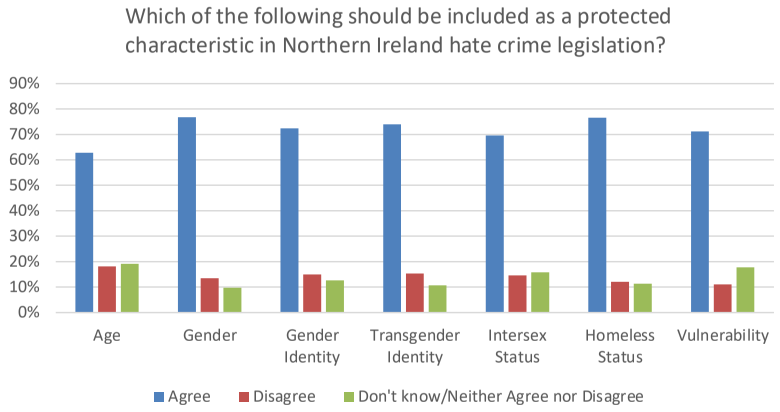




6 Question 6

The characteristics currently protected under hate crime law in Northern Ireland are "race, religion, sexual orientation and disability". The consultation document suggests additional categories be considered. Please indicate which of the following, if any, should be included as a protected characteristic in Northern Ireland hate crime legislation?

This question was answered in full or in part by 785 respondents with 14 respondents choosing not to answer. From the responses received, the majority of respondents agreed that all of the categories mentioned (age, gender, gender identity, transgender identity, intersex status, homeless status and vulnerability) should be included as protected characteristics. Overall 14% (739) of total responses received to the listed categories indicated they neither agreed nor disagreed or did not know.
There were 68 comments received including suggested additional categories covering, sex, sex workers, disability, language, nationality, ethnicity, political affiliation, physical appearance, religious and cultural beliefs.



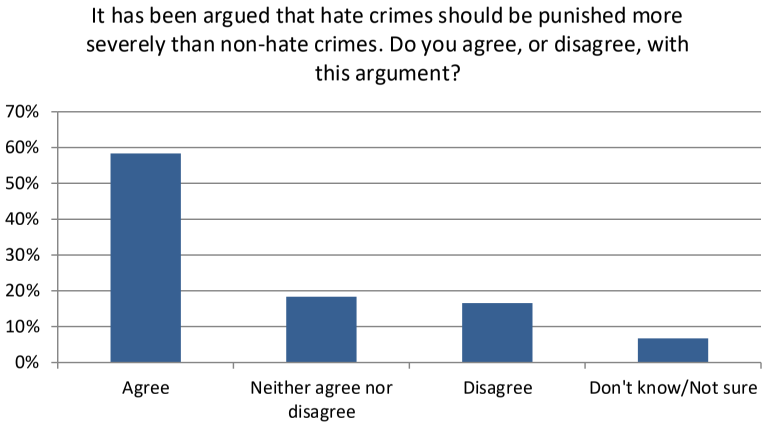
	Agree		Neither agree nor disagree		Disagree		Don't Know / Not Sure		Total
Age	62.80%	476	10.95%	83	18.07%	137	8.18%	62	758
Gender	76.80%	586	7.08%	54	13.50%	103	2.62%	20	763
Gender Identity	72.40%	556	9.24%	71	14.97%	115	3.39%	26	768
Transgender Identity	73.99%	569	7.54%	58	15.34%	118	3.12%	24	769
Intersex Status	69.59%	524	9.30%	70	14.61%	110	6.51%	49	753
Homeless Status	76.59%	589	7.93%	61	12.09%	93	3.38%	26	769
Vulnerability	71.15%	540	8.70%	66	11.07%	84	9.09%	69	759

7 Question 7

It has been argued that hate crimes should be punished more severely than non-hate crimes. Do you agree, or disagree, with this argument?

There were 718 responses to this question with 81 respondents choosing not to answer.
From those who responded, 58% (419) agreed that hate crimes should be punished more severely while 17% (119) of respondents disagreed. 25% (180) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	58.36%	419
Neither agree nor disagree	18.38%	132
Disagree	16.57%	119
Don't know/Not sure	6.69%	48

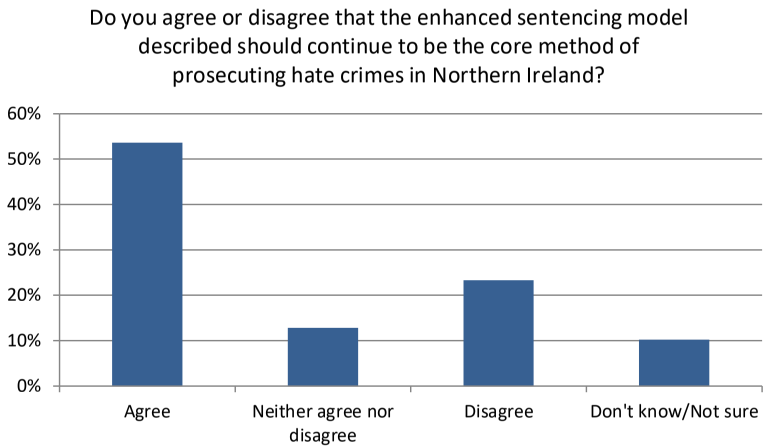


8 Question 8

In Northern Ireland, a sentence may be enhanced (for example by a longer sentence or higher fine) if the offence was aggravated by hostility towards the victim's disability, race, religion or sexual orientation. Research has shown there are relatively small numbers of cases where an enhanced sentence is given. This may be due, in part, to the lack of any requirement to record that a crime has been prosecuted and sentenced as a hate crime, or it may be that the hate crime element of an offence is frequently not considered or, if considered, does not result in an enhanced sentence. Do you agree or disagree that the enhanced sentencing model described above should continue to be the core method of prosecuting hate crimes in Northern Ireland?

