NORTHERN IRELAND HUMAN RIGHTS COMMISSION

# Submission to Hate Crime Review Consultation

**May 2020**

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## Summary of Recommendations

**The Northern Ireland Human Rights Commission (NIHRC):**

2.11 **in response to questions 2 and 3, recommends that specific hate crime legislation is designed in line with the international obligations to prevent, prohibit, prosecute and protect and takes into account best practice from other jurisdictions in the UK.**

2.12 **in response to questions 2, 3 and 35, advises that the obligation to protect means that hate crime laws should be designed to reassure communities and individuals who may be particularly vulnerable, while at the same time reflecting that some behaviours will fall short of hate crime. The NIHRC recommends that any hate crime law must reflect the need for hate 'signal incidents', which fall short of hate crime, to be recorded and support put in place for the victims of such incidents.**

2.13 **in response to questions 2, 3 and 35, recommends that the principle of legal certainty is reflected in any hate crime law and 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.**

2.14 **in response to questions 27, 28, 29 and 30, recommends that the hate crime law include a "by reason of" threshold to 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. 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.**

2.15 **in response to questions 27, 28, 29 and 30, recommends that legal definition of hate crime is set out in a 'general**

**interpretation for the purposes of the act' section and that 'hate' covers 'bias, hostility, prejudice, bigotry and contempt' and is broad enough to include prejudices or stereotyped information relating to a protected characteristic.**

3.7 **in response to questions 7 and 8, advises that international human rights standards do not prescribe a specific model for hate crime law. Hate crime law will be human rights compliant when it provides an effective deterrence. The NIHRC recommends that consideration be given to implementing the statutory aggravation model in NI, as evidence from other jurisdictions demonstrates that it is more effective in responding to hate crime than the enhanced sentencing model alone.**

3.8 **in response to question 21, advises that the human rights law requires that hate crime law provides an effective deterrence and recommends that evaluations of the effectiveness of the statutory aggravation models in Scotland and in England and Wales to ensure that the model that applies in NI reflects best practice in other jurisdictions and is in line with international human rights standards.**

4.13 **in response to questions 5 and 6, advises that the international human rights standards allow for some discretion as to the model of hate crime law, but require that it is effective, proportionate and dissuasive and respond effectively to the current shortcomings in the application of the current hate crime model in NI.**

4.14 **in response to questions 8 and 9, recommends developing specific sentencing guidance for hate crimes with an enhanced sentence to reflect the aggravating dimension of the offence to ensure that the deterrent effect is effective, proportionate and dissuasive.**

4.15 **in response to questions 8 and 9, recommends that judicial independence is safeguarded and that any statutory duty relating to specific sentencing guidance for hate crimes is framed as a 'due regard' principle, rather than a more onerous duty.**

4.16 **in response to questions 4, 10 and 20, recommends that where a hate crime results in an enhanced sentence, the court should make it clear that this is to ensure the deterrent effect of the sentence is maximised.**

4.17 **in response to questions 4, 10 and 20, recommends that any hate crime consideration should be recorded to ensure data collection is consistent, extensive and disaggregated across all stages of the criminal justice process, including sentencing and on the criminal record viewer.**

5.8 **in response to questions 22, 23, 24, 25, and 26, recommends that the particular characteristic which is the focus of any hate crime should be recorded to ensure data collection is consistent, extensive and disaggregated across all stages of the criminal justice, including sentencing and on the criminal record viewer.**

5.9 **in response to questions 22, 23, 24, 25, and 26, recommends that all parts of the criminal justice system should ensure that the collection and disaggregation of data is integrated at every stage of the process and all criminal justice agencies and personnel should be effectively trained on the importance of data collection and recording to monitor trends and evaluate performance.**

5.10 **in response to questions 22, 23, 24, 25, and 26, recommends that a comprehensive training regime be implemented for all agencies and personnel across the criminal justice system to share this data and ensure that training of all personnel is informed by this data.**

5.11 **in response to questions 22, 23, 24, 25, and 26, recommends that that a regular review of the hate crime measures, which engages with groups affected and victims, be implemented to ensure their continued effectiveness across the criminal justice system from reporting to prosecution and sentencing.**

6.6 **in response to questions 11, 12, 13, 14, 15, 16, 17, 18 and 19, recommends that the hate crime legislation draws specifically on the full range of equality and non-discrimination safeguards in local and international law and ensures that all protected**

**characteristics derived from the international human rights standards are recognised within the law.**

6.15 **in response to question 11, recommends that the NI Executive adopt appropriate legislative and policy measures to protect women from all forms of gender based violence, including through technology mediated and online settings and that gender be included as a protected characteristic in any hate crime law, with a particular emphasis on the harm of misogynistic hate crime, to assist in removing all impediments to full and equal participation of women in all areas of life.**

6.16 **in response to question 11, recommends that in defining hate crime on the grounds of gender, it is not defined in gender neutral terms, but is given a definition which recognises the unequal power structures within society and recognise the particular harms experienced by all women and girls, non-binary and gender queer people and by men and boys who experience multiple discriminations.**

6.21 **in response to question 12, recommends that the hate crime law recognises the specific harm of transphobic hate crime for transgender people living in Northern Ireland and recognises transgender as a protected characteristic in any hate crime law.**

6.24 **in response to question 13, recommends that the hate crime law recognises the specific harm of hate crime on grounds of being intersex and recognises being or perceived as intersex as a protected characteristic in any hate crime law.**

6.30 **in response to question 14, advises that the international human rights standards do not specifically call for hate crime legislation to cover 'age' as a particular characteristic, however it does recognise the particular aggravated harms experienced by younger people and older people and calls on states to address these harms through appropriate legal and policy responses.**

6.35 **in response to question 15, advises that the international human rights standards do not specifically call for hate crime legislation to cover 'victim vulnerability' as a particular characteristic,**

**however it does recognise the specific harm of hostility to vulnerable people and offences motivated by exploitation of vulnerability and calls on states to address these harms through appropriate legal and policy responses.**

6.38 **in response to question 16, recommends that the hate crime law recognises the specific harm of hostility to homeless people as a particular characteristic and that this definition is broad enough to encompass people who do not have a secure home.**

6.44 **in response to questions 52 and 53, recommends that the hate crime law recognises the specific harm of sectarianism as a particular characteristic of hate crime under the umbrella of racism and racial discrimination and uses this opportunity to develop a statutory definition of sectarianism in line with the international human rights standards on racism and racial discrimination.**

6.50 **in response to questions 18 and 19, advises that intersectional discrimination is not currently recognised in NI equality law and that the international human rights standards recognise the multiplying impact of experiencing discrimination and hostility on two or more particular characteristics. The NIHRC further advises that international human rights law does not specifically call for hate crime legislation to cover intersectional harms, however it does recognise the specific harm of hostility on grounds of two or more particular characteristics and calls on states to address these harms through appropriate legal and policy responses.**

6.57 **in response to question 17, recommends that 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.**

6.63 **in response to question 17, recommends that in light of the acute levels of anti-Traveller racism and to ensure the recording of**

**disaggregated data, that the hate crime law recognises the specific harm of hostility to Travellers, Roma and other non-settled people is recognised it as a particular characteristic of hate crime.**

6.68 **in response to question 17, recommends that in light of the serious and harmful impact of antisemitism, and to ensure the recording of comprehensive disaggregated data, that the hate crime law recognises the specific harm of antisemitism as a particular characteristic of hate crime.**

6.73 **in response to question 17, recommends that in light of the serious and harmful impact of Islamophobia, and to ensure the recording of comprehensive disaggregated data, that the hate crime law recognises the specific harm of islamophobia as a particular characteristic of hate crime.**

7.20 **in response to question 32, recommends that consideration is given to removing the dwelling defence from article 9(3) of the Public Order (Northern Ireland) Order 1987. Given the gravity of the harm which is caused by the hate speech designed to stir up hatred and arouse fear to individuals and communities that share protected characteristics, it is immaterial whether this harm is caused inside a dwelling or in another environment. This does not remove the imperative for any law on incitement to hatred to be read compatibly with the obligations which flow from Articles 8, 10 and 17 of the ECHR.**

7.21 **in response to questions 36 and 37, recommends that any defence of freedom of expression is guided by the balancing of rights under Articles 10 and 17 of the ECHR. These require that any defence is in accordance with law, in pursuance of a legitimate aim and no more than is necessary in a democratic society. 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.**

7.22 **in response to question 38 and 39, recommends that the legal definition of incitement to hatred 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.**

7.23 **in response to question 33, recommends that the assessment of the complex balance between Articles 10 and 17 of the ECHR and the rights of persons and communities who are the targets of hate speech, alongside the test to ensure that any prosecution meets the criminal threshold, is made by the Director of Public Prosecutions before any such prosecution is undertaken.**

7.24 **in response to question 40, advises that as this is a excepted matter, the review should consider making recommendations that social media companies should have clear policies that reflect international human rights standards and that any law, which seeks to impose liability for failure to remove online hate speech, must meet the standards of necessity and proportionality and that all decisions are recorded to ensure data collection is consistent, extensive and disaggregated across all protected characteristics. In addition, consideration should be given to recommending a legal obligation on social media companies to report hate crime perpetrated on their networks to local police services.**

7.25 **in response to questions 46, 47, 48, 49 and 50, recommends that any hate crime law should apply to the online context and be adapted to address the specific way in which online hate is manifested and to give reassurance to communities and individuals who may be particularly vulnerable to online hate crimes. 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.**

8.11 **in response to questions 60, 61, 62 and 63, recommends that a victim-centred approach is embedded across the criminal justice**

**system to prevent secondary victimisation, re-traumatisation or stigmatisation. This requires that effective steps are taken to ensure that there is an awareness of specialised information, advice and support services which are available to victims of hate crime through the Hate Crime Advocacy Service.**

8.12 **in response to questions 60, 61, 62 and 63, recommends that the Hate Crime Advocacy Service continue its role in supporting victims through the criminal justice process and 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.**

8.13 **in response to questions 60, 61, 62 and 63, recommends that the Hate Crime Advocacy Service and the criminal justice system is accessible to all victims of hate crime, which requires ensuring that special needs, mental capacity, age-appropriateness, gendered and other particular characteristics are taken into account and reasonably accommodated.**

8.14 **in response to questions 64 and 65, recommends that consideration be given to protecting the identity of vulnerable complainants in the criminal justice system where necessary to prevent further victimisation.**

8.15 **in response to questions 54, 55, 56, 57 and 58, recommends that any use of restorative justice processes is based on international best practice and has 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. No victim should be required to engage with restorative justice procedures.**

8.16 **recommends that consideration is given to the establishment of a protective security funding scheme for places of worship and other religious buildings which are, or are at a high risk of being, targeted by hate crimes.**

# 1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions, the following advice is submitted to the Judge Marrinan's Hate Crime Review team in response to its consultation.[1]

