



Department of
Justice

An Roinn Dlí agus Cirt
Máinnystrie O tha Laa

Improving the effectiveness of Hate Crime Legislation in Northern Ireland

Summary of Phase One Consultation and Call for Views Responses and Way Forward

Department of Justice
Community Safety Division
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Contents

1. Introduction and Background.....	3
2. The Consultation Process.....	6
3. Overview of Consultation Responses Received.....	7
Summary of Responses and Way Forward.....	8
4. New Statutory Aggravation Hate Crime Model.....	8
5. Sectarian Offending in Hate Crime Law.....	19
6. Stirring Up Offences.....	29
7. Special Measures and Cross-Examination.....	44
8. Call for Views: Exploring Misogyny/Transmisogyny in Hate Crime Law.....	56
9. Next Steps.....	68
Respondents to Phase One Consultation.....	70
Phase One Consultation: List of Final Policy Positions and Way Forward.....	71

1. Introduction and Background

- 1.1 This document provides a summary of responses to the Department of Justice's public consultation and call for views on *Improving the effectiveness of Hate Crime Legislation in Northern Ireland* [Improving the effectiveness of Hate Crime Legislation in Northern Ireland: A Public Consultation and Call for Views](#).
- 1.2 The document also outlines the ministerial approved way forward, while setting out any areas on which further consideration is required as a result of the analysis of responses.
- 1.3 Every effort has been made to reflect the range of responses received though it is not possible to include the detail of all responses or reflect every view on all the issues. The summary highlights the key issues for each question and area considered and, where relevant, indicates the complexities of the topic.
- 1.4 The purpose of the consultation was to seek views on a range of policy issues aimed at ensuring that any changes to the existing framework result in effective and appropriate hate crime legislation.
- 1.5 In May 2019, the Department of Justice appointed Judge Desmond Marrinan to carry out an independent Review of Hate Crime Legislation within the Terms of Reference provided [Review of Hate Crime Legislation Terms of Reference](#). This Review considered whether the existing legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice, including hate crime and abuse which takes place online.
- 1.6 Judge Marrinan's Final Report [Hate Crime Legislation Independent Review Final Report](#) was published on 1 December 2020. The report contains 34 recommendations which are detailed, for ease of reference, in the Departmental Response [Review of Hate Crime Legislation in Northern Departmental Response](#). The Departmental Response, published in July 2021, sets out the

then¹ Minister of Justice's initial position against each of the 34 recommendations which were categorised into nine strategic areas:

- A new hate crime model (***Recommendations 1-8***);
- Protected characteristics (***Recommendations 9-11***);
- Sectarianism (***Recommendations 12-13***);
- Stirring Up Offences and Freedom of Expression (***Recommendation 14***);
- Duty to remove hate expression (***Recommendation 15***);
- Restorative Justice (***Recommendations 16-22***);
- Victims of Hate Crime (***Recommendations 23-24, 33-34***);
- Online Hate Speech (***Recommendations 25-30***); and
- Legislation and Scrutiny (***Recommendations 31-32***).

1.7 The Department noted, in its initial Departmental Response, those recommendations as 'accepted' by the then Minister of Justice. Given the comprehensive public consultation carried out by Judge Marrinan as part of his review, and the Department's acceptance of these issues, those specific areas are not therefore considered as requiring further public consultation. Public consultation by the Department will focus on those recommendations noted in the Departmental Response as requiring further consideration.

1.8 The public consultation is being undertaken in two phases. Phase one of the consultation and call for views focused on five Strategic Themes:

- **Strategic Theme One: A new Statutory Aggravation Hate Crime Model;**
- **Strategic Theme Two: Sectarian Offending in Hate Crime Law;**
- **Strategic Theme Three: Stirring Up Offences** – Judge Marrinan's recommendation 14 on stirring up offences is broken down into a number of separate but interlinked sub-parts. Phase one of the consultation

¹ All Northern Ireland Ministers ceased to hold office at midnight 28 October 2022.

focused specifically on elements in relation to repealing the dwelling defence for stirring up hatred offences and replacing this with a private conversation defence; and role of the Director of the Public Prosecution Service in making personal decisions to prosecute cases under the relevant legislation;

- **Strategic Theme Four: Special Measures and Cross-Examination;** and
- **Strategic Theme Five: Exploring Misogyny/Transmisogyny in Hate Crime Law** – an initial call for views was sought in order to assist and inform wider conversations on violence against women and girls and the merits of misogyny within hate crime law; and to seek evidence on exploring options for dealing with misogynistic behaviour in the criminal law as a potential alternative to including sex/gender (neutral) as a protected characteristic (which will be considered in phase two of the consultation).

1.9 Phase two of the consultation, planned for 2023, will focus on three Strategic Themes:

- **Strategic Theme Six: Additional Protected Characteristics of Sex/Gender/Variations of Sex and Age;**
- **Strategic Theme Seven: Stirring Up Offences** – on the remaining sub-parts of the Stirring Up Offences recommendation 14; and
- **Strategic Theme Eight: A statutory duty for public authorities to remove hate expressions** from their buildings and public spaces where they carry out their functions.

1.10 This document provides a summary of responses from phase one of the consultation.

2. The Consultation Process

- 2.1 The Department of Justice (DoJ) launched the consultation and call for views on *Improving the effectiveness of Hate Crime Legislation in Northern Ireland* on 31 January 2022 via a press release and using social media to raise awareness. The consultation ran for 8 weeks and formally ended on 28 March 2022. An extension of one week was granted to a small number of organisations who contacted the Department prior to the closing date.
- 2.2 Full details were published on the DoJ website and a link to the consultation on Citizen Space (a digital tool for delivery), accessible via NI Direct, was distributed to the Department's consultation list and a wide range of stakeholders including criminal justice partner organisations, statutory agencies, political representatives, public bodies and third sector organisations involved in the delivery of services relating to / with an interest in hate crime.
- 2.3 Given the variety of issues to be considered, the consultation document was divided into distinct subject chapters. This allowed each to be considered as a standalone issue in its own right and to facilitate respondents to focus on those areas of most interest.
- 2.4 As a pre-cursor to launching the consultation, the Department held a series of virtual targeted workshops and presentations with a variety of organisations, including a number who engaged with Judge Marrinan's consultation. These organisations, along with respondents to Judge Marrinan's consultation, were also contacted via correspondence. An offer to meet with Departmental officials, to discuss any issues, was provided.
- 2.5 Throughout the consultation period, the Department used social media channels and events to promote the consultation and encourage individuals and organisations to respond. The Department of Justice is grateful to those who took the time to respond.

3. Overview of Consultation Responses Received

3.1 A total of 262 consultation responses were received:

- 223 responses were from individuals/members of the public
- 39 responses were from organisations (one noting a nil return)
- 206 responses were submitted via Citizenspace, using the online questionnaire provided
- 31 responses were submitted via email
- 25 responses were submitted by post.

3.2 Responses from organisations comprised a wide range of sectors and key stakeholders including statutory and criminal justice partners; public bodies; third sector organisations; human rights and equality groups; women's groups; organisations representing victims of hate crime; a range of faith and religious organisations and political parties. A full list of the organisations who responded is detailed in **Annex A**.

3.3 Most organisations provided a direct response, supported by comments, across all questions. Some respondents chose not to answer particular questions, provide further comments to questions that were answered, or did not provide a direct answer to a question but did provide commentary. For those who responded by email or post, some of the responses provided information that did not clearly answer some questions. Where clarity of an answer has not been provided, these have been noted as "unclear response" regarding agree/disagree; yes/no questions.

3.4 Percentage figures quoted in the summary of response data tables have been subject to rounding and may not add to 100%.

3.5 A summary of views and comments in response to each question in the consultation and way forward, as approved by the then Minister of Justice, is set out in Sections 4-8 below.

Summary of Responses and Way Forward

4. New Statutory Aggravation Hate Crime Model

- 4.1 In response to Judge Marrinan’s recommendations on dealing with hate crime in Northern Ireland, the Minister of Justice accepted the need for a new legislative statutory aggravation model to reform how perpetrators of hate crime are dealt with by the criminal justice system and ensure maximum opportunity for victims to have the redress they deserve.
- 4.2 In setting out the framework for the proposed new model for all criminal offences, whereby each existing offence can be aggravated and provision for higher maximum sentences will be retained, the Department sought the views of respondents on a number of issues aimed at simplifying and strengthening the law in this area.

Question 1: Do you agree / disagree that the threshold for Hate Crime legislation should be of a sufficient high level when criminalising a person for their behaviours/attitudes leading to hate motivated offences and which results in an increased sentence from the basic offence?

Table 1: Maintaining High Level of Threshold for Hate Crime Legislation

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	101	72%	24	83%	125	74%
Disagree	38	27%	1	3%	39	23%
Unclear Response	2	1%	4	14%	6	4%
Grand Total	141		29		170	

- 4.3 Of the 170 responses, a majority of respondents agreed that the threshold for hate crime legislation should be of a sufficiently high level when criminalising a person for their behaviours/attitudes leading to hate motivated offences and potentially resulting in an increased sentence. This view was generally shared

by respondents who indicated their support or opposition for hate crime legislation.

- 4.4 Of those respondents who provided additional comments, those who were generally supportive of hate crime legislation noted the need to have a criminal justice system which deals effectively with hate crime and provides an important marker that hate crime has no place in our society. Some respondents favoured setting the threshold at a high level where prosecutions can be brought for serious offending as intended by the legislation; and agreed that the threshold for criminalising a person should be sufficiently high to justify an increased sentence, especially when labelling someone as a hate crime offender. A high threshold was considered as ensuring, to the greatest extent possible, that the law provides legally effective protections for victims of hate crime as well as providing a defendant with adequate protection.
- 4.5 A high threshold was also seen as addressing risks of inappropriate or unmerited prosecutions. Some respondents noted the threshold as needing to be set at the correct level to prevent criminalisation and harsher sentences for having attitudes or disagreements that may cause offence, prejudices and biases in society which could adversely impact on rights to freedom of speech.
- 4.6 Of those predominantly individual respondents who disagreed that the threshold for hate crime legislation should be of a sufficiently high level, reasons provided included: the view that hate is hard to define, too subjective and hard to enforce, so should be addressed outside of legislation; retaining a high threshold discouraged reporting; and more fundamental disagreement with the concept of hate crime on the basis all crimes should be punished equally.
- 4.7 An additional comment noted the value in addressing the root causes of the offending behaviour and in providing victims with the opportunity to articulate the harm that has been caused through restorative justice. Work to consider the implementation of restorative justice recommendations by Judge Marrinan, as a method for dealing with low-level hate crimes, is being taken forward via the Department's Adult Restorative Justice Strategy and Action Plan.

4.8 The Department has noted the views of respondents in relation to retaining a high threshold for hate crime in legislation and this is reflected in the Way Forward under Question 2.

Question 2: Do you agree/disagree that the current threshold of hostility is maintained in legislation as that threshold?

Table 2: Maintaining Current Threshold of Hostility

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	93	69%	25	96%	118	73%
Disagree	39	29%	1	4%	40	25%
Unclear Response	3	2%	0	0%	3	2%
Grand Total	135		26		161	

4.9 Hate crime is currently dealt with under the [Criminal Justice \(No.2\) \(Northern Ireland\) Order 2004](#) and the threshold is of offences proved to be aggravated by ‘hostility’ towards a victim’s membership (or presumed membership) of protected groups. The consultation document noted the Minister’s recommendation that the definition threshold of hate crime, in law, should remain as ‘hostility’. This is seen as an appropriately high threshold when determining criminality / labelling someone a hate crime offender that could lead to a higher sentence.