There were 716 responses to this question with 83 respondents choosing not to answer.
From those who responded, 54% (384) agreed while 23% (167) of respondents disagreed. 23% (165) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	53.63%	384
Neither agree nor disagree	12.85%	92
Disagree	23.32%	167
Don't know/Not sure	10.20%	73

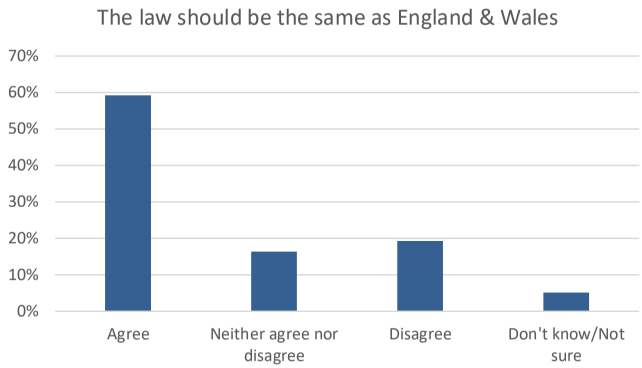


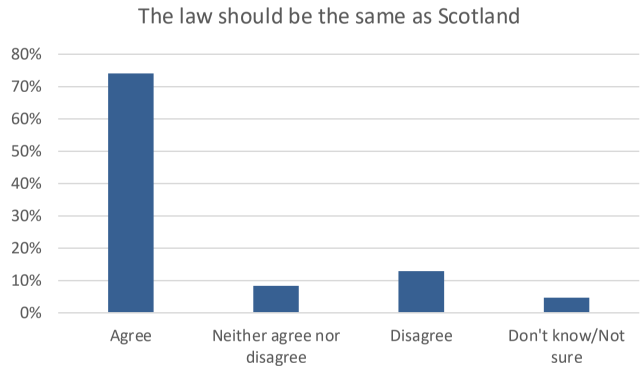
9 Question 9

In England and Wales, if a person commits certain offences and, in so doing, demonstrates, or was motivated by hostility on the grounds of race or religion, the offence can be prosecuted as a specific racially or religiously aggravated offence punishable by a higher sentence. In Scotland, any offence may be aggravated by prejudice and prosecuted as such, in respect of the protected characteristics of race, religion, disability, sexual orientation and transgender identity. Again, these are punishable by a higher sentence. In both jurisdictions the crime is recorded as a hate crime on the offender's criminal record. Do you think that the law, as outlined above, should be introduced into Northern Ireland law?

This question was answered in full or in part by 718 respondents with 81 respondents choosing not to answer.
From those who responded, 74% (506) agreed the law should be the same as Scotland and 59% (380) agreed it should be the same as England and Wales. Overall 17% (227) of total responses received to these questions indicated they neither agreed nor disagreed or did not know.

	Agree		Neither agree nor disagree		Disagree		Don't know/ Not sure		Total
The law should be the same as England & Wales	59.19%	380	16.36%	105	19.31%	124	5.14%	33	642
The law should be the same as Scotland	74.08%	506	8.35%	57	12.88%	88	4.69%	32	683



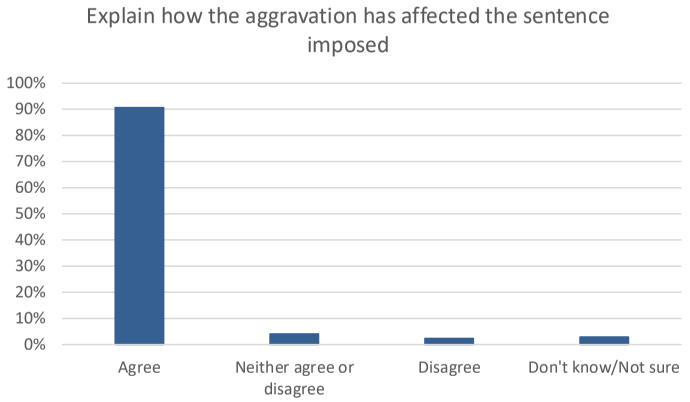


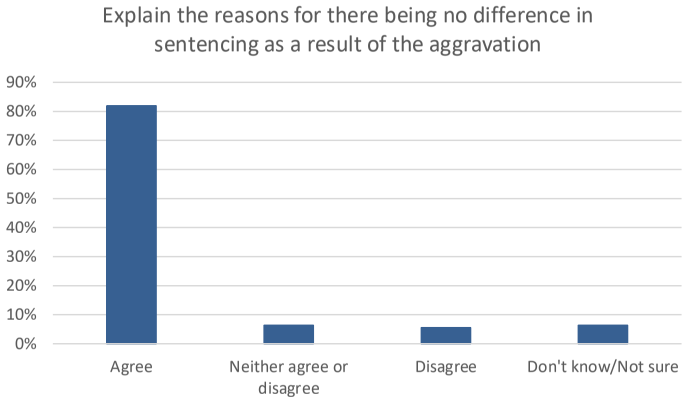
10 Question 10

In dealing with an aggravated offence, do you agree or disagree that the court should:
Explain how the aggravation has affected the sentence imposed?
Explain the reasons for there being no difference in sentencing as a result of the aggravation?

This question was answered in full or in part by 718 respondents with 81 respondents choosing not to answer.
From those who responded, 91% (649) agreed the court should explain how the aggravation has affected the sentence imposed and 82% (563) agreed that the court should explain for there being no difference in the sentence. Overall 10% (138) of total responses received to these questions indicated they neither agreed nor disagreed or did not know.