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN).The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);[2]
- UN International Covenant on Civil and Political Rights (UN ICCPR);[3]
- UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR);[4]
- UN Convention on the Elimination of All Forms of Racial Discrimination (UN CERD);[5]
- UN Convention on Elimination of Discrimination against Women (UN CEDAW);[6]
- UN Convention against Torture (UN CAT);[7]
- UN Convention on the Rights of the Child (UN CRC);[8]
- UN Convention on the Rights of Persons with Disabilities (UN CRPD);[9] and
- Framework Convention for the Protection of National Minorities.[10]

1.3 In addition to these treaty standards, there exists a body of 'soft law'

[1] Hate Crime Review Team, 'Hate Crime Legislation in Northern Ireland: Independent Review Consultation Paper' (HCRT, 2020)
[2] Ratified by the UK in 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).
[3] Ratified by the UK in 1966.
[4] Ratified by the UK in 1966.
[5] Ratified by the UK in 1969.
[6] Ratified by the UK in 1986.
[7] Ratified by the UK in 1988.
[8] Ratified by the UK in 1989.
[9] Ratified by the UK in 2009.
[10] Ratified by the UK in 1998.

developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Basic Principles on the Independence of the Judiciary 1985;[11]
- UN Basic Principles of Justice for Victims of Crime and Abuse of Power 1985;[12]
- UN Human Rights Committee General Comment No 18 on Non-discrimination;[13]
- European Commission against Racism and Intolerance Policy Recommendation No 1 on Combatting Racism and Xenophobia;[14]
- UN Committee on the Elimination of Racial Discrimination (UN CERD Committee), General Recommendation No 25 on gendered related dimensions of racial discrimination;[15]
- UN Human Rights Committee General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant;[16]
- UN CERD Committee General Recommendation No 31 on the Prevention of Racial Discrimination in the Criminal Justice System;[17]
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims 2005;[18]
- Yogyakarta Principles on sexual orientation and gender identity 2006;[19]
- UN Special Rapporteur on Racism's report on the implications of islamophobia on the enjoyment of rights;[20]

[11] UN Basic Principles on the Independence of the Judiciary, 13 December 1985.
[12] UN Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985.
[13] 'UN Human Rights Committee General Comment No 18: Non-discrimination', 10 November 1989.
[14] European Commission against Racism and Intolerance, 'Policy Recommendation No 1: Combatting Racism and Xenophobia', 4 October 1996.
[15] 'UN CERD Committee General Recommendation No 25: Gendered Related Dimensions of Racial Discrimination', 20 March 2000.
[16] CCPR/C/21/Rev.1/Add. 13, 'UN Human Rights Committee General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004.
[17] 'UN CERD Committee General Recommendation 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System', 2005.
[18] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.
[19] Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 2006.
[20] A/HRC/6/6, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, on the Serious Implications of Islamophobia on the Enjoyment of Rights', 21 August 2007.

- EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law;[21]
- Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, Hate Crime: A Practical Guide;[22]
- UN Committee on Economic, Social and Cultural Rights (ICESCR Committee) General Comment No 20 on Non-Discrimination in Economic, Social and Cultural Rights;[23]
- UN Guiding Principles on Business and Human Rights;[24]
- UN Human Rights Committee General Comment No 34 on freedoms of opinion and expression;[25]
- UN CERD Committee General Recommendation No 34 on Discrimination against People of African Descent;[26]
- Rabat Plan of Action on Incitement to Racial Hatred;[27]
- EU Victims Directive;[28]
- UN Special Rapporteur on freedom of religion's report on freedom of religion of persons belonging to religious minorities;[29]
- UN CERD Committee General Recommendation No 35 on Combating Racist Hate Speech;[30]
- Parliamentary Assembly of the Council of Europe Resolution on discrimination against transgender people;[31]
- UN High Commissioner for Human Rights' report on discrimination and violence against individuals based on their sexual orientation and gender identity;[32]

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[21] 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.
[22] Office for Democratic Institutions and Human Rights, 'Hate Crime: A Practical Guide' (OSCE, 2009).
[23] E/C.12/GC/20, 'UN ICESCR Committee General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights', 2 July 2009.
[24] A/HRC/17/31, 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', 21 March 2011.
[25] CCPR/C/GC/34, 'UN Human Rights Committee, General Comment No 34: Freedoms of Opinion and Expression', 12 September 2011.
[26] CERD/C/GC/34, 'UN CERD Committee General Recommendation No 34: Discrimination against People of African Descent', 3 October 2011.
[27] A/HRC/22/17/Add.4, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence', 11 January 2013.
[28] 2012/29/EU, 'EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.
[29] A/HRC/22/51, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, on the Need to Respect and Protect Freedom of Religion or Belief of Persons Belonging to Religious Minorities', 24 December 2012.
[30] CERD/C/GC/35, 'UN CERD Committee General Recommendation No 35: Combating Racist Hate Speech', 26 September 2013.
[31] CoE Parliamentary Assembly, 'Resolution 2048 on Discrimination against Transgender People in Europe', 22 April 2015.
[32] A/HRC/29/23, 'Office of the United Nations High Commissioner for Human Rights Report on Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender Identity', 4 May 2015.

- UN Special Rapporteur on Violence against Women 2015 Report on visit to the UK;[33]
- UN Human Rights Committee 2015 Concluding Observations to the UK;[34]
- European Commission against Racism and Intolerance Policy Recommendation No 15 on Combating Hate Speech[35]
- UN Special Rapporteur on the Right to Housing's report on the elimination of homelessness;[36]
- Council of Europe High Commissioner for Human Rights on Human Rights and Intersex People;[37]
- UN Committee on the Rights of the Child (UN CRC Committee) 2016 Concluding Observations to the UK;[38]
- UN ICESCR Committee 2016 Concluding Observations to the UK;[39]
- UN CERD Committee 2016 Concluding Observations to the UK;[40]
- Advisory Committee on the Framework Convention for the Protection of National Minorities 2017 Opinion on the UK;[41]
- UN CEDAW Committee General Recommendation No 35 on gender based violence against women;[42]
- UN Committee on the Rights of Persons with Disabilities (UN CRPD Committee) 2017 Concluding Observations to the UK;[43]

[33] A/HRC/29/27/Add.2, 'UN Special Rapporteur on Violence against Women its Causes and Consequences, Rashida Manjoo, on visit to the United Kingdom of Great Britain and Northern Ireland', 19 May 2015.
[34] CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015.
[35] European Commission against Racism and Intolerance, 'Policy Recommendation No 15: Combating Hate Speech', 8 December 2015
[36] A/HRC/31/54, 'UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Leilani Farha, Report on the Elimination of Homelessness', 30 December 2015.
[37] Council of Europe High Commissioner for Human Rights, 'Human Rights and Intersex People' (CoE, 2015).
[38] CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016.
[39] E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016.
[40] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third periodic Reports of UK', 26 August 2016.
[41] ACFC/OP/IV(2016)005, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK', 27 February 2017.
[42] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017.
[43] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017.

- European Commission against Racism and Intolerance Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination;[44]
- UN Special Rapporteur on Racism's report on shifts in ideologies and support for Nazism and neo-Nazism;[45]
- UN Special Rapporteur on Violence against Women's report on online violence against women and girls;[46]
- UN CEDAW Committee 2019 Concluding Observations to the UK;[47]
- UN Special Rapporteur on Racism 2019 Report on visit to the UK;[48]
- UN Committee against Torture (UN CAT Committee), 2019 Concluding Observations to the UK;[49]
- UN Special Rapporteur on freedom of religion's report on the elimination of religious intolerance;[50] and
- UN Special Rapporteur on Freedom of Expression 2019 Report on the regulation of online 'hate speech'.[51]

1.4 The NIHRC welcomes the opportunity to respond to the independent review of hate crime legislation in Northern Ireland. The NIHRC has sought to highlight relevant human rights standards and principles, where they may be of assistance in informing future hate crime legislation. The structure of this response is largely aligned to the structure of the consultation document, save where to avoid repetition, the issues have been grouped together.

[44] European Commission against Racism and Intolerance, 'Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination', 7 December 2017.
[45] A/HRC/38/53, 'Report of UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, on Concerning Shifts in Ideologies and Support for Nazism and Neo-Nazism', 28 April 2018.
[46] A/HRC/38/47, 'UN Special Rapporteur on Violence against Women its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence against Women and Girls from a Human Rights Perspective', 18 June 2018.
[47] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019.
[48] A/HRC/41/54/Add.2, 'UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, Report on Visit to the United Kingdom of Great Britain and Northern Ireland', 27 May 2019.
[49] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019.
[50] A/74/358, 'UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, on the Elimination of All Forms of Religious Intolerance', 20 September 2019.
[51] A/74/486, 'UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, Report on the Human Rights Law that Applies to the Regulation of Online 'Hate Speech'', 9 October 2019.

## 2.0 Definition and Justification for Hate Crime Law

2.1 The Hate Crime Review proposes a working definition of hate crime as "acts of violence, hostility and intimidation directed toward people because of their identity and perceived difference".[52] The international human rights framework recognises that the principle of non-discrimination is essential to the enjoyment of human rights. All international human rights treaties include the principle of non-discrimination as a core principle. Article 2 of UN ICESCR requires States to "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The UN ICCPR includes a similar obligation and Article 2(2) places a positive obligation on States to "take the necessary steps… to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

2.2 Article 26 of the UN ICCPR contains a broad prohibition on discrimination, stating that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In addition, Article 20(2) the UN ICCPR prohibits by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

2.3 The UN Human Rights Committee has made it clear that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant".[53] Moreover, General Comment 31 of the UN Human Rights Committee provides guidance on what this means in practice and states that "Article 2 [of the UN ICCPR] requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."[54] This is further elaborated as follows:

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[52] Hate Crime Review Team, 'Hate Crime Legislation in Northern Ireland: Independent Review Consultation Paper' (HCRT, 2020), at para 7.32.
[53] UN Human Rights Committee, 'General Comment No 18 on Non-discrimination', 1989, at para 10.
[54] CCPR/C/21/Rev.1/Add. 13, 'UN Human Rights Committee General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, at para 7.

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.[55]

2.4 The State therefore has a positive duty to "take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[56]

2.5 In its 2015 concluding observations to the UK, the UN Human Rights Committee urged the UK Government and NI Executive to ensure it was "thoroughly investigating alleged cases of incitement to discrimination, hostility or violence, and alleged hate crimes, prosecuting the perpetrators and, if they are convicted, punishing them with appropriate sanctions, and providing victims with adequate remedies, including compensation".[57]

2.6 Article 6 of the Framework Convention on the Protection of National Minorities requires States to encourage a "spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory" and to take "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".