4.10 Of the 161 responses, a majority of respondents agreed that the current threshold of ‘hostility’ be maintained in legislation.

4.11 There is general agreement from respondents that the threshold for hate crime should be high and that the current threshold of hostility is appropriate and should be retained in legislation. Many organisations across all sectors (including criminal justice organisations, human rights organisations and victims’ groups), and individuals, welcomed the new proposed model and noted

the need to keep the threshold high to ensure there is reasonable justification for higher sentences and criminalisation of hate motivated offences.

- 4.12 Of those respondents who provided additional comments in support of this, many cited similar reasons noted under Question 1. Additional reasons in favour for maintaining the threshold of hostility included the adequacy of current legislation; parity with other UK jurisdictions and similar proposals for hate crime legislation in the Republic of Ireland; and being in line with international standards. Some respondents did note that in agreeing with the new model proposals and maintaining hostility in legislation, they also agree with the Department's recommendation that attitudes of bias, prejudice, bigotry and contempt be included in any subsequent guidance as indicators of hostility (Question 3 refers).
- 4.13 Of those predominantly individual respondents who disagreed that the current threshold of hostility is maintained in legislation, reasons cited included the need to clarify the definition of hostility; that this threshold should be even higher; and the view that given the high levels of hate crime in Northern Ireland there is clearly an issue that needs to be addressed.
- 4.14 Some organisations and individual respondents conflated issues of hate *crime* via a statutory aggravation model (which was the focus of this consultation), and hate *speech* or "incitement" issues; a number of respondents in their commentary raised the need to protect freedom of speech and reduce the risk of criminalising 'attitudes'. The Department acknowledges the concerns expressed in relation to this and notes that the phase two consultation will cover these issues in more detail and will provide respondents with the opportunity to comment on specific proposed policy areas further.

Way Forward:

The Minister has agreed the threshold for Hate Crime legislation should be of a sufficiently high level and that the Department will retain the current threshold of hostility for hate crimes within the new hate crime legislation.

Question 3: Do you agree / disagree that the attitudes of bias, prejudice, bigotry and contempt, as suggested by Judge Marrinan, could be included as indicators of hate in subsequent guidance in support of new legislative changes in a Hate Crime Bill?

Table 3: Inclusion of Additional Attitudes in Guidance

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	12	6%	17	59%	29	12%
Disagree	198	93%	12	41%	210	87%
Unclear Response	3	1%	0	0%	3	1%
Grand Total	213		29		242	

4.15 In response to Judge Marrinan’s recommendations, the Department has recommended that a definition of hate crime should not be explicitly included in a Hate Crime Bill as this could be too prescriptive, open to interpretation and have unintended consequences. It is considered more appropriate to consider a working definition for Criminal Justice partners that could include additional attitudes of bias, prejudice, bigotry and contempt, as proposed by Judge Marrinan, as descriptors indicating hate crime. This definition could then be contained in any subsequent guidance to explain and raise awareness of possible attitudes to be considered in relation to hate crime.

4.16 Of the 242 responses to this question, a majority of respondents disagreed with the inclusion of proposed additional attitudes as indicators of hate in guidance. This view was shared predominantly by individual respondents and faith/religious based organisations, mainly on the need to protect freedom of speech and right to freedom of expression. Where additional comments were provided, some respondents in opposition appear to have misunderstood the proposal as drafted and may have incorrectly interpreted this proposal to include the additional attitudes in legislation and not in guidance only. The main

concern cited is that the inclusion of these attitudes as indicators could lead to people being criminalised for expressing opinions and differing views on issues, and curtail debate. One organisation noted the importance of following international standards so as not to infringe on the right to freedom of expression.

- 4.17 Some respondents also disagreed with the inclusion of proposed additional attitudes as indicators of hate in guidance on the basis the terms were too vague, subjective and open to interpretation. The Public Prosecution Service (PPS) noted a risk to making the current law on hate crime more complex, and noted that it is not aware of any difficulties in the current interpretation of the word hostility.
- 4.18 Most organisations in favour of including proposed additional attitudes as indicators of hate in guidance represent and/or work with victims of hate crime and offenders; the criminal justice sector; some women's groups; and on human rights and equality issues. The main reason cited was that these attitudes are recognised as motivating factors of hate crime, in certain circumstances. Whilst not being hate crimes in themselves, some respondents considered inclusion **in guidance** would help raise an understanding of hate and hostility which 'does not happen in a vacuum'. Again, the importance of shaping guidance around human rights international standards was noted.
- 4.19 Some organisations, including human rights and victims organisations, noted their preference for the additional attitudes to be added to the threshold of hostility in legislation in addition to guidance.
- 4.20 Hate crime legislation is established and internationally recognised so there are benefits in enhancing understanding of hate and agreed indicators of hate crime for practitioners in dealing with hate offending, as well as the public.
- 4.21 In response to concerns about the need to protect freedom of expression and not criminalise disagreement and the sharing of different views, the Department can confirm that additional attitudes are not being proposed for inclusion in

legislation and will not, therefore, in themselves be thresholds of criminality when considering motivation as part of a basic offence. As indicated by the PPS, ultimately it is a matter for the court to decide whether, having considered all the circumstances of a particular case, a defendant has demonstrated, or has been motivated by hostility.

Way Forward:

The Minister has agreed the Department will work with Criminal Justice organisations to discuss including attitudes of bias, prejudice, bigotry and contempt, as indicators of what may constitute hostility/hate resulting in a hate crime, to any available guidance. Discussion will include the need to be within international human rights standards and will clarify that these attitudes in themselves are not hate crime.

Question 4: Do you agree / disagree that a third ‘by reason of’ threshold should not be added to the current thresholds in legislation, which are demonstration of hostility and motivated by hostility?

Table 4: Third Threshold of ‘By Reason of’

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	70	61%	24	86%	94	66%
Disagree	41	36%	4	14%	45	32%
Unclear Response	3	3%	0	0%	3	2%
Grand Total	114		28		142	

4.22 At present in Northern Ireland, the court’s threshold for proving an offence was aggravated by hostility, by the offender, is ‘demonstration of hostility’ or ‘motivated (wholly or partly) by hostility’ towards the victim. The consultation document outlined Judge Marrinan’s recommendation to add a third threshold of ‘by reason of’ to assist prosecuting some crimes with no obvious display of hate; the practical difficulties with this; and the Department’s recommendation

not to include this in legislation, based on the lack of evidence that inclusion of this third threshold would provide success of redress for hate crime victims.

4.23 At the time of consulting on this issue, the third threshold was not included in Scottish hate crime legislation and was not recommended for inclusion by the Law Commission in England and Wales. Developments since the consultation note the Republic of Ireland has published its Hate Crime Bill which includes thresholds similar to current Northern Ireland legislation in relation to 'demonstration of' or 'motivated (wholly or partly) by'. A third threshold of 'by reason of' is not included at time of writing.

4.24 Of the 142 responses, there is general agreement by most respondents, comprising individuals and across a range of organisational sectors including criminal justice partners, to not include a 'by reason of' threshold in Northern Ireland legislation. Where additional comments were provided, reasons cited by respondents focused on three main issues:

- The need for evidence to prove an offence beyond reasonable doubt, including ensuring standards are not lower than in the rest of the UK. For those individual respondents who provided additional comments, some noted the need to have evidence of manifestation of hate to ensure protection against criminalising thought and undermining freedom of speech;
- From a practical perspective inclusion of this threshold was seen as unworkable and creating difficulties for criminal justice practitioners in reaching the evidential threshold required to prove that someone committed a hate crime because of a specific reason. As such, it was seen as unlikely that this change to legislation would see a significant increase in its use; and
- Concern that inclusion would dilute the concept of hate crime and significance of what the legislation is trying to achieve, and lower the threshold of hate crime legislation beyond its original intended scope.

- 4.25 Other reasons for not including a ‘by reason of’ threshold included current legislation and thresholds of demonstration of hostility/motivated by hostility are sufficient; the proposed threshold is too subjective a concept; and inclusion could weaken the legislation in the longer term.
- 4.26 Of those organisational respondents in favour of inclusion of a ‘by reason of’ threshold in legislation, the main reasons included the need to:
- protect equality groups/individuals who are members of a particular equality group and those perceived as vulnerable, where there is no outward visible manifestation of hostility or evidence of such (Equality Commission for NI);
 - ensure laws reflect sufficiently the harm done to victims and their communities through being targeted by reason of an immutable characteristic or fundamental aspect of their identity and effectively protect and remedy (potential) victims from hate crime (NI Human Rights Commission).
- 4.27 Where comments were provided from individuals in favour of inclusion of a ‘by reason of’ threshold in legislation, most shared their overall disagreement with the concept of hate crime, and the need to protect freedom of speech and prevent ‘thoughts or beliefs’ being subject to legislation.
- 4.28 One organisation in favour of inclusion of a ‘by reason of’ threshold proposed the US “group selection” model (also known as discriminatory selection model) where evidence of the offender’s prejudiced or bias motivation is not required. In the model, it is considered that, by virtue of specifically targeting a victim because of their identity characteristics, the offender has evinced prejudice or bias towards that individual.
- 4.29 The Equality Commission NI noted in its response that if a ‘by reason of’ threshold is not introduced in hate crime legislation, consideration should be given to protecting offences targeted at equality groups where there is no evidence of hostility but which are due to their perceived vulnerability. In its

response, the PPS noted that targeting a person in this way can currently be treated as an aggravating factor when sentencing i.e. the targeting of particular individuals by reason of their difference (without hostility being present) can still be explicitly treated as an aggravating factor when sentencing.

- 4.30 The Department considers maintaining a high criminal threshold, along with the need for evidence, is important when bringing forward legislation that can be labelled as 'hate' and therefore increase sentencing. The majority of responses to the questions in this chapter indicate agreement with this position. However, the Department also recognises concerns about the potential negative impact on equality groups and (perceived) vulnerable individuals in relation to offences outside of hate crime legislation. Two areas of work are ongoing that may assist this.
- 4.31 The Department of Justice concluded a public consultation on its Sentencing Policy Review in February 2020. In response to consultation responses that 'vulnerability' should be recognised in sentencing, the Minister has agreed legislation should provide that the fact that a victim's vulnerability was obvious or the victim was targeted due to their perceived vulnerability is an aggravating factor. It is intended that a Sentencing Reform Bill, included in the Department's proposed legislative programme for the 2022 – 2027 mandate, will make provision for enhanced sentences for crimes against vulnerable people, thereby enhancing their protection under the law outside of hate crime legislation.
- 4.32 The Department is also engaging with the Department of Health on its Adult Protection Bill. This Bill aims to reduce incidence and improve safeguarding arrangements for adults in a care setting who are at risk of harm from abuse, exploitation or neglect and are in need of protection. Some hate crime victims may be considered as an adult in need of protection under the definition in the Bill. Draft Statutory Guidance is being developed alongside the Adult Protection Bill. An Adult Protection Bill is included in the Department of Health's legislative programme for the 2022 – 2027 mandate.

Way Forward:

The Minister has agreed the Department will not include the 'by reason of' threshold in legislation as a threshold for proving an offence.