	Agree		Neither agree or disagree		Disagree		Don't know/ Not sure		Total
Explain how the aggravation has affected the sentence imposed	90.64 %	649	4.05%	29	2.37%	17	2.93%	21	716
Explain the reasons for there being no difference in sentencing as a result of the aggravation	81.95 %	563	6.40%	44	5.53%	38	6.40%	44	687



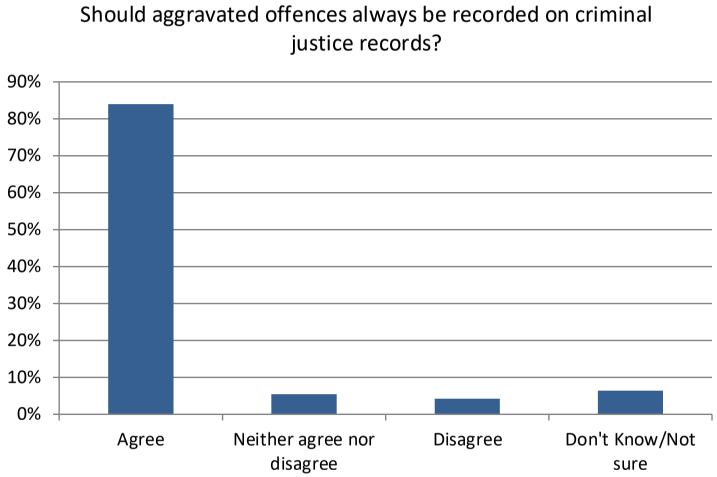


11 Question 11

Should aggravated offences always be recorded on criminal justice records?

There were 718 responses to this question with 81 respondents choosing not to answer.
From those who responded, 84% (603) agreed while 4% (30) of respondents disagreed. 12% (85) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	83.98%	603
Neither agree nor disagree	5.43%	39
Disagree	4.18%	30
Don't Know/Not sure	6.41%	46

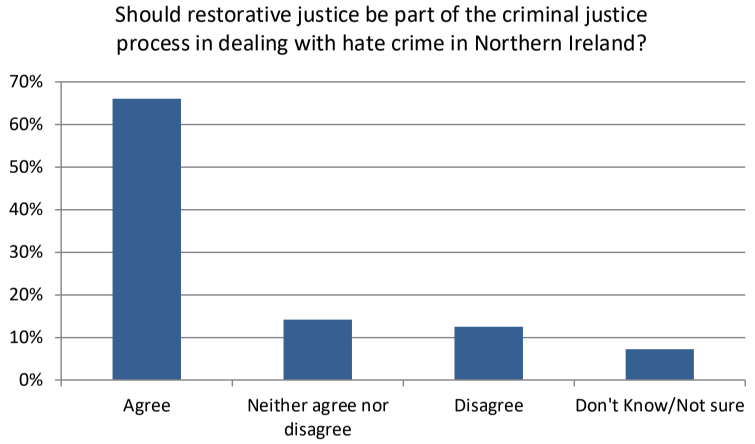


12 Question 12

Restorative justice is a process of independent facilitated contact, which supports constructive dialogue between a victim and a person who has harmed, arising from an offence or alleged offence. Should restorative justice be part of the criminal justice process in dealing with hate crime in Northern Ireland?

There were 719 responses to this question with 80 respondents choosing not to answer.
From those who responded, 66% (475) agreed while 13% (90) of respondents disagreed. 21% (154) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	66.06%	475
Neither agree nor disagree	14.19%	102
Disagree	12.52%	90
Don't Know/Not sure	7.23%	52

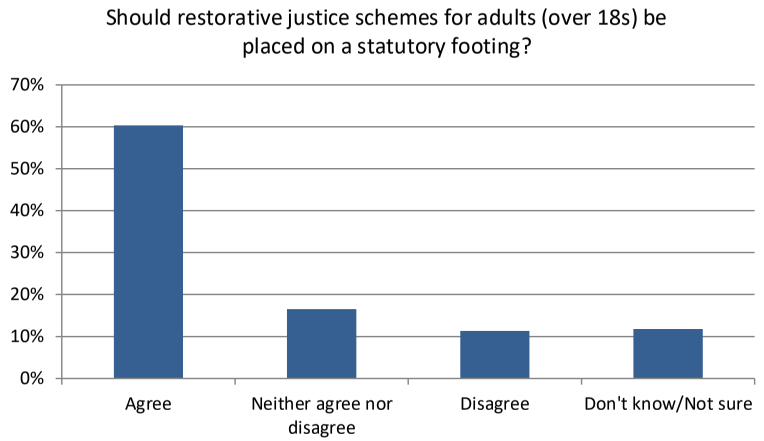


13 Question 13

Should restorative justice schemes for adults (over 18s) be placed on a statutory footing (restorative justice is currently used in some cases involving individuals under the age of 18)?

There were 713 responses to this question with 86 respondents choosing not to answer.
From those who responded, 60% (430) agreed while 11% (81) of respondents disagreed. 28% (202) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	60.31%	430
Neither agree nor disagree	16.55%	118
Disagree	11.36%	81
Don't know/Not sure	11.78%	84

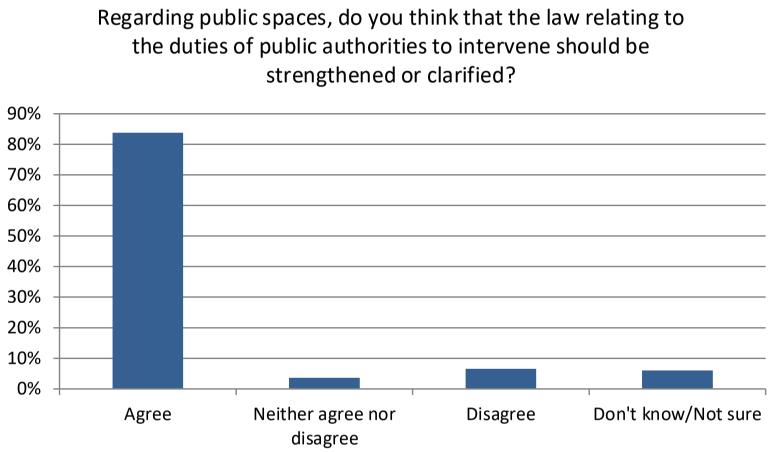


14 Question 14

With regard to tackling hate crime in public spaces, do you think that the law relating to the duties of public authorities to intervene should be strengthened or clarified?