2.7 The European Court of Human Rights (ECtHR) has consistently highlighted the need to investigate racially motivated crime in order to "reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence".[58] In addition, Article 14 of the ECHR which prohibits discrimination in the enjoyment of the rights in the Convention, places an added obligation on the authorities when investigating violent attacks to "take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice

[55] Ibid, at para 8.
[56] Ibid, at para 8.
[57] CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015, at para 10(d).
[58] *Angelova and Iliev v Bulgaria* (2007) ECHR 670, at para 98. *See also Menson v UK* (1998) ECHR 107.

may have played a role in the events".[59]

2.8 There is broad consensus across the international human rights supervisory bodies recognising the specific harms caused by hate crime. In its report on Racist Hate Crime, the NIHRC identified the four principles of State obligations: to prevent; prohibit; prosecute; and protect. Taken together, these principles provide a comprehensive framework for ensuring best practice in international human rights law and the effectiveness of the hate crime law should be measured against each of these four principles.[60]

2.9 The NIHRC Racist Hate Crime report recognised that "racial discrimination may give rise to action by private persons which may constitute criminal offences" and that 'hate crime' can be used to "incorporate acts of racism that may not amount to a criminal offence, such as name calling or anti-social behaviour".[61] Victims who have experienced 'hate' aggravated incidents that do not constitute a crime, so called 'signal incidents', are also protected by international human rights law and require safeguards alongside material, medical, psychological and social assistance and support.[62] Moreover, in order to monitor the potential for escalation from hate signal incidents to hate crimes, full disaggregated data needs to be collected to inform the response of the criminal justice system and other agencies.[63]

2.10 The Organisation for Security and Cooperation in Europe notes that "many States do not mention hatred or hostility at all in their hate crime laws" and instead requires that the accused acted "because of" or "by reason of" the victim's protected characteristic.[64] The advantage of this model is that it has a broader scope as it "reaches those offenders who harboured no hostility but selected their victims based on prejudices or stereotyped information about victim vulnerabilities".[65] This model is "easier to apply in practice and may do a better job of addressing the kind of harm that hate crime laws are intended to prevent", in particular:

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[59] *Nachova and Others v Bulgaria* (2005) ECHR 465.
[60] NI Human Rights Commission, 'Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland' (NIHRC, 2013).
[61] Ibid, at 9.
[62] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, at paras 18-19.
[63] NI Human Rights Commission, 'Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland' (NIHRC, 2013).
[64] Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, 'Hate Crime: A Practical Guide' (OSCE, 2009), at 48.
[65] Ibid.

> the impact on the victim and members of the victim's community is usually the same, regardless of whether the offender acted out of hate… A victim who is targeted because the offender assumes that some protected characteristic of the victim makes him/her especially vulnerable to crime.[66]

2.11 **In response to questions 2 and 3, the NIHRC recommends that specific hate crime legislation is designed in line with the international obligations to prevent, prohibit, prosecute and protect and takes into account best practice from other jurisdictions in the UK.**

2.12 **In response to questions 2, 3 and 35, the NIHRC advises that the obligation to protect means that hate crime laws should be designed to reassure communities and individuals who may be particularly vulnerable, while at the same time reflecting that some behaviours will fall short of hate crime. The NIHRC recommends that any hate crime law must reflect the need for hate 'signal incidents', which fall short of hate crime, to be recorded and support put in place for the victims of such incidents.**

2.13 **In response to questions 2, 3 and 35, the NIHRC recommends that the principle of legal certainty is reflected in any hate crime law and 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.**

2.14 **In response to questions 27, 28, 29 and 30, the NIHRC recommends that the hate crime law include a "by reason of" threshold to 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. 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**

[66] Ibid.

**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.**

2.15 **In response to questions 27, 28, 29 and 30, the NIHRC recommends that legal definition of hate crime is set out in a 'general interpretation for the purposes of the act' section and that 'hate' covers 'bias, hostility, prejudice, bigotry and contempt' and is broad enough to include prejudices or stereotyped information relating to a protected characteristic.**

## 3.0 Statutory Aggravation Model

3.1 Article 4(a) of UN CERD requires States to create an offence punishable by law addressing the "dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin". The UN CERD Committee in 2016 in its concluding observations recommended that the UK Government and the NI Executive, *inter alia*, "investigate all reported racist hate crimes, prosecute the perpetrators and punish them with sanctions commensurate with the gravity of the offence, and provide effective remedies to victims".[67]

3.2 In General Recommendation 35 in 2017, the UN CEDAW Committee called on States to:

> ensure that all forms of gender based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence.[68]

3.3 The ECtHR has previously advised that domestic legal frameworks fall short of compliance with the ECHR where they do not provide an effective

[67] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', 26 August 2016, para 16(a).
[68] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 29.

deterrence. The ECtHR has specifically stated that "effective deterrence is indispensable… and it can be achieved only by criminal-law provisions".[69] The ECtHR will evaluate whether the criminal justice system and the punishment imposed has "adequate deterrent effect capable of ensuring the effective prevention of unlawful acts".[70]

3.4 The Council of Europe's European Commission against Racism and Intolerance in Policy Recommendation No 7 requires that the law provide for "effective, proportionate and dissuasive" sanctions are accorded to racist offences.[71] It further states that the criminal law should penalise hate crimes against "a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin".[72] In addition, Policy Recommendation No 1 recommends that all racist and xenophobic acts are 'stringently punished' through methods such as defining common offences with racist or xenophobic elements as specific offences or by enabling the racist or xenophobic motives of the offender to be specifically taken into account in the criminal justice process.[73]

3.5 The Hate Crime Review notes that the experience from England and Wales demonstrates that the aggravated offences model produces a more effective response from the criminal justice process than the current NI model in which hate is only addressed at the point of sentencing.[74] In Scotland, a similar review of hate crime found that the statutory aggravation model in operation there was largely effective.[75] Concerns have been raised by civil society in NI that the English model of including specific aggravated offences could lead to prosecutions failing where the aggravated part of the offence has not been proven.[76] This could significantly undermine the human rights obligation to ensure that the hate crime law provides an effective deterrence and safeguards are required to ensure that when a hate aggravated offence is charged, that the base offence is charged concurrently.

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[69] *X and Y v the Netherlands* (1985) ECHR 4, at para 27.
[70] *Opuz v Turkey* (2009) ECHR 870, at para 199.
[71] European Commission against Racism and Intolerance, 'Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination', 7 December 2017, at para 12.
[72] Ibid, at para 18.
[73] European Commission against Racism and Intolerance, 'Policy Recommendation No 1: Combatting Racism and Xenophobia', 4 October 1996.
[74] Hate Crime Legislation in Northern Ireland: Independent Review Consultation Paper, at para 7.32.
[75] Lord Bracadale, (2018) 'Independent Review of Hate Crime Legislation in Scotland: Final Report', May 2018, para 3.4.
[76] Meeting with Equality Coalition on Hate Crime and Gender, 5 March 2020.

3.6 The international standards are agnostic on whether the best method for effectively addressing hate crime is via a specific aggravated offence or an enhanced sentence, but it is clear that whatever method employed, it must be effective. The evidence from other jurisdictions across the UK that the statutory aggravated model is a more effective deterrence and has many additional benefits, such as allowing for more effective reporting and data collection across the criminal justice process.[77]

3.7 **In response to questions 7 and 8, the NIHRC advises that international human rights standards do not prescribe a specific model for hate crime law. Hate crime law will be human rights compliant when it provides an effective deterrence. The NIHRC recommends that consideration be given to implementing the statutory aggravation model in NI, as evidence from other jurisdictions demonstrates that it is more effective in responding to hate crime than the enhanced sentencing model alone.**

3.8 **In response to question 21, the NIHRC advises that the human rights law requires that hate crime law provides an effective deterrence and recommends that evaluations of the effectiveness of the statutory aggravation models in Scotland and in England and Wales to ensure that the model that applies in NI reflects best practice in other jurisdictions and is in line with international human rights standards.**

## 4.0 Enhanced Sentencing Model

4.1 As noted above, the UN CERD Committee recommends that in responding to racist hate crimes, the UK government and NI Executive should ensure that perpetrators are prosecuted and punished "with sanctions commensurate with the gravity of the offence". [78]

4.2 The EU Framework Decision on racism and xenophobia is clear that:

[77] Law Commission, 'Hate Crime: The Case for Extending Existing Offences – A Consultation Paper' (LC, 2013); Law Commission, 'Hate Crime: Should the Current Offences be extended?' (LC, 2014); Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland: Final Report' (Scottish Government, 2018).
[78] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom of Great Britain and Northern Ireland', 26 August 2016, at para 16(a).

> for offences … Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.[79]

4.3 In addition, the European Commission against Racism and Intolerance recommends that hate crimes are "stringently punished" through "enabling the racist or xenophobic motives of the offender to be specifically taken into account".[80]

4.4 When developing sentencing guidance, adherence to the jurisprudence of the ECHR and best practice from other jurisdictions of the UK should be adopted in developing and implementing such guidelines. As such, due consideration should be given to Article 7(1) of the ECHR, which provides that:

> no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

4.5 The ECtHR advised in the case of *Coeme and Others v Belgium* (2000) that:

> according to its case-law, Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty... It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.[81]

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[79] 2008/913/JHA, 'EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', 28 November 2008, at Article 4.
[80] European Commission against Racism and Intolerance, 'Policy Recommendation No 1: Combatting Racism and Xenophobia', 4 October 1996, at part A.
[81] *Coeme and Others v Belgium* (2000) ECHR 250, at para 145.

4.6 Discretion in sentencing is essential to the independence of the judiciary and this needs to be balanced against the need to ensure that that the criminal law is "sufficiently dissuasive to prevent effectively illegal acts".[82] The NIHRC recognises the complexity of sentencing and judges must consider the multiple factors to arrive at an individualised judgment and that the proportionality test and the margin of appreciation, are key to determining sentences.

4.7 The independence of the judiciary is stressed within the UN Basic Principles on the Independence of the Judiciary, which state that:

1) the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2) the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[83]

4.8 When designing sentencing guidance, consideration must be given to the need for any sanctions to be effective, proportionate and dissuasive. Any enhanced sentencing must be effectively enforced to ensure its deterrent effect. The EU Council Framework Decision 2008 emphasises the need for States to take the necessary measures to ensure that "racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties".[84] In addition, this principle of "effective, proportionate and dissuasive penalties or measures" applies to both natural and legal persons.[85]

4.9 It is noted that the current enhanced sentencing model limits the consideration of the 'hate' element of the offence until the moment of

[82] *Okkali v Turkey*, Application No 52067/99, Judgment of 17 October 2006, at para 78.
[83] UN Basic Principles on the Independence of the Judiciary, 13 December 1985.
[84] 2008/913/JHA, 'EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', 28 November 2008, at Article 4.
[85] Ibid, at Article 6.

sentencing and that this makes collection of data on the 'aggravated by hate' element throughout the criminal justice process more difficult.

