

A Comparative Analysis of Hate Crime Legislation

A Report to the Hate Crime Legislation Review

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INTRODUCTION

In January 2017, the Scottish Government announced a review of hate crime legislation, chaired by Lord Bracadale.¹ Lord Bracadale requested that, to assist the Review it its task, we produce a comparative report detailing principles underpinning hate crime legislation and approaches taken to hate crime in a range of jurisdictions. Work on this report commenced in late March 2017 and the final report was submitted to the Review in July 2017.

Chapter 1 (What is Hate Crime?) explores what is meant by the term “hate crime”, noting that different definitions may properly be used for different purposes. It notes that the legislative response to hate crime can be characterised by the definition offered by Chakraborti and Garland: the creation of offences, or sentencing provisions, “which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim’s identity should be treated differently from ‘ordinary’ crimes”.

Chapter 2 (Hate Crime Legislation in Scotland) outlines the principal provisions of hate crime legislation, as identified in the Review’s remit. These can be divided into two categories. First, sentence aggravation provisions, which do not create distinct criminal offences, but allow for offences aggravated by prejudice to be recorded as such and require the aggravation to be taken into account in sentencing. Secondly, substantive offences, which primarily consist of offences relating to the stirring up of racial hatred but also include offences of racially aggravated harassment and threatening communications intended to stir up hatred on religious grounds.

Chapter 3 (Justifications for Punishing Hate Crime More Severely) considers the various possible justifications for treating hate crimes as more serious than parallel non-hate crimes. The possible justifications can be divided into three broad categories: harm-based justifications; culpability-based justifications; and denunciation-based justifications. Assessing the available evidence, it concludes that the argument that hate crimes are – compared to parallel non-hate crimes – more likely to cause harm both to the direct victim and to members of the group to which the victim belonged or was perceived to belong is particularly compelling. The argument that it is important to send a message to victims of hate crime that bias and inequality of treatment is roundly condemned by the State is also persuasive. Collectively, the harm argument and the denunciatory argument (and perhaps to a lesser extent the culpability argument) provide a compelling justification for punishing hate crime more severely.

¹ Scottish Government, “Review of hate crime legislation”, 26 January 2017, available at <https://news.gov.scot/news/hate-crime-legislation-review>

Chapter 4 (Models of Hate Crime Legislation) considers two questions: first, how should hate crime be identified; and secondly, how should it be addressed – through substantive and distinct offences or the penalty attaching to general offences? In relation to the first question, it outlines two specific legislative models. The first is the discriminatory selection model (where a hate crime is committed where the victim has been selected because of their membership of a protected group). The second is the animus model (where the offender is motivated by, or demonstrates, prejudice against a protected group). It notes a clear preference for the animus model in legislative practice and strong arguments of principle in support. In relation to the second question, the chapter outlines three broad models: (i) the penalty enhancement model, (ii) the sentence aggravation model, and (iii) the substantive offence model, noting that jurisdictions may choose to combine these models rather than choosing one alone. It concludes by outlining the thresholds specified for a crime to count as a hate crime in a range of jurisdictions, and examines various questions about the precise formulation of these thresholds.

Chapter 5 (Choice of Protected Characteristics) notes that the characteristics presently protected (in one form or another) under hate crime law in Scotland are race, religion, sexual orientation, disability and transgender identity. The chapter considers the range of characteristics protected in a range of other jurisdictions, noting that the characteristics protected in Scots law are the characteristics that are most commonly protected in the other jurisdictions analysed and that the two characteristics that are not presently protected in Scots law, but are most commonly protected in other jurisdictions, are age and sex. The chapter goes on to examine the principles which should guide a decision as to which characteristics should be protected. It notes a range of possibilities which have been identified in this respect, concluding that the most persuasive accounts are those that focus on identifying groups that experience unjustified marginalisation or possess forms of difference that have a justifiable claim to respect.

Chapter 6 (Hate Speech and Online Hate Crime) acknowledges that significant recent work has been carried out in relation to hate speech by the Law Commission and provides a high-level overview of the legal issues related to hate speech in a comparative perspective, including the applicability of legislation to online hate speech. It considers two questions of principle – what is hate speech, and what is the harm of hate speech? – before detailing offences relating to hate speech in a range of jurisdictions, considering both the legislative models adopted and the range of groups protected. It then outlines certain issues which arise in relation to hate speech online.

Chapter 7 (Hate Crime Legislation in Selected Jurisdictions) details the legislative provisions relating to hate crime in a range of jurisdictions. The jurisdictions assessed are as follows: Australia (the six states and two territories are examined separately); Canada; England and Wales; New Zealand; Northern Ireland; Republic of Ireland; South Africa and ten jurisdictions in the United States of America (the jurisdictions selected for analysis being those which expressly protect characteristics which are not explicitly protected in any of the hate crime legislative provisions discussed elsewhere in the chapter).

Chapter 8 (Approaches Taken in Other Jurisdictions Relevant to the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012) examines section 1 of the 2012 Act, which is distinct because it applies only to behaviour that takes place in relation to a regulated football match. The chapter outlines the background to the Act, sets out the offences contained in section 1 and details analogous legislation in other jurisdictions including England and Wales and Northern Ireland.

CHAPTER 1: WHAT IS HATE CRIME?

There is no single accepted definition of the term “hate crime”. One writer on the topic recounts a conversation with a British government policymaker “who lamented that even if you could lock academics in a room for six months with the task of producing a definition of hate crime, they would most likely emerge with more definitions than they had when they went in, which makes for interesting scholarly debate but is utterly useless for those tasked with actually responding to the problem of hate crime ‘in the real world’”.² The issue is inevitably complicated by the fact that different definitions may be produced for different purposes: a definition may be useful for criminological or sociological purposes but not for practitioners and legislators.³ Even within criminal justice practice, definitions will (for good reason) vary. For example, definitions produced for recording purposes may focus on the perception of the victim or any other person as to the motivation for the offence,⁴ so as to ensure they are properly “victim oriented”⁵ and that recording is comprehensive and inclusive. In contrast, legislative definitions, setting out the conditions which must be satisfied for a criminal conviction, are likely to be narrower.⁶

One of the most commonly quoted academic definitions⁷ is Barbara Perry’s, which is in the following terms:⁸

Hate crime... involves acts of violence and intimidation, usually directed toward already stigmatized and marginalized groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the ‘appropriate’ subordinate identity of the victim’s group. It is a means of marking both the Self and the Other in such a way as to reestablish their ‘proper’ relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.

² N Hall, *Hate Crime*, 2nd edn (2013) 4.

³ Ibid 4.

⁴ See e.g. College of Policing, *Hate Crime Operational Guidance* (2014) 2-4.

⁵ *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262-I: 1999) para 45.16.

⁶ As is noted in the College of Policing guidance (n 3) 5.

⁷ See e.g. N Chakraborti and J Garland, “Hate crime”, in WS DeKeseredy and M Dragiewicz (eds), *Routledge Handbook of Critical Criminology* (2011) 303, 304: “arguably the definition... that has gathered the strongest support from criminologists in the field”.

⁸ B Perry, *In the Name of Hate: Understanding Hate Crimes* (2001) 10.

Perry proposes this definition on the basis that earlier formulations, such as Wolff and Copeland's "violence directed toward groups of people who generally are not valued by the majority society, who suffer discrimination in other arenas, and who do not have full access to institutions meant to remedy social, political and economic injustice"⁹ are useful but incomplete, in that they do not acknowledge how hate crime itself contributes to the marginalisation of the victimised groups,¹⁰ or the effects which hate crimes have on the "victim, perpetrator and their respective communities".¹¹ This illustrates how it may be important, in order properly to understand hate crime, to include in a definition factors which are relevant to the decision to construct the criminal law in a particular way as a response, but which do not themselves form any part of hate crime legislation.

Even the term "hate crime" is itself contested: alternative descriptions which refer to "prejudice" or "bias" may be preferred.¹² While the term "hate crime" is a well-established one in the United Kingdom, "most credible definitions are consistent in referring to broader notions such as prejudice, hostility or bias as key factors".¹³ In using the term "hate crime", it is important to recognise the breadth of the concept. Such crime is only rarely committed by organised hate groups or extremists: "most hate crimes tend to be committed by relatively ordinary people in the context of their everyday lives",¹⁴ and may stem from rather banal motivations.¹⁵

The legislative response to hate crime can be characterised by a rather narrower definition: the creation of offences, or sentencing provisions, "which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim's identity should be treated differently from 'ordinary' crimes",¹⁶ although legislation may define hate crimes by reference to concepts other than motivation, such as the demonstration of hostility based on a particular feature of the victim's identity, or the selection of the victim on the basis of a particular feature.

⁹ L Wolff and L Copeland, "Violence against women as bias-motivated hate crime: defining the issues in the USA", in M Davies (ed), *Women and Violence* (1994) 200 at 201.

¹⁰ Perry, *In the Name of Hate* (n 7) 9.

¹¹ *Ibid* 10.

¹² See e.g. D Brax, "Motives, reasons and responsibility in hate/bias crime legislation" (2016) 35 *Criminal Justice Ethics* 230 at 233.

¹³ N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses*, 2nd edn (2015) 13.

¹⁴ N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16 *Theoretical Criminology* 499 at 505.

¹⁵ *Ibid* at 503.

¹⁶ Chakraborti and Garland, *Hate Crime* (n 12) 9.

This is reflected, as it is in other jurisdictions, in the four pieces of Scottish legislation specifically mentioned by the Scottish Government in announcing the Review,¹⁷ which – subject to one exception – either provide for sentence aggravation¹⁸ or create a standalone offence which closely mirrors other criminal offences but expressly records the “hate crime” element of the wrongdoing concerned.¹⁹ (The exception is the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, which raises distinct issues and is dealt with separately in chapter 8.) This report focuses on these offences and their analogues in other jurisdictions. The report also addresses (in chapter 6) standalone offences relating to hate speech and the stirring up of hatred.

¹⁷ See Scottish Government, “Review of hate crime legislation”, 26 January 2017, available at <https://news.gov.scot/news/hate-crime-legislation-review>, referring to the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal Justice (Scotland) Act 2003, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 and the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

¹⁸ Criminal Justice (Scotland) Act 2003 s 74 (offences aggravated by religious prejudice); Offences (Aggravation by Prejudice) (Scotland) Act 2009 (covering prejudice related to disability and prejudice related to sexual orientation or transgender identity).

¹⁹ Criminal Law (Consolidation) (Scotland) Act 1995 s 50A (racially aggravated harassment).

CHAPTER 2: HATE CRIME LEGISLATION IN SCOTLAND

This chapter outlines the principal provisions of hate crime legislation in Scotland, as identified in the Review's remit. These can be divided into two categories: (a) sentence aggravation provisions and (b) standalone offences. These are two of the principal legislative models for addressing hate crime, the third being penalty enhancement provisions (which are not found in Scotland). These three models are explained and distinguished in chapter 4.¹

2.1 Sentence aggravation provisions

2.1.1 Racially aggravated offences

The first legislation in Scotland making provision for aggravated sentences in respect of hate crimes is found in section 96 of the Crime and Disorder Act 1998. This provision, along with other aspects of the 1998 Act related to hate crime,² is a result of manifesto commitments made by the Labour Party prior to the 1997 general election, which are discussed below in the context of racially-aggravated harassment.³ Section 96 provides as follows:

- (1) The provisions of this section shall apply where it is—**
 - (a) libelled in an indictment; or**
 - (b) specified in a complaint,**
and, in either case, proved that an offence has been racially aggravated.
- (2) An offence is racially aggravated for the purposes of this section if—**
 - (a) at the time of committing the offence, or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a racial group; or**
 - (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group,**

¹ See section 4.1.4.

² The provisions of this Act applicable in England are discussed below in chapter 7.3.

³ See section 2.2.2.

and evidence from a single source shall be sufficient evidence to establish, for the purposes of this subsection, that an offence is racially aggravated.

- (3) In subsection (2)(a) above—
“membership”, in relation to a racial group, includes association with members of that group;
“presumed” means presumed by the offender.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—
 - (a) the fact or presumption that any person or group of persons belongs to any religious group; or
 - (b) any other factor not mentioned in that paragraph.
- (5) The court must—
 - (a) state on conviction that the offence was racially aggravated,
 - (b) record the conviction in a way that shows that the offence was so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
 - (ii) otherwise, the reasons for there being no such difference.
- (6) In this section “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

The courts have observed that it is not necessary to prove that the accused is in some way “ideologically racist”: the question is simply whether there was racist behaviour on the occasion in question.⁴ In some instances, the racist aspect of the alleged behaviour may be directly relevant to the crime charged, e.g. by showing that the conduct meets the legal standard required for breach of the peace or threatening and abusive behaviour. The fact that the racist aspect of the accused's

⁴ *Brown v HM Advocate* 2000 SCCR 736.

behaviour is directly relevant to the offence itself does not prevent the offence also being regarded as racially aggravated in terms of section 96.⁵

Subsection (2) provides that evidence from a single source is sufficient to establish that an offence is racially aggravated. While this was criticised as an apparent departure from the Scottish requirement of corroboration,⁶ this is incorrect. It is simply an application of the general rule that an aggravation of an offence – as opposed to an element of the offence itself – need not be proved by corroborated evidence.⁷

Subsection (5), as initially enacted, provided only that “[w]here this section applies, the court shall, on convicting a person, take the aggravation into account in determining the appropriate sentence”. It was replaced with the current text in 2010, following the creation of sentence aggravations in respect of disability, sexual orientation and transgender identity, in order to ensure consistency of approach across the suite of provisions relating to sentence aggravation for hate crimes in Scots law.⁸

2.1.2 Other grounds of aggravation: religion, disability, sexual orientation, transgender identity

Since the 1998 Act, Scots law has been extended to provide for sentence aggravation in respect of crimes aggravated by prejudice against religion, disability, sexual orientation or transgender identity. This has been achieved by the creation of distinct statutory provisions rather than the amendment of the 1998 legislation, although the new statutory provisions follow an almost identical structure.⁹

⁵ *Dyer v Hutchison* 2006 JC 212; *Mack v Dunn* 2016 SCL 125.

⁶ A Lothian, “Acting in the interest of tolerance”, *The Herald*, 11 Nov 1998, 22.

⁷ *Yates v HM Advocate* 1977 SLT (Notes) 42. This point was reiterated by the Deputy Minister for Justice (Hugh Henry MSP) in relation to concerns expressed about the amendment which later became section 74 of the Criminal Justice (Scotland) Act 2003: see Scottish Parliament, Justice Committee 2 Official Report, 11 Dec 2002, col 2460 (“Common-law aggravation does not require corroboration, nor does the law on racial aggravation. Therefore, amendment 148 is in line with the standard of proof for common-law aggravation, and indeed with the statute on racial aggravation.”)

⁸ Criminal Justice and Licensing (Scotland) Act 2010 s 25, as noted in the Explanatory Notes for that section.

⁹ There is one difference, which is that instead of s 96(4), the other provisions simply include a subsection stating “It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.” (Criminal Justice (Scotland) Act 2003 s 74(2A) (religion); Offences (Aggravation by Prejudice) (Scotland) Act 2009 s 1(3) (disability) and s 2(3) (sexual orientation and transgender identity)).

A sentence aggravation provision in respect of religion was created by section 74 of the Criminal Justice (Scotland) Act 2003, following a recommendation by the Cross-Party Working Group on Religious Hatred.¹⁰ As with section 96 of the 1998 Act, it is drafted with reference to groups: in this case, a “religious group”, or a “social or cultural group with a perceived religious affiliation”. A religious group is “a group of persons defined by reference to their (a) religious belief or lack of religious belief; (b) membership of or adherence to a church or religious organisation; (c) support for the culture and traditions of a church or religious organisation; or (d) participation in activities associated with such a culture or such traditions”.¹¹

The provision was not part of the Bill as introduced, but resulted from an amendment proposed by Donald Gorrie MSP and supported by the Scottish Executive.¹² The Cross-Party Working Group set out its reasoning and recommendation as follows:¹³

Common law in Scotland already covers assaults and abusive, insulting or threatening behaviour. It also allows for religious hatred as an aggravating factor to such offences when considering sentence. Where cases are prosecuted on indictment, the maximum penalty for common law offences is life imprisonment. On the face of it, the existence of these provisions would seem to argue against the need for new legislation provided they are used regularly. There is, however, inadequate evidence to enable us to make a judgement as to whether the common law is effective and some of the Group were strongly in favour of new legislation. On balance, with some members reserving their position, it was agreed that the current legal framework needs adjustment in order to ensure that any element of religious or sectarian hatred in any particular crime is always recorded, so that offences are prosecuted in a consistent manner. The Group were unanimously agreed that whilst there is anecdotal evidence about the use of the existing law it is essential that detailed statistics of cases involving religious or sectarian hatred are properly kept and made available. We do not think that legislation can be effective without the cultural and attitude change that is required to eradicate religious hatred and prejudice from our society but we can see strong arguments in favour of legislation when a suitable opportunity becomes available, as part of a package of other measures.

¹⁰ Scottish Executive, *Tackling Religious Hatred: Report of Cross-Party Working Group on Religious Hatred* (2002).

¹¹ Criminal Justice (Scotland) Act 2003 s 74(7).

¹² See Justice Committee 2, Official Report, 11 Dec 2002, cols 2441-2470.

¹³ Para 5.04.

During the progress of the Bill through Parliament, Robin Harper MSP proposed a further amendment which would have extended sentence aggravation to gender, sexual orientation, disability and age. The Scottish Executive committed to setting up a working group to examine the issue, in view of which Mr Harper chose not to press his amendment.¹⁴

The Working Group on Hate Crime reported in 2004, recommending that the Scottish Executive “should introduce a statutory aggravation as soon as possible for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability”.¹⁵ It noted that various other groups “may also suffer from hate crime” but concluded that the Working Group “did not feel sufficiently knowledgeable to make any firm recommendation relating to such groups. We do, however, recommend that legislation should be framed in such a way so as to allow any other group to be added to the legislation by statutory instrument if sufficient evidence emerges to show they are victims of hate crime”.¹⁶

No legislative action followed from this report until Patrick Harvie MSP introduced a Member’s Bill into the Scottish Parliament in May 2008.¹⁷ This became the Offences (Aggravation by Prejudice) (Scotland) Act 2009,¹⁸ which provides for sentence aggravation in respect of crimes aggravated by prejudice against disability,¹⁹ sexual orientation²⁰ and transgender identity.²¹ It does not include a provision, such as that suggested by the Working Group, whereby additional groups may be added to the legislation by statutory instrument.