There were 716 responses to this question with 83 respondents choosing not to answer.
From those who responded, 84% (600) agreed while 7% (47) of respondents disagreed. 10% (69) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	83.80%	600
Neither agree nor disagree	3.63%	26
Disagree	6.56%	47
Don't know/Not sure	6.01%	43

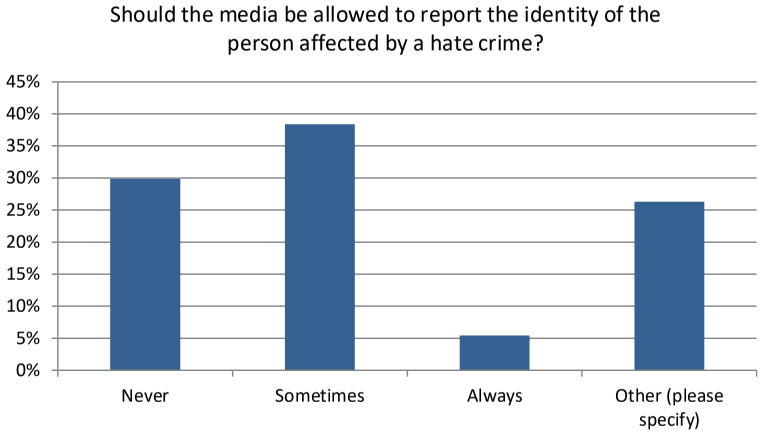


15 Question 15

Should the media be allowed to report the identity of the person affected by a hate crime?

There were 719 responses to this question with 80 respondents choosing not to answer.
From those who responded, 30% (215) said the media should never be allowed to report the identity of the individual affected. 38% (276) said sometimes this should be allowed and 5% (39) said it should always be allowed.
Of those who specified 'Other', the responses focused on media reporting only in cases where the victim has given permission or waived their right to anonymity.

	Responses	
Never	29.90%	215
Sometimes	38.39%	276
Always	5.42%	39
Other (please specify)	26.29%	189

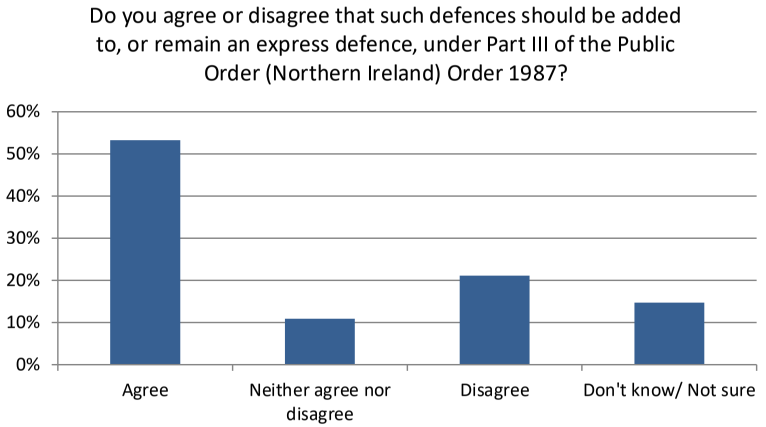


16 Question 16

In relation to freedom of expression (the right to hold your own opinions and to express them freely without interference) for religion and sexual orientation under the Public Order Act 1986 in England and Wales, there are express provisions protecting freedom of expression dealing with criticism of religious beliefs or sexual orientation. Until 13 January 2019, no such defence existed in Northern Ireland. However, under the Marriage (Same–sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland Regulations) 2019, the following defence was inserted into Article 8 of Part III of the Public Order (Northern Ireland) Order 1987:"(2) for the purposes of this Part, any discussion or criticism of marriage which concerns the sex of the parties to marriage is not to be taken of itself to be – Threatening, abusive or insulting or intended to stir up hatred or arouse fear". Do you agree or disagree that such defences should be added to, or remain an express defence, under Part III of the Public Order (Northern Ireland) Order 1987?

There were 706 responses to this question with 93 respondents choosing not to answer.
From those who responded, 53% (376) agreed and 21% (149) disagreed. 26% (181) of respondents indicated they neither agreed nor disagreed or did not know.

	Responses	
Agree	53.26%	376
Neither agree nor disagree	10.91%	77
Disagree	21.10%	149
Don't know/ Not sure	14.73%	104

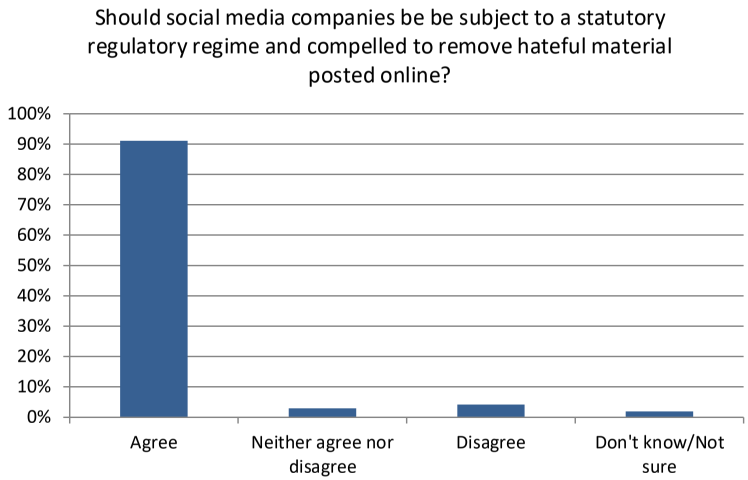


17 Question 17

Should social media companies be subject to a statutory regulatory regime and compelled to remove hateful material posted online?

There were 693 responses to this question with 106 respondents choosing not to answer.
From those who responded, 91% (631) agreed and 4% (29) disagreed. 5% (33) of respondents indicated they neither agreed nor disagreed or did not know.