4.10 The review makes clear that the current laws in NI relating to hate crime, which focus on the enhanced sentencing model, are ineffective. The NIHRC welcomes the inclusion of previous research conclusions on the inconsistent approach to sentencing for racist hate crime and recommendations.[86] 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 dissuasive sanction remains unfulfilled.[87]

4.11 NI civil society organisations have raised concerns about pressures on the Public Prosecution Service to secure convictions through the criminal process. In effect, that it is often easier to secure a guilty plea from the defendant in a criminal trial for an offence if the 'aggravated by hate' element is removed. Once a guilty plea is on record there is no need for a full criminal trial and the court can move to sentencing. To secure a speedy conviction it may be expeditious for the Public Prosecution Service to drop consideration of the 'aggravating' element and this means it cannot be considered at sentencing.[88]

4.12 The NIHRC recognises that embedding sentencing guidance in statute provides for clarity and greater consistency across sentencing for hate crimes, but maintaining discretion in sentencing is an essential aspect of ensuring independence of the judiciary.[89] The NIHRC position is that the judiciary should consistently demonstrate how they integrate attention to the aggravating 'hate' dimension in their sentencing practice and it is reflected in sentencing.[90] In addition, the NI Court and Tribunal Service should record and publish data on judicial decisions relating to the offences aggravated by a 'hate' element.[91]

4.13 **In response to questions 5 and 6, the NIHRC advises that the**

[86] NI Human Rights Commission, 'Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland' (NIHRC, 2013).
[87] Hate Crime Review Team, 'Legislation in Northern Ireland: Independent Review Consultation Paper' (HCRT, 2020), at 60-63.
[88] Meeting with Equality Coalition on Hate Crime and Gender, 5 March 2020.
[89] NI Human Rights Commission, 'Submission to the DOJ's Sentencing Review Consultation' (NIHRC, 2020), at 10.
[90] NI Human Rights Commission, 'Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland' (NIHRC, 2013), at 106.
[91] Ibid.

**international human rights standards allow for some discretion as to the model of hate crime law, but require that it is effective, proportionate and dissuasive and respond effectively to the current shortcomings in the application of the current hate crime model in NI.**

4.14 **In response to questions 8 and 9, the NIHRC recommends developing specific sentencing guidance for hate crimes with an enhanced sentence to reflect the aggravating dimension of the offence to ensure that the deterrent effect is effective, proportionate and dissuasive.**

4.15 **In response to questions 8 and 9, the NIHRC recommends that judicial independence is safeguarded and that any statutory duty relating to specific sentencing guidance for hate crimes is framed as a 'due regard' principle, rather than a more onerous duty.**

4.16 **In response to questions 4, 10 and 20, the NIHRC recommends that where a hate crime results in an enhanced sentence, the court should make it clear that this is to ensure the deterrent effect of the sentence is maximised.**

4.17 **In response to questions 4, 10 and 20, the NIHRC recommends that any hate crime consideration should be recorded to ensure data collection is consistent, extensive and disaggregated across all stages of the criminal justice process, including sentencing and on the criminal record viewer.**

## 5.0 Data Collection and Recording

5.1 The UN CAT Committee in 2019 in relation to gender based violence recommended that the UK Government and NI Executive:

> compile and provide to the Committee statistical data, disaggregated by the age and ethnicity or nationality of the victim, on the number of complaints, investigations, prosecutions, convictions and sentences recorded in cases of gender-based violence, as well as on the measures

adopted to ensure that victims have access to effective remedies and reparation.[92]

5.2 The UN CRPD Committee in its 2017 concluding observations to the UK government and NI Executive was concerned about "reports of cases of disability hate crime, in the absence of consistent data collection and differences in legal provisions for sentencing different types of hate crime".[93] In response the UN CRPD Committee recommended the UK "define comprehensively the offence of disability hate crime, and ensure appropriate prosecutions and convictions".[94]

5.3 The UN CERD Committee in its 2016 concluding observations emphasised the need for the UK Government and NI Executive to:

> systematically collect disaggregated data on hate crimes, ensure that measures to combat racist hate crimes are developed with the meaningful participation of groups affected, and undertake a thorough impact assessment of the measures adopted, in order to ensure their continued effectiveness.[95]

5.4 The UN CRC Committee recommended that the State "strengthen the systematic collection of data and recording of information on violence against children, including domestic violence, gender-based violence, abuse and neglect in all settings, and the sharing of information and referral of cases among relevant sectors".[96]

5.5 In May 2018, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E Tendayi Achiume visited NI. During her visit, the Special Rapporteur noted inconsistency in the data collected by government departments and its current limitations in scope, including its failure to account for the racial impact of immigration and counter terrorism law and policy.[97] The UN

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[92] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 57(e).
[93] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 38.
[94] Ibid, at para 39.
[95] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', 26 August 2016, at para 16.
[96] CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016, at para 43(b).
[97] Office of the High Commissioner for Human Rights, 'Press Release: UN rights expert hails UK for anti-racism action but raises serious concerns over Immigration Policy, Prevent programme and Brexit', 11 May 2018.

Special Rapporteur called on the UK authorities and other key stakeholders to "ensure the adoption of comprehensive legislation prohibiting racial discrimination in NI".[98]

5.6 The Parliamentary Assembly of the Council of Europe has called on States to:

> collect and analyse information and data on the human rights situation of transgender people, including discrimination on grounds of gender identity and multiple discrimination, as well as transphobic intolerance and hate crimes; these data are necessary for the design and implementation of anti-discrimination legislation and policies and for the monitoring of their impact.[99]

5.7 The Scottish hate crime review in its rationale for continuing to apply the statutory aggravations model noted that it permitted more effective and consistent data to be recorded across the criminal justice process. It confirmed that "the maintenance of records allows statistics to be kept and trends identified and monitored" and that it also permitted the aggravation appear on the criminal record of the individual.[100] This second consideration was important, as if the individual "commits a further offence, the earlier aggravated conviction may be taken into account".[101] This collection of data meant that "records have been maintained and annual statistics have been published", which allowed these records to inform the analysis of the effectiveness of the statutory aggravated model of hate crime.[102]

5.8 **In response to question 22, 23, 24, 25, and 26, the NIHRC recommends that the particular characteristic which is the focus of any hate crime should be recorded to ensure data collection is consistent, extensive and disaggregated across all stages of the criminal justice, including sentencing and on the criminal record viewer.**

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[98] A/HRC/41/54/Add.2, 'UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, Report on Visit to the United Kingdom of Great Britain and Northern Ireland', 27 May 2019, at para 74(f).
[99] CoE Parliamentary Assembly, 'Resolution 2048 on Discrimination against Transgender People in Europe', 22 April 2015.
[100] Lord Bracadale, (2018) 'Independent Review of Hate Crime Legislation in Scotland: Final Report' (Scottish Government, 2018), at para 3.3.
[101] Ibid.
[102] Ibid, at para 3.4.

5.9 **In response to question 22, 23, 24, 25, and 26, the NIHRC recommends that all parts of the criminal justice system should ensure that the collection and disaggregation of data is integrated at every stage of the process and all criminal justice agencies and personnel should be effectively trained on the importance of data collection and recording to monitor trends and evaluate performance.**

5.10 **In response to question 22, 23, 24, 25, and 26, the NIHRC recommends that a comprehensive training regime be implemented for all agencies and personnel across the criminal justice system to share this data and ensure that training of all personnel is informed by this data.**

5.11 **In response to question 22, 23, 24, 25, and 26, the NIHRC recommends that that a regular review of the hate crime measures, which engages with groups affected and victims, be implemented to ensure their continued effectiveness across the criminal justice system from reporting to prosecution and sentencing.**

## 6.0 Protected Characteristics

6.1 The Review acknowledges the current limitations on the characteristics protected under hate crime law in Northern Ireland and notes there is a lack of consensus on the inclusion of protected grounds beyond hostility based on membership of a racial group, a religious group, sexual orientation group or disability. The Review therefore examines the inclusion of potential new protected characteristics.

6.2 As noted in the Review, the Law Commission in England acknowledged that, "it is undesirable for aggravated offences not to apply equally to hostility based on race, religion, transgender identity, sexual orientation and disability" as the differential protection "sends the wrong message

about the impact of such offending and the seriousness with which it is taken".[103]

6.3 As noted in section 2 above, the duty to criminalise and pursue perpetrators of hate crime is founded on the principle human rights derive from the "inherent dignity of the human person".[104] Article 14 of the ECHR guarantees the enjoyment of all the rights in the Convention "without discrimination on any ground". Similarly ICESCR protects against "discrimination of any kind" and ICCPR states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination". The Human Rights Committee has clarified that these protections place a positive duty on governments to "take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[105]

6.4 The link between non-discrimination and hate crime is explicit in the Human Rights Committee's Concluding Observations in 2015 which urged the UK Government and NI Executive to ensure it was "thoroughly investigating alleged cases of incitement to discrimination, hostility or violence, and alleged hate crimes, prosecuting the perpetrators and, if they are convicted, punishing them with appropriate sanctions, and providing victims with adequate remedies, including compensation".[106]

6.5 The NIHRC welcomes the discussion of other particular characteristics for inclusion in any new hate crime law in NI and recognises the link with the particularly characteristics protected in the international human rights standards on non-discrimination.

6.6 **In response to questions 11, 12, 13, 14, 15, 16, 17, 18 and 19 the NIHRC recommends that the hate crime legislation draws specifically on the full range of equality and non-discrimination safeguards in local and international law and ensures that all**

[103] Law Commission, 'Hate Crime: Should the Current Offences be Extended?' (LC, 2014), at 12.
[104] Preamble, UN International Covenant on Economic Social and Cultural Rights 1966; Preamble, UN International Covenant on Civil and Political Rights 1966.
[105] CCPR/C/21/Rev.1/Add. 13, 'UN Human Rights Committee General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, at para 8.
[106] CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015, at para 10(d).

**protected characteristics derived from the international human rights standards are recognised within the law.**

## Gender

6.7 Article 14 of the ECHR guarantees the enjoyment of all rights in the Convention without discrimination on the basis of sex. Article 2 of UN ICESCR and article 2 of UN ICCPR require states to safeguards the rights of everyone within the jurisdiction "without distinction of any kind, such as ...sex". Article 26 of UN ICCPR recognises that the law shall "guarantee to all persons equal and effective protection against discrimination on any ground such as … sex". Article 2 of UN CEDAW requires States to pursue by "all appropriate means and without delay a policy of eliminating discrimination against women".