¹⁴ See Scottish Parliament, Official Report 19 Feb 2003, cols 15467 and 15471.

¹⁵ Scottish Executive, *Working Group on Hate Crime Report* (2004) 28 (recommendation 1).

¹⁶ Para 5.40. The group made a separate recommendation (29, recommendation 3) that the Executive should consider “a statutory aggravation for domestic abuse”.

¹⁷ Statements made by the Executive in the interim, supporting the principle of tackling hate crime but without making a firm legislative commitment, are noted in Mr Harvie’s statement of reasons on why the proposal did not require further consultation (2 Oct 2007), available at http://www.parliament.scot/S3_MembersBills/Draft%20proposals/prejudice_reasons.pdf.

¹⁸ Detailed discussion surrounding the principles of the Bill can be found in Justice Committee, *Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill* (6th Report, 2009).

¹⁹ Defined as a “physical or mental impairment of any kind”: s 1(7). Section 1(8) adds that “a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment”.

²⁰ Defined as “sexual orientation towards persons of the same sex or of the opposite sex or towards both”: s 2(7).

²¹ Defined as “(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or (b) any other gender identity that is not standard male or female gender identity”.

There is little reported case law on these provisions, although an illustration of the application of section 74 of the 2003 Act may be found in *Walls v Brown* (“the court has no difficulty in accepting the sheriff's conclusion that the use of words such as ‘f*** the Pope’ and ‘Fenian bastards’ display malice and ill will towards those of the Roman Catholic faith”).²²

One limitation of the legislative framework was evidenced in the 2016 murder of Asad Shah by Tanveer Ahmed.²³ The accused's actions were “motivated by [his] religious belief... notably his claim that what the deceased had said had so offended his faith and his Prophet that he considered that he had a duty to kill him”.²⁴ In passing an exemplary sentence (life imprisonment with a punishment part of 27 years), the sentencing judge commented that while she accepted “that this was not a religiously aggravated crime in terms of the legislation, nor was it motivated by hatred or prejudice against a particular religious group, it was a religiously motivated crime”.²⁵ While the sentencing judge was therefore able to take Ahmed's motivation into account in passing sentence, the offence was not formally labelled as aggravated in terms of the legislation.

It has been suggested that this amounts to a legislative lacuna, and that this could be corrected by extending it to cover cases where the offender evinces malice or ill-will towards the victim based on “the victim’s expression of personal religious belief(s)”.²⁶ Such an amendment would be a significant innovation on the established legislative framework, which is based – as in the other jurisdictions surveyed in this report – on the crime being linked to the victim’s membership (or perceived membership) of a particular group. The approach established in Scotland and elsewhere reflects the evidence (presented in chapter 3) which suggests that hate crimes are more likely to cause harm both to the victim of the offence and the wider group affected by the offender’s actions.

²² 2009 JC 375 at para 21.

²³ *Ahmed v HM Advocate* [2016] HCJAC 125.

²⁴ *Ahmed* at para 10, where it is noted that this was the agreed narrative presented to the court.

²⁵ *Ahmed* at para 13. Ahmed's appeal against sentence was refused.

²⁶ P Glover, “Statutory aggravation by religious prejudice in Scotland: correcting the ‘Lord Advocate’s lacuna’” 2017 JR 85 at 86.

2.2 Substantive hate crime offences

2.2.1 The Public Order Act 1986

The offence of incitement to racial hatred was initially created by section 6 of the Race Relations Act 1965. The relevant offences are now found in the Public Order Act 1986. A detailed history of the legislation can be found elsewhere,²⁷ but perhaps the most significant departure from the 1965 formulation of the offence is that it is no longer necessary to prove an intention to stir up racial hatred. This had been heavily criticised by Lord Scarman in his 1975 report on the Red Lion Square Disorders:²⁸

The statute law does, however, call for scrutiny. Section 6 of the Race Relations Act is merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent) it is useless to a policeman on the street... The section needs radical amendment to make it an effective sanction, particularly, I think, in relation to its formulation of the intent to be proved before an offence can be established.

The Race Relations Act 1976 reformulated the legislation so as to allow the offence to be established either by proof of intent or by proof that hatred was likely to be stirred up having regard to all the circumstances.²⁹ The principal relevant offences are now formulated as follows:³⁰

²⁷ Law Commission, *Hate Crime: The Case for Extending the Existing Offences; History of Hate Crime Legislation* (Law Com CP No 213, Appendix B) paras B.54-B.145.

²⁸ *The Red Lion Square Disorders of 15 June 1974: Report of Inquiry by the Rt Hon Lord Justice Scarman, OBE* (Cmnd 5919: 1975) para 125.

²⁹ Public Order Act 1936 s 5A(1), as inserted by the Race Relations Act 1976 s 70. The requirement of the Attorney-General's consent to prosecution in England and Wales was retained at this stage but was never relevant to Scotland.

³⁰ See also s 20 (public performance of a play); s 21 (distributing, showing or playing a recording), s 22 (broadcasting or including programme in cable programme service).

Section 18 (use of words or behaviour or display of written material)³¹

- (1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—
 - (a) he intends thereby to stir up racial hatred, or
 - (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
 - (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
- [...]
- (4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.
 - (5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.
 - (6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme included in a programme service.

Section 19 (publishing or distributing written material)³²

- (1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—
 - (a) he intends thereby to stir up racial hatred, or
 - (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

³¹ Maximum sentence on conviction on indictment: seven years' imprisonment and a fine; on summary conviction, twelve months' imprisonment and a fine of the statutory maximum: s 27(3) read with the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s 45.

³² Maximum sentence on conviction on indictment: seven years' imprisonment and a fine; on summary conviction, twelve months' imprisonment and a fine of the statutory maximum: s 27(3) read with the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s 45.

- (2) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.
- (3) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

In *R v Sheppard*,³³ a prosecution was based on material which had been made available online and downloaded by a police officer. The Court of Appeal held that it was sufficient for the Crown to show “that the material was generally accessible to all or available to or was placed before or offered to the public”; it mattered not that the evidence went no further than showing that a single police officer had downloaded it.³⁴

It was held, under the slightly different definition of distribution under section 6 of the Race Relations Act 1965,³⁵ that sticking a pamphlet on the door of a house occupied by an MP and his family, along with leaving similar pamphlets nearby, did not amount to distribution as required by the legislation.³⁶ It has been suggested that a similar case might today be decided differently.³⁷

Section 23 (possession of racially inflammatory material)³⁸

- (1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—
 - (a) in the case of written material, its being displayed, published, distributed, or included in a cable programme service, whether by himself or another, or

³³ [2010] 1 WLR 2779.

³⁴ At para 34.

³⁵ Race Relations Act 1965 s 6(2), which provided that “‘publish’ and ‘distribute’ mean publish or distribute to the public at large or to any section of the public not consisting exclusively of members of an association of which the person publishing or distributing is a member”.

³⁶ *R v Britton* [1967] 2 QB 51.

³⁷ P Thornton et al, *The Law of Public Order and Protest* (2010) para 2.72.

³⁸ Maximum sentence on conviction on indictment: seven years’ imprisonment and a fine; on summary conviction, twelve months’ imprisonment and a fine of the statutory maximum: s 27(3) read with the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s 45.

- (b) in the case of a recording, its being distributed, shown, played, or included in a cable programme service, whether by himself or another,
is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby.
- (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.
- (3) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

2.2.2 Racially-aggravated harassment

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 includes a provision relating to racially aggravated harassment, which is in the following terms:³⁹

- (1) A person is guilty of an offence under this section if he—
 - (a) pursues a racially-aggravated course of conduct which amounts to harassment of a person and—
 - (i) is intended to amount to harassment of that person; or
 - (ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or
 - (b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.
- (2) For the purposes of this section a course of conduct or an action is racially aggravated if—
 - (a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will based on that person's membership (or presumed membership) of a racial group; or

³⁹ Maximum penalty on conviction on indictment, seven years' imprisonment and a fine; on summary conviction, twelve months' imprisonment and a fine: s 50A(5) read with the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s 45.

- (b) the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.
- (3) In subsection (2)(a) above—
“membership”, in relation to a racial group, includes association with members of that group;
“presumed” means presumed by the offender.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—
 - (a) the fact or presumption that any person or group of persons belongs to any religious group; or
 - (b) any other factor not mentioned in that paragraph.
- [...]
- (6) In this section—
“conduct” includes speech;
“harassment” of a person includes causing the person alarm or distress;
“racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins, and a course of conduct must involve conduct on at least two occasions.

This creates two separate offences: racially aggravated harassment (s 50A(1)(a)) and racially aggravated conduct (or behaviour) (s 50A(1)(b)).⁴⁰ Police statistics record far more instances of racially aggravated conduct than racially aggravated harassment: 2639 instances of the former and 111 of the latter in 2013-14.⁴¹ The offences may be committed in private: no public element is required.⁴²

Where the accused is charged under s 50A(1)(b), it is necessary that the person who is potentially distressed by the conduct is the person against whom the conduct is directed. It followed in *Martin v Howdle*⁴³ that where a spectator at a football match

⁴⁰ Some early empirical data on the operation of these offences is available in I Clark and S Moody, *Racist Crime and Victimation in Scotland* (2002).

⁴¹ Scottish Government, *Racist Incidents Recorded by the Police in Scotland, 2013-14* (2015) table 7A. This was the most recent set of statistics available at <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubRacistIncidents> at the time of writing.

⁴² *King v Webster* 2012 SLT 342.

⁴³ 2006 JC 35.

shouted racial remarks at football players and caused distress to another spectator, this was not a basis for conviction under s 50A(1)(b),⁴⁴ although the facts did amount instead to a racially aggravated breach of the peace. It is not, however, necessary under s 50A(1)(b) to prove that the accused had intended the target of the conduct to hear it, if in fact the target did hear it and the conduct was accompanied by the malice and ill-will required under s 50A(2).⁴⁵

The interpretation of the term “racial group” in s 50A(6) has been considered in a number of cases. This has included decisions that the English are a racial group for these purposes (and the term “Geordie” was a reference to the English and therefore covered),⁴⁶ and a decision that disruption of a Jerusalem String Quartet performance by shouting statements including “These are Israeli army musicians”, “Genocide in Gaza” and “End the siege in Gaza” was not covered by s 50A, being directed not at a racial group, but instead at the State of Israel and members of the Israeli army.⁴⁷ The term may also be interpreted by reference to a larger body of case law concerned with the use of similar definitions in a range of criminal and anti-discrimination provisions.⁴⁸

Section 50A was created by the Crime and Disorder Act 1998, along with a series of provisions applicable to England and Wales designed to implement the Labour government’s manifesto commitment to “create a new offence of racial harassment and a new crime of racially motivated violence to protect ethnic minorities from intimidation”.⁴⁹ The equivalent Scottish manifesto was slightly more circumspect in its proposals: “[w]e are concerned that the problems of racial harassment and racially motivated violence are not treated seriously enough by Scotland’s criminal justice system. The offence of breach of the peace offers some protection but we

⁴⁴ As the court pointed out at para 9, the charge may be based on the accused having intended to cause alarm or distress, and there is no requirement that the person whom the accused intends to be alarmed or distressed actually be aware of the conduct. It follows that a charge under s 50(1)(b) on the basis that the accused intended to cause the players alarm or distress (if the Crown believed this could be proven) would be relevant in such circumstances, but that was not the way in which the charge in *Martin v Howdle* was framed.

⁴⁵ *King v Webster* 2012 SLT 342 at para 18, noting that “the maker of the remark on the telephone cannot be sure that only one person can hear the conversation or comment. Similarly, two people sitting together in a cinema or other place of public entertainment may quietly whisper comments, which they do not mean to be overheard.” Such comments are not excluded from the ambit of s 50A.

⁴⁶ *Moscrop v McLintock* 2011 SCCR 621.

⁴⁷ *Procurator Fiscal, Edinburgh v Napier*, 8 April 2010, Edinburgh Sheriff Court, unreported. See K Goodall, “Conceptualising ‘racism’ in criminal law” (2013) 33 LS 215 at 231.

⁴⁸ See generally J Chalmers and F Leverick, *The Criminal Law of Scotland: Volume II*, 4th edn (2017) para 48.22, and the English case law discussed in chapter 7.3.1 below.

⁴⁹ Labour, *New Labour: Because Britain Deserves Better* (1997) 23.

will consult on introducing a new offence of racial harassment and a new crime of racially motivated violence to protect ethnic minorities from intimidation.”⁵⁰

While no precise rationale for the creation of section 50A was articulated when the legislation proceeded through Parliament, the legislation seems clearly to have been motivated, consistent with the government’s manifesto commitment, by a desire to ensure that racial harassment and racially motivated violence were recognised, treated with appropriate seriousness, and seen to be both recognised and treated as such, rather than to expand the scope of the criminal law beyond conduct which would already be criminal as a breach of the peace. One prosecutor noted that “[i]t might be argued that the conduct described would, on any occasion, constitute a breach of the peace, but note that the level of penalties set out... is much higher than would normally be imposed on a first conviction for that common law offence”.⁵¹ During the legislation’s passage, the Lord Advocate (Lord Hardie), when speaking against proposals which would have extended the proposed offence to include a reference to religion, said:⁵²

I am aware that attacks which include elements of religious bigotry do arise in Scotland and they, too, are deplorable. However, as I said when we previously discussed this issue, such acts are difficult to identify and define in any satisfactory way. I should make it clear that I have no difficulty in prosecuting crime under the existing law, no matter what the motivation. The new offence of racial harassment carries the advantage that it may fit the facts of some cases of racial harassment better than would a breach of the peace, particularly where there is a course of conduct involved. I do not believe that there is the same correspondence in the case of attacks that may include an element of harassment on the grounds of religion.

⁵⁰ Scottish Labour Party, *New Labour: Because Scotland Deserves Better* (1997) 23. The exact basis for the concerns noted here is unclear. A later newspaper report records earlier concerns that racial motivations were not being brought to the attention of the courts: “In 1994 a leading justice of the peace complained that cases were being brought to court without sheriffs being informed that the alleged offences might be racially motivated. Fife Racial Equality Council reported that it had represented clients in cases where witnesses and clear evidence of racial motivation had not been brought to court.” (E Kelly, “We are treated like third-class citizens while loudmouths and bullies get the law on their side”, *The Herald*, 31 Jan 1998, 17.)

⁵¹ I Bradley, [annotations to] “Crime and Disorder Act 1998”, *Current Law Statutes Annotated*, s 33.

⁵² Hansard HL Debs, 17 Mar 1998, cols 705-706. Later that year, in addressing the Scottish Criminology Conference, Lord Hardie added that “although I value the flexibility of the common law crime of breach of the peace its very generality does not always demonstrate that particular mischiefs are being effectively addressed”: J McEachran, “Lord Advocate promises a crackdown to counter the culture of violence”, *The Herald*, 5 Sep 1998, 7.

2.2.3 Threatening communications intended to stir up hatred on religious grounds

Section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 creates an offence of “threatening communications” which can be committed in two ways (referred to in the section as “Condition A” and “Condition B”). Condition A is concerned with threats or incitement to carry out seriously violent acts. It is condition B, which is concerned with religious hatred, which is relevant here. In this respect, section 6 provides as follows:⁵³

- (1) A person commits an offence if—**
 - (a) the person communicates material to another person, and**
 - (b) either Condition A or Condition B is satisfied.**
- [...]
- (5) Condition B is that—**
 - (a) the material is threatening, and**
 - (b) the person communicating it intends by doing so to stir up hatred on religious grounds.**
- (6) It is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable.**

Section 7(1) provides “for the avoidance of doubt” that nothing in section 6(5) “prohibits or restricts (a) discussion or criticism of religions or the beliefs or practices of adherents of religions, (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters, (c) proselytising, or (d) urging of adherents of religions to cease practising their religions”.⁵⁴

Hatred on religious grounds is defined in section 8(4), in a provision which mirrors the sentence aggravation provisions for religiously motivated hate crime (section 74 of the Criminal Justice (Scotland) Act 2003, discussed above)⁵⁵ as follows:

- “Hatred on religious grounds” means hatred against—**
- (a) a group of persons based on their membership (or presumed membership) of—**

⁵³ Maximum sentence on conviction on indictment: five years’ imprisonment and a fine; on summary conviction, twelve months’ imprisonment and a fine of the statutory maximum: s 6(7). It is likely that the defence under s 6(6) places only an evidential burden on the accused: see J Chalmers and F Leverick, *The Criminal Law of Scotland, Volume II*, 4th edn (2017) para 48.14.

⁵⁴ Section 7(2) states that in s 7(1), “religions” includes “(a) religions generally, (b) particular religions, (c) other belief systems”.

⁵⁵ See section 2.1.2.

- (i) a religious group (within the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003),
 - (ii) a social or cultural group with a perceived religious affiliation,
- or
- (b) an individual based on the individual's membership (or presumed membership) of a group mentioned in either of sub-paragraphs (i) and (ii) of paragraph (a).

Charges under section 6 are relatively unusual, particularly in comparison to the offence of offensive behaviour at a regulated football match created by section 1 of the Act. In 2015-16, there were seven charges under section 6 reported to Crown Office (compared to 287 under section 1).⁵⁶ This data does not record how many of the charges, if any, were based on Condition B rather than Condition A.⁵⁷

The Scottish Government, in introducing the Bill which became the 2012 Act into the Scottish Parliament, explained its rationale for the Condition B element of section 6 in the following terms:⁵⁸

The offence will also criminalise threats made with the intent of stirring up religious hatred. “Religious hatred” is defined as meaning hatred against a person or group of persons based in their membership of a religious group, or of a social or cultural group with a perceived religious affiliation. The definition of “religious group” is the same as that used in section 74 of the Criminal Justice (Scotland) Act 2003, which provides for a statutory aggravation that an offence was aggravated by religious prejudice. It brings Scotland into line with England and Wales, where threats intended to stir up religious hatred are criminalised by the Public Order Act 1986, as amended by [the] Racial and Religious Hatred Act 2006 (and both Northern Ireland and the Irish Republic have also legislated to criminalise inciting religious hatred).

⁵⁶ Scottish Government, *Charges Reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2015-16* (2016) 28 (for the s 6 figure) and 8 (for the s 1 figure). At the time that report was written, court proceedings had commenced in respect of three of the seven cases: one was on-going, one had resulted in an acquittal, and one in a conviction and a community sentence. There were four charges in 2014-15, eleven in 2013-14 and 19 in 2012-13.

⁵⁷ There is no further information regarding this point in the Scottish Government's own evaluation of the legislation: Scottish Government, *Scottish Government Report on the Operation of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012* (2015), where it is simply noted that the number of charges under section 6 is “very low” (22).