5. Sectarian Offending in Hate Crime Law

5.1 The Minister of Justice accepted Judge Marrinan’s recommendations to create a sectarian aggravator in hate crime legislation, supported by a definition subject to agreement. The consultation noted defining ‘sectarian’, for this purpose, is in the context of hate crime law only and will cover specific issues in Northern Ireland. In creating a statutory sectarian aggravator, the Department sought the views of respondents on the legal expression, including Judge Marrinan’s recommendation to apply the findings of the Working Group on Defining Sectarianism in Scots Law, subject to any necessary adjustments.

Question 5: In supporting the understanding of a statutory sectarian aggravator in hate crime law, do you agree / disagree that ‘sectarian’ should be defined in law?

Table 5: Legal Definition of Sectarianism

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	77	60%	28	100%	105	67%
Disagree	49	38%	0	0%	49	31%
Unclear Response	2	2%	0	0%	2	1%
Grand Total	128		28		156	

5.2 Of the 156 responses, there was broad support for including a legal definition of ‘sectarian’ in new hate crime legislation, to support the introduction of a statutory sectarian aggravator. This proposal was supported by most individuals and unanimously by organisations across a range of sectors.

5.3 Where additional comments were provided in agreement with defining ‘sectarian’ in law, some respondents noted the importance of this for providing clarity, understanding and legal certainty. Whilst recognising the complexity in agreeing and defining a sectarian offence in hate crime legislation, this was seen as necessary to ensure the issue is not open to interpretation.

Suggestions to assist developing a definition included drawing upon international standards; looking to other jurisdictions; and referenced existing research.

- 5.4 Agencies within the criminal justice system noted the need for a clear and operationally effective definition which would help to categorise incidents, provide a framework for evidence gathering, and ensure it can be used practically by criminal justice partners. One organisation also noted a definition would assist public bodies when developing policies around their response to the new hate crime legislation.
- 5.5 Other respondents in agreement with defining 'sectarian' were of the view that this would assist progress and political commitments in addressing historical sectarianism in Northern Ireland. There were also suggestions for more fundamental changes to address sectarianism, for example in the educational system.
- 5.6 Of the individual respondents who provided comments on why they disagree with the inclusion of a legal definition of 'sectarian' in new hate crime legislation, some felt sectarianism was already covered by religious hate crime; is too difficult to define; or all crime should be treated equally regardless of the motivation. As with previous questions, some individual respondents cited fundamental disagreement with the concept of hate crime, noting concerns about freedom of speech. However, there was acknowledgement that sectarian 'actions' (as opposed to beliefs) should be penalised and if a sectarian aggravator was to be included, then it should be defined.

Way Forward:

The Minister has agreed a definition of sectarian offending will be included in hate crime legislation to support the creation of a sectarian aggravator.

Question 6: In supporting a statutory sectarian definition, in relation to hate crime law, do you agree / disagree that the definition should include the following elements?

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

Table 6: Elements for Inclusion in a Statutory Sectarian Definition

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	45	36%	20	80%	65	44%
Disagree	79	64%	4	16%	83	56%
Unclear Response	0	0%	1	4%	1	1%
Grand Total	124		25		149	

5.7 Of the 149 responses, there was a wide range of comments and views in response to this proposal, reflecting the complexity and uniqueness of this issue to Northern Ireland.

5.8 Most organisations and some individuals were broadly in favour of the proposed elements in whole or in part. Where additional comments were provided, these came mainly from organisations across the spectrum of sectors who responded. The challenge of defining sectarianism in hate crime law that would work in a Northern Ireland context, was recognised. However, there was a general view that the findings of the Working Group on Defining Sectarianism in Scots Law was a good starting point and provided an alternative to the current ‘religion’ protected group which was deemed by some to be too narrow.

- 5.9 Some respondents noted issues that need to be considered when developing a definition. These included the need to be in line with international standards, particularly relating to racism; ensuring freedom of expression in itself is not criminalised and political speech is not captured; and proposing elements that do not rely too heavily on religious affiliation. Some respondents also took the opportunity to offer views on further elements they would like to see in a definition. These are explored under Question 8.
- 5.10 Of those predominantly individual respondents who disagreed that the definition should include the elements outlined in the consultation, a key reason cited was the need to protect the right to talk about beliefs and only criminalise actions and not thoughts or beliefs. Other views expressed included the elements mentioned being too wide in scope and open to interpretation; the need to remove any links with religious denomination or mention of ‘presumed’ membership; and other faith groups being unprotected – this issue is covered under Question 9.
- 5.11 Of the four organisational respondents who disagreed that the definition should include the elements outlined in the consultation, the reasons provided for three were similar in nature to those provided by individual respondents. The PSNI differed in its comments, raising operational concerns should the definition be worded as set out in the consultation. It noted the potential overlap with existing categories which may cause complications when categorising and gathering evidence.
- 5.12 It is clear that defining ‘sectarian’ in hate crime law needs to be further examined to ensure that all relevant elements of sectarian offending are recognised and that there are no gaps or duplications with existing provisions. It is also important to develop a proposed definition that is both politically acceptable and workable for the criminal justice organisations responsible for implementing any changes to the legislation. Further discussion with relevant stakeholders will be needed before a specific definition with its key elements can be proposed and finalised.

Way Forward:

The Minister has agreed that, using the Scottish Working Group’s definition as a starting point and consultation suggestions, the Department will carry out further research and engagement on each of the elements for consideration, including their operational use by criminal justice partners.

Question 7: The suggested definition of sectarianism does not include political opinion. Do you agree / disagree that political opinion should be excluded?

Table 7: Exclusion of Political Opinion in a Statutory Sectarian Definition

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	92	73%	22	85%	114	75%
Disagree	31	25%	2	8%	33	22%
Unclear Response	3	2%	2	8%	5	3%
Grand Total	126		26		152	

5.13 In line with Judge Marrinan’s recommendation, the Consultation noted the Minister of Justice is also minded not to include political opinion in any proposed statutory definition of a sectarian aggravator in the context of hate crime law. When respondents were asked if they agree/disagree with excluding political opinion from a sectarian definition, three quarters of the 152 respondents agreed. There was general consensus on this from individuals and organisations across all sectors.

5.14 Where additional comments were provided in agreement with excluding political opinion, many of the respondents highlighted the risk of criminalising freedom of expression and noted the importance of protecting legitimate political opinion and political debate as part of living in a democratic society. It

was also noted that the inclusion of political opinion would conflict with Article 10 Human Right obligations on freedom of speech.

- 5.15 Where respondents disagreed with excluding political opinion from a sectarian definition, some cited their reason on the basis that sectarianism and political opinion can be intertwined in Northern Ireland, therefore difficult to separate out in legislation without leaving gaps. Other views against exclusion of political opinion included the need for protection on the basis of political affiliation; perceived role of some politicians in stirring up hate/being sectarian; and general disagreement with the concept of hate crime law. The PSNI, as one of two organisations to disagree, noted sectarianism is included to protect communities against incidents motivated on political opinion.

Way Forward:

The Minister has agreed the exclusion of political opinion from the definition of sectarianism in hate crime legislation and that officials will work with partners to ensure the definition is workable operationally.

Question 8: Are there any other elements that you believe would assist defining sectarianism in the context of Northern Ireland’s history? If yes, please include details.

Table 8: Proposed Elements for Inclusion in a Statutory Sectarian Definition

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Yes	18	16%	13	57%	31	23%
No	94	84%	10	43%	104	77%
Grand Total	112		23		135	

5.16 Of the 135 responses, 31 respondents comprising individuals and a range of organisations provided further comments, some of which included suggestions on other elements that may assist defining sectarian in hate crime law and in the Northern Ireland context. Some respondents noted that a person’s (perceived) community affiliation / background can be drawn from a number of factors and, that any definition should be limited in scope to reflect society in Northern Ireland and be compliant with Human Rights legislation.

5.17 Examples of other suggested elements, which will be examined alongside those in the Working Group on Defining Sectarianism in Scots Law definition set out in Question 6, include:

- identity;
- descent (because of community born into);
- language;
- area of origin or residence, schools or educational facilities attended, membership or support of certain football clubs or other athletic or sporting associations
- political affiliation as opposed to political opinion;
- proscribed organisations / members of paramilitary groups; and

- need to reference sectarianism as a specific form of racism in Northern Ireland, as recommended by the United Nations and Council of Europe.

Question 9: Whilst Judge Marrinan has suggested that a sectarian aggravator should be created and defined in a Northern Ireland and Christian context, do you consider any future changes to the hate crime legislation should include future proofing to include different denominations from non-Christian religions/faiths should evidence emerge to show this was required?

Table 9: Future Proofing a Statutory Sectarian Definition

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Yes	53	47%	22	79%	75	53%
No	58	51%	5	18%	63	45%
Unclear Response	2	2%	1	4%	3	2%
Grand Total	113		28		141	

5.18 In line with Judge Marrinan’s recommendation, the consultation noted proposals to defining ‘sectarian’ in hate crime law is specific to historical issues in Northern Ireland. As a number of respondents commented, Northern Ireland is growing in diversity. Question 9 therefore considered future proofing legislation to include sectarianism from different non-Christian religions/faiths, if required.

5.19 Of the 141 responses received, most organisations and almost half of the individual respondents were broadly in favour of the proposal to future proof legislation. A wide range of organisations agreed with this proposal including faith and religious organisations; third sector organisations including those representing victims of hate crime; equality and human rights organisations; criminal justice partners; political representatives and public bodies. Reasons provided were that legislation needs to reflect the growing diverse population in

Northern Ireland; provide equality of protection under the law for persons of all faiths and religions, including non-Christian denominations; and ensure the criminal justice system is responsive to any change in religious, faith and cultural dynamics.

- 5.20 In support of future proofing legislation, some individual respondents noted the need to ensure freedom of expression, in relation to personal religious beliefs, is protected. Some organisations also noted the need to ensure any future changes in the law would be evidence based, widely consulted on and subject to full legislative scrutiny to ensure effective oversight. It is noted that these similar concerns were cited by some respondents as reasons for not supporting this proposal.
- 5.21 Of those respondents not in favour of future proofing legislation, and who provided additional comments, reasons cited included that sectarianism in Northern Ireland should be specific to British or Irish identity and related affiliations; there should be equality before the law regardless of characteristics of victims of crime; existing legislation is sufficient, including via the protected characteristic of religion; and, if there is a need to address future proofing (e.g.) on a UK wide basis, this should be done in separate legislation or by appropriate future amendment.
- 5.22 As raised by some respondents in favour of the proposal to future proof legislation, some respondents not in favour also noted a concern in relation to potential lack of public consultation and Northern Ireland Assembly (Assembly) scrutiny. The Department can confirm its intentions that any provisions in future hate crime legislation, to amend the definition of sectarianism to apply to different non-Christian religions/faiths outside of the Northern Ireland context, will be subject to public consultation and appropriate scrutiny by the Assembly.

Way Forward:

The Minister has agreed, in recognising the need to reflect the changing demographics of Northern Ireland, that the hate crime legislation will be future proofed to include sectarianism from different non-Christian religions/faiths should evidence emerge to show this was required.

6. Stirring Up Offences

6.1 Judge Marrinan made one recommendation, containing a number of separate but interlinked parts (recommendation 14 (a) – (k)), in relation to stirring up hatred offences provided for in the Public Order (NI) Order 1987. Consultation on this recommendation will be split across two consultation phases. This phase one consultation focused on two specific areas in relation to:

- i. A current dwelling defence and merits of replacing this with a private conversation defence to ensure legislation continues to be fit for purpose in allowing private conversations that take place in the physical and online world within homes/dwellings to be defended (recommendation 14(d) and (e)); and
- ii. The role of the Director of Public Prosecutions in personally taking decisions for stirring up hatred prosecutions (recommendation 14(g)).