Answer Choices	Responses	
Agree	91.05%	631
Neither agree nor disagree	2.89%	20
Disagree	4.18%	29
Don't know/Not sure	1.88%	13

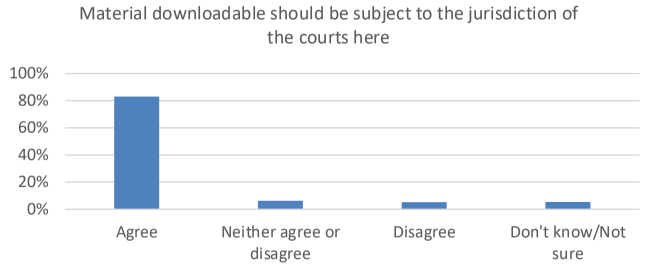


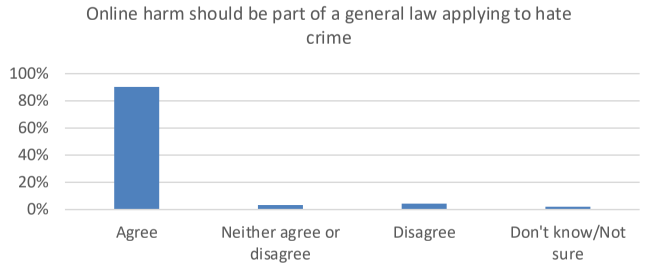
18 Question 18

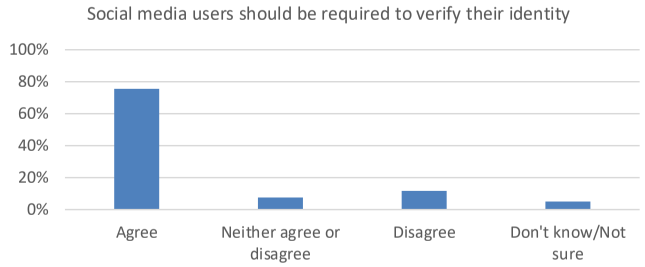
Please indicate which of the following, if any, should be included in criminal law to deal with hate speech online:
Material downloadable in Northern Ireland should be subject to the jurisdiction of the courts here.
Online harm should be part of a general law applying to hate crime.
To deal with the problem of anonymous posts online, social media users should be required to verify their identity.

This question was answered in full or in part by 694 respondents with 105 respondents choosing not to answer.
From those who responded, the majority, between 76% and 90% agreed with each of the statements listed.

	Agree		Neither agree or disagree		Disagree		Don't know/ Not sure		Total
Material downloadable in Northern Ireland should be subject to the jurisdiction of the courts here	82.95%	574	6.36%	44	5.20%	36	5.49%	38	692
Online harm should be part of a general law applying to hate crime	90.32%	625	3.32%	23	4.34%	30	2.02%	14	692
To deal with the problem of anonymous posts online, social media users should be required to verify their identity	75.62%	521	7.55%	52	11.76%	81	5.08%	35	689





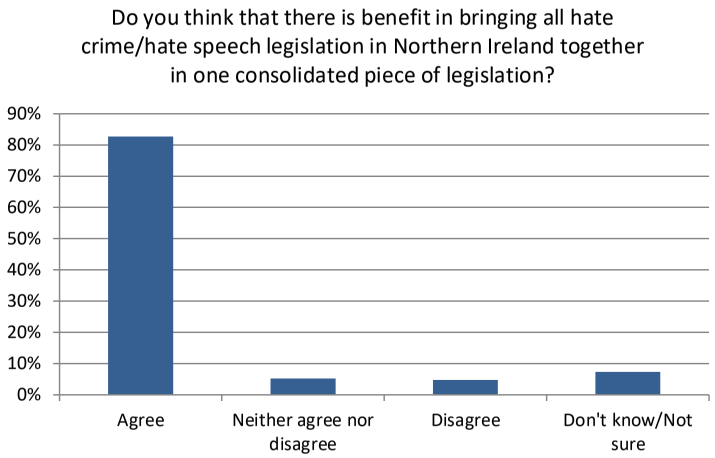


19 Question 19

Do you think that there is benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation?

There were 694 responses to this question with 105 respondents choosing not to answer.
From those who responded, 83% (574) agreed there would be benefit in consolidating the legislation. 5% (33) disagreed and 13% (87) neither agreed nor disagreed or did not know.

	Responses	
Agree	82.71%	574
Neither agree nor disagree	5.19%	36
Disagree	4.76%	33
Don't know/Not sure	7.35%	51

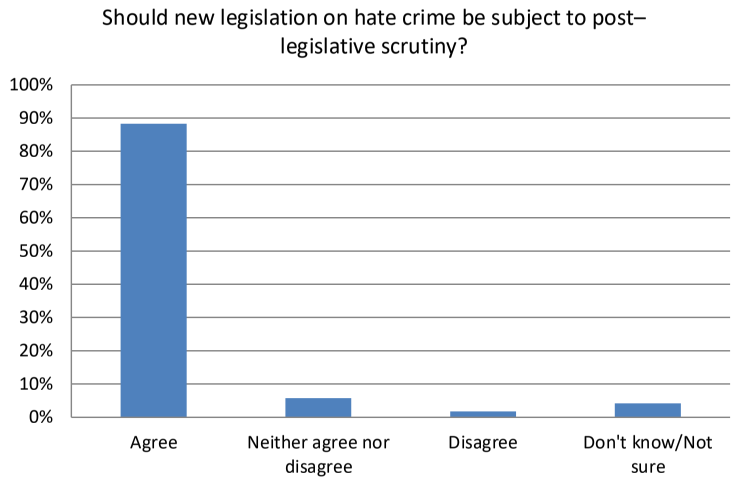


20 Question 20

Do you agree or disagree that any new legislation on hate crime should be subject to post–legislative scrutiny (reviewed every three years)?

There were 694 responses to this question with 105 respondents choosing not to answer.
From those who responded, 88% (613) agreed that any new legislation should be subject to post-legislative scrutiny. 2% (12) disagreed and 10% (69) neither agreed nor disagreed or did not know.

	Responses	
Agree	88.33%	613
Neither agree nor disagree	5.76%	40
Disagree	1.73%	12
Don't know/Not sure	4.18%	29



21 Other Comments

There were a total of 103 comments in the further comment box. These comments and the comments from previous questions are attached in a separate document. Comments shown in red are from respondents who have not given permission for their anonymised comments to be published.

22 Breakdown of Respondents

Gender

There were 693 responses to this question with 106 respondents choosing not to answer.

From those who responded, 36% (250) were male and 57% (392) were female.

5% (34) of respondents preferred not to say and 2% (17) selected other.

From the 17 respondents who chose other, 1 did not disclose gender, 5 identified as female, 1 as male and 10 as intersex/transgender/non-binary.