⁵⁸ Scottish Government, *Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Policy Memorandum* (2011) paras 40-41.

The provision is restricted to threats made with the intent of stirring up religious hatred. As such, it does not interfere with the right to preach religious beliefs nor a person's right to be critical of religious practices or beliefs, even in harsh or strident terms. There was extensive criticism of early attempts to criminalise incitement of religious hatred in England and Wales on the grounds that provisions extending to insults and abuse as well as threats could inadvertently criminalise comedians and satirists who make jokes about religion, or even religious texts themselves. We believe that the Bill avoids those problems and does not restrict legitimate freedom of expression.

During the Bill's passage through Parliament, the question of whether the offence should extend to groups other than religious groups was raised. The Minister for Community Safety and Legal Affairs (Roseanna Cunningham) explained that the Bill had been tightly drawn in view of the limited time which it was envisaged would be available for consideration (the Bill having initially been proposed as emergency legislation),⁵⁹ but that she had "no huge antipathy" towards an expansion of the offence.⁶⁰ The Justice Committee "invite[d] the Scottish Government to consult on widening section 5 at an appropriate point should the Bill be passed".⁶¹ The Justice Committee also indicated that it would welcome a provision protecting freedom of speech,⁶² as is now found in section 7 of the Act.

⁵⁹ This was to allow the legislation to commence before the new football season in late July 2011. It was later agreed that the Bill would not be treated as an emergency Bill. See Justice Committee, *Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2* (1st Report, 2011) paras 47-54.

⁶⁰ Ibid, para 235.

⁶¹ Para 237.

⁶² Para 231.

CHAPTER 3: JUSTIFICATIONS FOR PUNISHING HATE CRIME MORE SEVERELY

There are a number of justifications for treating hate crimes as more serious than parallel non-hate crimes and these can be grouped into three broad categories:¹ harm-based justifications; culpability-based justifications; and denunciation-based justifications. It should perhaps be said at the outset that establishing that hate crime should be punished more severely than non-hate crime does not necessarily shed light on the method by which this should be achieved – whether through the creation of specific aggravated offences or via sentencing provisions – although some of the arguments do have implications in this respect.² With this in mind, each of the three types of justification are discussed in more detail in the sections that follow.

3.1 Harm-based justifications

The most commonly advanced justification for punishing hate crime more severely is on the basis of the additional harm it causes – harm over and above the harm that would have resulted from the underlying offence alone.³ It has been argued that hate crimes cause additional harm at three levels – harm to the direct victim, harm to the group to which the victim belonged (or was thought to belong) and harm to the wider community⁴ – each of which is discussed in more detail below.

3.1.1 Harm to the direct victim(s)

The first level at which additional harm might result is at the level of the direct victim(s) of the crime. Three different types of harm might be considered here – physical harm, psychological harm and social (or behavioural) harm.

¹ See e.g. D Brax, “Hate crime concepts and their moral foundations: a universal framework?”, in J Scheweppe and MA Walters (eds), *The Globalization of Hate: Internationalising Hate Crime?* (2016) 49 at 58-63; G Mason, “Legislating against hate”, in N Hall et al (eds), *The Routledge International Handbook on Hate Crime* (2015) 59 at 65-66; J Scheweppe and MA Walters, “Hate crimes: legislating to enhance punishment”, in *Oxford Handbooks Online* (2015) at 3-11.

² For discussion of the various legislative approaches that can be taken, see chapter 4.

³ See e.g. Organization for Security and Cooperation in Europe (OSCE), *Hate Crime Laws: A Practical Guide* (2009) 20.

⁴ P Iganski, “Hate crimes hurt more” (2001) 45 American Behavioral Scientist 626 at 628 (individual harm), 629 (peer group harm) and 630 (harm to the wider community); FM Lawrence, “The punishment of hate: toward a normative theory of bias-motivated crimes” (1994) 93 Michigan LR 320 at 342-346 (impact on the victim), 345-346 (impact on the target community) and 347-348 (impact on society as a whole).

Physical harm

One possible argument is that hate crimes should be punished more severely because they are more likely than non-hate crimes to result in physical injury to the victim (or because they tend to result in more serious physical injury than non-hate crimes).⁵ This is, however, not a particularly compelling argument as the empirical evidence to support it is mixed to say the least.⁶ Some studies have presented evidence that hate crimes are more physically harmful than non-hate crimes⁷ but these studies all suffer from methodological weaknesses and other studies have found no relationship between hate crime and the likelihood or severity of physical injury that results.⁸

Psychological harm

A more convincing argument is that hate crimes should be punished more severely because they are more likely than non-hate crimes to cause psychological harm to the victim(s) over and above that which would result from a parallel non-hate crime (or that the psychological harm they do cause is likely to be more severe). Hate crimes, it has been argued, are more psychologically harmful at least in part because the victims have been specifically targeted because of who they are and they cannot rationalise the crime in terms of them merely being “in the wrong place at the wrong time”.⁹ It has also been suggested that victims may feel “to blame” for their own victimisation by virtue of being different and this may lead to a sense of shame.¹⁰

⁵ See e.g. MD Fetzer and FS Pezzella, “The nature of bias crime injuries: a comparative analysis of physical and psychological victimization effects” (2016) *Journal of Interpersonal Violence* 1-24 (advance eprint available online) at 17; MA Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (2014) 81.

⁶ M Al-Hakim and S Dimock, “Hate as an aggravating factor in sentencing” (2012) 15 *New Criminal LR* 572 at 590.

⁷ See e.g. Fetzer and Pezzella (n 5); B Levin, “Bias crimes: a theoretical and practical overview” (1993) 4 *Stanford Law and Policy Review* 165 at 167 (figure 2); S Messner, S McHugh and RB Felson, “Distinctive characteristics of assaults motivated by bias” (2004) 42 *Criminology* 585 at 605.

⁸ See e.g. H Corcoran and K Smith, *Hate Crime, England and Wales, 2015/16* (Home Office Statistical Bulletin 11/16, 2016); P Iganski and S Lagou, “The personal injuries of ‘hate crime’”, in N Hall et al (eds), *The Routledge International Handbook on Hate Crime* (2014) 34 at 40; FS Pezzella and MD Fetzer, “The likelihood of injury among bias crimes: an analysis of general and specific bias types” (2017) 32 *Journal of Interpersonal Violence* 703 at 720.

⁹ Walters *Hate Crime and Restorative Justice* (n 5) 74.

¹⁰ Ibid.

A number of studies claim to have demonstrated empirically the proposition that hate crimes are more psychologically harmful than parallel non-hate crimes.¹¹ Initially, these tended to be small-scale studies,¹² many of which suffered from methodological flaws such as the absence of a control group of non-hate crime victims¹³ or a failure to distinguish hate crime from non-criminal discriminatory activity.¹⁴ Other early studies evidenced the link between hate crime and psychological harm through research undertaken with criminal justice professionals rather than with victims themselves.¹⁵

More recently, however, larger scale studies have been undertaken. Herek et al,¹⁶ for example, surveyed 2259 gay/lesbian/bisexual adults in Sacramento¹⁷ and concluded that those who had been the victim of an assault accompanied by a bias motivation scored significantly more highly on four different measures of psychological distress (depression, anger, anxiety and traumatic distress) than those who had been victims of an assault without a bias motivation.¹⁸

An even larger scale study was carried out by Iganski and Lagou, who analysed data from three years of the Crime Survey for England and Wales (covering 35,521 crimes).¹⁹ They compared the 441 incidents of crime believed by respondents to be

¹¹ For a review of much of the early literature, see P Iganski and S Lagou, "Hate crimes hurt some more than others: implications for the just sentencing of offenders" (2015) 30 *Journal of Interpersonal Violence* 1696 at 1698-1699.

¹² See e.g. GM Herek et al, "Hate crime victimization among lesbian, gay, and bisexual adults: prevalence, psychological correlates, and methodological issues" (1997) 12 *Journal of Interpersonal Violence* 195 (sample size of 147); J McDevitt et al, "Consequences for victims: a comparison of bias- and non-bias-motivated assaults" (2001) 45 *American Behavioral Scientist* 697 (sample size of 136).

¹³ See e.g. MD Otis and WF Skinner, "The prevalence of victimization and its effect on mental well-being among lesbian and gay people" (1996) 30 *Journal of Homosexuality* 93. For a more recent study that also had no control group, see AC Burks et al, "Frequency, nature, and correlates of hate crime victimization experiences in an urban sample of lesbian, gay, and bisexual community members" (2015) *Journal of Interpersonal Violence* (advance eprint available online).

¹⁴ AS House et al, "Interpersonal trauma and discriminatory events as predictors of suicidal and nonsuicidal self-injury in gay, lesbian, bisexual, and transgender persons" (2011) 17 *Traumatology* 75.

¹⁵ Iganski (n 4) at 701.

¹⁶ GM Herek, JR Gillis and JC Cogan, "Psychological sequelae of hate-crime victimization among lesbian, gay, and bisexual adults" (1999) 67 *Journal of Consulting and Clinical Psychology* 945.

¹⁷ For details of their methodology, see *ibid* at 946.

¹⁸ *Ibid* at 948.

¹⁹ Iganski and Lagou (n 11) at 1700. Formerly called the British Crime Survey (it was re-named in 2012 to better reflect its geographical coverage), the Crime Survey for England and Wales involves interviews with approximately 35,000 people per year in an attempt to capture their experiences of crime – whether these were reported to the police or not. A similar survey is undertaken in

racially motivated to incidents with no perceived bias motivation²⁰ and found that the victims of crimes perceived to be racially motivated were twice as likely as the victims of otherwise motivated crimes to state that they had been affected “very much” by the incident.²¹ They also found that the victims of the racially motivated crimes were significantly more likely than the other crime victims to have experienced a number of specific emotional effects following the incident (including anxiety/panic attacks, crying/tears, depression, difficulty sleeping, fear, loss of confidence/feeling vulnerable and shock).²² They concluded that their analysis “demonstrates that as a group, victims of racist crime collectively experience greater emotional and psychological harms compared with victims of parallel crimes”.²³ Smith et al used a similar dataset (two years of the Crime Survey, but this time focusing more widely on crime perceived as motivated by disability, gender-identity, race, religion/faith and/or sexual orientation) and reported near identical results.²⁴ As a qualification to this, it should be noted that neither of the studies controlled for offence category and this may have had some impact on the findings, given that crimes of violence were more prevalent in the hate crime sample than in the non-hate crime sample.²⁵ However, analysis undertaken by Iganski on earlier British Crime Survey data from 2002 to 2005 (covering 45,908 crimes, of which 944 were perceived as hate crimes) indicated that hate crime victims were significantly more likely to have experienced a negative emotional reaction than non-hate crime victims even when offence category is controlled for.²⁶

This conclusion was supported by an even larger data set in research undertaken by Fetzer and Pezzella,²⁷ who used data from the US National Crime Victimization Survey (NCVS) of 2013. They analysed 4,645,961 violent victimisations – 4,343,475 of which were non-bias motivated and 302,486 of which were bias motivated.²⁸ The NCVS asks respondents to report on a series of feelings experienced in response to the crime that are indicative of psychological trauma, which include feeling worried or

Scotland (the Scottish Crime and Justice Survey) but it does not specifically ask about experiences of hate crime.

²⁰ Ibid at 1702.

²¹ Ibid at 1704.

²² Ibid.

²³ Ibid at 1711.

²⁴ K Smith et al, *Hate Crime, Cyber Security and the Experience of Crime Among Children: Findings From the 2010/11 British Crime Survey* (2012) 22.

²⁵ See table 4 at 1705 (Iganski and Lagou); table 1a at 18 (Smith et al).

²⁶ See the analysis in table 1.4 of P Iganski, ‘Hate Crime’ and the City (2008) 10.

²⁷ Fetzer and Pezzella (n 5).

²⁸ Ibid at 12. As the researchers themselves note (at 19), the data did not allow them to examine the particular nature of the bias.

anxious, angry, sad or depressed, vulnerable, violated, unsafe, or distrustful. The researchers identified psychological trauma as being present if any of these feelings or signs of distress were reported by the respondent²⁹ and found that when an assault was motivated by bias, the likelihood of the victim suffering traumatic feelings was 150 per cent greater than when an assault was not motivated by bias, a relationship that was significant at the $p < .001$ level.³⁰ The study is notable not only because of its scale, but also because it compared victims of violent hate crime with a comparable control group specifically of victims of violent non-hate crime.

The studies discussed thus far have tended to focus on either a single category of hate crime (such as racist hate crime) or have analysed a number of different types of hate crime as a unified group. A study that took a different approach was undertaken by Williams and Tregidga,³¹ who surveyed 1810 members of minority groups in Wales³² in order to compare the psychological effects of hate crime between different victim groups (namely those defined by gender, age, race, religion, disability, sexual orientation and transgender identity).³³ The researchers found that, of the 562 respondents who identified as victims of hate crime, victims of transphobic hate crime and disability hate crime were significantly more likely than victims of other types of hate crime to have experienced a range of psychological impacts, including loss of confidence, depression, loss of sleep, anxiety, fearfulness, stress, feelings of isolation, suicidal feelings and shock.³⁴ Transphobic hate crime victims were especially notable in this respect, the researchers reporting that such victims were ten times more likely to suffer thoughts of suicide as a result of the crime than other hate crime victims.³⁵

Social/behavioural harm

A third type of harm that may result from hate crime is social harm or, as Iganski and Lagou term it, “behavioural injury”.³⁶ The argument here is that victims of hate crimes are more likely than victims of parallel non-hate crimes to change their behaviour in response to the incident because they are worried about and wish to

²⁹ Ibid at 13.

³⁰ Ibid at 17.

³¹ ML Williams and J Tregidga, “Hate crime victimization in Wales: psychological and physical impacts across seven hate crime victim types” (2014) 54 BJ Crim 946.

³² For details of their research methods, see ibid at 953.

³³ Ibid at 954.

³⁴ Ibid at 955.

³⁵ Ibid at 961.

³⁶ Iganski and Lagou (n 8) at 43.

avoid repeat victimisation. Some support for this proposition can be taken from Iganski's analysis of data from three years of the British Crime Survey (2002/03, 2003/04 and 2004/05), which demonstrated that, within every broad crime category, victims of hate crimes were more likely than victims of non-hate crimes to report being "worried" or "very worried" about future victimisation.³⁷ Such concern may well be justified – there is evidence to suggest that the extent of repeat victimisation is greater for hate crime than it is for parallel non-hate crime.³⁸

To date there has been no large scale empirical study specifically of the behavioural effects of hate crime, but there is some evidence from smaller scale quantitative studies and qualitative studies. The most extensive of the quantitative studies to date is that of Benier,³⁹ who used data from a survey of 4396 residents living in Brisbane who self-identified as having been victims of hate crime (specifically incidents that were perceived as occurring due to race, colour or ethnicity), non-hate crime or no crime.⁴⁰ The survey included a number of questions relating to what Benier termed "place attachment" (such as whether respondents felt they belonged in the community) and what she termed "frequency of neighbouring" (such as whether they visited neighbours' homes or asked neighbours for advice on problems).⁴¹ She found that, compared to non-hate crime victims and those who had been victims of no crime, hate crime victims felt significantly less attached to the neighbourhood in which they lived;⁴² reported significantly fewer interactions with their neighbours than non-hate crime victims;⁴³ and had significantly fewer friends in the neighbourhood.⁴⁴ As Benier herself admits, however, the study did not control for offence type, which may have had some effect as there was a higher proportion of violent offences in the hate crime sample than in the non-hate crime sample.⁴⁵

³⁷ Iganski *Hate Crime and the City* (n 26) 83 (table 4.3).

³⁸ See e.g. the analysis undertaken by Iganski of 302 racially motivated instances of crime compared to 41,320 non-racially motivated instances of crime (based on British Crime Survey data from 2002/03, 2003/04 and 2004/05): *ibid* at 11 (table 1.2). See also Smith et al (n 24) 20.

³⁹ K Benier, "The harms of hate: comparing the neighbouring practices and interactions of hate crime victims, non-hate crime victims and non-victims" (2017) 23 International Review of Victimology 171.

⁴⁰ *Ibid* at 183. For details of the research methods used by the study, see *ibid* at 181.

⁴¹ *Ibid* at 186.

⁴² *Ibid* at 193.

⁴³ *Ibid* at 194.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* at 195.

Other studies have evidenced the social harm of hate crime in qualitative studies, which did not involve a control group.⁴⁶ Barnes and Ephross, for example, conducted focus groups with 59 victims of race hate crime⁴⁷ and found that almost one third reported behavioural changes as a result of the attack. These included moving out of the neighbourhood, decreased social participation and taking additional security precautions.⁴⁸ Haynes et al⁴⁹ interviewed twelve victims of hate crime (ten direct victims and two family members of victims with intellectual disabilities).⁵⁰ Their interviewees reported a number of “strategies” they had used to cope with hate crime, including relocation (four of the twelve respondents reported that they had moved home as a direct result of the incident);⁵¹ avoiding public spaces (or public transport);⁵² self-segregation more generally (such as choosing to stay at home);⁵³ and making the decision to hide visible expressions of their identity.⁵⁴ Funnell undertook an ethnographic investigation of racist hate crime at an agency supporting victims of racist hate crime in England, conducting nine interviews with caseworkers, 16 unstructured interviews with their clients and undertaking case file analysis.⁵⁵ She reported that victims adopted various strategies to avoid future victimisation, most notably restricting the occasions on which they left their homes (she described some victims as “prisoners in their own home”⁵⁶) and avoiding using amenities in their immediate environment, often opting “to shop and use the resources and amenities of neighbouring towns and cities”.⁵⁷ Some victims had also moved house to avoid further abuse, resulting in social isolation.⁵⁸ Walters conducted research with 38 victims of hate crime involved in restorative justice projects⁵⁹ – 27 of the 38 stated that they avoided certain locations as a result of the incident, explaining for example that they would no longer visit certain areas of

⁴⁶ Aside from those discussed below, see also D Jauk, “Gender violence revisited: lessons from violent victimization of transgender identified individuals” (2013) *Sexualities* 807 at 821.

⁴⁷ A Barnes and PH Ephross, “The impact of hate violence on victims: emotional and behavioral responses to attacks” (1994) 39 *Social Work* 247 at 248.

⁴⁸ *Ibid* at 250.

⁴⁹ A Haynes et al, ‘*Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings* (2015).

⁵⁰ For details of their research methods, see *ibid* at 16.

⁵¹ *Ibid* at 23.