6.2 “Stirring up” legislation aims to provide protection against conduct, commonly referred to as ‘hate speech’, which incites hatred against / arouses fear of a group of persons as defined in the legislation. The Department is mindful of the contrasting views on this legislation, as articulated in Judge Marrinan’s Report, and concerns expressed - mainly by individuals and religious/faith organisations - in response to this consultation, that ‘thoughts and attitudes’ may be criminalised. The Department can confirm that there are no plans to change the current test for stirring up offences and the aim is to balance protecting victims from harm against the need to protect freedom of expression rights.

(i) Replace Dwelling Defence with Private Conversation Defence

6.3 In the offence of stirring up hatred against/arousing fear of a group of persons named in the Public Order (NI) Order 1987, Article 9(2) currently provides for a dwelling defence i.e. for the accused to prove they were inside a dwelling and had no reason to believe that the words or behaviour they used, or written material they displayed, would be heard or seen by a person outside that or any other dwelling.

- 6.4 In response to concerns that this defence was no longer suitable in protecting private conversations in dwellings, due to modernised technology and online communications, Judge Murrinan recommended repealing the dwelling defence and replacing it with a specific defence for private conversations which would meet the right to respect for a private/family life under European Convention of Human Rights (ECHR) Article 8. He argues that to protect ECHR Article 8 rights, there must be an explicit defence of private conversations in legislation.
- 6.5 At the time of consulting, the Minister agreed that the current dwelling defence is no longer fit for purpose however, if removed, alternative protection would be needed. It remains the Department's position that an appropriate defence must remain in place to protect freedom of expression within the family home whilst also protecting victims from those who would seek to cause harm through inciting hatred or arousing fear.
- 6.6 Based on additional comments provided from a number of individual responses opposing the repeal of the dwelling defence, it is possible some may have misunderstood the Department's proposals. It appears a number of individuals may believe that, in line with the proposals made in the consultation document, there would be no protection for conversations and discussions within the family home, whereas the proposal is aimed at ensuring this protection. The Department and Minister has noted and carefully considered these concerns when analysing responses to Questions 10 to 13 below and in setting out the Way Forward.

Question 10: Given the prevalence of online communications that now exist within private dwellings, but have a reach outside those private dwellings, do you agree that the dwelling defence is no longer fit for purpose?

Table 10: Dwelling Defence is no longer fit for purpose given online communication

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	11	5%	17	59%	28	12%
Disagree	200	95%	12	41%	212	88%
Grand Total	211		29		240	

6.7 Of the 240 responses, a majority of respondents disagreed that the current dwelling defence is no longer fit for purpose. This view was shared predominantly by individuals and organisations with a religious/faith, secular, freedom of speech and/or human rights interest.

6.8 The almost unanimous views of the individuals who felt that the dwelling defence remains fit for purpose and should not be repealed included: it is well established and understood; there is no evidence current provisions cause any problems; and, people have the right to privacy in their homes and should be able to express their own views therein without fear of prosecution/criminalisation. Reasons cited by the organisations included the need to protect the privacy of family life and the right to discuss all (including controversial) matters within the sanctuary of the family home, without fear of prosecution. Some were also of the view that stirring up hatred offences should be restricted to Public Order Legislation and should not apply to private dwellings and conduct in 'own home'.

6.9 Of the respondents who agreed that the dwelling defence is no longer fit for purpose, the majority were from organisations including criminal justice partners; third sector organisations including those representing victims of hate crime; women's groups; human rights organisation; and political

representatives. Where comments were provided, the main reason cited is that the dwelling defence is outdated and not fit for purpose given developments in online communications since the original legislation was enacted. In relation to responses from criminal justice partners responsible for the workability of the legislation, PSNI felt that additional legislation should be considered for social media/online conversations, whilst being mindful of the impact of freedom of speech. The PPS noted the current defence was not appropriate to online hate crime offences.

- 6.10 Some respondents also made additional comments. For those agreeing the dwelling defence is no longer fit for purpose, they commented that the dwelling defence should be removed and not included in a Hate Crime Bill so that hatred inside a dwelling cannot be protected at all. For those disagreeing the dwelling defence is no longer fit for purpose (in support of retaining it), a number of individuals and organisations offered a compromise hybrid position whereby the dwelling defence would be retained but supported by the creation of an additional protection for private conversations i.e. retain the dwelling defence and include a private conversation defence to safeguard private online conversations e.g. within a WhatsApp group.
- 6.11 A number of individual and organisational respondents also recognised the need to balance the protection of human rights and freedom of expression under Article 9 (right to freedom of thought, conscience and religion) and Article 10 (right to freedom of expression) of the ECHR, whilst legislating to address hate speech to ensure the safety of those targeted due to incitement.

Question 11: Do you agree that repealing the dwelling defence and replacing it with a specific defence for private conversations would balance the need to protect individuals or groups of persons from accusations of stirring up offences, along with the need to ensure freedom of expression and debate of matters which are not, of themselves, threatening, abusive or insulting?

Table 11: Repeal dwelling defence and replace with specific defence for private conversations

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	17	8%	15	52%	32	13%
Disagree	191	91%	12	41%	203	85%
Unclear Response	1	0%	2	7%	3	1%
Grand Total	209		29		238	

6.12 Of the 238 responses, a majority of respondents disagreed that repealing the dwelling defence and replacing it with a specific defence for private conversations would balance the need to protect individuals or groups of persons from accusations of stirring up offences, along with the need to ensure freedom of expression and debate of matters which are not, of themselves, threatening, abusive or insulting. This view was shared predominantly by individuals and organisations with a religious/faith, secular, and freedom of speech interest.

6.13 Most individuals and organisations disagreeing with this proposal reiterated that the dwelling defence should be maintained rather than replaced with a specific defence for private conversations. As for Question 10, a number did however suggest an additional private conversation protection in addition to retaining the dwelling defence, whilst noting the challenges in defining this.

6.14 Again, there were clearly expressed views that the right to freedom of expression must be protected in the home. A number of respondents noted that stirring up legislation is about addressing public disorder and that the home

is not a public place. A response on behalf of women's groups also noted that private conversations can be conducted in public spaces, including online where private comments can be made public. They were not in favour of additional protections on the basis private conversations can be conducted in a way to stir up hate. Their preference was to remove all defences and focus on defining circumstances in which communication is deemed public.

- 6.15 Of the respondents who agreed with repealing the current dwelling defence and replacing it with a specific defence for private conversations, the majority were from organisations including criminal justice partners; third sector organisations including those representing victims of hate crime; women's groups; and political and human rights organisations. Comments provided from both organisations and individuals noted the need for a clear definition of private conversation in order for the legislation to be effective. One respondent suggested setting the definition out in guidance in order to keep pace with future technological advances. Comments also included the need to ensure private groups/forums used to radicalise and incite hate were not protected, whether inside or outside a building.
- 6.16 A number of respondents also highlighted the importance of an appropriate replacement of the dwelling defence, if this is to be repealed, in order to ensure the right to freedom of speech is preserved. Where one respondent is of the view that the dwelling defence should be repealed, they did feel replacing it with a private conversation defence should be justified, albeit not totally opposed to this. A further respondent noted the position adopted in Canada – private conversation is covered by its hate crime legislation where section 319(2) Canadian Criminal Code makes it clear that, communicating statements in private conversations will be exempt from hate crime where communications occur to promote hatred against an identifiable group

Question 12: If a specific defence for private conversations was introduced, should consideration be given to defining the term "private conversations"?

Table 12: Defining the term Private Conversations if defence introduced

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Yes	189	94%	24	83%	213	92%
No	13	6%	3	10%	16	7%
Unclear Response	0	0%	2	7%	2	1%
Grand Total	202		29		231	

6.17 Of the 231 responses, a majority of respondents from both individuals and organisations agreed the term ‘private conversation’ should be defined if a specific defence for private conversations was introduced. In the comments provided, a number of individuals and organisations recognised the difficulties with defining this, noting this was a reason for retaining the dwelling defence which is understood.

6.18 Most of the individual and faith/religious organisation responses, in favour of defining private conversations, focussed on the importance of protecting family conversations without fear of criminalisation and need to cover all of family life. They outlined the value in ensuring clarity on what is / is not protected so people can fully understand the law. Where additional comments were provided by other organisations in support of defining private conversation, the need for the definition to be effective in practice was raised. This included dealing with online hate now and for the future developments.

6.19 In recognising the difficulties of reaching agreement on a suitable definition for a private conversation defence, some respondents provided observations including:

- need to consider the location of a private conversation in the event it may be overheard or shared/read by those not part of the conversation;

- any criteria for numbers of people involved should be broader than two – this may include persons unknown to each other;
- large online groups should be excluded from the defence, even if the group uses a ‘closed/private’ mechanism available on a platform, for example white supremacist and incel groups who conduct much activity, organisation, radicalisation and messaging online;
- all conversations should be considered private until they meet the threshold for harassment, incitement, or offences against the state;
- applicability to those only actually involved, present in the building etc; and
- need to consider where it is reasonable to assume/expect privacy in-person and online.

6.20 To assist consideration of defining private conversation, sources of information identified included the Hate Crime and Public Order (Scotland) Act 2021 (Part 3, section 4) and the Law Commission of England and Wales Hate Crime Report, both of which involve a ‘reasonableness’ test – reasonable expectation of privacy. The need to draw on the concept of international standards and explicitly incorporate ECHR rights into a Hate Crime Bill, for safeguarding, was also raised.

6.21 Where additional comments were provided for those respondents against defining the private conversation term, reasons cited included difficulties with defining this and general opposition to the proposals.

Question 13: If you agree that consideration should be given to defining the term "private conversations", have you any proposals on the criteria for the concept of private conversations?

Table 13: Criteria Proposals for the concept of Private Conversations

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Yes	170	85%	19	73%	189	83%
No	31	15%	7	27%	38	17%
Grand Total	201		26		227	

6.22 Of the 227 responses, 189 respondents comprising individuals and a range of organisations indicated they had proposals on the criteria for the concept of private conversations if agreed for inclusion in legislation/guidance. However, where additional comments were provided, a number made general comments as opposed to specific private conversation criteria proposals, for example on the difficulties of defining private conversation, showing the importance of retaining the dwelling defence, and that agreement with defining private conversation was only in the event this was brought forward.

6.23 Some respondents also noted the need to protect the right to privately hold any view under Human Rights law and any definition should be explored, for example by deferring to experts, case law, international obligations, and other jurisdictional comparators. Other respondents, in recognising the need to ensure freedom of expression not intended to incite hatred, noted it may be preferable to explore a solution via a public expression lens instead of a private conversations lens i.e. where incitement to hatred offence is expressly referenced in 'a public context', thereby making the need for an express defence redundant.

6.24 Where proposals were made on the criteria for the concept of private conversations, these included:

- need to protect conversations within families and friends, including in private settings e.g. home, private cars;
- where conversations are not specifically public speeches;
- where it is reasonable to expect privacy, including work discussion, online messaging, discussion platforms;
- in-person face to face conversation between two people or a small group of individuals in a private setting, where at least one person would not want or expect to be overheard by anyone not part of the conversation;
- excluding social media posts;
- not restricting any definition to include one-to-one conversations only;
- where no element of a private conversation is either audible to, or made available in, an online format potentially accessible to large numbers of individuals; and
- changing the term 'private conversation' to 'private communications' in recognition that not all types of private speech will be in the form of conversations e.g. could be expressed through the sharing of voice, image, video, or other forms of artistic or expressive content.