6.8 The UN CRPD Committee, in its 2017 concluding observations, recommended the UK Government and NI Executive "adopt inclusive and targeted measures, including disaggregated data, to prevent multiple and intersectional discrimination of women and girls with disabilities, in particular those with intellectual and/or psychosocial disabilities, in education [and] employment".[107]

6.9 In 2017 the UN CEDAW Committee issued General Recommendation No 35, which highlighted that:

> gender based violence against women, whether committed by States, intergovernmental organizations or non-State actors, including private persons and armed groups, remains pervasive in all countries, with high levels of impunity. It manifests itself on a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, including technology mediated settings and in the contemporary globalised world it transcends national boundaries.[108]

6.10 In 2019, the UN CEDAW Committee also recommended that the NI Executive "adopt legislative and comprehensive policy measures to protect women from all forms of gender-based violence" in NI and that disabled

[107] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', 29 August 2017, at para 19.
[108] CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 6.

women, asylum-seeking and migrant women and women with insecure immigration status are able to seek effective protection.[109]

6.11 In 2019, the UN CAT Committee recommended the UK Government and NI Executive "take effective measures … to ensure that all cases of gender-based violence … are thoroughly investigated, that the alleged perpetrators are prosecuted and, if convicted, punished appropriately" and "provide mandatory training on the prosecution of gender-based violence to all justice officials and law enforcement personnel and continue awareness-raising campaigns on all forms of violence against women". [110]

6.12 In addition, the UN Special Rapporteur on Violence against Women, Rashida Manjoo, following her 2014 mission to the UK, recommended that the UK Government and devolved administrations "implement comprehensive and co-ordinated strategies to prevent and combat violence against women and girls, introduce robust monitoring and accountability mechanisms to monitor the impact of these strategies, and ensure the provision of services for victims".[111]

6.13 In 2018, the UN Special Rapporteur on Violence against Women, Dubravka Šimonović, noted that "when women and girls do have access to and use the Internet they face online forms and manifestations of violence that are part of the continuum multiple, recurring and interrelated forms of gender based violence against women" and that "despite the benefits and empowering potential of the Internet and ICT, women and girls across the world have increasingly voiced their concern at harmful, sexist, misogynistic and violent content and behaviour online".[112] She recommended that States "apply a gender perspective to all online forms of violence, which are usually criminalised in a gender-neutral manner, in order to address them as acts of gender based violence".[113]

6.14 Gender based violence is a pervasive problem and the increase in online misogynistic hate towards women is an impediment on the advancement

[109] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 30(b).
[110] CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 57(c).
[111] 'Oral End of Mission Statement by the UN Special Rapporteur on Violence against Women, Rashida Manjoo on Visit to the UK and NI', 16 June 2015.
[112] A/HRC/38/47 'UN Special Rapporteur on Violence against Women, its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence against Women and Girls from a Human Rights Perspective', 18 June 2018, at para 14.
[113] Ibid, at para 102.

of women in public life and is recognised by the UN Special Rapporteur on Violence against Women as an impediment to their full participation in public life.[114]

6.15 **In response to question 11, the NIHRC recommends that the NI Executive adopt appropriate legislative and policy measures to protect women from all forms of gender based violence, including through technology mediated and online settings and that gender be included as a protected characteristic in any hate crime law, with a particular emphasis on the harm of misogynistic hate crime, to assist in removing all impediments to full and equal participation of women in all areas of life.**

6.16 **In response to question 11, the NIHRC recommends that in defining hate crime on the grounds of gender, it is not defined in gender neutral terms, but is given a definition which recognises the unequal power structures within society and recognise the particular harms experienced by all women and girls, non-binary and gender queer people and by men and boys who experience multiple discriminations.**

**Transgender**

6.17 In 2009, the UN ICESCR Committee recognised that "groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination" and that transgender people are particularly at risk from discrimination and clarified that 'other status' in Article 2 of the UN ICESCR included transgender as a protected characteristic, as "persons who are transgender … often face serious human rights violations, such as harassment in schools or in the workplace".[115]

6.18 In 2016, the UN High Commissioner for Human Rights reported on the scale of violence experienced by trans people and noted that "violence motivated by homophobia and transphobia is often particularly brutal, and

[114] Ibid, at para 29.
[115] E/C.12/GC/20 'UN ICESCR Committee General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights', 2 July 2009, at paras 1 and 32.

in some instances characterized by levels of cruelty exceeding that of other hate crimes".[116]

6.19 In 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution on the discrimination of transgender people in Europe called on states to explicitly "prohibit discrimination based on gender identity in national non-discrimination legislation" and to "enact hate crime legislation which affords specific protection for transgender people against transphobic crimes and incidents; provide specific training to sensitise law-enforcement officials and members of the judiciary".[117]

6.20 The Yogyakarta Principles make it clear in principle 5 on the right to security of the person, that "everyone, regardless of … gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group".[118] This places an obligation on States to "take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity" and to "take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation or gender identity of any person or group of persons".[119]

6.21 **In response to question 12, the NIHRC recommends that the hate crime law recognises the specific harm of transphobic hate crime for transgender people living in Northern Ireland and recognises transgender as a protected characteristic in any hate crime law.**

**Intersex**

6.22 The need for specific protections for intersex people in law has been raised by the UN CRC Committee, UN CRPD Committee and UN CAT Committee in their concluding observations to the UK Government and NI Executive.[120]

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[116] A/HRC/29/23, 'Report of the Office of the United Nations High Commissioner for Human Rights on Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity for Human Rights', 4 May 2015, at para 23.
[117] CoE Parliamentary Assembly, 'Resolution 2048 on Discrimination against Transgender People in Europe', 22 April 2015, at para 6.1.4.
[118] Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 2006.
[119] Ibid.
[120] CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016, at para 47; CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding

In 2019, the UN CEDAW Committee recommended that the Northern Ireland Executive review and amend the public sector equality duty in order to address situations of intersectional forms of discrimination, including intersex persons.[121]

6.23 Furthermore, in 2015, the Council of Europe High Commissioner for Human Rights published a number of recommendations on the positive obligations on states to facilitate the recognition of intersex persons though the law, including that:

> national equal treatment and hate crime legislation should be reviewed to ensure that it protects intersex people. Sex characteristics should be included as a specific ground in equal treatment and hate crime legislation or, at least, the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination.[122]

6.24 **In response to question 13, the NIHRC recommends that the hate crime law recognises the specific harm of hate crime on grounds of being intersex and recognises being or perceived as intersex as a protected characteristic in any hate crime law.**

**Age**

6.25 The ECtHR interprets the words 'other status' in Article 14 ECHR as having a wide meaning[123] and 'age' is recognised as being included as a ground for discrimination in the enjoyment of the rights in the ECHR.[124]

6.26 Article 26 of the UN ICCPR recognises that "Every child shall have, without any discrimination ... the right to such measures of protection as are required by his status as a minor". Article 2 of the UN CRC recognises that all the rights should be ensured to each child "without discrimination of any kind". In in a joint General Comment with the UN CEDAW Committee, the UN CRC Committee recognised the harm caused to children by

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Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', 29 August 2017, at para 41; CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019.

[121] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at paras 15(a) and 15(c).

[122] CoE High Commissioner for Human Rights, 'Human Rights and Intersex People' (CoE, 2015), at 9.

[123] *Carson v UK* (2010) ECHR 1223, at para 70.

[124] *Schwizgebel v Switzerland,* Application No 25762/07, Judgment of 10 June 2010, at para 85.

"persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering".[125]

6.27 In addition the UN CRC Committee in its concluding observations to the UK government and NI Executive raised concerns about children under 16 years of age being excluded from age discrimination legislation and highlighted groups of children who continue to experience discrimination and social stigmatization, including through the media.[126] Moreover, the UN CRC Committee recommended that the UK Government and NI Executive take "urgent measures to address the 'intolerance of childhood' and general negative public attitude towards children, especially adolescents, within society, including in the media".[127]

6.28 The UN CRPD Committee has recognised the contribution of age related discrimination as a contributing harm in multiple and intersectional discrimination.[128] Similarly, the UN CEDAW Committee in General Recommendation No 35 "confirmed that discrimination against women was inextricably linked to other factors that affected their lives… [including] age" and that it therefore required appropriate and policy and legal responses to address these aggravated harms.[129] The UN CRPD Committee recommended in 2019 that the discrimination experienced by, *inter alia,* older women is specifically addressed in equality legislation.[130]

6.29 It is noted in the Review that, beyond the scope of specific hate crime consideration, a judge or magistrate already takes into consideration the vulnerability of an older victim as an aggravating factor in sentencing. There is a presumption towards a higher sentence in line with the "increasing age, vulnerability or infirmity of the victim" and further aggravating factors include "an especially serious, physical or psychological

[125] CEDAW/C/GC/31/CRC/C/GC/18, 'UN CEDAW Committee/UN CRC Committee Joint General Recommendation No 31 and General Comment No 18: Harmful Practices', 5 November 2014, at para 15.
[126] CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and NI', 12 July 2016, at para 21(c).
[127] Ibid, at paras 22(c) and 23.
[128] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017.
[129] CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 12.
[130] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee, Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019.

effect on the victim even if unintended" and "deliberately targeting a vulnerable victim".[131]

6.30 **In response to question 14, the NIHRC advises that the international human rights standards do not specifically call for hate crime legislation to cover 'age' as a particular characteristic, however it does recognise the particular aggravated harms experienced by younger people and older people and calls on states to address these harms through appropriate legal and policy responses.**

**Victim vulnerability**

6.31 In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

> establish measures to ensure equal access to justice and to safeguard persons with disabilities, particularly women, children, intersex people and elderly persons with disabilities from abuse, ill-treatment, sexual violence and/or exploitation. [And] ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.[132]

6.32 During the passage of the Mental Capacity (NI) Act 2016, the NIHRC advised that the then draft Bill should provide a free-standing offence in circumstances where an individual, who has the care of another individual by virtue of being a care worker, ill-treats or wilfully neglects that individual.[133] This would have reflected provisions within the Criminal Justice and Courts Act 2015, which applies to England and Wales. However, the draft Bill was not amended to provide for a free-standing offence.

6.33 Vulnerability in relation to hate offences extends beyond mentally and physically disabled people and may be of particular relevance to people who experience multiple forms of discriminations across a range of

[131] *R v Edward Cambridge* [2015] NICA 4.
[132] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 39.
[133] NI Human Rights Commission, 'Submission to the Consultation on Proposals for New Mental Capacity Legislation for NI' (NIHRC, 2014).

characteristics. The UN CEDAW Committee listed the following non-exhaustive list of overlapping vulnerabilities for women which included:

> ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders.[134]

6.34 Whereas some of these issues overlap with other potential protected characteristics, there are others which would otherwise not fit into those categories.