⁵² *Ibid* at 24.

⁵³ *Ibid* at 26.

⁵⁴ *Ibid* at 27.

⁵⁵ C Funnell, “Racist hate crime and the mortified self: an ethnographic study of the impact of victimization” (2015) 21 *International Review of Victimology* 71 at 73.

⁵⁶ *Ibid* at 80.

⁵⁷ *Ibid* at 74.

⁵⁸ *Ibid* at 77.

⁵⁹ Walters *Hate Crime and Restorative Justice* (n 5) 78.

town or walk home late at night.⁶⁰ One of those interviewed summed up his experience by explaining how, since becoming a victim of hate crime, he “waited until the middle of the night before cautiously venturing out to purchase groceries”.⁶¹ Some of those interviewed had also moved house and others wished to move away from the location where they had been targeted but were unable to do so because they could not afford to.⁶² Such anecdotal accounts do not, of course, equate to a large scale study undertaken with a comparable control group, but the increased likelihood of repeat victimisation associated with hate crime does lend weight to the proposition that hate crime is more likely to lead to forced behavioural changes than a parallel non-hate crime.

3.1.2 Harm to the targeted group

The second level at which hate crime is said to cause harm is in terms of the wider effect of the crime on other members of the group to which the direct victim belonged (or was perceived to belong).⁶³ Perry and Alvi describe this as the “in terrorem” effect of hate crime, suggesting that:⁶⁴

...hate crimes are ‘message crimes’ that emit a distinct warning to all members of the victim’s community: step out of line, cross invisible boundaries, and you too could be lying on the ground, beaten and bloodied. Consequently, the individual fear... is thought to be accompanied by the collective fear of the victim’s cultural group, possibly even of other minority groups likely to be victims.

As Brax puts it:⁶⁵

Hate crimes remind members that they are targets, often for reasons that make the risk impossible to avoid, or avoidance of which is a form of harm in itself. Hate crimes threaten to make the lives of those already among the worse off in a society even worse.

The group harm justification has sometimes been dismissed on the basis that there is no empirical evidence to support it,⁶⁶ but there are now a number of studies that

⁶⁰ For details of the research methods, see *ibid* at 80.

⁶¹ *Ibid* at 81.

⁶² *Ibid* at 83.

⁶³ E Burney, “Using the law on racially aggravated offences” [2003] Crim LR 28 at 35; I Hare, “Legislating against hate: the legal response to bias crimes” (1997) 17 OJLS 415 at 417; OSCE, *Hate Crime Laws* (n 3) 20; Walters *Hate Crime and Restorative Justice* (n 5) 84.

⁶⁴ B Perry and S Alvi, “‘We are all vulnerable’: the in terrorem effects of hate crimes” (2012) 18 International Review of Victimology 57 at 59.

⁶⁵ Brax (n 1) at 59.

provide at least some evidence of its existence. Perry and Alvi themselves undertook a small scale study (involving 27 self-completion questionnaires⁶⁷) in which they asked members of targeted communities who had not themselves been direct victims of hate crime how they felt when they heard about victimization of others in their community. Over 75 per cent of respondents reported that they feared such incidents could happen to them or members of their community again; that they had lost trust in communities to whom the perpetrator(s) belonged; and that they now felt unwelcome.⁶⁸ Between 50 to 75 per cent of respondents reported that they were now more fearful of people who shared the same identity as the perpetrator.⁶⁹ The authors also conducted a focus group with twelve further respondents, who spoke of experiencing “shock”, “fear” and “inferiority” as a result of hate crime directed at their community.⁷⁰ Members of the focus group also reported having made behavioural changes (such as avoiding certain places or travelling in groups) as a result of hearing about hate crime.⁷¹

A number of other studies have reported similar effects.⁷² Bell and Perry undertook four focus groups with 15 participants who self-identified as lesbian, gay, bisexual or pansexual.⁷³ When asked how incidences of hate crime directed towards other members of the community had affected them, respondents reported a wide range of emotions, including anger, pain, worry, sadness, isolation, anxiety, depression, bewilderment, fear and disgust.⁷⁴ Some reported making changes to the way they dressed and expressed themselves⁷⁵ or in terms of who they associated with⁷⁶ to

⁶⁶ See e.g. Al-Hakim and Dimock (n 6) at 592.

⁶⁷ Perry and Alvi (n 64) at 61.

⁶⁸ Ibid at 62.

⁶⁹ Ibid (the authors do not provide a specific percentage figure – only this range). The proportion reporting negative effects was even higher when respondents were asked how they thought such attacks made *other* members of their community feel (see the results reported at 63), but the fact that respondents were speculating here about what other people felt makes this a less reliable finding.

⁷⁰ Ibid at 64-65.

⁷¹ Ibid at 67.

⁷² Aside from those discussed here, see K Gelber and L McNamara, “Evidencing the harms of hate speech” (2016) 22 Social Identities 324, where evidence of the negative effect of hate speech on targeted communities is presented. For a study that attempted but failed to evidence the group harm effect in relation to hate crime, see KM Craig, “Retaliation, fear, or rage: an investigation of African American and white reactions to racist hate crimes” (1999) 14 Journal of Interpersonal Violence 138 at 149.

⁷³ JG Bell and B Perry, “Outside looking in: the community impacts of anti-lesbian, gay, and bisexual hate crime” (2015) 62 Journal of Homosexuality 98. For details of their research methods, see *ibid* at 105.

⁷⁴ Ibid at 106.

⁷⁵ Ibid at 111.

decrease the possibility of victimisation. Guasp et al, drawing on a survey of 2,500 gay, lesbian and bisexual people in the UK, found that 26 per cent of their respondents reported changing their behaviour to reduce their risk of being the target of a hate crime.⁷⁷ Lim interviewed 45 Asian Americans who had not been direct victims of hate crime, many of whom reported that hearing of hate crime had made them feel vulnerable and unsafe.⁷⁸ Noelle undertook qualitative interviews with nine BGL⁷⁹ respondents several months after a particularly notorious and brutal hate crime committed against a gay man in the US.⁸⁰ Two of the participants specifically stated that they felt far more vulnerable to anti-BGL hate crime victimization after learning the details of this crime⁸¹ and two other participants reported that they had changed their behaviour as a result.⁸²

It does have to be said that all of these studies are relatively small scale, none involved a control group and – so far as any behavioural changes are concerned – they all relied on self-reporting.⁸³ They do, however, provide some limited evidence of a group harm effect which, when combined with the more extensive evidence of the individual effects of hate crime, provides a convincing case for a distinctive legal response.

3.1.3 Societal harm

A final level at which the harm from hate crime might result is at a societal level (i.e. beyond members of the targeted group). This has sometimes been expressed in terms of hate crime decreasing social cohesion and increasing the general risk of social unrest.⁸⁴ Incidences of hate crime may “exacerbate existing intergroup

⁷⁶ Ibid at 112.

⁷⁷ A Guasp, A Gammon and G Ellison, *Homophobic Hate Crime: The Gay British Crime Survey 2013* (2013) 25.

⁷⁸ HA Lim, “Beyond the immediate victim: understanding hate crimes as message crimes”, in B Perry and P Iganski (eds), *Hate Crimes: The Consequences of Hate Crime (Volume 2)* (2009) 107 (as cited by Bell and Perry (n 73) at 103) at 198 (103 of Bell and Perry).

⁷⁹ i.e. bisexual, gay and lesbian: BGL is the term used in Noelle’s paper.

⁸⁰ M Noelle, “The ripple effect of the Matthew Shepard murder: impact on the assumptive worlds of members of the targeted group” (2001) 46 American Behavioral Scientist 27. The crime (which took place in Wyoming) is described in detail by Noelle at 31.

⁸¹ Ibid at 45.

⁸² Ibid at 47.

⁸³ These limitations are recognised by the authors themselves – see e.g. Bell and Perry (n 73) at 117; Noelle (n 80) at 47.

⁸⁴ P Iganski, “Why make hate a crime?” (1999) 19 Critical Social Policy 386 at 389; JB Weinstein, “First Amendment challenges to hate crime legislation: where’s the speech?” (1992) 11 Criminal Justice Ethics 8 at 13; Walters *Hate Crime and Restorative Justice* (n 5) 86.

tensions”,⁸⁵ which might lead to a cycle of retaliatory violence.⁸⁶ Others have expressed it in terms of hate crime harming societal values.⁸⁷ Lawrence, for example, writing in the US context, suggested that hate crimes:⁸⁸

...cause an even broader injury to the general community. Such crimes violate not only society's general concern for the security of its members and their property but also the shared values of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the antidiscrimination principle that have become fundamental not only to the American legal system but to American culture as well.

Of all of the possible levels at which harm might occur, however, the societal effect is the most intangible and difficult to evidence. If punishing hate crime more severely is to be justified on the basis of the additional harm it causes, the more compelling case may well lie in the harm to the direct victim and to other members of the targeted group.

3.1.4 The harm justification summarised

There is compelling evidence that hate crimes are more harmful than parallel non-hate crimes, both in terms of the psychological and emotional harms that they cause and in terms of the behavioural changes victims make in order to avoid repeat victimisation. It should perhaps be stressed that not all hate crime victims respond in the same way – it is not the case, for example, that every single victim of hate crime will experience psychological harm. This has led some to suggest that a “blanket uplift in penalty” may not be justified.⁸⁹ But what is necessary to justify punishing hate crime as a class more severely is not that additional harm must happen in every single case – all that is required is robust evidence that hate crime typically causes greater harm than parallel non-hate crime (in the same way that assaults accompanied by a weapon typically cause more harm than those where the assailant is unarmed). That evidence, on the basis of the studies presented here, does exist. When one adds to this the evidence that hate crime also results in psychological and behavioural harm to members of the targeted group other than

⁸⁵ OSCE, *Hate Crime Laws* (n 3) 20.

⁸⁶ Ibid.

⁸⁷ Although this does start to overlap with denunciatory justifications discussed in section 3.3 below.

⁸⁸ Lawrence (n 4) at 347.

⁸⁹ Iganski and Lagou (n 11) at 1713.

the direct victim (the *in terrorem* effect), the harm justification for enhanced punishment becomes very compelling indeed. Admittedly, the empirical evidence to support the group harm claim is less well developed than that supporting the individual harm claim, but a limited body of evidence does exist to this effect, albeit primarily from small scale qualitative studies. Against this, it might be said that hate crime is not unique in this respect and that other types of crime can also cause fear across a wider community,⁹⁰ but this does not negate the argument that hate crime as a category should be punished more severely if it is more likely than other parallel crimes to result in this effect.

3.2 Culpability based justifications

An alternative (or additional) approach to justifying the enhanced punishment of hate crime is on the basis that hate crime offenders are more morally blameworthy than those who commit equivalent non-hate crimes. The culpability-based justification has been articulated in a number of different ways. One approach is to argue that because hate crime perpetrators intentionally (or recklessly) cause additional harm, they deserve additional punishment.⁹¹ On this approach, only those who intend to cause harm (or who are reckless as to a risk of harm) deserve an enhanced penalty. It might also be surmised on the basis of this justification that only in cases where additional harm has actually occurred (in terms of the psychological or behavioural effects discussed in the previous section) would the offender deserve greater punishment, although it might equally be argued that an intention to cause such harm or recklessness as to a risk of harm might suffice even if it does not actually occur in the specific case.

Another approach is to argue that those who commit hate crime act with particularly reprehensible motives and that enhanced punishment is justified on this basis. Those who literally act out of “hate” have been singled out in this respect, but it has been suggested that those who act out of bias or prejudice might also be more culpable than offenders who act without these motivations.⁹²

⁹⁰ AR Baehr, “A feminist liberal approach to hate crime legislation” (2003) 34 *Journal of Social Philosophy* 134 at 142; C Card, “Is penalty enhancement a sound idea?” (2001) 20 *Law and Philosophy* 195 at 209.

⁹¹ See e.g. Iganski and Lagou (n 11) at 1713; OSCE, *Hate Crime Laws* (n 3) 23; G Mason, “Victim attributes in hate crime law: difference and the politics of justice” (2014) 54 *BJ Crim* 161 at 165.

⁹² DM Kahan, “Two liberal fallacies in the hate crimes debate” (2001) 20 *Law and Philosophy* 175 at 187; G Mason and A Dyer, “‘A negation of Australia’s fundamental values’: sentencing prejudice-motivated crime” (2012) 36 *Melbourne University LR* 871 at 882.

This has led some to argue against penalty enhancement, on the basis that the additional punishment imposed involves unfairly punishing individuals solely on the basis of their “bad character” or “beliefs”, factors that are not within their control.⁹³ The issue is one to which philosophers have devoted a great deal of attention,⁹⁴ but for our purposes, it suffices to say that it can be refuted on the basis that what is being (additionally) punished here is not character or belief alone, but the decision to act on that belief.⁹⁵ It might also be said that prejudice (or hate or bias) is not necessarily immutable – there is evidence to suggest that offenders can and do change their prejudiced attitudes through education, community dialogue and maturity.⁹⁶ A related objection to hate crime laws is that they punish the constitutional value of freedom of speech, a debate that has played out in the US courts in particular (although it was ultimately held that such laws were not unconstitutional).⁹⁷ This objection too is easily dismissed for our purposes – hate crime laws in the present context do not necessarily involve speech at all. If speech is involved, it is simply as evidence that a crime was committed with an accompanying motive of bias, rather than it being (additionally) punished in its own right.⁹⁸

It has been suggested that a further difficulty with the culpability argument based on motive is that it is not clear why bias/hatred deserves to be singled out over other equally reprehensible motives such as greed, revenge or sadism (to name but a few).⁹⁹ One answer here may be that all of these motives should (and would) be relevant factors in sentencing. If one does accept the version of the culpability justification based on the offender’s motive, however, then this suggests a particular

⁹³ HM Hurd, “Why liberals should hate ‘hate crime legislation’” (2001) 20 *Law and Philosophy* 215 at 226; HM Hurd and MS Moore, “Punishing hatred and prejudice” (2004) 56 *Stanford LR* 1081 at 1128.

⁹⁴ For detailed critique of Hurd and Moore, see e.g. D Brax, “Motives, reasons, and responsibility in hate/bias crime legislation” (2016) 35 *Criminal Justice Ethics* 230; Kahan (n 92).

⁹⁵ Hare (n 63) at 425; A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2009) 121; J Stanton-Lee, *Criminalising Conduct with Special Reference to Potential Offences of Stirring Up Hatred against Disabled or Transgender Persons* (2013) 49.

⁹⁶ N Hall, *Hate Crime*, 2nd edn (2013) ch 8.

⁹⁷ See section 7.8.

⁹⁸ Hare (n 63) at 428.

⁹⁹ Al-Hakim and Dimock (n 6) at 588; J Ip, “Debating New Zealand’s hate crime legislation: theory and practice” (2005) 21 *New Zealand Universities LR* 575 at 592; AM Dillof, “Punishing bias: an examination of the theoretical foundations of bias crime statutes” (1997) 91 *Northwestern University LR* 1015 at 1080.

model of hate crime in which only those offenders who do act with a motive of hate/bias/prejudice are punished as hate crime offenders.¹⁰⁰

A final approach to justifying enhanced punishment on the basis of offender culpability is to do so not on the basis of the biased motive of the perpetrator, but on his or her deliberate decision to target a weak or vulnerable victim.¹⁰¹ It is well established that targeting the vulnerable can be an aggravating factor in sentencing.¹⁰² The difficulty in utilising this as the overriding justification for punishing hate crime more severely is that it only covers those victims who actually are vulnerable (or perhaps suggests a model of hate crime in which vulnerability is the basis on which target groups should be protected – a model that, as chapter 5 discusses, is not without disadvantages). A more convincing approach is perhaps to regard hate crime offenders as more culpable because they target groups who are already at an unfair disadvantage in society,¹⁰³ although this justification too, if accepted as the primary justification, has implications for the selection of protected groups.

3.3 Denunciation based justifications

A third group of justifications for punishing hate crime more severely are those based on the denunciatory message sent by doing so. Punishment, it has been said, has an expressive or communicative function – it conveys both to the offender and to society as a whole the wrongfulness of the conduct concerned.¹⁰⁴ Punishing a hate crime more severely than a parallel non-hate crime conveys the message that it is, and should be regarded as, a more serious wrong. Although they have been grouped together here, there are two very different conceptions of this argument – denunciation in terms of its consequentialist value in deterring conduct and denunciation as a value in its own right.

The consequentialist version of the argument holds that by punishing hate crime more severely, this will have the effect of deterring future hate crimes – either in terms of the specific deterrence of the punished offender or the general deterrence

¹⁰⁰ This feeds into the broader debate between those who favour an “animus” model of hate crime and those who favour a discriminatory selection model: see chapter 4 where both models are outlined and discussed.

¹⁰¹ Brax (n 1) at 61.

¹⁰² See e.g. (in the context of England and Wales) Sentencing Guidelines Council Guideline, *Overarching Principles: Seriousness* (2004) 5.

¹⁰³ AM Danner “Bias crimes and crimes against humanity: culpability in context” (2002) 6 Buffalo Crim LR 389 at 392.

¹⁰⁴ See e.g. Duff, *Answering for Crime* (n 95) 8.

of others.¹⁰⁵ A direct link between the size of the penalty for hate crime and the frequency of its incidence is rarely argued for outside of behavioural economics circles.¹⁰⁶ There is no empirical evidence that offenders (in any context) are deterred by the magnitude of punishment – the only factor that has been shown to deter (rationally calculating) potential offenders in practice is the likelihood of being apprehended.¹⁰⁷ It has even been suggested that labelling some crimes specifically as “hate crimes” (and attaching higher penalties to them) might have the opposite effect. This could act as an attractive “badge of honour”¹⁰⁸ for offenders¹⁰⁹ or, on a different account, the stigmatisation might result in anger and alienation, factors which are associated with recidivism.¹¹⁰ In any case, other processes may be more effective than punishment in terms of individual deterrence, such as restorative justice.¹¹¹

That said, the deterrence argument should perhaps not be dismissed too quickly. It has been suggested that hate crime legislation may serve an educative function by consistently sending a message that prejudice is socially unacceptable. Such a message may actually have the effect, over a long period of time, of decreasingly the incidence of prejudiced motivated incidents.¹¹² As Mason puts it, hate crime laws are “engaged in a process of remoralization... that seeks to challenge norms and moral boundaries that sustain racial, religious, sexual and other hierarchies of difference”.¹¹³ It is plausible, then, that the repeated denunciation of hate crime over time may make it societally less acceptable and reduce its incidence in the long term, although evidencing this claim would be difficult in practice.