6.25 Where respondents indicated they had no private conversation criteria proposals, some did offer further comments. Again these varied with some reiterating their opposition to this proposal and others recognising the challenges in defining private conversation, including in an era of quickly changing technology. Despite the challenges, some respondents noted this is necessary in order to maintain public confidence and avoid perception of trying to 'police peoples' thoughts' and impact on freedom of speech; and to provide protection against criminal/terrorist activity that is being discussed privately and where there is any evidence of a hate element.

Conclusion - Replace Dwelling Defence with Private Conversation Defence

- 6.26 To assist respondents' consideration of Judge Marrinan's recommendation to replace the dwelling defence with a private conversation defence (to strengthen protection for 'truly private conversations' by individuals within the home due to advances in technology in an online era), the consultation document provided information on the current position in comparable jurisdictions. At the time of consulting, the Law Commission had also recommended that the dwelling defence exception be replaced with an exception for 'private conversation' in England and Wales. The UK Government has yet to publish its position in response to the Law Commission and the Department awaits its outcome.
- 6.27 In response to consultation responses in Northern Ireland, the Department notes the depth of feeling expressed in support for retaining the dwelling defence, whilst acknowledging no one should be protected from prosecution in circumstances where incitement is intended. The Department also notes proposals, in preference of retaining the dwelling defence, for the creation of an additional (as opposed to 'instead of') private conversation defence to take account of developments in online technology. In the event of including 'private conversation' in legislation, whilst recognising the challenges, many respondents were of the view this should be clearly defined.
- 6.28 Given the complexities of this issue, it is clear that further consideration will be needed to explore and work through the detail on how this will be delivered in legislation.

Way Forward:

The Minister has agreed, taking into account internet/online developments:

- **to retain the dwelling defence and modernise it to strengthen protections for private conversations within dwellings;**
- **to create an explicit private conversation defence to protect private conversations which take place in spaces outside dwellings, both in the physical and online world; and**

- to ensure there is no defence for those who incite hate from dwellings or through private conversations taking place in the public space i.e. that neither the dwelling nor private conversation defences are abused and used as a protection from stirring up offences.

(ii) Role of the Director of Public Prosecutions (DPP) in personally taking decisions for stirring up hatred prosecutions

6.29 The current position in Northern Ireland in relation to prosecuting stirring up hatred cases, under the Public Order (NI) Order 1987, is that ‘consent’ applies whereby the DPP can delegate decisions to a prosecutor i.e. delegated authority can proceed without needing to seek the Director’s personal consent. Judge Marrinan recommended all decisions on whether or not to prosecute stirring up offences should be taken personally by the DPP (recommendation 14(g)). For the reasons outlined in the consultation document, the Minister was of the view that there are more compelling reasons for not introducing the personal consent of the DPP.

Question 14: Under the current arrangements, decisions on whether or not to prosecute stirring up offences can be taken by or with the consent of the DPP (meaning that a prosecutor who has a delegated authority to initiate proceedings can do so without the need to seek the Director's personal consent). Do you agree this arrangement is an adequate safeguard in the consideration of stirring up offences by the Public Prosecution Service?

Table 14: Adequacy of Delegated Authority of Director of Public Prosecutions in Decisions on Prosecution of Stirring Up Offences

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	10	5%	16	70%	26	11%
Disagree	197	95%	7	30%	204	89%
Grand Total	207		23		230	

- 6.30 Of the 230 responses, a majority of respondents disagreed that the current arrangements, where decisions on whether or not to prosecute stirring up offences can be taken by or with the consent of the DPP i.e. delegated, are an adequate safeguard in the consideration of stirring up offences by the Public Prosecution Service. This view was shared predominantly by individuals and religious/faith organisations. Overall, individual and organisational responses held contrasting views with a majority of individuals disagreeing that the current arrangements were an adequate safeguard and a majority of organisations agreeing that they were.
- 6.31 Most of the individuals and organisations who disagreed that the current delegation arrangements are adequate, expressed the view that decisions taken personally by the DPP would provide an additional safeguard, particularly given the seriousness of the offence. They also commented this would protect against trivial disputes or grievances being prosecuted and would provide consistency of prosecution policy, which was seen as reducing inappropriate / costly prosecutions and reducing the likelihood of miscarriages of justice. Some compared the position in England and Wales, citing the requirement for consent from the Attorney General to prosecute stirring up offences and need for similar ‘weight’ in Northern Ireland. Others reiterated their disagreement with stirring up legislation and what they view as criminalisation of opinion.
- 6.32 Based on additional comments provided by some individual responses, it is possible some may have misunderstood the current delegation arrangements. It appears some individuals may have interpreted this question as proposing a new “delegation of responsibility” arrangement from the DPP to prosecutors, rather than proposing no change to current arrangements.
- 6.33 Of the organisational respondents who agreed that the current Public Prosecution Service delegation arrangement is an adequate safeguard in the consideration of stirring up offences, the majority were from third sector organisations; women’s groups; criminal justice partners; and political and human rights organisations. Comments provided noted that ‘personal’ consent by the DPP is not practically workable for one individual; would provide one

person with undue influence over decisions to prosecute, often over long periods; and may lead to potential delays in the criminal justice system. Others recognised the sensitivity of these cases and need for a careful and balanced approach, but felt this can be achieved through the current delegation arrangement to qualified senior and experienced prosecutors where existing and public interest tests for prosecutions are already codified.

Question 15: Do you agree that all decisions on whether or not to prosecute stirring up offences do not necessitate being taken personally by the Director of Public Prosecution?

Table 15: That all decisions on whether or not to prosecute stirring up offences do not necessitate being taken personally by the Director of Public Prosecutions

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	13	6%	15	65%	28	12%
Disagree	191	94%	8	35%	199	88%
Grand Total	204		23		227	

6.34 Responses and additional comments provided by individuals and organisations to Question 15 were similar to those provided to Question 14, with a number of respondents referring to their Question 14 response. Of the 227 responses, a majority of respondents disagreed that all decisions, on whether or not to prosecute stirring up offences, do not necessitate being taken personally by the DPP. This view was shared predominantly by individuals and religious/faith organisations. Of the organisational respondents who agreed with the proposal that personal decision-making by the DPP was not necessary, the majority were from third sector organisations; women’s groups; criminal justice partners; and political and human rights organisations. As for Question 14, individual and organisational responses held contrasting views with a majority of individuals in favour of personal decision-making by the DPP and a majority of organisations agreeing personal decision-making by the DPP was not required.

6.35 In relation to organisational responses for Questions 14 and 15, it is noted that there is a difference in data in relation to responses. This is due to one organisation from the women's sector who indicated agreement that the current delegation arrangement is an adequate safeguard in the consideration of stirring up offences by the Public Prosecution Service (Q14), but indicated disagreement that all decisions do not necessitate being taken personally by the DPP. Additional comments by this organisation clarified their view, noting that any decision taken to prosecute should only be done with the consideration of multiple prosecutors.

Conclusion - Role of the Director of Public Prosecutions in personally taking decisions for stirring up hatred prosecutions

6.36 The Department has carefully considered the views of all respondents in relation to the role of the DPP in personally making decisions on whether or not to prosecute stirring up offences under the Public Order (NI) Order 1987. As outlined in the consultation document, a range of factors were considered including the potential disproportionate workload for one person; the potential for delays in moving cases through the criminal justice system; and concerns and allegations of personal bias by the DPP. A number of organisations directly involved in this process have indicated the current arrangement is working with decisions being taken by senior and experienced lawyers. No evidence has been received from responses to demonstrate this is not the case. It is also noted that legislative change is not required to facilitate the DPP in making personal decisions as to what cases are prosecuted.

Way Forward:

The Minister has agreed that the current decision-making position for prosecuting stirring up offences will continue to apply whereby the DPP can delegate to a prosecutor - meaning that delegated authority can proceed without needing to seek the Director's personal consent.

7. Special Measures and Cross-Examination

7.1 As outlined in Chapter 4, the Minister of Justice has accepted the need for a new legislative statutory aggravation model to reform how perpetrators of hate crime are dealt with by the criminal justice system. This will result in hate crime offences, including the hate/hostility element of an offence, being determined by a jury for the first time. In response to concerns that many hate crime victims may be discouraged from giving evidence in hate crime/hate speech criminal cases, Judge Marrinan recommended (recommendation 24):

- complainants should automatically be eligible for consideration of special measures when giving evidence, and
- no person charged with any aggravated or stirring up offence may, in any criminal proceedings, cross-examine a witness who is the complainant i.e. protection from in-person cross-examination by the defendant.

7.2 This recommendation was noted as ‘accepted’ in the initial Departmental Response published in July 2021. As Judge Marrinan did not consult on this, the Minister of Justice proposed that the Department of Justice should consult and consider all of the consultation responses on this matter.

(i) Automatic Eligibility for Consideration of Special Measures

7.3 At present, special measures can be applied for to assist vulnerable / intimidated witnesses give their best evidence in court. This is subject to the discretion of the court. In addition, under the Criminal Evidence (NI) Order 1999, legislative provisions are also available to facilitate certain groups of witnesses to be automatically eligible for consideration of special measures. The Department consulted on adding hate crime victims to the latter.

Question 16: The criminal justice system currently provides the opportunity for victims of hate crimes to apply for special measures in that an application can currently be made by PPS to explain that a victim of hate crime is in fear/intimidated and requires special measures. Do you agree/disagree that these current provisions are sufficient for hate crime victims?

Table 16: Current Provisions on Special Measures for Victims of Hate Crime sufficient?

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	94	82%	8	36%	102	75%
Disagree	20	18%	10	45%	30	22%
Unclear Response	0	0%	4	18%	4	3%
Grand Total	114		22		136	

7.4 Of the 136 responses, a majority of respondents agree that current provisions on special measures are sufficient for victims of hate crime. This view was indicated predominantly by individuals and some organisations. There was a split in organisational responses with the majority, mainly representing victims, women and human rights groups, indicating they disagree that current provisions on special measures are sufficient for victims of hate crime.

7.5 Where individual and organisational respondents indicated they agree that current provisions on special measures are sufficient, most did not provide additional comments to their answers so the rationale of views provided is limited. Where comments were provided, which were mainly by individuals, some noted the current special measures as sufficient; that there should be no difference in how victims are treated; and cautioned toward a blanket acceptance that a hate crime had occurred. However, other individuals who indicated they 'agree' that current special measures are sufficient commented on the need for (further) support and protection for hate crime victims in a court environment and improving this. Given the divergence in commentary in

comparison with the main answer, it is possible some respondents misinterpreted the question.