6.35 **In response to question 15, the NIHRC advises that the international human rights standards do not specifically call for hate crime legislation to cover 'victim vulnerability' as a particular characteristic, however it does recognise the specific harm of hostility to vulnerable people and offences motivated by exploitation of vulnerability and calls on states to address these harms through appropriate legal and policy responses.**

**Homelessness**

6.36 In December 2015, the UN Special Rapporteur on the right to adequate housing, Leilani Farha, recognised that "Homeless people are subject to constant intimidation and harassment by authorities and the general public … they are subject to extreme forms of violence, including hate crimes and sexual violence; and they are often the subject of vilification"[135] and that there was a direct correlation between homelessness and the experience of discrimination as it is:

[134] CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 12.
[135] A/HRC/31/54, 'UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Leilani Farha, Report on the Elimination of Homelessness', 30 December 2015, at para 21.

both a cause and a consequence of homelessness. Those who face discrimination on the grounds of race, ethnicity, place of origin, socioeconomic status, family status, gender, mental or physical disability, health condition, sexual orientation and/or gender identity and age are more likely to become homeless and, once homeless, experience additional discrimination.[136]

6.37 As a result, the UN Special Rapporteur recommended that States recognise homeless people "as a protected group in all relevant domestic anti-discrimination and hate-crime laws".[137]

6.38 **In response to question 16, the NIHRC recommends that the hate crime law recognises the specific harm of hostility to homeless people as a particular characteristic and that this definition is broad enough to encompass people who do not have a secure home.**

**Sectarianism**

6.39 In 2016, the UN CERD Committee reiterated its "previous concern that measures to tackle racism and sectarianism are kept outside the framework of protections against discrimination provided by the Convention and the Durban Programme of Action".[138] The UN CERD Committee recommended that the next periodic report contain information on concrete measures adopted to address racial discrimination and on the impact of the Together: Building a United Community Strategy.[139]

6.40 In February 2017, the Advisory Committee on the Framework Convention for the Protection of National Minorities noted that "to treat sectarianism as a distinct issue rather than a form of racism is problematic, as it allows it to fall outside the scope of accepted anti-discrimination and human rights protection standards".[140] It noted that in sectarian-motivated crimes there is no aggravated sentencing and, "though sectarian crimes may be

[136] Ibid, at para 39.
[137] A/HRC/31/54, 'UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Leilani Farha, Report on the Elimination of Homelessness', 30 December 2015, at para 91(f).
[138] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom of Great Britain and Northern Ireland', 26 August 2016, at para 36.
[139] Ibid, at para 37.
[140] ACFC/OP/IV(2016)005, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK', 27 February 2017, at para 86.

prosecuted through the notion of race, the high threshold for evidence generally prevents this happening".[141] In addition, it was noted that sectarian crime goes largely unreported. As a result it recommended that the UK Government and NI Executive introduce definitions of 'good relations' and 'sectarianism' in legislation, which draw on "international standards relating to racism and human rights in general; and to ensure that sectarian crimes are dealt with in the criminal justice system in a way equivalent to other forms of hate crime".[142]

6.41 Article 1 of UN CERD defines the term 'racial discrimination' as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

6.42 The European Commission Against Racism and Intolerance defined 'racism' in Policy Recommendation 7 as "the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons".[143]

6.43 The NIHRC condemns sectarianism and supports a NI that promotes the human rights principles of tolerance, understanding and mutual respect. It is noted that the Scottish Hate Crime review proposed a 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.[144]

[141] Ibid, at para 87.
[142] Ibid, at para 90.
[143] European Commission against Racism and Intolerance, 'Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination', 7 December 2017, at para 1.
[144] Scottish Government, 'Final Report of the Working Group on Defining Sectarianism in Scots Law' (Scottish Government, 2018).

6.44 **In response to questions 52 and 53, the NIHRC recommends that the hate crime law recognises the specific harm of sectarianism as a particular characteristic of hate crime under the umbrella of racism and racial discrimination and uses this opportunity to develop a statutory definition of sectarianism in line with the international human rights standards on racism and racial discrimination.**

**Intersectionality**

6.45 In 2017, the UN CRPD Committee recognised the overlapping harms of intersectional discrimination and recommended that the UK Government and NI Executive:

> explicitly incorporate in its national legislation protection from, in particular multiple and intersectional discrimination on the basis of gender, age, race, disability, migrant, refugee and/or other status, and provide appropriate compensation, and redress for victims, and sanctions proportional with the severity of the violation.[145]

6.46 In 2017, the UN CEDAW Committee in General Recommendation No 35:

> confirmed that discrimination against women was inextricably linked to other factors that affected their lives… Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender based violence may affect some women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed.[146]

6.47 The UN CEDAW Committee in 2019 recommended that the NI Executive:

> review and amend the public sector equality duty in order to address situations of intersectional forms of discrimination, such as discrimination faced by 'Black, Asian and Minority Ethnic' women, older women, women

[145] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', 29 August 2017, at para 15.
[146] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 12.

with disabilities, asylum-seeking and refugee women, and lesbian, bisexual, transgender women and intersex persons.[147]

6.48 UN CERD Committee in General Recommendation No 25 recognised that some forms of racial discrimination have a "unique and specific impact on women" and highlighted the need for states to address that multiple discrimination.[148] The UN CERD Committee, in its concluding observations to the UK in 2016, recommended that the UK government and NI Executive ensure that "equality legislation in all jurisdictions of the [UK] provides effective protection to victims of dual or multiple discrimination".[149]

6.49 The experience of intersectional and multiple discriminations has a compounding impact, which can cause further harms to people living in NI and there is a need to introduce legislation providing for intersectional multiple discrimination claims in NI. NI legislation does not currently provide for intersectional multiple discrimination cases. The Equality Act 2010, which covers other parts of the UK, contains a dual discrimination provision, which has not been brought into force to date. At present, each discrimination ground has to be considered and ruled on separately.[150] The NIHRC position is that the Executive Office should introduce legislation providing for intersectional multiple discrimination claims in NI.

6.50 **In response to questions 18 and 19, the NIHRC advises that intersectional discrimination is not currently recognised in NI equality law and that the international human rights standards recognise the multiplying impact of experiencing discrimination and hostility on two or more particular characteristics. The NIHRC further advises that international human rights law does not specifically call for hate crime legislation to cover intersectional harms, however it does recognise the specific harm of hostility on grounds of two or more particular characteristics and calls on**

[147] CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 16(c).
[148] 'UN CERD Committee General Recommendation No 25: Gendered Related Dimensions of Racial Discrimination', 20 March 2000, at para 3.
[149] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', 26 August 2016, at para 8(b).
[150] Equality Commission NI, 'Strengthening Protection against Racial Discrimination Recommendations for Law Reform', (ECNI, 2014), at 38.

**states to address these harms through appropriate legal and policy responses.**

## Additional Protected Characteristics

6.51 The connection between international human rights standards on non-discrimination and equality and hate crime law is one which suggests that the law specifically address a potential 'residual category' for protection. Across the human rights framework, those safeguards which protect against discrimination on a range of protected grounds which is much more extensive than the particular characteristics listed as potential protected grounds in the Hate Crime Review. Article 14 ECHR includes political or other opinion, social origin, property, birth and 'other status'. Article 2 of the ICCPR and Article 2 of the ICESCR include similar lists.

6.52 In addition to the enumerated lists of protected grounds in international human rights law, the words 'other status' have been used to expand the list of protected grounds. In addition to age,[151] disability,[152] sexual orientation[153] and being transgender,[154] the ECtHR has expanded the scope of 'other status' in Article 14 ECHR to include immigration status,[155] employment status[156] and parental[157] and marital status.[158]

6.53 The ECtHR has made it clear discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour".[159] However, it has not made it explicit that discrimination on grounds of age should be equated with other grounds of discrimination.[160] Similarly, for discrimination on grounds of immigration status, the objective and reasonable justification required for differentiation will not be as weighty as for distinction based on nationality.[161]

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[151] *Schwizgebel v Switzerland,* Application No 25762/07, Judgment of 10 June 2010, at para 85.
[152] *Glor v Switzerland*, Application No 13444/04, Judgment of 30 April 2009, at para 54 and 80.
[153] *Salgueiro da Silva Mouta v Portugal* (1999) ECHR 176, at para 28.
[154] *Identoba v Georgia* (2015) ECHR 537, at para 96; *Sousa Goucha v Portugal* (2016) ECHR 284, at para 27.
[155] *Hode and Abdi v UK* (2012) ECHR 1871, at para 47.
[156] *Valkov v Bulgaria* (2011) ECHR 1956, at para 115.
[157] *Weller v Hungary* (2009) ECHR 530.
[158] *Şerife Yiğit v Turkey* (2010) ECHR 1672, at para 79.
[159] *Vejdeland v Sweden* (2012) ECHR 242, at para 55.
[160] *British Gurkha Welfare Society v UK* (2013) ECHR 126, at para 88.
[161] *Bah v UK, Application* (2011) ECHR 260, at para 47.

6.54 To ensure consistency proposals for the inclusion of particular protected characteristics in hate crime law should be based on international human rights safeguards and designed support victims of hate crimes throughout the criminal justice process. The law should reflects the human rights obligations to prevent, prohibit, prosecute and protect.

6.55 Any inclusion of an 'other protected characteristic' residual category in the hate crime law should be in line with the obligation to ensure there is no criminal punishment without law in Article 7 ECHR. Similar provision exists in article 15 of the UN ICCPR. The ECtHR has clarified Article 7 ECHR requires that the basis for the imposition of a sentence or a penalty is established in law and is accessible and foreseeable. Therefore the punishment available for an offence must be clear at the time when an accused person performed the act and any punishment imposed cannot exceed the limits prescribed by law.[162]

6.56 In order to be compliant with Article 7 ECHR, the ECtHR requires that the law is accessible and foreseeable. As regards accessibility, the wording of the legislation need not be absolutely precise and where the interpretation and application are interpreted through case law, this should be published and accessible.[163] Foreseeability relates to an individual's ability to assess the potential criminal liability from the wording of the law, the relevant case law and with legal advice.[164] A 'penumbra of doubt' in relation to borderline facts does necessarily render a specific provision incompatible provided that it proves to be sufficiently clear in the large majority of cases and the role of the courts is to interpret that provision so as to remove any doubt, taking into account the changes over time. [165]

6.57 **In response to question 17 the NIHRC recommends that 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.**

[162] *Coeme and Others v Belgium* (2000) ECHR 250, at para 145.
[163] *Kokkinakis v Greece* (1993) ECHR 20, at para 40.
[164] *Kafkaris v Cyprus* (2008) ECHR 2123, at para 140.
[165] *Cantoni v France* (1996) ECHR 52, at paras 31-32.

**Travellers, Roma and other non-settled people**

6.58 The Race Relations Order 1997 cites "belonging to the Irish Traveller community" as included in the 'racial grounds' provision of the anti-discrimination law in Northern Ireland.[166] This definition is used in the Criminal Justice No 2 (Northern Ireland) Order which established enhanced sentencing for offences which were aggravated by hostility towards someone on the basis of membership of a "racial group".