A second version of the argument is that denunciation is important in its own right on the basis that punishing hate crime more severely sends a message to hate crime

¹⁰⁵ Hall, *Hate Crime* (n 96) 168.

¹⁰⁶ For an example, see T Klumpp and H Mialon, “On hatred” (2013) 39 American Law and Economics Review 39 at 65.

¹⁰⁷ Iganski (n 84) at 388. More generally see A von Hirsch et al, *Criminal Deterrence and Sentence Severity* (1999); PH Robinson and JH Darley, “Does criminal law deter? a behavioural science investigation” (2004) 24 OJLS 173.

¹⁰⁸ Kahan (n 92) at 470.

¹⁰⁹ There is some limited evidence to support this from research undertaken with those convicted of hate crimes: see e.g. B Dixon and D Gadd, “Getting the message? ‘New’ Labour and the criminalization of ‘hate’” (2006) 6 Criminology and Criminal Justice 309 at 322.

¹¹⁰ Burney (n 63) at 35.

¹¹¹ See chapter 8 of Walters, *Hate Crime and Restorative Justice* (n 5), where the author presents some evidence from a small scale study that restorative justice was effective in challenging the prejudices and modifying the behaviour of perpetrators of hate crime.

¹¹² Iganski (n 84) at 388.

¹¹³ G Mason, “The symbolic purpose of hate crime law: ideal victims and emotion” (2014) 18 Theoretical Criminology 75 at 76.

victims (and other members of protected groups) that the State values them as equal members of society who are worthy of respect and is committed to eradicating disadvantage and prejudice.¹¹⁴ As Kaupinnen puts it:¹¹⁵

Hate or bias crimes dramatize the expressive aspect of crime, as they typically, and sometimes by design, send a message of inferiority to the victim's group and society at large. Treating the enactment of contempt and denigration toward a historically underprivileged group as an aggravating factor in sentencing may be an appropriate way to counter this message, as it reaffirms and indeed realizes the fundamental equality of all members of a democratic community.

Such a message, Iganski has suggested, is especially significant where the State itself has historically been the cause of minority group oppression.¹¹⁶

If one accepts that hate crime laws are important because of their denunciatory function, this does have one important implication, which is that the law must clearly label such crimes as hate crimes.¹¹⁷ It has been suggested that this is an argument for specific aggravated offences, rather than simply increasing sentences,¹¹⁸ although sentence aggravations might serve this purpose if they are effectively communicated and recorded.¹¹⁹

¹¹⁴ Al-Hakim and Dimock (n 6) at 604; Ip (n 99) at 595; OSCE, *Hate Crime Laws* (n 3) 20; Baehr (n 90) at 148; M Blake, "Geeks and monsters: bias crimes and social identity" (2001) 20 Law and Philosophy 121 at 122; Dixon and Gadd (n 109) at 309.

Something akin to this argument seems to be made by Bakalis, who justifies enhanced punishment on the basis that hate crime "undermines the equality enterprise": C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) LS (advance eprint available online) at 17.

¹¹⁵ A Kaupinnen, "Hate and punishment" (2015) 30 Journal of Interpersonal Violence 1719 at 1720.

¹¹⁶ Iganski *Hate Crime and the City* (n 26) 87.

¹¹⁷ See J Chalmers and F Leverick, "Fair labelling in criminal law" (2008) 71 MLR 217.

¹¹⁸ Al-Hakim and Dimock (n 6) at 598.

¹¹⁹ For discussion of the advantages and disadvantages of aggravated offences compared to sentencing aggravations, see section 4.1.3.

3.4 Summary

There is near universal agreement among scholars that hate crime should be punished more severely than non-hate crime.¹²⁰ As this chapter has discussed, there are a number of different justifications for this. Some are more persuasive than others. The argument that hate crimes are – compared to parallel non-hate crimes – more likely to cause harm both to the direct victim and to members of the group to which the victim belonged or was perceived to belong is particularly compelling. The argument that it is important to send a message to victims of hate crime that bias and inequality of treatment is roundly condemned by the State is also persuasive. Collectively, the harm argument and the denunciatory/expressive argument (and perhaps to a lesser extent the culpability argument) provide a compelling justification for punishing hate crime more severely.

What is less clear on the basis of the discussion above is precisely how this should be achieved. Some of the arguments have implications for the legal approach taken to hate crime – for the denunciation to be effective, for example, the law needs to clearly label hate crime and communicate this to offenders, victims and society more widely. These issues will be discussed further in chapter 4.

¹²⁰ For rare examples of those who take the opposing view, see J Jacobs and K Potter, *Hate Crimes: Criminal Law and Identity Politics* (1998); Card (n 90); Hurd (n 93); Hurd and Moore (n 93).

CHAPTER 4: MODELS OF HATE CRIME LEGISLATION

Two principal issues arise when considering how hate crime legislation should be formulated. First, how should hate crime be identified? Secondly, how should it be addressed – in particular, is this a question of substantive and distinct offences or of the penalty which attaches to general offences? Each of these issues will be considered in turn.

4.1 Identifying hate crime: discriminatory selection or animus?

Academic scholarship on hate crime legislation typically distinguishes between two legislative models: the discriminatory selection model (referred to here as the DSM) and the animus model.¹

4.1.1 The discriminatory selection model

Under the DSM,² a hate crime is committed where the victim has been selected because of their membership of a protected group. This decision need not involve any animus on the offender's part, and might for example be based on a belief that the group membership can be exploited in some way. This would encompass a case such as the New South Wales decision in *R v Aslett*,³ where the Court of Criminal Appeal held that the following circumstances did *not* fall within the terms of section 21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999, providing that “hatred for or prejudice against a group of people” is an aggravating factor in sentencing:⁴

Bonham’s evidence was that he and his co-offenders were told to look for Asians, apparently on the basis that Asians tended to keep money and jewellery in their homes. Mr and Mrs A may be taken to fall within the description “Asians”. Whether persons of that description have the quality or tendency asserted by the appellant to Bonham is beside the point. The importance is that the offenders were at least in part motivated by a belief that because their intended victims were Asians they were more likely to have

¹ See e.g. FM Lawrence, “The punishment of hate: toward a normative theory of bias-motivated crimes” (1994) 93 Mich LR 320 at 326; K Goodall, “Conceptualising ‘racism’ in criminal law” (2013) 33 LS 215 at 222.

² A wide range of names has been suggested for this model: Goodall (n 1) at 223 n 36 notes possibilities as including “opportunistic bias crime”, ‘targeted crime’, ‘actuarial selection’, ‘discriminatory victim selection’ or a form of ‘rational targeting’”.

³ [2006] NSWCAA 49. See Goodall (n 1) at 223.

⁴ [2006] NSWCAA 49 at para 124.

on their premises money and goods they would like to steal. It was submitted that that was quite a different motivation from crimes committed out of race hatred or prejudice. In my opinion that submission should be accepted. It seems to me that a better analysis is that the appellant approved the attack on Mr and Mrs A's home not because he believed that Mr and Mrs A were Asian but because he believed that as Asians they fell into the category of people whose homes might contain valuables suitable for stealing. There was no evidence that the appellant hated Asians. There was no evidence that he was prejudiced against Asians.

Other examples of offending which would be captured by a DSM model (but not an animus one), assuming the relevant groups are protected under the applicable legislation, might be a purse-snatcher who targets women because of "the manner in which they carry their valuables",⁵ or an attacker who targets victims with a disability because of a belief that they will be slower to escape.⁶

Although the DSM model has its proponents,⁷ most legislatures have taken a different approach. One example of a DSM approach is the law in Wisconsin,⁸ where certain offences against the person or property are subject to enhanced penalties where the offender "intentionally selects the person against whom the crime... is committed or selects the property that is damaged or otherwise affected by the crime... in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct".⁹

4.1.2 The animus model

Under the animus model, a hate crime is committed where the offender is motivated by, or demonstrates, prejudice against a protected group. This is the

⁵ L Wang, "The transforming power of hate: social cognition theory and the harms of bias-related crimes" (1997) 71 Southern California LR 47 at 72.

⁶ Ibid.

⁷ See e.g. Wang, "The transforming power of hate" (n 5); L Wang, "Recognising opportunistic bias crimes" (2000) 80 Boston U LR 1399; JB Woods, "Taking the 'hate' out of hate crimes: applying unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes" (2008) 56 UCLA LR 489.

⁸ Woods (n 7) at 497 states that Wisconsin is the only US state to "unambiguously follow" the model, although, as table 1 below indicates, there are a number of other US states which might be classified in this way.

⁹ Wis Stat § 939.645(1)(b).

model most commonly found in legislation, although some legislative formulations can be difficult to classify as falling into either the DSM or animus models.¹⁰

There are, however, significant differences between different formulations of the animus model. At its highest and perhaps simplest, the model might – as in the Northern Territory’s sentencing statute – require proof that “the offence was motivated by hate against a group of people”.¹¹ Two elements of this test are key: first, the requirement to prove motive, and secondly, the requirement to prove hate. Both elements can be replaced with lower or alternative thresholds.

First, the threshold set by the legislation may be lower than “hate”, as in the English legislation (“hostility”)¹² or the Scottish legislation (“malice and ill-will”)¹³.

Secondly, legislation can replace or supplement the motive condition with a condition that the offender demonstrate prejudice. This means, for example, that an offender who commits an assault accompanied by racial epithets has little or no room to argue that they were not in fact prejudiced but had simply resorted to vulgar abuse in the heat of the moment. Such formulations are found both in English and Scottish legislation, which refer respectively to “demonstrating”¹⁴ or “evincing”¹⁵ the relevant prejudice.

The latter of these changes is so significant¹⁶ that it may be helpful to distinguish between two different types of animus model: first, a subjective animus model which requires proof of the offender’s motivation and secondly, an objective animus model – or “demonstration of hostility” test – which can be satisfied either by proof of motive or proof of the expression of hostility in connection with the offence. Where this latter model is adopted, it is likely that in practice prosecutions will be based predominantly on the expression of hostility (that being easier to prove, and perhaps simply more frequent) than on proof of motive.¹⁷

¹⁰ Lawrence, “The punishment of hate” (n 1) at 340 (discussing the use of the formulation “because of” in hate crime legislation).

¹¹ Sentencing Act 1995 s 6A(e) (NT).

¹² Crime and Disorder Act 1998 s 28(1).

¹³ Offences (Aggravation by Prejudice) (Scotland) Act 2009 ss 1(2), 2(2).

¹⁴ Crime and Disorder Act 1998 s 28(1).

¹⁵ Offences (Aggravation by Prejudice) (Scotland) Act 2009 ss 1(2), 2(2).

¹⁶ See e.g. E Burney, “Using the law on racially aggravated offences” [2003] Crim LR 28, who notes at 29 that the definition of racial aggravation in the Crime and Disorder Act 1998 was “considerably wider than American prototypes, creating conceptual problems for prosecutors and sentencers”.

¹⁷ See E Burney and G Rose, *Racist Offences – How is the Law Working?* (Home Office Research Study 244, 2002) 93-94.

4.1.3 Is the animus model or the discriminatory selection model preferable?

Despite the clear preference for the animus model which can be seen in legislative practice, a number of different arguments have been presented in support of the DSM approach. These include the argument that such crimes involve taking unfair advantage of groups with a particular characteristic,¹⁸ and that by selecting a member of a protected group as the victim of an offence, the offender “knowingly or recklessly joins other wrongdoers in a demonstration of bias and discrimination that ultimately harms our society”.¹⁹ The offender therefore contributes to the oppression of that group even if they have not done so by reason of personal prejudice.

Goodall has robustly criticised these arguments.²⁰ As she points out, concluding that such instances are not “hate crimes” does not involve denying that the offence is made more serious by the offender’s decision to select the victim on the basis of a particular characteristic:²¹

We may regard it as aggravated on another ground – the pre-planned selection of a vulnerable group victim. There can be enhanced punishment without treating this as a hate crime. Is it fair to label such an offence necessarily as an act of criminally blameworthy racism?

Including instances of discriminatory selection within the “hate crime” context may, therefore, mischaracterise the nature of the offender’s conduct, while not being necessary in order for their sentence to be aggravated.

It has also been argued that, for example, the DSM approach could assist with the prosecution of persons for hate crimes against the elderly: it would be easier to prove that an elderly person had been targeted because of their vulnerability than because of animus against the elderly as a group.²² This is again vulnerable to Goodall’s objection: it mischaracterises the offending conduct. The opportunistic exploitation of a vulnerable victim should be treated as an aggravated form of offending, but it is not a hate crime and need not be labelled as such in order to achieve that end.

¹⁸ Woods (n 8) at 492.

¹⁹ AM Danner, “Bias crimes and crimes against humanity: culpability in context” (2002) 6 Buffalo Crim LR 389 at 406.

²⁰ Goodall (n 1) at 228-230.

²¹ Ibid at 228.

²² HG Hull, “The not-so-golden years: why hate crime legislation is failing a vulnerable aging population” (2009) Michigan State LR 387 at 411-412.

4.1.4 Addressing hate crime: sentencing or substantive offence?

Once hate crime has been identified, how should it be addressed? Here, Mason has identified three broad models: (i) the penalty enhancement model, (ii) the sentence aggravation model, and (iii) the substantive offence model.²³ Individual jurisdictions may combine these models in their legislative schemes rather than opting for a single one.

The first two of these models do not create additional offences in order to address hate crime, but instead permit or require modifications to the applicable penalty. They do so in slightly different ways. In both instances, the question will arise of the extent – if any – to which the aggravation is recorded alongside the conviction. For example, in England and Wales the Law Commission noted concerns that where enhanced sentences were imposed under sections 145 and 146 of the Criminal Justice Act 2003, these would not be automatically recorded on the Police National Computer and so would not normally show on the offender's criminal record, and made recommendations as to how this could be rectified.²⁴

Penalty enhancement models alter the maximum (or potentially the minimum) penalty, if any, applicable to the offence. For example, under Wisconsin law, a felony to which the hate crime provisions apply has its maximum fine increased by \$5,000 and the maximum term of imprisonment increased by five years.²⁵ This model can also be implemented by the creation of distinct offences which exactly mirror their counterparts but for the addition of a hate crime element, as seen in English law's provision in respect of racially or religiously aggravated assaults, criminal damage, public order offences and harassment.²⁶

Sentencing aggravation models do not increase the maximum penalty applicable to the crime, but identify the hate crime aspect of the offence as an aggravating factor and require that it be taken into account by the sentencing judge. In some jurisdictions, such as Canada,²⁷ the aggravation is named as one of a long list of factors which must (if present) be taken into account. Elsewhere, as in Scotland, the

²³ G Mason, "Legislating against hate", in N Hall et al (eds), *The Routledge International Handbook on Hate Crime* (2015) 59 at 60. See also G Mason, "Hate crime laws in Australia: are they achieving their goals?" (2009) 33 Criminal Law Journal 326.

²⁴ *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014) paras 2.100-2.120.

²⁵ Wis Stat § 939.645(2)(c). The provision refers to the maxima being increased by "not more than" these limits, but in any event these are increased maxima rather than mandatory enhancements to the sentence.

²⁶ Crime and Disorder Act 1998 ss 29-32.

²⁷ Canadian Criminal Code s 718.2.

sentencer may be required to state expressly the difference (if any) which the aggravation has made to the sentence imposed, and the reasons for that difference or the absence of a difference.²⁸

The substantive offence model involves the creation of bespoke offences to address hate crime, and as such is significantly more varied across jurisdictions. This approach takes two broad forms. It may, for example, involve the creation of offences which do not exactly mirror the general criminal law but are unlikely to criminalise conduct which would not already be an offence. An example is the Scottish offence of racially aggravated harassment.²⁹ While that offence can be expected in most cases to involve conduct which would amount to another substantive offence – such as threatening or abusive behaviour,³⁰ or the common law offence of breach of the peace,³¹ it exists entirely independently of those crimes. Where such offences have direct analogues elsewhere in the criminal law, they are likely to carry higher maximum penalties than those analogues,³² and may therefore operate in much the same way as penalty enhancement provisions even if the offences are not formally linked to non-aggravated equivalents.

Alternatively, substantive offences may be distinct from the general criminal law, as with offences of serious vilification or the stirring up of racial hatred. These raise distinct issues which are discussed separately in chapter 6 of this report.

4.1.5 The threshold for hate crime legislation: comparing practice across a range of jurisdictions

Against this background, table 1 below outlines the various threshold tests which are employed in the jurisdictions included in our analysis. It should be noted, first, that this table only includes jurisdictions which have sentence aggravation or penalty enhancement provisions and, secondly, that it only includes a sub-sample of jurisdictions from the United States.³³ The tests have been loosely grouped together into a number of different categories, as set out in the table.

²⁸ Offences (Aggravation by Prejudice) (Scotland) Act 2009 ss 1(5), 2(5).

²⁹ Criminal Law (Consolidation) (Scotland) Act 1995 s 50A.

³⁰ Criminal Justice and Licensing (Scotland) Act 2010 s 38.

³¹ See generally J Chalmers and F Leverick, *The Criminal Law of Scotland, Vol II*, 4th edn (2017) ch 47.

³² Mason, “Legislating against hate” (n 23) at 61.

³³ The reasons for this, and for the selection of jurisdictions, are explained in section 7.8.

Table 1: Thresholds for the application of sentence aggravation or penalty enhancement provisions in selected jurisdictions

Tests requiring that the victim was selected because of a protected characteristic	
“intentionally selected a victim [or property]... because of hostility”	Hawaii
“[the offender] select[ed] the victim... because of [the protected characteristic]”	Louisiana
“selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected because of [the protected characteristic]”	Maine
Tests requiring that the offence is motivated by the protected characteristic	
“conduct is maliciously motivated by the victim’s [protected characteristic]”	Vermont
Tests requiring a causal link	
“because the [protected characteristic] of the victim was different from that characteristic of the perpetrator”	Nevada
“[the crime is committed] because of another’s [protected characteristic]”	Maryland
“[the crime is committed] because of the victim’s [protected characteristic]”	West Virginia
“committed against a person or a person’s property because of [the protected characteristic]”	Iowa
Tests requiring a partial causal link	
“the offender committed the offence partly or wholly because of hostility”	New Zealand
Tests requiring motivation by hatred	
“motivated by hate against”	Northern Territory
Tests requiring motivation by hatred or certain specified alternatives	
“motivated by hatred for or prejudice against”	New South Wales
“motivated (wholly or partly) by hatred for or prejudice against”	Victoria
“motivated on the basis of... prejudice, bias or intolerance”	South Africa (draft Bill)
“motivated by bias, prejudice or hate”	Canada

Tests which can be satisfied either by a hostile motivation or by the demonstration of hostility	
“evinces... malice and ill-will based on the victim’s membership (or presumed membership) [of a protected group, or] the offence is motivated (wholly or partly) by malice and ill-will towards [members of the protected group]”	Scotland
“demonstrates hostility... [or] motivated, in whole or part, by hostility”	Western Australia
“demonstrates... hostility... [or] the offence is motivated (wholly or partly) by hostility”	England and Wales; Northern Ireland
Tests requiring the demonstration of prejudice	
“an... act that demonstrates an accused’s prejudice”	District of Columbia
“the commission of [the] felony or misdemeanour evidences prejudice”	Florida

As this table demonstrates, the Scottish approach (along with England and Wales, Northern Ireland, and Western Australia) is a broad one, capturing both cases of motivation and the demonstration of hostility.