- 7.6 For those individual and organisational respondents who indicated they 'disagree' that current special measures are sufficient, a number did provide additional comments. Generally, these comments noted the need for as much support and protection as possible for hate crime victims throughout the court process, based on a victim-centred approach. Automatic eligibility for consideration of special measures was seen as helping victims achieve the best possible evidence and important to victims who may be re-traumatised or re-victimised in the course of interacting with the criminal justice system. It was noted that victims would have the option not to utilise this service. In indicating they disagree that current special measures are sufficient, a small number of individuals responded with comments that either expressed their opposition to hate crime legislation or on the basis current law was adequate.
- 7.7 A small number of organisations, from various sectors, did not tick the 'agree/disagree' options but did provide additional comments. As this commentary was not completely clear in their position in relation to the specific question, these are noted as 'unclear response'. However, some of the comments did indicate support for special measures in hate crime cases, with 'automatic eligibility for consideration' as a way to help remove hurdles. Other comments noted the need to take account of other experiences, jurisdictions and human rights standards (Equality Commission for NI); and for caution to be exercised to distinguish cases where the defendant may use the court process to advance continued domination/coercion over the victim or discourage the victim from continuing – evidence for hate crime was considered as less clear than, for example, domestic abuse cases (PPS).
- 7.8 Given the split in responses and divergence in commentary in comparison with the main answer by some respondents, the Department considered the responses to Question 17 before making a final recommendation on whether or not to extend statutory 'automatic eligibility for consideration of special measures' to hate crime victims.

Question 17: Do you agree/disagree that hate crime victims in criminal proceedings, involving the proposed aggravated offences or stirring up offences, should automatically be eligible for consideration of special measures when giving evidence?

Table 17: Automatic eligibility for consideration of special measures

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	50	45%	14	64%	64	48%
Disagree	57	52%	5	23%	62	47%
Unclear Response	3	3%	3	14%	6	5%
Grand Total	110		22		132	

7.9 Of the 132 responses, there was a general split in respondents who indicated ‘agree’ and ‘disagree’ with the provision of automatic eligibility for consideration of special measures for victims of hate crime. When comparing these figures with Question 16, there is an increase in support from both individuals and organisations across a range of sectors.

7.10 Where additional comments were provided, common themes from individuals and organisations that agreed with automatic eligibility for consideration of special measures included: that the safety of victims was paramount; this would encourage the victim to remain part of the court process; and that it would encourage greater reporting of hate crimes and improve conviction rates, given the additional protection. Some also referred to how this provision could alleviate fear of intimidation and reprisals and the possibility of re-victimisation or re-traumatisation, and that victims would have the option to not utilise these measures, should they so prefer. Of the organisations who were in agreement, many work closely with both victims and perpetrators and in a professional capacity on hate crime issues.

- 7.11 Of the individuals who disagreed with automatic eligibility for consideration of special measures, a number did not provide additional comments to their answers. Where comments were provided, they were similar to Question 16 and noted general disagreement with hate crime legislation; felt the current system is adequate; and that consideration of special measures should be considered for special circumstances. Some individuals also commented on the need to protect the rights of the accused and prevent abuse and false accusations. This is explored further under Questions 18 to 20.
- 7.12 Of the five organisations who disagreed with automatic eligibility for consideration of special measures, three were religious/faith based and did not provide additional comments. The remaining two organisations noted hate crime victims should be eligible for special measures but that consideration should not be 'automatic' i.e. should be left to the judge to decide whether or not they are justified and appropriate (UUP); and (as for Question 16) that caution should be exercised to distinguish cases where the defendant may use the court process to advance continued domination/coercion over the victim or discourage the victim from continuing – evidence for hate crime was considered as less clear than, for example, domestic abuse cases (PPS).
- 7.13 In weighing up the views provided, the Department considered criteria that can be applied to groups where automatic eligibility for consideration of special measures is already provided for under the Criminal Evidence (NI) Order 1999, for example victims of human trafficking; domestic abuse; sexual violence and stalking. Proposed eligibility criteria includes:
- victim is in fear/distressed about testifying resulting in diminished quality of evidence/disengagement with the court process;
 - vulnerability to repeat victimisation and re-traumatisation;
 - victim may come into contact with perpetrator e.g. in community, home, work;
 - nature of the offence;
 - evidence of underreporting; and
 - should meet international / human rights standards.

Way Forward:

The Minister has agreed that hate crime victims in Northern Ireland are **automatically eligible for consideration of special measures by the criminal justice system, under Articles 4 and 5 of the Criminal Evidence (NI) Order 1999.**

It should be noted that 'automatic eligibility for consideration of special measures' does not mean that this will automatically be granted by the court. An application for special measures will have to be formally drafted by the PPS and served on both the court and the defendant. It will be for the court to decide whether the application is granted, taking into account that the special measures requested are likely to maximise the quality of the victim's evidence.

(ii) Protection from cross-examination by a person charged with any aggravated or stirring up offence

7.14 At present, under the Criminal Evidence (NI) Order 1999, provisions are provided to protect certain groups of witnesses, who are the complainant, from in-person cross-examination by the accused. The Department consulted on extending these provisions to hate crime victims and any potential detriment for abuse if the defendant is unable to cross-examine in-person.

7.15 On analysis of the additional comments made to Questions 18-20, there is a possibility that some respondents may have misunderstood the concept of protection from in-person cross-examination by the perpetrator to mean protection from any cross-examination of the victim. Consequently, this may have influenced the overall response in the tables to these questions.

7.16 **The Department can confirm that the defendant's right to a fair trial is protected in ECHR law, including legal representation to cross-examination.**

Question 18: Do you agree/disagree that victims in hate crime criminal proceedings, involving the proposed aggravated offences or stirring up offences, would benefit from protection from cross-examination where the alleged perpetrators choose to exercise a right to cross-examine their victims in-person?

Table 18: Victims of hate crime would benefit from protection from in-person cross-examination by the alleged perpetrator

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	45	41%	16	70%	61	46%
Disagree	62	57%	2	9%	64	48%
Unclear Response	2	2%	5	22%	7	5%
Grand Total	109		23		132	

7.17 Of the 132 responses, there was a split in respondents who agree/disagree that victims of hate crime would benefit from protection from cross-examination where the alleged perpetrators choose to exercise a right to cross-examine their victims in-person. This split is noted between individuals and organisational respondents, and within individuals to some degree, with the majority of individuals disagreeing and the majority of organisations agreeing.

7.18 Of the individuals who disagreed that victims of hate crime would benefit from protection from in-person cross-examination by the defendant, and where additional comments were provided, a common theme was that the defendant should have the right to cross-examine their accuser as part of a free democracy and the rule of law. Other reasons included the need to ensure a fair trial and not treat an alleged perpetrator as guilty; the need to balance protecting a victim versus protection from potential abuse of the system; and general lack of support for hate crime legislation. Some individuals, whilst indicating they disagree, commented on the need for safeguards when cross-examining witnesses in individual circumstances rather than a blanket approach. Of the two organisations that disagreed, one (religious/faith based)

did not provide any additional comments and the other (representing free speech) noted a defendant should not be forced to rely on a regulated lawyer.

- 7.19 A wide range of organisations and a number of individuals agreed that victims of hate crime would benefit from protection from in-person cross-examination by the defendant. Organisations included faith and religious; third sector, including those representing victims of hate crime; criminal justice partners (PSNI and Probation Board NI); women's groups; and political and human rights organisations.
- 7.20 Reasons provided in favour of protection from in-person cross-examination were that hate crime victims should be supported and protected from re-victimisation or re-traumatisation – and that protection from in-person cross-examination was a valid way to prevent this; and that such a protection would improve confidence and encourage victims to report hate crime. In addition to improving reporting, this is seen as a way to help improve conviction rates by supporting hate crime victims to remain engaged with the court process and alleviating the intimidation and fear felt in interacting with their perpetrator. To ensure a fair trial under ECHR Article 6, it was noted that the defendant can/should be represented by a lawyer.
- 7.21 A small number of individuals and organisations from various sectors did not tick the 'agree/disagree' options but did provide additional comments. As this commentary was not completely clear in their position in relation to the specific question, these are noted as 'unclear response'. However, some of the comments did indicate they were in favour with applying protection from in-person cross-examination to victims of hate crime; or that, as protections already exist albeit are not automatic, consideration should be on a case-by-case basis / at the discretion of the judge.

Question 19: Do you agree/disagree that automatic eligibility to protection from cross-examination by the alleged perpetrator would support reporting of hate crime by victims?

Table 19: Automatic eligibility to protection from cross-examination by the alleged perpetrator would support reporting of hate crime by victims

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	54	49%	16	70%	70	53%
Disagree	49	45%	2	9%	51	38%
Unclear Response	7	6%	5	22%	12	9%
Grand Total	110		23		133	

7.22 Of the 133 responses, a majority of respondents agreed that automatic eligibility to protection from cross-examination by the alleged perpetrator would support reporting of hate crime by victims. This majority includes individuals and organisations from a range of sectors, noting a split within individuals to some degree.

7.23 Where additional comments were provided to support agree/disagree views, these were similar to those noted for Question 18. Whether agreeing or disagreeing that automatic eligibility to protection from in-person cross-examination by the alleged perpetrator would support reporting, a number of respondents noted the need to protect ECHR Article 6 and right to a fair trial.

Question 20: Do you agree/disagree that there is a potential detriment for abuse of the criminal justice system if the defendant is unable to cross-examine the hate crime victim?

Table 20: Potential detriment for abuse of the criminal justice system if the defendant is unable to cross-examine the hate crime victim

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	79	74%	8	33%	87	66%
Disagree	27	25%	11	46%	38	29%
Unclear Response	1	1%	5	21%	6	5%
Grand Total	107		24		131	

7.24 Of the 131 responses, a majority of respondents agreed that there is a potential detriment for abuse to the criminal justice system if the defendant is unable to cross-examine the hate crime victim. This view was shared predominantly by individuals and some organisations.

7.25 Where additional comments were provided by individuals agreeing that there is a potential detriment for abuse, reasons included: the possibility of vexatious claims, particularly if the accuser does not face scrutiny; the importance of maintaining a fair trial; there should be no difference in cases brought to court; and the defendant's right to face their accuser, though noting from a protected position. Further comments noted decisions should be on a case by case basis and that legal work should be taken forward by legal experts. Others, as for previous questions, generally disagree with hate crime legislation and perceived attempts to criminalise freedom of speech.

7.26 Where additional comments were provided by organisational respondents who agree there is a potential detriment for abuse, one noted similar reasons provided by individuals in relation to concerns of vexatious complaints. Generally, others were unsupportive of an automatic protection, preferring decisions to be taken on a case by case basis and for the judge to decide.

- 7.27 Of the individuals who disagree there is a potential detriment for abuse, and where additional comments were provided, the key reason was the availability of solicitors and barristers who are trained to cross-examine. This view was shared by organisations across a range of sectors including the PPS who noted a defence solicitor or barrister can be instructed by the defendant or appointed by the Court. Other organisational comments noted the additional harm and increased risk of abuse that would be caused on hate crime victims, who are already traumatised, and need for a victim-centred approach; protection precedence set by recent Domestic Abuse legislation; and, in relation to concerns relating to vexatious claims, that there is an onus on investigation and prosecution procedures to identify these early on.
- 7.28 The Department has carefully considered the views of all respondents in relation to extending current legislative protection for certain groups, from in-person cross-examination, to hate crime i.e. where no person charged with an offence involving hate crime under the new statutory aggravation model or stirring up offences, may in any criminal proceedings cross-examine in-person a witness who is the complainant.
- 7.29 The Department's initial acceptance of Judge Marrinan's recommendation 24, relating to protection from in-person cross-examination by the defendant, was based on the premise a Hate Crime Bill will be victim-centred and with the intention of improving the criminal justice process for victims of hate crime. In response to concerns relating to the potential for abuse and importance of maintaining a fair trial, a Court will always be mindful of striking a balance under ECHR Article 6, between protecting the defendant's right to a fair trial and ensuring that witnesses who give evidence in a case are enabled to do so to the best of their ability. The defendant's right to a fair trial is protected in ECHR law, including legal representation to cross-examination.