6.59 The Race Equality Strategy 2015-2025 recognises that Travellers are in a particularly vulnerable position in Northern Ireland and that there is a need to "develop and implement specific programmes of work to address particular challenges and vulnerabilities facing particular groups such as Irish Travellers and the Roma".[167]

6.60 In its report 'Out of Sight, Out of Mind' on Traveller Accommodation in NI, the NIHRC found that "Travellers experience the most negative attitudes of any ethnic group. Poor relations and intimidation has resulted in some Travellers leaving their homes."[168] In addition, this report highlighted that "the lack of structured race relations programmes to improve relations between the settled and Traveller communities contributes to discrimination against Travellers that has persisted for decades" and that "without proactive and systemic changes in attitude at all levels" this discrimination will continue.[169]

6.61 In 2016, the UN CERD Committee was concerned at "continued reports of racist bullying and harassment in schools" across the UK and that there was a disproportionate rate of exclusion from school of pupils belonging to Traveller communities.[170] The UN CERD Committee recommended that the UK Government and NI Executive "strengthen efforts to eliminate all racist bullying and harassment in… schools, including by requiring schools to collect qualitative and quantitative data on bullying and exclusions from school on the grounds of race, colour, descent, or national or ethnic origin".[171] It further recommended that the NI Executive "ensure that

[166] Section 5, Race Relations (Northern Ireland) Order 1997.
[167] Office of the First Minister and Deputy First Minister, 'Racial Equality Strategy 2015-2025' (OFMdFM, 2015), at para 6.20.
[168] NI Human Rights Commission, 'Out of Sight, Out of Mind – Traveller Accommodation in Northern Ireland' (NIHRC 2018), at 278.
[169] Ibid, at 289.
[170] CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom of Great Britain and Northern Ireland', 26 August 2016, at para 34.
[171] Ibid, at para 35(a).

schools comply with their public sector equality duty under… section 75 of the Northern Ireland Act 1998 to challenge racist bullying and to promote respect for diversity".[172]

6.62 The Advisory Committee to the Framework Convention on National Minorities in 2017 highlighted that "certain sections of the media and online sources of hate speech are responsible for spreading racially hostile narratives, often targeting… Gypsies, Travellers and Roma" and that the UK Government and NI Executive were required to "ensure that debates are carried out in a responsible manner respecting all groups in society".[173]

6.63 **In response to question 17, the NIHRC recommends that in light of the acute levels of anti-Traveller racism and to ensure the recording of disaggregated data, that the hate crime law recognises the specific harm of hostility to Travellers, Roma and other non-settled people is recognised it as a particular characteristic of hate crime.**

**Antisemitism**

6.64 The UN CERD Committee has highlighted the overlap between racist speech and hate speech targeted at people in minority religious groups and raised concerns about "hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups".[174]

6.65 In 2018, the UN Special Rapporteur on Racism urged states to "to take immediate measures to combat direct and indirect manifestations of neo-Nazism, racism and related intolerance, including implementing legal sanctions".[175] In 2012, the UN Special Rapporteur on Freedom of Religion observed that "the spread of negative stereotypes and prejudices …

[172] Ibid, at para 35(b).
[173] ACFC/OP/IV(2016)005, 'Advisory Committee to the Framework Convention on National Minorities Fourth Opinion on the United Kingdom', 27 February 2017.
[174] CERD/C/GC/35, 'UN CERD Committee General Recommendation No 35: Combating Racist Hate Speech', 26 September 2013, at para 6.
[175] A/HRC/38/53, 'Report of UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, on Concerning Shifts in Ideologies and Support for Nazism and Neo-Nazism', 28 April 2018, at para 35.

poisons the relationship between different communities and puts people belonging to religious minorities in a vulnerable situation".[176]

6.66 In addition, the UN Special Rapporteur on Freedom of Religion makes it clear that states should "acknowledge that antisemitism poses a threat to stability and security" and that the "commission of antisemitic hate crimes engages the obligation of the State under international human rights law to protect Jews against the violation of their fundamental rights".[177] States must also "invest in preventive security measures, compliant with international human rights law, to deter antisemitic hate crimes".[178]

6.67 The UN Special Rapporteur also emphasised the need for effective hate crime law that "recognizes antisemitism as a prohibited bias motivation and to ensure that relevant officials recognize antisemitic hate crimes and record them as such".[179] Such recording of anti-Semitic hate crimes is necessary to collect "accurate, disaggregated data … enabling policymakers and law enforcement authorities to understand the scope of the problem, discern patterns, allocate resources and investigate cases more effectively".[180]

6.68 **In response to question 17, the NIHRC recommends that in light of the serious and harmful impact of antisemitism, and to ensure the recording of comprehensive disaggregated data, that the hate crime law recognises the specific harm of antisemitism as a particular characteristic of hate crime.**

**Islamophobia**

6.69 In 2007, the then UN Special Rapporteur on Racism highlighted the complex and varied ways Islamophobia progresses:

> Islamophobia can take very different and sometimes cumulative forms, which include individual acts of discrimination against Muslim populations, such as physical and verbal attacks against Muslims, profanation of their

[176] A/HRC/22/51, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, on the Need to Respect and Protect Freedom of Religion or Belief of Persons Belonging to Religious Minorities', 24 December 2012, at para 47.
[177] A/74/358, 'UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, on the Elimination of all Forms of Religious Intolerance', 20 September 2019, at para 76.
[178] Ibid, at para 76.
[179] Ibid, at para 77.
[180] Ibid, at para 79.

places of worship and culture, and predominantly institutionalized forms of racism, including social and ideological discrimination.[181]

6.70 The then UN Special Rapporteur on Racism also reminded States "to take fully into account the increasing intertwining of race, ethnicity, culture and religion" in measures adopted to combat racism and discrimination.[182]

6.71 In 2019, the current UN Special Rapporteur on Racism, after a UK country visit, raised concerns about reports that "sustained and pervasive discourses vilifying Islam and Muslims persist in the British media and even among the political leadership, and that Islamophobia has taken firm root in the UK".[183]

6.72 In 2018, the UN Special Rapporteur on Racism reminded States that "Neo-Nazi intolerance is not limited to Jews or people of Jewish descent. It also vilifies many other racial, ethnic and religious groups including Slavs, people of African descent and Muslims".[184] She urged States to "continue taking steps through national legislation in accordance with international human rights law, aimed at preventing hate speech and incitement to violence".[185]

6.73 **In response to question 17, the NIHRC recommends that in light of the serious and harmful impact of Islamophobia, and to ensure the recording of comprehensive disaggregated data, that the hate crime law recognises the specific harm of islamophobia as a particular characteristic of hate crime.**

## 7.0 Incitement to Hatred and Online Hate

7.1 Article 10(1) of the ECHR states that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive

[181] A/HRC/6/6, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, on the Serious Implications of Islamophobia on the Enjoyment of Rights', 21 August 2007, at para 28.
[182] Ibid, at para 75.
[183] A/HRC/41/54/Add.2, 'UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, Report on Visit to the United Kingdom of Great Britain and Northern Ireland', 27 May 2019, at para 45.
[184] A/HRC/38/53, 'Report of UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, on Concerning Shifts in Ideologies and Support for Nazism and Neo-Nazism', 28 April 2018, at para 5.
[185] Ibid, at para 35.

and impart information and ideas without interference by public authority". This right can be limited when the limitation is proportionate in pursuit of a legitimate aim and is based on the principle of non-discrimination.[186] Article 10(2) of the ECHR identifies a legitimate aim as:

> prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

7.2 The right to freedom of expression in the ECHR applies:

> not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such as the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic' society.[187]

7.3 However, hate speech which seeks to extinguish the rights of others is not protected by Article 10 of the ECHR. In relation to hate speech, the right to freedom of expression must be read alongside Article 17 of the ECHR on the prohibition of abuse of rights, which states that:

> nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

7.4 Article 17 is relevant where an individual attempts to rely on an ECHR provision which deflects from its real purpose, including in order to justify, promote or perform acts that are contrary to the text and spirit of the ECHR; are incompatible with democracy or other fundamental values of the ECHR; or infringe the rights in the ECHR.[188] For Article 17 to apply,

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[186] *Sunday Times v UK* (1979) 2 EHRR 245, *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 50 and *Handyside v UK* (1979) 1 EHRR 737.
[187] *Handyside v UK* (1979) 1 EHRR 737, at para 49.
[188] *Garaudy v France,* Application No 65831/01, Judgment of 24 June 2003.

the:

> offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to purse objectives that are racist or likely to destroy the rights and freedoms of others.[189]

7.5 The United Nations Human Rights Committee's General Comment No 34 makes it clear that any limitation of freedom of expression must be "provided by law" and must "conform to the strict tests of necessity and proportionality".[190] In addition, any restrictions must be "applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".[191]

7.6 In its General Recommendation No 35 on combatting racist hate speech, the UN CERD Committee recommended that:

> the criminalisation of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, *inter alia*, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.[192]

7.7 In General Recommendation No 34 on discrimination against people of African descent, the UN CERD Committee specifically addressed the issue of online hate and urged states to "take strict measures against any incitement to discrimination or violence against people of African descent including through the Internet and related facilities of similar nature".[193] It further urged States to "take measures to prevent any dissemination of ideas of racial superiority and inferiority or ideas which attempt to justify violence, hatred or discrimination against people of African descent".[194]

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[189] *Lehideux and Isorni v France* (1998) ECHR 90.
[190] CCPR/C/GC/34, 'UN Human Rights Committee General Comment No 34: Freedoms of Opinion and Expression', 12 September 2011, at para 22.
[191] Ibid.
[192] CERD/C/GC/35, 'UN CERD Committee General Recommendation No 35: Combating Racist Hate Speech', 26 September 2013, at para 12.
[193] CERD/C/GC/34, 'UN CERD Committee, General Recommendation No 34: Discrimination against People of African Descent', 3 October 2011, at para 29.
[194] Ibid, at para 28.

7.8 The European Commission against Racism and Intolerance General Policy Recommendation No 15 defines hate speech as:

> the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes "race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age.[195]

7.9 The Rabat Plan for Action in 2012 made the case that criminalisation be reserved for certain forms of hate and incitement and in relation to the domestic sanctions:

> it is essential to make a careful distinction between:
>
> a) forms of expression that should constitute a criminal offence;
> b) forms of expression that are not criminally punishable, but may justify a civil suit; and
> c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others.[196]

7.10 The European Commission against Racism and Intolerance makes it clear that for hate speech to reach the threshold for criminal responsibility it must amount to a "more serious character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context".[197]

7.11 In 2015, the UN Human Rights Committee raised concerns with the UK government and NI Executive "about the prevalence in the media and on

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[195] European Commission against Racism and Intolerance, 'Policy Recommendation No 15: Combating Hate Speech, 8 December 2015, at para 19.
[196] A/HRC/22/17/Add.4, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence', 5 October 2012, at para 12.
[197] European Commission against Racism and Intolerance, 'Policy Recommendation No 15: Combating Hate Speech', 8 December 2015, at para 173

the internet of racist and xenophobic expressions that may amount to incitement to discrimination, hostility or violence".[198]

7.12 The UN Special Rapporteur on freedom of expression reported on online hate speech in 2019 and made it clear that "legislative efforts to incentivise the removal of online hate speech and impose liability on internet companies for failure to do so must meet the necessity and proportionality standards" and while governments have been:

> increasing pressure on companies to serve as adjudicators of hate speech…. The process of adoption should be subject to rigorous rule of law standards, with adequate opportunity for public input and hearings and evaluation of alternatives and the impact of human rights.[199]

7.13 The UN Special Rapporteur recommended that companies "adopt content policies that tie their hate speech rules directly to international human rights law", including transparent decision-making and reasoned explanations and engagement with communities most affected by hate speech to identify the most effective tools to address the harms caused.[200] The UN Special Rapporteur further recommends that companies:

> as part of an overall effort to address hate speech, develop tools that promote individual autonomy, security and free expression, and involve de-amplification, de-monetization, education, counter-speech, reporting and training as alternatives, when appropriate, to the banning of accounts and the removal of content.[201]

7.14 In addition, the UN Special Rapporteur on freedom of expression recommends that States:

- adopt or review intermediary liability rules to adhere strictly to human rights standards;

[198] CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015, at para 10.
[199] A/74/486, 'UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, Report on the Human Rights Law that Applies to the Regulation of Online Hate Speech', 9 October 2019, at para 33.
[200] Ibid, at para 58(b).
[201] Ibid, at para 58(f).