	Responses	
Male	36.08%	250
Female	56.57%	392
Prefer not to say	4.91%	34
Other (please specify)	2.45%	17

Male	1
Female	5
Intersex/transgender/non-binary	10
Not disclosed	1

Age

There were 691 responses to this question with 108 respondents choosing not to answer.

From those who did respond, 30 preferred not to state an age group. This resulted in 661 respondents identifying an age group and 138 who either did not specify an age group or preferred not to say.

From the 661 respondents who provided an age group, the largest proportion 28% (191) were 45-54 years. The age groups of 45 and over made up 62% (407) of the responses. Those aged 44 and under made up 38% of respondents who provided an age group.

	Responses	
Under 18	0.29%	2
18-24	6.22%	43
25-34	11.00%	76
35-44	19.25%	133
45-54	27.64%	191
55-64	22.00%	152
65 or over	9.26%	64
Prefer not to say	4.34%	30

23 Organisations Identified

The survey asked if responses were made on behalf of an organisation. The following organisations were listed by respondents.

Active Citizens Engaged
ArtsEkta
Atlas Womens Centre
Belfast Jewish community
Cara-Friend
Conor Rise Residents Association Belfast
Derry and District Youth Foyle Cup
Destined Ltd
F and O / DC. PCSP
Galop
Indian community centre
Kiltonga Christian Centre
Kings Christian Fellowship Church.
Leonard Cheshire
Migrant Centre NI
Mindwise
Northern Ireland Council for Racial Equality
Northern Ireland Rural Women's Network
Omagh Community House
Portaferry sailing club
Potens
PSNI
Resolve restorative practices
Swai
UglyMugs.ie
Unison LGBT+ committee
Waterside Women's Centre
Women's Support Network
YMCA North Down - Ethnic Minorities Support
Youth Service

Appendices

Appendix 1

List of Outreach Events

Date	Location	Venue
Thursday 16th January 2020	Enniskillen	Fermanagh House, Broadmeadow Place, Enniskillen BT74 7HR
Tuesday 21st January 2020	Dungannon	The Junction, 12 Beechvalley Way, Dungannon BT70 1BS
Wednesday 5th February 2020	Ballymena	The Braid Arts Centre 1-29 Bridge Street, Ballymena BT43 5EJ
Wednesday 12th February 2020	Belfast	Moot Court, Queen's University Belfast, 2nd Floor, School of Law, Main Site Tower, University Square, Belfast BT7 1NN
Wednesday 4th March 2020	Derry/Londonderry	The Guildhall, Guildhall Street, Londonderry BT48 6DQ
Thursday 12th March 2020	Craigavon	Craigavon Civic Centre, Lakeview Road, Craigavon BT64 1AL

Appendix 2

Relevant Legislative Provisions in Northern Ireland

Communications Act 2003

127. Improper use of public electronic communications network

Contempt of Court Act 1981

Section 11 - Restrictions on Publication

Criminal Damage (Northern Ireland) Order 1977

Criminal Justice (Children) (Northern Ireland) Order 1998

Statutory provision for restorative justice for defendants under 18

Disclosure of Victims and Witnesses Information (Prescribed Bodies) Regulations (Northern Ireland) 2015

Victim Support NI to be the prescribed body for provision of support services for victims

Human Rights Act 1998

Sections 1 to 9

Justice Act (Northern Ireland) 2011

37. Chanting

Justice Act (Northern Ireland) 2015

Establishment of a Victims Charter

Malicious Communications (Northern Ireland) Order 1988

Article 3 – offence of sending letters et cetera with intent to cause distress or anxiety.

Northern Ireland Act 1998

75. Statutory duty on public authorities

76. Discrimination by public authorities

Offences against the Person Act 1861

18. Shooting or attempting to shoot, or wounding, with intent to do grievous bodily harm, or to resist apprehension

20. Inflicting bodily injury, with or without weapon

47. Assault occasioning bodily harm—Common assault

Police (Northern Ireland) Act 2000

Section 32 duty to bring offenders to justice and prevent commission of criminal offences

Protection of the Person and Property Act (Northern Ireland) 1969

1. Intimidation

The Anti-social Behaviour (Northern Ireland) Order 2004

3. Anti-social behaviour orders on application to magistrates' court

4. Interim anti-social behaviour orders on applications under Article 3

7. Breach of anti-social behaviour orders

The Criminal Evidence (Northern Ireland) Order 1999

Part II Special measures directions in case of vulnerable and intimidated witnesses

4. Witnesses eligible for assistance on grounds of age or incapacity

5. Witnesses eligible for assistance on grounds of fear or distress about testifying

The Criminal Justice (Northern Ireland) Order 1996

Article 24 – custody probation orders

The Criminal Justice (No.2) (Northern Ireland) Order 2004

2. Increase in sentence for offences aggravated by hostility

3. Inciting hatred or arousing fear on grounds of sexual orientation or disability

4. Increase of penalties

The Justice (Northern Ireland) Act 2002

Section 41 – consent of the Director of Public Prosecutions to initiate proceedings under the Public Order (Northern Ireland) Order 1987

Section 36– DPP's power to delegate such consent

The Protection from Harassment (Northern Ireland) Order 1997

2. Interpretation

3. Prohibition of harassment

4. Offence of harassment

6. Putting people in fear of violence

7. Restraining orders

The Public Order (Northern Ireland) Order 1987

Part III Stirring up hatred or arousing fear

Acts intended or likely to stir up hatred or arouse fear

8. Meaning of "fear" and "hatred"

8.2 Discussion or criticism of same-sex marriage

9. Use of words or behaviour or display of written material

9.3 Dwelling defence

10. Publishing or distributing written material

11. Distributing, showing or playing a recording

12. Broadcasting or including programme in cable programme service

13. Possession of matter intended or likely to stir up hatred or arouse fear

Supplementary provisions

14. Powers of entry and search

15. Savings for reports of parliamentary, Assembly or judicial proceedings

16. Punishment of offences under Part III

17. Interpretation of Part III

Part IV Miscellaneous Public Order Offences

19. Provocative conduct in public place or at public meeting or procession

The Race Relations (Northern Ireland) Order 1997

3. Racial discrimination

5. Meaning of “racial grounds” “racial group” etc.

The Shared Education Act (Northern Ireland) 2016

Youth Justice and Criminal Evidence Act 1999

Section 46 -reporting restrictions

Appendix 3

List of Organisations Met

Judge Marrinan and/or his review team have met or had discussions with a large number of organisations including:

Action on Elder Abuse Northern Ireland
Alliance Party of Northern Ireland
Assistant Chief Constable Mark Hamilton
Attorney General for Northern Ireland
Belfast City Council Good Relations Officers
Belfast City Council Migrant Forum
Belfast Islamic Centre
Catholic Church
Centre for Democracy and Peace Building
Church of Ireland
Commissioner for Children and Young People
Commissioner for Older People
Commissioner for Victims and Survivors
Committee on the Administration of Justice
Community Restorative Justice Ireland
Council for the Curriculum, Examinations & Assessment
Crown Office and Procurator Fiscal Service
Democratic Unionist Party
Department of Education
Department of Justice
Department of Justice and Equality
Equality Commission for Northern Ireland
Ethnic Minority Police Association
Executive Council of the Belfast Jewish Community
Evangelical Alliance Northern Ireland
Focus: The Identity Trust

Grand Orange Lodge of Ireland

Green Party Northern Ireland

Hate Crime Advocates

Humanists UK

Independent Reporting Commission

Inspire Wellbeing Services

Law Commission

Lord Bracadale

Methodist Church in Ireland

Muslim Community, North Down

NIACRO

Northern Ireland Alternatives

Northern Ireland Centre for Racial Equality

Northern Ireland Council for Integrated Education

Northern Ireland Courts and Tribunals Service

Northern Ireland Housing Executive

Northern Ireland Human Rights Commission

Northern Ireland Policing Board

Northern Ireland Women's Policy Group

Office of the Lord Chief Justice

People before Profit

Police Service of Northern Ireland

Police Service of Northern Ireland Cybercrime Unit

Presbyterian Church in Ireland

Probation Board for Northern Ireland

Professor Dominic Bryan (Queen’s University Belfast)

Professor Mark Walters (University of Sussex)

Public Prosecution Service Northern Ireland

Rainbow Project

Sacro (Scottish Association for the Care and Resettlement of Offenders)

Scottish Government

Simon Community Northern Ireland

Sinn Fein

Social Democratic and Labour Party

Traditional Unionist Voice

TransgenderNI

Ulster Unionist Party

Victim Support Northern Ireland

Women’s Aid Federation Northern Ireland

Youth Justice Agency

Appendix 4

Key Stakeholder Group

Chair

Judge Desmond Marrinan

Membership

Bar of Northern Ireland

Belfast Islamic Centre

Belfast Policing & Community Safety Partnership

Department of Justice

Equality Commission for Northern Ireland

Ethnic Minority Police Association

Law Society of Northern Ireland

Leonard Cheshire

Migrant Centre Northern Ireland

Northern Ireland Housing Executive

Northern Ireland Human Rights Commission

Police Service of Northern Ireland

Probation Board for Northern Ireland

Public Prosecution Service Northern Ireland

The Executive Office

The Rainbow Project

Victim Support Northern Ireland

Appendix 5

Hate Crime Legislation Review

Terms of Reference

Introduction

Hate crime is a generic term used to describe offences which are motivated by hostility/bias based on a personal characteristic of the victim. Hate crime normally falls into two categories:

- A criminal offence is committed with a prejudice, hostile, or hateful motivation towards the victim; or
- An incitement offence where certain actions are intended, or likely to stir up hatred or arouse fear.

Hate crime violates the ideal of equality between members of society. There is significant evidence which indicates that hate crimes have a pronounced impact on victims, as this type of crime is an attack on a personal attribute or group identity, such as one's ethnicity, disability, religion or sexuality. Hate crime can therefore have a particular and significant impact on victims' self-esteem and personal confidence.

It is also recognised that the repercussions of this type of crime extend beyond the direct victim, by signalling that members of certain groups are not acceptable or not worthy of equal respect. In societies which are already showing manifestations of division, intolerance hate crime can further exacerbate tensions and undermine community cohesion.

It is for this reason that a range of legislation has been enacted which aims to:

- Provide censure, and support for societal change, by sending a message that prejudice-motivated conduct will not be tolerated;
- Enhance punishments for hate crime offences to acknowledge the increased harms caused to victims, minority communities and wider society; and
- Support the effective operation of hate crime policies by law enforcement agencies.

Following calls for a review of Part III of the Public Order (Northern Ireland) Order 1987, from a range of sources, a commitment was made by the then Minister for Justice to come back to the Assembly, and confirm whether she intended to initiate a review of the legislative framework on hate crime.

Momentum for a review of this piece of legislation, and the wider legislative framework for the prosecution of incitement to hatred offences have been heavily influenced by wider societal concerns regarding the display of offensive materials at bonfires, and the proliferation of paramilitary flags displayed across Northern Ireland. However, we are also mindful of the continued broader implication of hate crime for a wide cross section of society.

While a response was not provided prior to the dissolution of the Assembly, as part of our forward work programme on community safety, a commitment to review hate crime legislation was included in the draft Programme for Government.

Scope of Review

The remit for this review is:

To consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice, including hate crime and abuse which takes place online.

In particular, the review will consider and provide recommendations on:

- A workable and agreed definition of what is a hate crime;

- Whether the current enhanced sentence approach is the most appropriate to take, and determine if there is an evidential basis to support the introduction of statutory aggravated offences;

- Whether new categories of hate crime should be created for characteristics such as gender and any other characteristics (which are not currently covered);

- The implementation and operation of the current legislative framework for incitement offences, in particular Part III of the Public Order (Northern Ireland) Order 1987 and make recommendations for improvements;

- How any identified gaps, anomalies and inconsistencies can be addressed in any new legislative framework for Northern Ireland ensuring this interacts effectively with other legislation guaranteeing human rights and equality.