Way Forward:

The Minister has agreed that the Criminal Evidence (NI) Order 1999 is amended to protect complainants of hate crime from cross-examination by a person charged with any aggravated or stirring up offence i.e. protection from in-person defendant cross-examination.

8. Call for Views: Exploring Misogyny/Transmisogyny in Hate Crime Law

- 8.1 In his Final Report, Judge Marrinan acknowledged the general lack of consensus internationally as to which characteristics should be protected under hate crime law. In recommending the inclusion of sex/gender (neutral) and variations of sex characteristics (recommendation 9) his findings noted the complexity of this, including that the vast majority of cases relate to affording criminal law protection to females.
- 8.2 Phase two of the hate crime consultation will include consideration of sex/gender (neutral) as an additional protected characteristic in hate crime law, as recommended by Judge Marrinan. In the meantime, to assist and inform wider Government discussions on tackling gender issues and violence against women and girls, the Department of Justice used the phase one hate crime consultation to seek views on the merits of including misogyny (to include transmisogyny) within hate crime law as an alternative to including sex/gender as a protected characteristic.
- 8.3 The results from this 'call for views' will be considered in the development of the phase two policy proposals and consultation. No policy position or ministerial approved way forward is provided on this theme at this stage.

Question 21: Of the options outlined as proposals for addressing violence against women and girls, which is your preferred option, if any:

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

Table 21: Preferred option for addressing violence against women and girls

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
1 - Sex/Gender as a protected characteristic	45	42%	5	17%	50	36%
2 - Misogyny (and transmisogyny) as a statutory aggravating factor	5	5%	4	14%	9	7%
3 - Misogyny (and transmisogyny) as a stand-alone crime/specific offence	*	*	0	0%	*	*
4 - No recognition of sex/gender for the purposes of aggravated offences and enhanced sentencing	38	35%	2	7%	40	29%
5 - Other	17	16%	7	24%	24	18%
1 + 2	0	0%	1	3%	1	1%
2 + 3	*	*	5	17%	#	#
Unclear Response	0	0%	5	17%	5	4%
Grand Total	108		29		137	

** means a figure attributable to fewer than three individual responses has been treated under rules of disclosure.*

means a figure of three or more has been treated to prevent disclosure of a small number elsewhere.

- 8.4 Question 21 called for views on the preferred option for addressing violence against women and girls. Whilst respondents were asked to tick one option, some did respond indicating a preference for two options. Similar to Judge Marrinan's findings on the proposed inclusion of sex/gender as a protected characteristic in hate crime law, based on the 137 responses to this question, there is no settled public opinion or clear consensus on this or other options in the context of addressing violence against women and girls.
- 8.5 Of the options offered, two majority views are split between inclusion of sex/gender as a protected characteristic (option 1) and no recognition of sex/gender as a protected characteristic (option 4). This split was also noted in responses from individuals. A summary of additional comments provided for each option is noted below.

Option1. Sex/Gender as a protected characteristic (as recommended by Judge Marrinan)

- 8.6 Of the 45 individual responses indicating a specific preference for option 1, a number did not provide any comments to explain their preference for this option. Of the limited comments provided, they focused on the need to be inclusive and not protecting one gender over the other. A small number commented on the need to differentiate between 'sex' and 'gender' as they are not the same.
- 8.7 Of the five organisation responses indicating a specific preference for option 1, two (one religious/faith based and Probation Board for NI) did not provide any specific comments to explain their preference for this option. NIACRO noted its preference was on the basis option 1 was 'inclusive' of all genders. The Equality Commission commented that hate crime legislation should include gender, gender identity and intersex, protecting both men and women, but that policy approaches to tackle hate crime should be gender specific to reflect women being disproportionately affected.
- 8.8 The NI Humanists focused on the need to create parity/language with other protected characteristics already protected under existing legislation in England

and Wales, and Scotland. It should be noted that England and Wales does not currently include sex/gender in their hate crime laws and the Law Commission, in its recent review, has not recommended this. Scotland has been specific about the inclusion of an enabling power for 'sex' in its Hate Crime and Public Order (Scotland) Act 2021, subject to the out-workings of Baroness Kennedy's report on 'Misogyny – A Human Rights Issue'. This Report has now been published and does not recommend adding a sex characteristic to the Scottish hate crime legislation. The UK and Scottish Governments are currently considering their respective reports on this issue and the Department awaits their outcome.

- 8.9 In addition to the five organisation responses indicating a specific preference for option 1, one political party (SDLP) indicated a preference for the inclusion of sex/gender as a protected characteristic and recognising misogyny as a hate crime category. Additional comments provided noted this would increase the accuracy of data collection and enable records to accurately reflect what occurred, thereby informing preventative approaches tackling gender based violence.

Option 2. Misogyny (and trans-misogyny) as a statutory aggravating factor

Option 3. Misogyny (and trans-misogyny) as a stand-alone crime/specific offence

- 8.10 Of the five individual responses indicating a specific preference for option 2, fewer than three explained their preference which related to anticipating the rise in misogyny inspired by incel ideology. Of the fewer than three individual responses indicating a specific preference for option 3, none offered comments to explain their position. In addition, fewer than three individual responses indicated a preference for both options 2 and 3.

- 8.11 Four organisations indicated a specific preference for option 2 and five organisations indicated a preference for both options 2 and 3. Organisations included voluntary and community groups, including those representing victims; women's groups; NI Human Rights Commission and Sinn Féin. Reasons for preferring a misogyny approach were on the basis that inclusion of sex/gender

(option 1) is not sufficient to address offending, as women are not a minority; a gender-sensitive approach is required and gender neutral language should not be used as men/boys are not targeted based on gender; and noting the importance of intersectionality.

8.12 Additional comments, particularly by some women's groups, noted that the proposals in Baroness Kennedy's report on 'Misogyny – A Human Rights Issue' are adopted and used to inform the development of legislation in Northern Ireland. Some organisations also noted the need for safeguards to avoid against fictitious claims, re-traumatising victims and a scenario where everyone could potentially claim to be a hate crime victim, even if not from a marginalised or vulnerable group, which leaves the law vulnerable to exploitation and seeking to silence (trans) women.

8.13 Whilst recognising inclusion of misogyny in law will not necessarily prevent hate crime happening, inclusion was seen as helping to underline the prevalence and seriousness of such crimes and yielding statistics and information to help understand the extent and impact of the issue and encouraging awareness e.g. introduction of educational efforts, training and awareness campaign.

Option 4. No recognition of sex/gender for the purposes of aggravated offences and enhanced sentencing

8.14 After the majority preference for option 1, option 4 was the next preferred approach as indicated mainly by individuals and two religious/faith based organisations. Neither of the organisations provided additional comments. Where individual respondents provided comments, these focused on the preference to apply the law equally to everyone, regardless of sex; the need to avoid criminalisation of attitudes, including misogynistic attitudes; difficulties in getting evidence of misogyny to meet the criminal threshold; how trans rights are perceived to undermine the rights of women; and lack of evidence of discrimination/harm against trans people compared to harm against (biological) women.

Option 5. Other

8.15 An 'other' option was offered to respondents to see if further options could be identified in progressing this issue. Ideas shared in responses included:

- hate motivated by gender (individual);
- inclusion of trans people in one hate crime category relating to gender (individual);
- legislation should offer separate protection of female sex class and of transsexuals (individual);
- 'women' (including transgender women) as a protected characteristic rather than sex/gender as this sends a message in recognition of disproportionate hate and abuse due to being a woman (Women's Aid Federation NI);
- concept of statutory aggravation based on individual victim's vulnerability could help proceed issue rather than categorisation of people (Evangelical Alliance); and
- support protected characteristic of 'sex' but linked to misogyny and not transmisogyny on basis latter will be covered separately as a protected characteristic as accepted by the Department (CAJ).

8.16 Where alternative option ideas were not offered, some respondents did provide additional comments. The PSNI explained it was still reviewing the best course of action whilst taking into account the Law Commission report (which recommended sex/gender should not be included in hate crime law but should be included as a stirring up hatred offence). Other respondents (individuals, free speech and religious/faith based organisations) took the opportunity to share their opposition to hate crime law in general; any extension of protected categories and misogyny as a stand-alone offence; and the concept of transgender/ transmisogyny/ gender ideology. There is also opposition from some against conflating sex and gender. Some responses from the women's sector noted the need to recognise 'sex' on the basis 'gender' is not tangible and changes. Others noted the need for clarity on who is being protected, which should be based on evidence – with views that evidence exists for biological sex only.

8.17 A small number of organisations did not indicate a preferred option or stated they had no preference, but did provide additional comments. As this commentary was not completely clear in their position or where they indicated they had no policy position (PPS), in relation to the specific question, these are noted as 'unclear response'. Additional comments included:

- preference for the use of 'sex' as opposed to 'gender' as the latter could prosecute critics of the concept of transgender / non-binary (Family Education Trust);
- use of 'neutral' law disguises the reality of behaviours that target women and any law change needs to be effective and make a difference. Misogyny as a statutory aggravator may aid recording of statistics and enhance sentencing, but only if the legislation is used correctly. It was proposed to consider/utilise laws already in place (SE Area Domestic & Sexual Violence Partnership);
- transmisogyny should not be conflated into misogyny, and expanding hate crime legislation may move it beyond its intent to protect vulnerable and minority groups. Any change that makes it more difficult to secure convictions for domestic abuse or sexual offences should be resisted (Presbyterian Church in Ireland); and
- need to ensure legal mechanism will actually achieve intended result. The Law Commission recommendation on undertaking a review of the need for the specific offence of public sexual harassment was noted (UUP).

Question 22: Many of the issues surrounding misogyny are closely linked to sexual offences and domestic abuse. If misogyny is considered for inclusion as a hate crime statutory aggravator, do you agree/disagree that domestic abuse and sexual offences be excluded?

Table 22: Exclude sexual offences and domestic abuse from any hate crime statutory aggravator

	Individual		Organisation		Grand Total	
	n	%	n	%	n	%
Agree	33	31%	8	33%	41	32%
Disagree	68	65%	7	29%	75	58%
Disagree - with exemptions	0	0%	2	8%	2	2%
Unclear Response	4	4%	7	29%	11	9%
Grand Total	105		24		129	

8.18 Of the 129 responses, a majority of respondents disagreed that domestic abuse and sexual offences should be excluded if misogyny was recognised as a hate crime statutory aggravator. This view was shared by individuals and organisations mainly representing victims and women’s groups. However, some additional comments provided further insight into these responses that indicate disagreement is wider than the question posed. Where respondents agreed that domestic abuse and sexual offences should be excluded, this view was shared by some individuals and organisations representing the criminal justice sector (PSNI and PBNI), women’s groups, voluntary and community sector, and religious/faith organisations.

8.19 A number of respondents, particularly individuals, who disagreed that domestic abuse and sexual offences should be excluded if misogyny was recognised as a hate crime statutory aggravator, did not make comments in relation to their response. Where additional comments were provided, some are clear that they believe domestic abuse and sexual violent offences should be included on the basis they are inherently misogynistic. Some organisations, particularly

representing the women's sector, agree with this inclusion but caveat it on the basis that if misogyny was to be a hate crime statutory aggravator, it should not be applied in intimate partner/known perpetrator crimes such as domestic abuse. Their view was that it should only be applied in unknown perpetrator situations as misogynistic attitudes would be the dominant motivator of the crime.