A number of points require further discussion in light of this table. These are (a) the use of “partial motivation” tests, (b) whether there need be a victim who is a member of the protected group for the provisions to apply, and (c) whether the test should be based solely on “hate” or employ additional or alternative concepts. Each issue is considered in turn.

Partial motivation. Where a motivation test is used, some jurisdictions expressly provide that it is sufficient for the offender to have been only partly motivated by reference to the protected characteristic; others make no mention of this point. This may not make any difference in the application of the law: even without this provision, a statement that a person is motivated by a particular factor is not a statement that they had no other motivations whatsoever.³⁴ Nevertheless, the

³⁴ Cf the New Zealand test: Sentencing Act 2002 s 9(1) (“that the offender committed the offence partly or wholly because of hostility towards a group of persons”): partial motivation is more important in this formulation because of the use of a causal test. The Victorian Sentencing Advisory Council, in *Sentencing for Offences Motivated by Hatred or Prejudice* (2009) recommended a “partial motivation” test to deal with cases such as a theft motivated by the desire to obtain property but which was accompanied by verbal abuse about the victim’s sexuality

distinction between partial and full motivation has caused difficulties for the Canadian courts,³⁵ and so there may be benefits to expressly stating that partial motivation suffices. A partial motivation threshold, whether express or implicit, is important given that, as hate crime scholars have observed, the intersectional nature of identity is particularly significant in this context. The commission of hate crimes may often be related to a range of different characteristics possessed by a victim (only some of which might be protected by the relevant legislation):³⁶

For example, the harassment of lesbians may be caused by homophobia and by misogyny. A similar issue occurs in some instances against transgendered people where the higher level of victimization incurred by male-to-female (MtF), as opposed to female-to-male (FtM) transgender people has been explained by gender oppression. Equally, the intersections between a range of identity characteristics – including sexual orientation, ethnicity, disability, age, class, mental health, material deprivation or bodily shape and appearance (to name but some) – have been observed by a number of scholars, all of whom have exposed what Moran and Sharpe describe as ‘the differences, the heterogeneity, within what are assumed to be homogeneous identity categories and groups’.

Need there be a victim who is a member of the protected group? Different jurisdictions take different approaches as to whether the victim must themselves be a member of the protected group. It is commonplace to provide – as in Scotland – that the offender’s perception here will suffice,³⁷ so that a putative hate crime does

and partner (para D.5). There might, however, be difficulties in proving that the offender’s hatred or prejudice in such a case was genuinely a motivation – even a partial one – for the theft, and if such a case is to be caught by hate crime legislation, a demonstration of hostility test would seem the more appropriate mechanism.

³⁵ See chapter 7.2.1.

³⁶ N Chakraborti and J Garland, “Reconceptualizing hate crime victimization through the lens of vulnerability and ‘difference’” (2012) 16 Theoretical Criminology 499 at 504, quoting from L Moran and A Sharpe, “Violence, identity and policing: the case of violence against transgender people” (2004) 4 Criminal Justice 395 at 400.

³⁷ In principle, the test could be based *solely* on the offender’s perception, whether correct or false, as in section 21A of the Crimes (Sentencing Procedure) Act 1999 in New South Wales: if the offender does not perceive the victim as having the relevant characteristic, it would seem difficult to describe the case as one of hate crime (although it is possible to imagine, for example, a crime having a marked effect on a particular community even though the offender did not know the victim belonged to that community: see *R v Cran* 2005 BCSC 171, discussed in chapter 7.2.1). This course is, however, not normally followed in practice, and the more common drafting technique is to refer to actual membership and perceived membership as alternatives, as in section 96(2)(a) of the Crime and Disorder Act 1998 (the Scottish provisions on racially aggravated offences, referring

not cease to be such because the offender erred in believing that the victim had the relevant characteristic. What is not always clear, however, is whether association with the protected group will suffice, or whether there needs to be a victim within (or perceived to be within) the protected group. Consider the following examples:

- (a) A person is assaulted because of their work with people belonging to a protected group, but they themselves do not belong to that group.
- (b) A property is vandalized with graffiti including a message which is hostile to a protected group, but the owner of the property does not belong to that group or have any connection to it; their property has been randomly selected by the offender.

Would such conduct fall within the scope of sentence aggravation provisions? In some instances, the answer would clearly be no, as in New South Wales, where the sentence aggravation provisions require that the offence have been “motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged”.³⁸ An alternative approach, taken in Victoria, is to make it sufficient for the victim to be “associated” with the protected group, which would encompass example (a) but not example (b).³⁹

The broadest approach is not to require there be a specific victim at all, but simply to ask whether the offending in some way evidences the necessary prejudice. So, for example, Scots law allows an offence to be regarded as racially aggravated “if motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group”,⁴⁰ a test wide enough to potentially encompass both examples (a) and (b).

Hatred, or an alternative test? Despite the term “hate crime”, it is rare for legislation to require that actual hate – potentially a very high threshold⁴¹ – be

to “malice and ill-will based on the victim’s membership (or presumed membership) of a racial group”.

³⁸ Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A. The New South Wales Law Reform Commission has proposed that this should be amended so as to encompass association: see section 7.1.2.

³⁹ Sentencing Act 1991 (Vic) s 5(2)(daaa).

⁴⁰ Or, alternatively, that “the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim’s membership (or presumed membership) of a racial group”: Crime and Disorder Act 1998 s 96(2).

⁴¹ See e.g. *R v Keegstra* [1990] 3 SCR 697, although that case was concerned with an offence of wilfully promoting hatred, where it is important to interpret the term narrowly so as to preserve free speech rights. The same concern does not arise in respect of sentence aggravation or penalty enhancement provisions, which concern conduct with is criminal regardless of whether or not hatred is evidenced.

proven in order to trigger sentence aggravation or penalty enhancement provisions. The one exception is the Northern Territory, which refers to an offence having been “motivated by hate against a group of people” as an aggravating factor in sentencing.⁴² This is an unusually narrow provision which would not in fact prevent a sentencing judge from taking something short of hatred into account.⁴³ Elsewhere, although hatred may be one possible means of triggering the relevant legal provisions, it is usually grouped alongside alternatives such as “bias” or “prejudice”, or eschewed in favour of a test such as “hostility” (in England and Wales) or “malice and ill-will” (in Scotland).

The fact that racial aggravation can be established by way of a demonstration of hostility (in England and Wales, or Northern Ireland) or malice and ill-will (in Scotland) alone, rather than by proof of motivation, makes the law of hate crimes in the United Kingdom particularly broad compared to some other jurisdictions. It has been strongly argued by Walters (in reference to English law, but the argument holds equally for Scotland) that this breadth is appropriate:⁴⁴

...demonstrations of racial or religious hostility, though not always motivated by hatred, are conscious attempts to subordinate and *additionally* harm victims by targeting their ‘difference’. As such, most expressions of hate made during the commission of an offence will amount to either an *intentional* act of prejudice or an act where the offender is *aware* he is subjugating the victim’s identity... [I]t matters not whether the offender holds any deeply felt animosity against the victim’s group identity. It is also irrelevant that the act is committed in the ‘heat of the moment’, or that it is out of character for the offender to act in such a way. Indeed, many crimes are committed by ordinary people during the routine activities of their everyday life. While this may have some bearing on the sentence that the judge passes, it should play no part in assessing whether a racially or religiously aggravated criminal act has been committed.

This position has not been universally accepted: the New South Wales Law Reform Commission, for example, concluded that evidence of the demonstration of hostility might be relevant to prove motive, but that in some cases “that behaviour may be

⁴² Sentencing Act 1995 (NT) s 6A(e).

⁴³ Section 6A expressly provides that it has effect “[w]ithout limiting section 5(2)(f)”, which requires the court to have regard to “the presence of any aggravating or mitigating factor concerning the offender”.

⁴⁴ MA Walters, “Conceptualizing ‘hostility’ for hate crime law: minding ‘the minutiae’ when interpreting section 28(1)(a) of the Crime and Disorder Act 1998” (2014) 34 OJLS 47 at 73-74 (emphasis in original).

unrelated to the reason for the offence, and involve little more than spontaneous insult".⁴⁵ This does not, however, meet the argument presented by Walters: whether or not the demonstration of hostility is the *reason* for the offence should not be determinative of whether or not it amounts to a hate crime. On Walters' approach, the inclusion of cases of "spontaneous insult" within the category of hate crime is entirely justified.

⁴⁵ New South Wales Law Reform Commission, *Sentencing* (Report 139, 2013) para 4.183.

CHAPTER 5: CHOICE OF PROTECTED CHARACTERISTICS

5.1 What characteristics are protected in other jurisdictions?

The characteristics presently protected (in one form or another) under hate crime law in Scotland are race, religion, sexual orientation, disability and transgender identity.¹ In terms of comparison with other jurisdictions, the Organization for Security and Cooperation in Europe (OSCE) notes that, outside the “core groups” of race, national origin, ethnicity and religion, there is a lack of consensus in other jurisdictions as to which characteristics are protected under hate crime law.² Its analysis of hate crime provisions in the 57 Member States of the OSCE³ identified “gender, age, mental or physical disability, and sexual orientation” as characteristics that are “quite frequently protected”⁴ and also noted a number of other characteristics that are “occasionally protected”, such as marital status, wealth, class, personal appearance, educational status, political affiliation or ideology, and military service.⁵

A summary of the characteristics that are protected in the jurisdictions included in our analysis is set out in table 2.⁶ A number of explanatory points relating to the table are worth noting. First, two of the jurisdictions that we examined (South Africa and Tasmania) do not have hate crime legislation at all. Tasmania plays no further part in this analysis, but in the case of South Africa a draft Bill is under consideration that would introduce such legislation⁷ and the characteristics that would be protected under this Bill are included in the table. That said, the list of protected characteristics in the draft Bill is extremely lengthy and should be regarded with caution as it cannot be assumed that all of the characteristics listed in the Bill will be protected in the legislation when it is passed (or even that it will be passed at all). Secondly, only those US jurisdictions which were selected for our analysis are included in the table. The table should not be read as meaning that US jurisdictions other than those noted here do not protect particular characteristics in their hate

¹ See chapter 2.

² Organization for Security and Cooperation in Europe (OSCE), *Hate Crime Laws: A Practical Guide* (2009) 37-46. See also J Garland and N Chakraborti, “Divided by a common concept: assessing the implications of different conceptualizations of hate crime in the European Union” (2012) 9 European Journal of Criminology 38 at 44 (noting a lack of consensus throughout the EU).

³ The OSCE has 57 participating States from Europe, Central Asia and North America, which are listed at <http://www.osce.org/participating-states>.

⁴ OSCE, *Hate Crime Laws* (n 2) 43.

⁵ Ibid.

⁶ The individual provisions are discussed in more detail in chapter 7.

⁷ See section 7.7.

crime laws, as the table is not intended to be a comprehensive analysis of all US jurisdictions.⁸ Thirdly, two of the jurisdictions included in our analysis (the Australian jurisdictions of Northern Territory and Victoria) do not list any specific groups in their hate crime legislation, but extend protection to (in the case of Northern Territory) any “group of people”⁹ or (in the case of Victoria) any “group of people with common characteristics”.¹⁰ Finally, the table says nothing about the manner in which particular characteristics are protected, which, as chapter 4 set out, could be via specific offences or sentencing enhancement provisions. Some jurisdictions (such as England and Wales) use a combination of approaches and protect different characteristics under different provisions. Where this is the case, the table lists a characteristic as protected in a jurisdiction if it is protected under at least one of the hate crime provisions in force in that jurisdiction.

⁸ As noted in chapter 7, given the vast range of legislative provisions in the United States, this is neither feasible nor especially useful, given that it can be found elsewhere: see section 7.8.

⁹ Sentencing Act 1995 (Northern Territory) s 6A. The provision is discussed in more detail in section 7.1.3.

¹⁰ Sentencing Act 1991 (Victoria) s 5(2). The provision is discussed in more detail in section 7.1.7.

Table 2: Protected characteristics in selected jurisdictions (listed in order of frequency)¹¹

Race (including national and ethnic origin, colour)	ACT, NSW, Queensland, WA, Canada, E&W, SA (draft Bill), NZ, NI, South Australia, Ireland, District of Columbia, Florida, Hawaii, Iowa, Louisiana, Maine, Maryland, Nevada, Vermont, West Virginia
Religion/religious belief	ACT, NSW, Queensland, Canada, E&W, SA (draft Bill), NZ, NI, Ireland, District of Columbia, Florida, Hawaii, Louisiana, Maine, Maryland, Nevada, Vermont, West Virginia
Sexual orientation/sexuality	ACT, NSW, Queensland, Canada, E&W, SA (draft Bill), NZ, NI, Ireland, District of Columbia, Florida, Hawaii, Iowa, Louisiana, Maine, Maryland, Nevada, Vermont
Disability	ACT, NSW, Canada, E&W, SA (draft Bill), NZ, NI, District of Columbia, Hawaii, Iowa, Louisiana, Maine, Maryland, Nevada, Vermont
Gender identity/transgender identity	ACT, Queensland, E&W, SA (draft Bill), NZ, District of Columbia, Hawaii, Nevada, Vermont
Age	NSW, Canada, NZ, District of Columbia, Florida ("advanced age"), Iowa, Louisiana, Vermont
Sex	Canada, SA (draft Bill), District of Columbia, Iowa, Maine, Vermont, West Virginia
Gender	SA (draft Bill), Louisiana, Maryland
Gender expression (in addition to gender identity)	District of Columbia, Hawaii, Nevada
Homelessness/homeless status	District of Columbia, Florida, Maine, Maryland
Political affiliation	District of Columbia, Iowa, West Virginia
Language	NSW, Canada, SA (draft Bill)
HIV/AIDS status	ACT, NSW, SA (draft Bill)
Intersex status	ACT, SA (draft Bill)
Occupation or trade	SA (draft Bill), Louisiana
Albinism	SA (draft Bill)
Belief (unspecified)	SA (draft Bill)

¹¹ The abbreviations used in the table are as follows: ACT = Australian Capital Territory; NSW = New South Wales; WA = Western Australia; E&W = England and Wales; SA = South Africa; NZ = New Zealand, NI = Northern Ireland.

Birth	SA (draft Bill)
Culture	SA (draft Bill)
Family responsibility	District of Columbia
Marital status	District of Columbia
Matriculation	District of Columbia
Membership of an organisation	Louisiana
Personal appearance	District of Columbia
Membership of the travelling community	Ireland
Service in the armed forces	Vermont
Social origin	SA (draft Bill)
Residual category	NSW, Canada, NZ
No specification	Northern Territory, Victoria

The first thing that table 2 indicates is that the characteristics that are currently protected in Scotland (race, religion, sexual orientation, disability and transgender identity) are also the characteristics that are most commonly protected in the other jurisdictions included in our analysis.

Of those characteristics that are not currently protected in Scots law, the two that are most commonly protected in other jurisdictions are age and sex/gender. Aside from those that are already protected, age¹² and sex/gender¹³ are also the two characteristics that are most frequently argued for in the academic literature as groups that should be covered by hate crime legislation (if they are not covered already). In terms of other possibilities, the table notes five characteristics that are not presently covered in Scotland, but that are protected in more than one other

¹² J Garland, "Difficulties in defining hate crime victimization" (2011) 18 International Review of Victimology 25 at 31; HG Hull, "The not-so-golden years: why hate crime legislation is failing a vulnerable aging population" (2009) Michigan State LR 387; J Schweppe, "Defining characteristics and politicizing victims: a legal perspective" (2012) 10 Journal of Hate Studies 173 at 187.

¹³ M Angelari, "Hate crime statutes: a promising tool for fighting violence against women" (1994) 2 American University Journal of Gender and the Law 63; C Brown, "Legislating against hate crime in New Zealand: the need to recognise gender-based violence" (2004) 35 Victoria University of Wellington LR 591; G Choundas, "Neither equal or protected: the invisible law of equal protection, the legal invisibility of its gender based victims" (1995) 44 Emory LJ 1069; MA Walters and J Tumath, "Gender hostility, rape, and the hate crime paradigm" (2014) 77 MLR 563; SB Weisburd and B Levin, "On the basis of sex: recognizing gender-based bias crimes" (1993) 5 Stanford Law and Policy Review 21; JM Maher, J McCulloch and G Mason, "Punishing gendered violence as hate crime: aggravated sentences as a means of recognising hate as motivation for violent crimes against women" (2015) 41 Australian Feminist LJ 177.

jurisdiction, namely homelessness,¹⁴ political affiliation,¹⁵ language, HIV/AIDS status¹⁶ and occupation.¹⁷ The rest of the characteristics listed are covered in only one of the jurisdictions we analysed. Aside from those characteristics listed in the table, arguments have been put forward in the academic literature to include alternative sub-cultures (such as goths),¹⁸ those with mental health problems,¹⁹ and those who suffer from drug/alcohol dependency.²⁰

The final point worth noting is that three of the jurisdictions included in our analysis (New South Wales, Canada and New Zealand), as well as listing particular characteristics, do not limit protection to these specified groups. New South Wales has an enhanced sentencing provision which applies where the offence was motivated by hatred or prejudice against a group of people “such as” those listed (namely people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).²¹ New Zealand’s approach is similar, in that it is an aggravating factor in sentencing where the offence was committed because of hostility towards “a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity,

¹⁴ There is a substantial body of academic literature arguing that the homeless should be protected by hate crime legislation: see e.g. M Al-Hakim, “Making a home for the homeless in hate crime legislation” (2015) 30 *Journal of Interpersonal Violence* 1755; M Blake, “Geeks and monsters: bias crimes and social identity” (2001) 20 *Law and Philosophy* 121; Garland (n 12) at 34; Garland and Chakraborti (n 2) at 49; J Schweppe, “Defining characteristics and politicizing victims: a legal perspective” (2012) 10 *Journal of Hate Studies* 173 at 187.