- establish or strengthen independent judicial mechanisms to ensure that individuals may have access to justice and remedies when suffering cognizable harms; and
- adopt laws that require companies to describe how they define hate speech and enforce their rules against it, to create databases of actions taken against hate speech by the companies, and to otherwise encourage companies to respect human rights standards in their own rules.[202]

7.15 The UN Special Rapporteur on violence against women has noted that the UN CEDAW is "fully applicable in technology-mediated environments, such as the internet and digital spaces, as settings where contemporary forms of violence against women and girls were frequently committed in their redefined form" and that "acts of online violence may force women to retreat from the internet".[203] As a result, internet service providers should "uphold the principle that human rights are protected online, and voluntary [sic] accept and apply all core international human rights and women's rights instruments with a view to contributing to universal human rights protection".[204]

7.16 Principle 17 of the Guiding Principles on Business and Human Rights requires corporations to carry out human rights due diligence test which "should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed".[205]

7.17 There is a risk that the removal of online posts and websites that include hate speech by social media companies and internet service providers can add additional impediments to agencies investigating complaints. Once posts have been removed they cannot be obtained, except in the particular circumstances where the investigating officers know and understand the processes to acquire this information, which can be constrained by the convoluted processes within private companies for accessing this

[202] Ibid, at para 57(f).
[203] A/HRC/38/47 'UN Special Rapporteur on Violence against Women its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence Against Women and Girls from a Human Rights Perspective', 18 June 2018, at paras 50 and 26.
[204] Ibid, at para 116.
[205] A/HRC/17/31, 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', 21 March 2011.

information. This also presents a gap in accountability, as there is no requirement for host companies to report online hate posts to the police.[206]

7.18 Article 8 of the ECHR recognises that "everyone has the right to respect for his private and family life, his home and his correspondence". This is not an absolute right and can be limited. Article 8(2) of the ECHR permits interference with this right in the interests of public safety or for the protection of the rights and freedoms of others, provided that such interference is in accordance with law, in pursuance of a legitimate aim and is no more than is necessary in a democratic society – proportionate and based on the principle of non-discrimination.[207]

7.19 In extreme circumstances, online hate can pose a threat to life, equate to torture or ill-treatment, or compromise an individual's physical or moral integrity. Article 2 of the ECHR requires the State to take reasonable steps to prevent intentional and unintentional deprivation of life within their jurisdictions.[208] They also must take reasonable steps to counteract a known real and imminent risk to life.[209] Article 3 of the ECHR requires the State to take steps to eliminate torture, inhuman or degrading treatment or punishment under any circumstances. The right to respect for private life under Article 8 of the ECHR requires the State to put measures in place to protect a person's physical and moral integrity on the basis that "a person's body concerns the most intimate aspect of private life"[210] and that "preservation of mental stability is… an indispensable precondition to effective enjoyment of the right to respect for private life".[211]

7.20 **In response to question 32, the NIHRC recommends that consideration is given to removing the dwelling defence from article 9(3) of the Public Order (Northern Ireland) Order 1987. Given the gravity of the harm which is caused by the hate speech designed to stir up hatred and arouse fear to individuals and communities that share protected characteristics, it is immaterial whether this harm is caused inside a dwelling or in another environment. This does not remove the imperative for any law on**

[206] Discussions at the Policing and Community Safety Partnership and PSNI event, '#NoPlaceforHate – Online Hate Crime', 27 February 2020.
[207] *Soering v UK* (1989) ECHR 14.
[208] *Öneryildiz v Turkey* (2004) ECHR 657; *LCB v UK* (1999) 27 EHRR 212, at para 36.
[209] *Burke v UK*, Application No 19807/06, 11 July 2006, at para 1.
[210] *YF v Turkey* (2003) ECHR 391, at para 33.
[211] *Bensaid v United Kingdom* (2001) ECHR 82, at para 47.

**incitement to hatred to be read compatibly with the obligations which flow from Articles 8, 10 and 17 of the ECHR.**

7.21 **In response to questions 36 and 37, the NIHRC recommends that any defence of freedom of expression is guided by the balancing of rights under Articles 10 and 17 of the ECHR. These require that any defence is in accordance with law, in pursuance of a legitimate aim and no more than is necessary in a democratic society. 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.**

7.22 **In response to question 38 and 39, the NIHRC recommends that the legal definition of incitement to hatred 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.**

7.23 **In response to question 33, the NIHRC recommends that the assessment of the complex balance between Articles 10 and 17 of the ECHR and the rights of persons and communities who are the targets of hate speech, alongside the test to ensure that any prosecution meets the criminal threshold, is made by the Director of Public Prosecutions before any such prosecution is undertaken.**

7.24 **In response to question 40, the NIHRC advises that as this is a excepted matter, the review should consider making recommendations that social media companies should have clear policies that reflect international human rights standards and that any law, which seeks to impose liability for failure to remove online hate speech, must meet the standards of necessity and proportionality and that all decisions are recorded to ensure data collection is consistent, extensive and disaggregated across all protected characteristics. In addition, consideration should be given to recommending a legal obligation on social media**

**companies to report hate crime perpetrated on their networks to local police services.**

7.25 **In response to questions 46, 47, 48, 49 and 50, the NIHRC recommends that any hate crime law should apply to the online context and be adapted to address the specific way in which online hate is manifested and to give reassurance to communities and individuals who may be particularly vulnerable to online hate crimes. 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.**

## 8.0 Victims of Hate Crimes

8.1 The UN CEDAW Committee in 2017 recommended that States "take measures in the areas of prevention, protection, prosecution and punishment, redress, data collection and monitoring and international cooperation in order to accelerate elimination of gender based violence against women".[212]

8.2 The UN CEDAW Committee further recommended that:

> all measures should be implemented with an approach centred around the victim/survivor, acknowledging women as right holders and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence. In addition, the measures should be designed and implemented with the participation of women, taking into account the particular situation of women affected by intersecting forms of discrimination.[213]

8.3 In 2017, the UN CRPD Committee recommended that UK Government and NI Executive ensure all non-discrimination law "provide appropriate compensation, and redress for victims, and sanctions proportional with the

[212] CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women,' 26 July 2017, at para 28.
[213] Ibid, at para 27.

severity of the violation".[214]

8.4 In 2005, the UN CERD Committee recommended that States ensure that victims are at the centre of the criminal justice process and complainants to be heard during the criminal court proceedings and that the criminal justice system "treats the victims of racial discrimination without discrimination or prejudice, while respecting their dignity, through ensuring in particular that hearings, questioning or confrontations are carried out with the necessary sensitivity as far as racism is concerned".[215] It further recommended that victims are guaranteed "just and adequate reparation for the material and moral harm suffered as a result of racial discrimination".[216]

8.5 The Advisory Committee to the Framework Convention on National Minorities in 2017 raised concerns about the impact of underreporting of hate incidents in NI, stating that:

> the discrepancy between public perceptions of what is a hate crime and what is achieved in court as a final result is often at the origin of under-reporting and distrust of the police and judicial system by persons belonging to national and ethnic minorities.[217]

8.6 The Advisory Committee to the Framework Convention on National Minorities further highlighted the impact this had on Travellers, Gypsies and Roma, who have a "heightened distrust of the police" and that there was a "lack of evidence of crimes against these minorities, which are not monitored by the police as such, coupled with a loss of ability among the police to recognise prejudice make their situation particularly worrisome".[218]

8.7 The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims states that:

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[214] CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', 29 August 2017, at para 19.
[215] 'UN CERD Committee General Recommendation 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System', 2005, at para 19(b).
[216] 'UN CERD Committee General Recommendation 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System', 2005, at para 19(d).
[217] ACFC/OP/IV(2016)005, 'Advisory Committee to the Framework Convention on National Minorities Fourth Opinion on the United Kingdom', 27 February 2017, at para 80.
[218] Ibid.

> victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.[219]

8.8 EU Victims' Rights Directive sets out the minimum standards on the rights, support and protection of victims of crime recognised that some victims are particularly at risk and particular care and attention is required when a victim of hate crime. It requires governments to ensure that victims may be heard during any criminal proceedings and give evidence and that special provision for child victims be made which takes account of their age and evolving capacity.[220]

8.9 Further guidance on restorative justice is available in the EU Victims' Rights Directive, which makes it clear that States are required to "safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services".[221] It also makes it clear that any restorative justice services are used "only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time" and on the basis of full and impartial information about the process and potential outcomes.[222]

8.10 The Hate Crime Review does not address the specific issue of hate crimes targeting places of worship and religious buildings and institutions. In England and Wales, a security fund has been established which is designed to allow places of worship to install enhanced security protections as part of the Hate Crime Action Plan.[223] This is a direct response to hate crimes

[219] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, at para 10.
[220] European Parliament, 'Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012, at Article 10.
[221] Ibid.
[222] Ibid.
[223] Home Office, Action Against Hate: The UK Government's plan for tackling hate crime, July 2016, para 56-58.

targeting places of worship and evidence of hate crimes targeting the building, its adherents or in proximity to the place of worship or religious building.[224] The current scheme is under review in England and Wales.[225] There is no similar scheme currently in operation in Northern Ireland.

8.11 **In response to questions 60, 61, 62 and 63, the NIHRC recommends that a victim-centred approach is embedded across the criminal justice system to prevent secondary victimisation, re-traumatisation or stigmatisation. This requires that effective steps are taken to ensure that there is an awareness of specialised information, advice and support services which are available to victims of hate crime through the Hate Crime Advocacy Service.**

8.12 **In response to questions 60, 61, 62 and 63, the NIHRC recommends that the Hate Crime Advocacy Service continue its role in supporting victims through the criminal justice process and 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.**

8.13 **In response to questions 60, 61, 62 and 63, the NIHRC recommends that the Hate Crime Advocacy Service and the criminal justice system is accessible to all victims of hate crime, which requires ensuring that special needs, mental capacity, age-appropriateness, gendered and other particular characteristics are taken into account and reasonably accommodated.**

8.14 **In response to questions 64 and 65, the NIHRC recommends that consideration be given to protecting the identity of vulnerable complainants in the criminal justice system where necesary to prevent further victimisation.**

8.15 **In response to questions 54, 55, 56, 57 and 58, the NIHRC recommends that any use of restorative justice processes is based**

[224] Guidance on the Places of Worship (POW): protective security funding scheme is available here (https://www.gov.uk/guidance/places-of-worship-security-funding-scheme).
[225] Home Office, Protecting Places of Worship: Government Consultation, opened 15 March 2020.

**on international best practice and has 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. No victim should be required to engage with restorative justice procedures.**

8.16 **The NIHRC recommends that consideration is given to the establishment of a protective security funding scheme for places of worship and other religious buildings which are at a high risk of being or are targeted by hate crimes.**

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