- 8.20 Serious concerns were also raised in the implications of including misogyny in hate crime law. It was argued that domestic and sexual abuse is about power and to dismiss as 'hate' does not deal with the issue. The application of misogyny as a hate crime statutory aggravator, in some domestic abuse and sexual offences cases, but not others, was also viewed as creating a perceived 'hierarchy' of perpetrators and victims.
- 8.21 Other respondents elaborated that their disagreement related to misogyny being classed as a crime, a hate crime or being an aggravator in law; that inclusion of misogyny would achieve nothing and would be difficult to prosecute; and, if providing for an aggravator, this should be based on biological sex and not misogyny. One women's group also recommended that particular attention be paid to the growth of online hate movements against women, especially the 'incel' movement, in The Executive Office's Violence Against Women and Girls Strategy.
- 8.22 Of those individuals and organisations who agree domestic abuse and sexual offences should be excluded if misogyny was recognised as a hate crime statutory aggravator, a number did not include additional comments to explain their view. Where additional comments were provided, the existence of legislation already in place to deal with these offences was noted, for example domestic abuse offences should be prosecuted under domestic abuse legislation. Some noted there would be little benefit in including domestic and sexual offences in hate crime law. There were calls for current legislation to be enforced and to avoid duplication/overlap in law.

8.23 Some respondents pointed to other work in this area. One women’s group noted the Scottish Working Group position, in the Report on ‘Misogyny – A Human Rights Issue’, to exclude domestic and sexual offences as they go beyond hate crime and risk diluting that legislation as well as domestic abuse and sexual offence legislation. They also noted that hate crime legislation should be developed taking cognisance of the Gillen review and ongoing work to implement its recommendations. The work of the Law Commission was also raised, including its views that domestic abuse and sexual offences were inherently unsuitable for inclusion in hate crime laws; this could create new legislative hierarchies; any exclusions would increase legislative complexity, which creates difficulties in application for law enforcement agencies; and that the removal of these offences may leave the remaining offences covered as largely “tokenistic”.

Question 23: Whilst evidence demonstrates the disproportionate experience of females, if misogyny is considered for inclusion in hate crime law, to ensure fairness in legislation, do you agree/disagree an act of misandry should also be considered to recognise the experience of male victims?

Table 23: Misandry should also be considered for inclusion in hate crime law to recognise the experience of male victims

	Individual		Organisation		Grand Total	
	n	%	n	%	N	%
Agree	81	76%	9	35%	90	68%
Disagree	23	22%	12	46%	35	27%
Unclear Response	2	2%	5	19%	7	5%
Grand Total	106		26		132	

8.24 Of the 132 responses, a majority of respondents agree that misandry should be considered in hate crime law if misogyny is included. This view was shared by individuals and a range of organisations representing the criminal justice sector (PSNI and PBNI), free speech, religious/faith, political (UUP) and women’s organisations. However, as for Question 22, some additional

comments provided views beyond the question posed. Where respondents disagree that misandry should be considered in hate crime law if misogyny is included, this view was shared by some individuals and organisations representing most women's groups, voluntary and community sector organisations representing victims, and political (Sinn Féin) and human rights organisations.

- 8.25 A number of respondents who indicated misandry should be considered in hate crime law if misogyny is included, did not provide additional comments in relation to their response. Where additional comments were provided, the need for parity and equality before the law, to be fair and inclusive, was a main reason cited by both individuals and organisations. Some respondents took the opportunity to restate their opposition to hate crime law, extension of new categories of criminal aggravation and criminalising attitudes – but if legislation is to proceed, their preference is to criminalise both misogyny and misandry.
- 8.26 Of those individual respondents who disagreed with the inclusion of misandry, a number did not comment further. Where individuals did comment, the main reason provided was that there is no evidence that hate crime is perpetrated against men and boys because of their gender. This was a similar reason provided by organisations, particularly those representing women who felt a gender neutral approach and proposal was unhelpful and harmful. They made a number of suggestions including referring to international standards to assist prevention of abuse of provisions, and understanding inequality 'through the lens of power'. CAJ noted that taking a neutral approach risks legislation being used as a tool to entrench misogyny further.
- 8.27 In disagreeing with the inclusion of misandry, one women's group advised they did not agree that the majority of abuse against women and girls stems from misogyny, believing the root causes to be broader. They were of the view that it was important to address these causes rather than add on new crimes, which would not protect women and girls.

8.28 As indicated, the responses to this call for views will be considered in the development of the phase two hate crime policy proposals and consultation which will include consideration of sex/gender (neutral) as an additional protected characteristic in hate crime law, as recommended by Judge Marrinan.

To assist this work, Departmental officials will also:

- engage further with relevant stakeholders to listen to their views;
- liaise with colleagues across the Department of Justice and in The Executive Office on related work, including on the Violence Against Women and Girls (VAWG) Strategy;
- liaise with the PSNI on its consideration of recording sex/gender as a hate motivation, in order to build a more accurate picture of the prevalence and trends in violence against women and girls, as part of its VAWG Action Plan; and
- monitor developments in other jurisdictions, including the Scottish Government's response to the Independent Report of the Scottish Working Group; the UK Government's response to the Law Commission Report on its hate crime legislation review and the Irish Government's Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 which is currently progressing through its legislative stages.

9 Next Steps

- 9.1 In response to recommendations by Judge Marrinan, the proposals in the phase one public consultation document were aimed at ensuring that any changes to the existing framework result in effective, appropriate and operationally achievable legislation in the criminal justice system to tackle hate crime. A range of views were shared on a number of topics with, at times, a variation of opinion on how to address hate crime through the criminal law. The consultation has shown that there is general support for improving the criminal justice system to protect victims of hate crime from harm whilst balancing this protection with the need to safeguard freedom of expression rights.
- 9.2 The overall responses to the consultation have informed the ministerial decisions and approved way forward in relation to future legislative changes; areas which will be dealt with administratively; or on which further consideration is required. The final policy positions arising from the consultation, as agreed by the then Justice Minister in October 2022, are summarised in **Annex B**.
- 9.3 The former Justice Minister approved a draft primary legislative programme, for the Department of Justice, which included proposals for the development and introduction of a Hate Crime Bill to the Assembly in the latter half of the 2022-2027 mandate. An incoming Justice Minister will wish to review the proposed programme, following restoration of the Northern Ireland Executive (Executive), taking account of the time available for delivery in the Assembly mandate. The timing for bringing forward a Bill is dependent upon the Assembly's legislative programme.
- 9.4 In the meantime, in preparation for a functioning Assembly and Executive, work on the outcome of the phase one consultation and subsequent changes to legislation in a Hate Crime Bill is progressing. Work has commenced to share final policy positions with partners responsible for implementation, to assist early identification and resolution of any potential impacts for each organisation. Drafting instructions are also being prepared in readiness for Executive approval to commence drafting of a Bill. In the absence of a Justice

Minister, officials will also continue to engage with key stakeholders to keep them updated on progress and to hear their views.

9.5 Work on developing policies to be included in the phase two public consultation has also commenced with the intention of issuing a public consultation on these issues in 2023, subject to the return of Ministers. The remaining policy aspects relate to consideration of three strategic themes:

- Additional protected characteristics of sex/gender/variations of sex characteristics and age (recommendation 9);
- Stirring Up Offences – on the remaining sub-parts not covered in the phase one consultation (recommendation 14); and
- A statutory duty for public authorities to remove hate expressions from buildings and public spaces where they carry out their functions (recommendation 15).

Respondents to Phase One Consultation

The following organisations submitted responses to the phase one consultation:

1. Ballyclare Reformed Presbyterian Church
2. Belfast Jewish Community
3. Commissioner for Older People for Northern Ireland
4. Committee on the Administration of Justice (CAJ)
5. Equality Commission for Northern Ireland
6. Evangelical Alliance Northern Ireland
7. Family Education Trust
8. Health and Safety Executive NI
9. Here NI
10. Migrant Centre NI
11. National Secular Society
12. Newbuildings Independent Methodist Church
13. NIACRO
14. Northern Ireland Council for Racial Equality
15. Northern Ireland Housing Executive (NIHE)
16. Northern Ireland Humanists
17. Northern Ireland Human Rights Commission (NIHRC)
18. Northern Ireland Policing Board (NIPB)
19. Park Avenue Free Methodist Church
20. Participation and the Practice of Rights (PPR)
21. Police Service of Northern Ireland (PSNI)
22. Presbyterian Church In Ireland
23. Probation Board for Northern Ireland (PBNI)
24. Public Prosecution Service (PPS)
25. Sinn Féin
26. Social Democratic and Labour Party (SDLP)
27. SE area Domestic & Sexual Violence Partnership
28. Standing for Women (2 responses)
29. The Caleb Foundation
30. The Christian Institute
31. The Free Speech Union
32. The Rainbow Project
33. Ulster Unionist Party (UUP)
34. Victims Support NI (VSNI)
35. Women's Aid Federation Northern Ireland
36. Women's Platform
37. Women's Policy Group NI
38. Women's Regional Consortium

In addition, 223 responses were received from individuals/members of the public.

Phase One Consultation: List of Final Policy Positions and Way Forward

Recommendations 1 and 5

The Minister has agreed the threshold for Hate Crime legislation should be of a sufficiently high level and that the Department will retain the current threshold of hostility for hate crimes within the new hate crime legislation.

The Minister has agreed the Department will work with Criminal Justice organisations to discuss including attitudes of bias, prejudice, bigotry and contempt, as indicators of what may constitute hostility/hate resulting in a hate crime, to any available guidance. Discussion will include the need to be within international human rights standards and will clarify that these attitudes in themselves are not hate crime.

Recommendation 6

The Minister has agreed the Department will not include the ‘by reason of’ threshold in legislation as a threshold for proving an offence.

Recommendation 12

The Minister has agreed a definition of sectarian offending will be included in hate crime legislation to support the creation of a sectarian aggravator.

The Minister has agreed that, using the Scottish Working Group’s definition as a starting point and consultation suggestions, the Department will carry out further research and engagement on each of the elements for consideration, including their operational use by criminal justice partners.

The Minister has agreed the exclusion of political opinion from the definition of sectarianism in hate crime legislation and that officials will work with partners to ensure the definition is workable operationally.

The Minister has agreed, in recognising the need to reflect the changing demographics of Northern Ireland, that the hate crime legislation will be future proofed to include sectarianism from different non-Christian religions/faiths should evidence emerge to show this was required.

Recommendation 14 (d), (e) and (g)

The Minister has agreed, taking into account internet/online developments:

- **to retain the dwelling defence and modernise it to strengthen protections for private conversations within dwellings;**
- **to create an explicit private conversation defence to protect private conversations which take place in spaces outside dwellings, both in the physical and online world; and**
- **to ensure there is no defence for those who incite hate from dwellings or through private conversations taking place in the public space i.e. that neither the dwelling nor private conversation defences are abused and used as a protection from stirring up offences.**

The Minister has agreed that the current decision-making position for prosecuting stirring up offences will continue to apply whereby the DPP can delegate to a prosecutor - meaning that delegated authority can proceed without needing to seek the Director's personal consent.

Recommendation 24

The Minister has agreed that hate crime victims in Northern Ireland are automatically eligible for consideration of special measures by the criminal justice system, under Articles 4 and 5 of the Criminal Evidence (NI) Order 1999.

The Minister has agreed that the Criminal Evidence (NI) Order 1999 is amended to protect complainants of hate crime from cross-examination by a person charged with any aggravated or stirring up offence i.e. protection from in-person defendant cross-examination.