¹⁵ Political affiliation has also been covered in Canada via the residual category of “any other similar factor”: see section 7.2.1.

¹⁶ There are also proposals in New South Wales to add “illness” to the list of characteristics protected there under the sentence aggravation provisions, which would include HIV/AIDS status: see section 7.1.2. HIV/AIDs status is already protected under the NSW hate speech provisions.

¹⁷ The academic debate here has tended to focus specifically on the protection of sex workers: see e.g. R Campbell, “Not getting away with it: linking sex work and hate crime in Merseyside”, in N Chakraborti and J Garland (eds), *Responding to Hate Crime: The Case for Connecting Policy and Research* (2014) 55; G Ellison and L Smith, “Hate crime legislation and violence against sex workers in Ireland: lessons in policy and practice”, Queen's University Belfast Law Research Paper No. 03 (2017); Garland and Chakraborti (n 2) at 49.

¹⁸ N Chakraborti and J Garland, “Reconceptualizing hate crime victimization through the lens of vulnerability and ‘difference’” (2012) 16 *Theoretical Criminology* 499 at 503; J Garland and P Hodkinson, “‘F**king freak! What the hell do you think you look like?’ Experiences of targeted victimization among goths and developing notions of hate crime” (2014) 54 *BJ Crim* 613; Schweppe (n 14) at 187.

¹⁹ Garland and Chakraborti (n 2) at 49.

²⁰ Ibid.

²¹ Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2)(h). The New South Wales Law Reform Commission has proposed that the residual category should be removed: see sections 5.3 and 7.1.2.

sexual orientation, age or disability".²² Canada's approach is slightly different, in that the relevant provision lists a number of characteristics (race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability and sexual orientation) but provides that sentence should also be enhanced if the offence was motivated by bias, prejudice or hate based on "any other similar factor".²³

5.2 How to determine which groups should be protected?

The issue of how to determine which groups should be protected is not an easy one and various different principled approaches have been advocated. One of the difficulties is that protection serves a symbolic purpose, both in terms of victims and offenders. As Schweppe puts it:²⁴

By singling out specific groups, the legislature is sending a clear message that these groups are deserving of more protection than others. This means that the legislature is classifying distinct victim types as more worthy of legal protection – legal protection which has an enormous impact on the offender during the sentencing stage. When the legislature chooses to discriminate between offenders, placing certain offenders into a category, any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind.

In other words, incorporating a particular group into hate crime legislation may send a message to members of that group that they are worthy of protection,²⁵ but by implication also a message to excluded groups that they are *not* worthy of protection,²⁶ or, as Brown puts it, that they are "second class citizens".²⁷ It also labels the offender who has targeted a protected group specifically as someone who has committed a "hate crime". For these reasons, consistency is important.²⁸ The symbolic function of protection would also seem to mitigate against selecting

²² Sentencing Act 2002 (NZ) s 9(1).

²³ Canadian Criminal Code s 718.2(a)(i). For further discussion of all of these provisions and the groups that have been protected under the residual categories concerned, see chapter 7.

²⁴ Schweppe (n 14) at 178.

²⁵ On this, see the discussion of the expressive/denunciatory justification of hate crime law in chapter 3.

²⁶ Blake (n 14) at 138.

²⁷ A Brown, "The 'who?' question in the hate speech debate: part 2: functional and democratic approaches" (2017) 30 Canadian Journal of Law and Jurisprudence 23 at 25.

²⁸ A Brown, "The 'who?' question in the hate speech debate: part 1: consistency, practical, and formal approaches" (2016) 29 Canadian Journal of Law and Jurisprudence 275 at 284; F Lawrence, *Punishing Hate: Bias Crime Under American Law* (1999) 14.

groups solely on the basis that they experience the majority of (or a substantial number of) hate based incidents in practice.²⁹

It has also been pointed out that much hate crime is intersectional – in other words victims are not necessarily targeted on the basis of a single characteristic.³⁰ As Walters and Tumath note, an offender may be “motivated by multiple and intersecting prejudices”.³¹ Someone may, for example, be a victim of hate crime on the basis of both their gender and their sexuality, or on the basis of a disability combined with economic deprivation. This does not necessarily impact upon the choice of protected groups (although it *might* be seen as an argument for a relatively wide range of groups to be protected), but it is an argument for drafting hate crime law in a way that does not require the offender to have been motivated by prejudice against a single protected group.

5.2.1 A group identity

At the most basic level, although it has occasionally been suggested that hate crime might be identified on a case by case basis, without legislative definition of specific protected groups,³² there is general agreement that what is first required is a *group that share common characteristics*.³³ This criterion alone, though, is far too broad. As such, Lawrence has argued that protection should be limited to what he terms “self-regarding groups”, as opposed to “random collections of people”³⁴ such as “people with blue eyes”.³⁵ Others have described this as a requirement for an “identity group”³⁶ or for a group based on “constitutive” or “integral” characteristics.³⁷

Even this, though, has been contested, on the basis that it is both over and under-inclusive. In terms of over-inclusivity, the notion of an identity group would potentially bring into the realm of protection groups such as “the wealthy”³⁸ or

²⁹ See Brown (n 28) at 294.

³⁰ Chakraborti and Garland (n 18) at 504; E Vipond, “Trans rights will not protect us: the limits of equal rights discourse, antidiscrimination laws, and hate crime legislation” (2015) 6 Western Journal of Legal Studies 1 at 18.

³¹ Walters and Tumath (n 13) at 590. See also the discussion of partial motivation in section 4.1.5.

³² See H Mason-Bish, “Beyond the silo: rethinking hate crime and intersectionality”, in N Hall et al (eds), *The Routledge International Handbook on Hate Crime* (2015) 24 at 31 (although she ultimately rejects the notion as “unwieldy”).

³³ Lawrence (n 28) 12.

³⁴ Ibid at 14.

³⁵ Ibid at 12.

³⁶ Garland (n 12) at 25.

³⁷ Brown (n 28) at 309.

³⁸ Al-Hakim (n 14) at 1762.

members of particular professions,³⁹ as these groups might well view their wealth or occupation as core to their identity. This is not necessarily a problem, if one thinks that such groups *should* be protected under the auspices of hate crime law,⁴⁰ but the danger is that the label of hate crime loses its significance if the categories of protected groups are stretched too far. In terms of under-inclusivity, Blake has argued against the requirement for an identity group, on the basis that it would tend to rule out inclusion of the homeless, as a homeless person would not regard his or her homelessness “as a key aspect of their self-understanding”,⁴¹ although once again this is only problematic if one holds the view that the homeless *should* be a protected group.

5.2.2 Immutability

It has sometimes been argued that protection should be limited to groups whose characteristics are “immutable” or difficult/impossible to change.⁴² The argument here would be that the harm is worse if there is nothing that one can do to change one’s identity to avoid being targeted.⁴³ But this can be quickly dismissed as a useful defining criterion as it implies that members of groups such as religious groups should not be protected because they can change or conceal their identity in order to avoid being a victim of hate crime.⁴⁴ This is clearly an unacceptable message for the law to send. Similar to immutability, the notion of characteristics that are “unchosen” has also been canvassed as a possible criterion relevant to determining which groups are protected,⁴⁵ but it suffers from the same disadvantages as the use of immutability. The fact that someone chose to follow a particular religion, for example, is not a good reason to refuse protection under hate crime law. This would be akin to, as Brown puts it, saying that women who choose to wear revealing clothes do not deserve legal protection against sexual harassment.⁴⁶

³⁹ Brown, (n 28) at 312. JV Roberts and AJA Hastings, “Sentencing in cases of hate-motivated crime: an analysis of subparagraph 718.2(a)(i) of the Criminal Code” (2001) 27 Queen’s LJ 93 give the example of doctors (at 123).

⁴⁰ Roberts and Hastings (n 39) seem to argue in favour of extending protection to doctors, based on a real life example of an offender in Canada who targeted doctors working at abortion clinics: see their discussion of this (unreported) case at 123. Others have argued that sex workers should be protected: see the sources cited at n 17.

⁴¹ Blake (n 14) at 129.

⁴² See FM Lawrence, “The punishment of hate: toward a normative theory of bias-motivated crimes” (1994) 93 Michigan LR 320 at 343; R Delgado, “Words that wound: a tort action for racial insults, epithets, and name calling” (1982) 17 Harvard Civil Rights-Civil Liberties LR 133 at 136.

⁴³ Blake (n 14) at 301.

⁴⁴ OSCE, *Hate Crime Laws* (n 2) 38; Schweppe (n 14) at 180.

⁴⁵ Brown (n 28) at 303.

⁴⁶ Ibid at 309.

5.2.3 History of discrimination/oppression

A more common approach is to argue that historical and social context is important⁴⁷ and that only those groups who have suffered a history of oppression and/or discrimination should be included as protected groups for the purposes of hate crime.

One of the first to argue along these lines was Lawrence, who proposed that protected groups ought to be defined on the basis of “societal fissure lines”, features that relate to “divisions that run deep in the social history of a culture”.⁴⁸ Others have argued similarly. Jenness and Grattet suggest that what is required is a “long-standing historical [axis] of discrimination and inter-group conflict upon which significant inequality is built and in which violence or threats of violence have historically been a means of maintaining inequality”.⁴⁹ Reidy likewise refers to a need for “historical, systemic, group-based oppression” and states:⁵⁰

There are two reasons for this, I think. First, history carries with it its own moral force; and a history of group-based oppression encumbers a society with special moral obligations, obligations consistent with but distinct from those generated by disproportionate vulnerabilities alone. Second, long lasting, historical, group-based oppression is rarely accomplished without significant state or governmental action. Thus, where a particular disproportionate vulnerability, or, more likely, a general pattern of such vulnerabilities, arises out of historical oppression, there are good reasons to think that the state or government, in addition to citizens collectively, has a special obligation to respond.

A definition that relies on a past history of oppression/power relationships would probably exclude age as a protected characteristic. It could, however, plausibly be interpreted to include gender, on the basis of the lengthy history of the oppression of women.⁵¹

Others have placed less stress on the need for a lengthy history of oppression/discrimination, as this “narrows the scope too much” and “fails to take

⁴⁷ OSCE, *Hate Crime Laws* (n 2) 38.

⁴⁸ Lawrence *Punishing Hate* (n 28) 12.

⁴⁹ V Jenness and R Grattet, *Making Hate a Crime* (2001) 122. See similarly AR Baehr, “A feminist liberal approach to hate crime legislation” (2003) 34 Journal of Social Philosophy 134 at 147.

⁵⁰ DA Reidy, “Hate crimes, oppression and legal theory” (2002) 16 Public Affairs Quarterly 259 at 275.

⁵¹ Choundas (n 13) at 1072.

into consideration attacks on newly formed minorities who may not [have been] historically disadvantaged".⁵² Bakalis has suggested that the groups protected by hate crime legislation should be the same as those protected under civil equality legislation,⁵³ but this seems unnecessary, at least in the UK context, where the Equality Act 2010 includes marriage and civil partnership status as a protected characteristic.⁵⁴ A preferable formulation might be that used by Perry, in her oft-quoted definition of hate crime,⁵⁵ of "already stigmatized and marginalized groups".⁵⁶ This formulation would open the door to gender and (possibly) age being included as protected characteristics. It might, however, be over-inclusive if all that is required is that a group is stigmatised or marginalised. This suffers from some of the same problems as approaches based on vulnerability (discussed below) and could, for example, make it difficult to exclude less sympathetic (but still marginalised) groups, such as those who are targeted because they have been convicted of sexual offences against children.⁵⁷

5.2.4 Vulnerability and difference

An alternative approach is to define protected groups around the notion of vulnerability. The main advocates of this approach are Chakraborti and Garland,⁵⁸ who have argued that what is important is not whether a group has historically suffered discrimination or oppression, but whether the group is vulnerable to violence because of their perceived difference. This approach, they state:⁵⁹

...emphasizes the real harm that such hate crime, or targeted victimization, can have. Such an approach would acknowledge that all vulnerable communities and social groups, irrespective of minority or majority status,

⁵² Al-Hakim (n 14) at 1771.

⁵³ C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) LS (advance eprint available online) at 17. See also AM Danner "Bias crimes and crimes against humanity: culpability in context" (2002) 6 Buffalo Crim LR 389, who suggests that protection should be extended to all "groups that experience discrimination in the community" (at 422).

⁵⁴ Equality Act 2010 s 8. Including marriage and civil partnership as a protected characteristic is not necessary to capture incidents motivated by prejudice towards gay marriage. As partial motivation suffices for the sentencing aggravation provisions (see section 2.1.1), this would be covered by including sexual orientation as a protected characteristic.

⁵⁵ See chapter 1.

⁵⁶ B Perry, *In the Name of Hate: Understanding Hate Crimes* (2001) 10.

⁵⁷ As issue that is discussed further below.

⁵⁸ See e.g. Chakraborti and Garland (n 18); Garland (n 12); Garland and Chakraborti (n 14).

⁵⁹ Garland and Chakraborti (n 2) at 49.

can be the subject of hate crime, and that this violence can have a devastating impact.

An approach based solely on groups who are more vulnerable to attack because of their perceived difference, would – if difference is interpreted to include physical weakness or “being an easy target”⁶⁰ – bring groups into the ambit of protection such as the elderly and the homeless who may not qualify for protection under other models. Indeed, some have argued for the inclusion of age as a protected characteristic under hate crime legislation precisely on this basis.⁶¹

There are, however, a number of problems with choosing protected groups on the basis of their vulnerability. First, it has been seen by some as an undesirable term to focus on, implying as it does that the groups concerned are weak and helpless.⁶² When Mason-Bish interviewed criminal justice professionals, policy makers and campaign group representatives about hate crime,⁶³ she found that some gave this as a reason why they did not agree with the inclusion of age as a characteristic that should be protected in hate crime legislation. One respondent commented:⁶⁴

My alternative view is that the older people that we work with feel very uncomfortable self-identifying as victims of a hate crime. We did some work with older victims of domestic violence and they felt uncomfortable identifying themselves as victims of domestic violence but they felt a lot more uncomfortable identifying as victims of hate crime. They wouldn't see it motivated by hatred of them as an old person.

Chakraborti and Garland acknowledge this issue, but argue that vulnerability “encapsulates the way in which many hate crime perpetrators view their target” far better than notions of oppression or subordination.⁶⁵ Most hate crimes, they say, “tend to be committed by relatively ordinary people in the context of their everyday lives” who target their victims not through a mechanism of oppression or

⁶⁰ It is not entirely clear whether Garland and Chakraborti do see “difference” in this way – some of their work suggests that more than simply being an “easy target” is required.

⁶¹ Hull (n 12) at 416.

⁶² Al-Hakim (n 14) at 1770.

⁶³ H Mason-Bish, “Examining the boundaries of hate crime policy: considering age and gender” (2013) 24 Criminal Justice Policy Review 297. She conducted 50 in-depth interviews with policy makers, criminal justice officials and campaign group representatives in England and Scotland (for an account of her methods, see *ibid* at 302).

⁶⁴ *Ibid* at 305.

⁶⁵ Chakraborti and Garland, “Reconceptualizing hate crime victimization” (n 18) at 507.

subordination but act instead “from boredom, jealousy, convenience or unfamiliarity with ‘difference’”.⁶⁶

A second difficulty with defining hate crime around vulnerability is that the message conveyed by labelling a crime as a hate crime becomes diluted and the category of hate crime “loses its special symbolic power”.⁶⁷ If a vulnerability based approach to target group selection was combined with a discriminatory selection model (i.e. a model that does not require evidence that the offender bore hostility towards the group of which the victim was perceived to be a member), the ambit of hate crime could potentially become very broad indeed. That is not to say that targeting a vulnerable victim should not be an aggravating factor in sentencing – rather it is to say that this should be reflected on the basis of the victim’s *vulnerability*,⁶⁸ not on the basis that the offender has committed a *hate crime*.⁶⁹ As Hare puts it:⁷⁰

The main reason for the enhanced penalty is that [hate] crimes are particularly despicable because the perpetrator is actuated by a form of hatred for the victimized group, a widespread and growing phenomenon with detrimental effects on the whole of society. Elderly or disabled victims are selected not because the perpetrator hates the elderly or the disabled, but because he anticipates less resistance from such a victim. Protection against such offences thus properly lies in the realm of enhanced penalties for crimes against especially vulnerable members of the community. Such factors are already (and adequately) dealt with as a part of sentencing discretion. Moreover, specific statutory provision would present extreme practical difficulties as the class of those regarded as especially vulnerable is unlikely to prove capable of adequate definition or to remain closed.

That said, it is not impossible to conceive of cases involving vulnerable groups (such as the elderly) where the victim *was* targeted not because of their vulnerability but because of a genuine hostility possessed by the offender towards that group (or perhaps because of a combination of both of these things). Furthermore, if it is thought that the offender who selects a vulnerable victim because they are an “easy target” should not be encompassed within the boundaries of hate crime, it is not necessary to exclude entire groups from the ambit of protection in order to achieve

⁶⁶ Ibid at 506.

⁶⁷ J Jacobs and K Potter, *Hate Crimes: Criminal Law and Identity Politics* (1998) 78.

⁶⁸ As noted in section 3.2, targeting a vulnerable victim is a recognised sentencing aggravation aside from any issues of hate crime.

⁶⁹ Danner (n 53) at 427; Baehr (n 49) at 144; A Kaupinnen, “Hate and punishment” (2015) 30 *Journal of Interpersonal Violence* 1719 at 1725.

⁷⁰ I Hare, “Legislating against hate: the legal response to bias crimes” (1997) 17 OJLS 415 at 433.

this. It can be achieved instead through the use of a legislative model that requires a motive of hostility, prejudice or suchlike.⁷¹

A third difficulty in defining protected groups around notions of vulnerability is that it makes it difficult to exclude from protection groups that are rather less sympathetic than those that have traditionally been protected.⁷² The point is illustrated by two Australian cases, *R v Robinson*⁷³ and *Dunn v The Queen*,⁷⁴ where the New South Wales courts have extended the hate crime legislation applicable in that jurisdiction⁷⁵ to cover offences that were motivated by hatred for “paedophiles”.⁷⁶ On a notion of protected groups based on vulnerability and difference, it is difficult to see how to exclude such a group from the ambit of hate crime. This is, of course, not problematic if one takes the view that such groups *should* be included. But Mason argues persuasively that they should not, stating that undoubtedly:⁷⁷

... the community and the state have a responsibility to appropriately address the vulnerability of child sex offenders, or adults who are assumed to have sexually assaulted children, to intimidation and violence. The question we need to ask here, however, is whether hate crime statutes are the appropriate mechanism for doing this.