- Whether there is potential for alternative or mutually supportive restorative approaches for dealing with hate motivated offending.

The review will take cognisance of the Department's review of sentencing policy and will ensure that it does not cut across any options planned for consultation in this regard.

Given that telecommunications legislation is a reserved matter, and the commitments made in the UK Government recent response to the 14th report from the Home Affairs Select Committee Session 2016 to 17, on Hate crime: abuse, hate and extremism online, our intention would be that the review would not include consideration of any issues related to online hate crime that would duplicate this.

The review team will make a written report for consideration, by the Department of Justice, no later than 15 months from the commencement of the review.

Delivery Mechanism

The review team will consist of a senior review manager and an office manager, supported by a researcher.

It would also be our intention for the review process to be supported by a Reference Group, comprising of a core group of relevant experts, and a broader forum of key stakeholders. The review team will develop its thinking and early conclusions with the Reference Group, who will act as a catalyst for developing new ideas and as a quality

mechanism for the review. Setting up the Reference Group will be the responsibility of the Review Team, with support provided by the Department where required.

Given the particular legal complexities involved in incitement legislation, an independent expert will be commissioned to take forward the review – a similar approach was taken when reviews of hate crime legislation were conducted in England and Wales, and in Scotland.

Appendix 6

Glossary

ACPO	Association of Chief Police Officers
AI	Artificial Intelligence
APPG	All-Party Parliamentary Group (House of Commons)
BAME	Black, Asian and Minority Ethnic
Bar NI	The Bar of Northern Ireland is a body of over 600 self-employed barristers in independent practice
CAJ	Committee on the Administration of Justice - independent human rights organisation with cross community membership in NI
CASC	Church of Ireland Church and Society Commission
CBRJ	Community Based Restorative Justice
CCEA	Council for the Curriculum, Examinations and Assessment
CDA	Crime and Disorder Act 1998
CEG	Core Expert Group for the review of hate crime in Northern Ireland
CENI	Community Evaluation Northern Ireland
CJINI	Criminal Justice Inspection Northern Ireland
COPFS	Crown Office and Procurator Fiscal Service
CPS	Crown Prosecution Service (England and Wales)
CRJI	Community Restorative Justice Ireland
DE	Department of Education
DoJ	Department of Justice
DfI	Department for Infrastucture
DPP	Director of Public Prosecutions
DUP	Democratic Unionist Party (NI)
DVD	Digital Video Disc
ECHR	European Convention on Human Rights
ECHR	European Court of Human Rights
ECNI	Equality Commission for Northern Ireland
ECRI	European Commission Against Racism and Intolerance

EU	European Union
EWHC	The High Court of Justice in London (formally "Her Majesty's High Court of Justice in England") EWHC for legal citation purposes
Executive Office	Northern Ireland Executive (the Executive) is the devolved government of Northern Ireland, an administrative branch of the legislature – the Northern Ireland Assembly
FICT	(Commission on) Flags, Identity, Culture and Tradition
GAA	Gaelic Athletic Association
GBH	Grievous Bodily Harm
HCAS	Hate Crime Advocacy Service
HCOG	Hate Crime Operational Guidance
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
IP	Internet Protocol
JSB	Judicial Studies Board
Justice Committee	The Committee for Justice was established in Northern Ireland to advise and assist the Minister of Justice on matters within their responsibility as a Minister
LBGT	Lesbian, Gay, Bisexual, and Transgender
LGBT plus	Lesbian, Gay, Bisexual, Transgender + Others
LGBT+	Lesbian, Gay, Bisexual, Transgender + Others
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Queer (or Questioning)
LJ	Lord Justice
MLA	Member of the Legislative Assembly (NI)
MP	Member of Parliament (UK)
NGO	Non-Governmental Organisation
NI	Northern Ireland
NIA	Northern Ireland Alternatives
NICTS	Northern Ireland Courts and Tribunals Service
NIHE	Northern Ireland Housing Executive

NIHRC	Northern Ireland Human Rights Commission
NIPB	Northern Ireland Policing Board
NISRA	Northern Ireland Statistics and Research Agency
NIWEP	Northern Ireland Women's European Platform
ODIHR	Office for Democratic Institutions and Human Rights
Ofcom	Regulator for the communications services (UK)
OSCE	Organisation for Security and Co-operation in Europe
PBNI	Probation Board for Northern Ireland
PCSP	Policing and Community Safety Partnership
PDP	Personal Development Plan
PPR	Participation and the Practice of Rights
PPS	Public Prosecution Service (Northern Ireland)
PSNI	Police Service of Northern Ireland
QC	Queen's Counsel
QUB	Queen’s University Belfast
RJ	Restorative Justice
RP	Restorative Practice
RRAO	Racially or Religiously Aggravated Offence
SDLP	Social Democratic and Labour Party
SF	Sinn Fein
SMCs	Social Media Companies
SS	Schutzstaffel
T:BUC	Together: Building a United Community
UCD	University College Dublin
UK	United Kingdom
UN	United Nations (General Assembly)
USA (US)	United States of America (US)
UUP	Ulster Unionist Party
UVF	Ulster Volunteer Force
VSNI	Victim Support Northern Ireland

WPG NI	Women's Policy Group Northern Ireland
WRDA	Women's Resource and Development Agency

Acts and Orders (by year):

(1965 Act)	*Race Relations Act 1965*
(the 1970 Act)	*Prevention of Incitement to Hatred Act (Northern Ireland) 1970*
(the 1981 Act)	*Contempt of Court Act 1981*
(the 1987 Order)	*Public Order (Northern Ireland) Order 1987*
(MCA 1988)	*Malicious Communications Act 1988*
(MCO 1988)	*Malicious Communications (Northern Ireland) Order 1988*
(PHO1997)	*The Protection from Harassment (Northern Ireland) Order 1997*
(the 1997 Order)	*Race Relations (Northern Ireland) Order 1997*
(CDA 1998)	*(the 1998 Act) Crime and Disorder Act 1998*
(CA 2003)	*Section 127 (1) of the Communications Act 2003*
(CJA 2003)	*(the 2003 Act) Criminal Justice Act 2003*
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