She continues:⁷⁸

[T]he problem with applying hate crime sentencing laws to child sex offenders as a protected victim group is that it sends a message of acceptance, equality and state affirmation for a form of conduct that is illegal, harmful and unacceptable according to community standards. The claim that hate crime laws should apply to adults who are victimized because they are believed to have sex with children assumes that there is no meaningful distinction

⁷¹ See the discussion of models of hate crime in chapter 4.

⁷² G Mason, “Victim attributes in hate crime law: difference and the politics of justice” (2014) 54 BJ Crim 161 at 167.

⁷³ [2004] NSWSC 465 (Supreme Court of NSW).

⁷⁴ [2007] NSWCCA 312 (Court of Criminal Appeal of NSW).

⁷⁵ Namely section s 21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999, which provides that it will be an aggravating factor at sentencing if “the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)”.

⁷⁶ For further discussion of the cases, see section 7.2.1 and G Mason, “Prejudice and paedophilia in hate crime laws: *Dunn v R*” (2009) 34 Alternative LJ 253 at 167-169; Mason (n 72) at 167-169.

⁷⁷ Mason (n 72) at 169.

⁷⁸ Ibid at 171.

between this form of difference and other forms of difference that are commonly recognized as rendering people vulnerable to prejudice-related crime (as if the similarities outweigh the differences).

In other words, by including a group within the ambit of the protection provided by hate crime law, a statement is being made about the value of that group within society and the right of that group to be treated with tolerance and respect.⁷⁹ Extending that message to those who have committed sexual offences against children extends, as Mason puts it, a “degree of legitimacy to adults who sexually assault children”⁸⁰ and is to “affirm, even if unintentionally, the right of this group of people to pursue that activity as well as its societal value”.⁸¹

It has been suggested that using “disadvantage” as an alternative concept to vulnerability addresses these problems,⁸² but it is hard to see how it does – a case could be made that child sex offenders are a disadvantaged group as much as they are a group who are vulnerable to attack.

5.2.5 Adding in a notion of injustice

A more promising approach than the vulnerability approach is perhaps Mason’s own suggestion, which is to approach the question of which groups should be protected around notions of perceived difference, but to extend protection only to those who are unjustly marginalised in society because they are perceived as being different. Mason concludes that “at the heart of the rationale for the distinct protection and punishment imposed by these laws is the construction of hate crime as a problem of injustice: unjustified or unfair intolerance, inequality and disrespect towards people because of their assumed difference”.⁸³ She suggests that:⁸⁴

...we need to tether difference, as a criterion for victim protection, to a politics of justice that limits protected attributes to forms of difference that have a *justifiable* claim to affirmation, equality and respect for the attribute that makes them different.

What this means in practice in terms of which groups are chosen for protection under hate crime law may be little different from choosing to protect groups who

⁷⁹ See the discussion of the expressive function of hate crime law in section 3.3.

⁸⁰ Mason (n 72) at 170.

⁸¹ Ibid at 175. See similarly Al-Hakim (n 14) at 1772.

⁸² Al-Hakim (n 14) at 1773.

⁸³ Mason (n 72) at 174.

⁸⁴ Ibid at 175 (emphasis added).

are stigmatised or marginalised in society,⁸⁵ except that on Mason's approach, in order for a group to have protected status, such stigma or marginalisation (and so on) would need to be *unjustified*. Adding in this notion of injustice means that it is possible to avoid extending hate crime protection to marginalised groups (such as paedophiles) who engage in illegitimate activities.

5.3 Conclusion

At present, the characteristics protected (in one form or another) by Scots law's hate crime provisions are race, religion, sexual orientation, disability and transgender identity. If protection is to be extended to other groups, one possible approach would be to avoid specifying characteristics at all (as some of the Australian jurisdictions have done), but this has two major disadvantages. It risks inconsistency and, perhaps most importantly, the declaratory function of the legislation, in expressing that members of the groups concerned are equal and valued members of society, is lost. This symbolic function of hate crime legislation is an important consideration when it comes to determining which groups are protected. Incorporating a particular group into hate crime legislation can send a message to members of that group that they are valued citizens who are worthy of protection, but by implication may also send the opposite message to groups who are excluded.

If protection is to be extended to specific groups that are not presently covered by the Scottish legislation, it is useful to look both to practice in other jurisdictions and to the broader principles upon which group selection might be based. The two characteristics that are not presently protected under Scots law but that are most commonly protected in other jurisdictions are age and sex. A principled case for including these characteristics within the ambit of hate crime legislation is not difficult to make – it could be done, for example, on the basis that women and the elderly are groups who experience (unjustified) marginalisation in society. A case could also be made for including age on the basis of vulnerability although, as was noted earlier, selecting groups on the basis of their vulnerability does suffer from a number of drawbacks.

As well as extending the list of protected characteristics, consideration might also be given to including a residual category in Scottish hate crime legislation, as some other jurisdictions (namely Canada, New South Wales and New Zealand) do. This means that the list of protected groups is not closed and has the advantage that the

⁸⁵ Discussed in section 5.2.3.

courts can respond to societal changes or other unforeseen circumstances. The disadvantage of such an approach is that it can lead to unanticipated and unwanted consequences. This is evident from New South Wales, where the fact that the list of protected groups is not exhaustive has allowed the courts to extend hate crime provisions to offenders who were motivated by hostility towards paedophiles,⁸⁶ a troubling outcome given the expressive value that hate crime laws have in terms of signalling society's respect for the groups that are protected. It is perhaps instructive in this regard that the New South Wales Law Commission has recommended amending the law so that the list of protected groups becomes a closed list without a residual category.⁸⁷

As a final point, it is worth noting that the choice of which characteristics to protect via hate crime law is not entirely divorced from either (a) the justifications for punishing hate crime more severely or (b) the model of legal protection employed. Different justifications for punishing hate crime more severely have different implications for the selection of protected groups – if one is persuaded by the harm based justification, for example, that might lead one to choose protected groups in part on the basis that some groups are more severely affected in terms of the psychological harm caused by hate crime. Likewise, if one is persuaded by the denunciatory justification, one might select the protected groups in part because of the need to send the message to a particular group in society that they are valued and worthy of protection. In terms of the method used for protection, choosing a discriminatory selection model means that the category of crime that is marked out as hate crime is potentially wider than that under an animus model, so one might choose to mitigate this by making the number of protected groups more limited.

⁸⁶ See in particular *Dunn v Regina* [2007] NSWCCA 312 at para 32.

⁸⁷ New South Wales Law Reform Commission, *Sentencing* (Report 139, 2013) para 4.186. See section 7.2.1 for further discussion.

CHAPTER 6: HATE SPEECH AND ONLINE HATE CRIME

The remit of the Hate Crime Legislation Review includes the provisions commonly referred to as the “stirring up” offences in the Public Order Act 1986, which criminalise certain forms of hate speech. These provisions, which form part of UK-wide legislation, have recently been the subject of extensive (albeit narrowly focused) work by the Law Commission.¹ Given this recent, detailed and extensive work, this chapter provides a high-level overview of the legal issues related to hate speech in a comparative perspective, including the applicability of legislation to online hate speech.

6.1 What is hate speech?

Although hate crime and hate speech are connected, at least to some degree, they are distinct concepts that each raise different issues in the criminal law context. Hate crime is, broadly speaking, crime committed against a member (or members) of a specific group with an accompanying motive of hatred.² The ‘baseline’ conduct is already criminal – it is the motive of the perpetrator that marks it out as hate crime and, potentially, as deserving greater punishment. Hate speech, on the other hand, has been defined as speech that “expresses, encourages, stirs up, or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality, and sexual orientation”.³ Hate is primarily relevant not as the motive for the crime, but as a possible effect of the perpetrator’s conduct.⁴

It is also something of a misnomer to talk about hate *speech*,⁵ as hate speech offences generally cover not merely verbal expressions, but also non-verbal behaviour, the display or distribution of printed material and the publication of

¹ *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014). The Commission also published detailed appendices to its 2013 consultation paper including a paper on hate crime and freedom of expression under the ECHR (Appendix A) and a history of hate crime legislation (Appendix B). All these documents are available at <http://www.lawcom.gov.uk/project/hate-crime/>. In addition, a separate academic paper was commissioned dealing particularly with the question of extending the stirring-up offences to disabled and transgender persons: J Stanton-Ife, *Criminalising Conduct with Special Reference to Potential Offences of Stirring Up Hatred against Disabled or Transgender Persons* (2013).

² Or, as discussed in chapter 1, other motives such as prejudice or hostility.

³ B Parekh, “Is there a case for banning hate speech?”, in M Herz and P Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (2012) 37 at 40.

⁴ J Waldron, *The Harm in Hate Speech* (2012) 35.

⁵ Ibid 37.

material online.⁶ This is an important point as conceiving of hate speech merely as verbal expression to a live audience neglects the fact that printed material or material published online can, as Waldron puts it, “become a permanent or semi-permanent part of the visible environment in which our lives, and the lives of vulnerable minorities, have to be lived”.⁷ Printed or published material also has the potential to reach a much larger audience, especially where online material is concerned.

Unlike hate crime, where the underlying conduct is already criminal, and debate centres around whether it should be punished more severely than non-hate crime, the central question in relation to hate speech is whether there is a case for its criminalisation at all. This chapter starts out by considering this and then proceeds to examine models of criminalisation before, finally, the distinct issues relating to online hate speech are outlined. Our main concern here is with criminal offences specifically of stirring up hatred, rather than with incitement offences more generally. The stirring up offences raise particular issues because the intended or likely result of the accused’s conduct (“hatred”) is not in itself a criminal offence,⁸ unlike incitement offences more generally, which target the incitement of behaviour that is itself criminal.

6.2 What is the harm of hate speech?

Two pathways have been identified through which harm might result from hate speech – direct and indirect.⁹ Direct harms are those that might result from members of the targeted community being exposed to hate speech.¹⁰ Indirect harms are those that might result from persons outside the targeted group changing their behaviour or attitudes towards members of the targeted group.¹¹ Each will be discussed in turn.¹²

⁶ For example, the incitement to racial hatred offences contained in the Public Order Act 1986 cover the use of words, behaviours or displays of written material (under s 18) and the publication or distribution of written material (under s 19): see section 2.1.1 above.

⁷ Waldron, *The Harm in Hate Speech* (n 4) 37.

⁸ D Nash and C Bakalis, “Incitement to religious hatred and the ‘symbolic’: how will the Racial and Religious Hatred Act 2006 work?” (2007) 28 Liverpool LR 349 at 367; LW Sumner, “Criminalizing expression: hate speech and obscenity”, in J Deigh and D Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (2011) 17 at 27.

⁹ Sumner (n 8) at 24.

¹⁰ Ibid at 24.

¹¹ Ibid at 24.

¹² The discussion here summarises the main harms that might result from hate speech. For a fuller account of these and of the case for criminalisation, see chapter 4 of Law Commission, *Hate Crime: The Case for Extending the Existing Offences* (Law Com CP No 213) and the paper commissioned to support the Law Commission project: Stanton-Ife (n 1).

6.2.1 Direct harms

There are two ways in which the direct harm argument has been made – in terms of psychological harm and in terms of harm to dignity. The psychological harm argument is that if members of the targeted group are directly exposed to hate speech, this is likely to result in the same sort of psychological harm that has been shown to result from hate crime, such as depression or low self-esteem.¹³

Evidencing this effect empirically, however, is far more difficult to do than it is for hate crime,¹⁴ where it has been possible to compare hate crime victims with a control group of parallel non-hate crime victims.¹⁵ As such, doubts have been expressed over whether hate speech can be linked to psychological harm in the same way.¹⁶

Notwithstanding the difficulties of doing so, a small handful of studies have attempted to demonstrate an empirical link between hate speech and psychological harm. Boeckman and Liew, in a study involving 53 Asian-American students, presented the participants with stimulus materials relating to three scenarios, all of which involved people standing in a line to pay for groceries.¹⁷ The first involved a theft with no racial element, the second involved a customer making denigrating remarks about African-Americans and the third involved similar remarks about Asian-Americans.¹⁸ Before and after being exposed to each scenario, the participants were asked questions designed to rate their emotional state and self-esteem.¹⁹ No significant effect was found in terms of emotional state, but the researchers did find a significant decrease in self-esteem after the participants heard the Asian-American insult, an effect that was not present in relation to either of the other two scenarios.²⁰ The scale of the study and its lack of realism mean, however,

¹³ See e.g. KA Appiah, “What’s wrong with defamation of religion?”, in M Herz and P Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (2012) 164 at 174; R Delgado, “Words that wound: a tort action for racial insults, epithets, and name calling” (1982) 17 Harvard Civil Rights-Civil Liberties Law Review 133 at 146; TJ Webb, “Verbal poison – criminalizing hate speech: a comparative analysis and a proposal for the American system” (2011) 50 Washburn LJ 445 at 468; R Delgado and J Stefancic, “Four observations about hate speech” (2009) 44 Wake Forest LR 353 at 362.

¹⁴ T Jay, “Do offensive words harm people?” (2009) 15 Public Policy, and Law 81 at 84.

¹⁵ See section 3.1.1 above.

¹⁶ E Barendt, “Religious hatred laws: protecting groups or belief?” (2011) 17 Res Publica 41 at 51; JT Bennett, “The harm in hate speech: a critique of the empirical and legal bases of hate speech regulation” (2016) 43 Hastings Constitutional LQ 445 at 499.

¹⁷ RJ Boeckmann and J Liew, “Hate speech: Asian American students’ justice judgments and psychological responses” (2002) 58 Journal of Social Issues 363 at 372. It is unclear from the account of the experiment whether the materials were written or on video.

¹⁸ Ibid at 373.

¹⁹ Ibid at 374.

²⁰ Ibid at 377.

that little can be reliably concluded from it, although the researchers do suggest that direct experience of hate speech would “no doubt result in more extreme and enduring consequences”.²¹

Another attempt to evidence the psychological harm of hate speech is that of Leets, who asked 120 participants (who all self-identified as either Jewish or gay) to complete a questionnaire where they were presented with examples of hate speech and then asked to answer the question “if you had been the recipient of the comments above, do you think you would have experienced any short term/long term consequences?”²² A total of 66 per cent of the Jewish respondents and 92 per cent of the gay respondents reported that they would experience short term consequences (which tended to be emotional, such as an effect on self-esteem) and 55 per cent and 65 per cent respectively reported that they would experience long term consequences (which tended to be behavioural, such as choosing to hide their identity).²³ Once again, however, the small scale of the study, the lack of realism, the absence of a control group and the fact that the participants were speculating about the likely effect of the hate speech, rather than reporting directly on their own experiences, mean that it is not especially useful in evidencing psychological harm.

A rather different method of approaching the issue was adopted by Mullen and Smyth, who examined suicide rates among European ethnic groups in the 1950s and attempted to correlate these with the severity of hate speech targeting those groups in the same time period.²⁴ They found that the degree of negativity of the language used about the group was a significant independent predictor of the suicide rate for that group, after other factors such as group size and the suicide rate for the group in its country of origin were accounted for.²⁵ The researchers themselves, however, acknowledge the limitations of the exercise, which were many, the primary one being that alternative explanations of the differences in suicide rates could not be ruled out.²⁶

²¹ Ibid at 377.

²² L Leets, “Experiencing hate speech: perceptions and responses to anti-semitism and antigay speech” (2002) 58 Journal of Social Issues 341 at 348.

²³ Ibid, table 3 at 352.

²⁴ B Mullen and J Smyth, “Immigrant suicide rates as a function of ethnophaulisms: hate speech predicts death” (2004) 66 Psychosomatic Medicine 343. The researchers drew on linguistic research to classify the language that was commonly used about particular minority groups at the time – see the account of their methodology at 344.

²⁵ Ibid at 345.

²⁶ Ibid at 346.

It might be concluded on the basis of this evidence that the psychological harm argument is unconvincing. We should, perhaps, not be too quick to reach this conclusion. While it is near impossible to demonstrate empirically, the proposition that being exposed to hate speech is psychologically harmful is not an implausible one, especially when the cumulative effect of multiple exposures over time is taken into account.²⁷ As Stanton-Ife puts it, “one hateful message posted in a window or uploaded onto the internet may itself make little difference to the lives of those in the groups against which the hate was directed, but a mass of such material could be very damaging”.²⁸

The second way in which the direct harm argument has been made is in terms of harm to the dignity and sense of security of members of the targeted groups. The leading proponent of this argument is Jeremy Waldron, who argues that:²⁹

... dignity and the assurance that comes with it are public goods, constituted by what thousands or millions of individuals say and do. Our society is heavily invested in the provision of those goods. The point of hate speech is to detract from that provision – to undermine it and establish rival goods that indicate (to fellow racists, to members of vulnerable groups, and to society generally) that the position of some minority or other is by no means as secure as the rest of the world would like to affirm. The point of hate speech restrictions ... is to protect the first set of public goods from being undermined in this way.

Waldron stresses that what is important in thinking about the harm to dignity that results from hate speech is the accumulated effect of multiple instances of hate speech over time. It creates, he argues, “something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word”.³⁰

The dignity argument is different to the psychological harm argument in that it does not depend on empirical evidence of harm. Waldron states quite clearly that a person’s “dignity or reputation has to do with how things are with respect to them in society, not how things feel to them”.³¹ It is about ensuring a climate in which

²⁷ C Calvert, “Hate speech and its harms: a communication theory perspective” (1997) 47 *Journal of Communication* 4 at 6; R Moon, “Hate speech regulation in Canada” (2008) 36 *Florida State University LR* 79 at 82.

²⁸ Stanton-Ife, *Criminalising Conduct* (n 1) para 115.

²⁹ Waldron, *The Harm in Hate Speech* (n 4) 154. See also Appiah (n 13) at 174; Delgado (n 13) at 143; JC Knechtle, “When to regulate hate speech” (2006) 110 *Penn State LR* 539 at 551.

³⁰ Waldron, *The Harm in Hate Speech* (n 4) 5. See similarly Parekh (n 3) at 45.

³¹ Waldron, *The Harm in Hate Speech* (n 4) 106.

equal respect is accorded to all members of society. In this, Waldron's account is not dissimilar to that of Duff who, writing in the context of racist hate speech, argues that hate speech constitutes a public wrong:³²

... because it denies its victims' membership of the community to which the racist belongs and casts doubt on their legitimate membership of the polity. It attacks their civic standing in the community – an attack that is particularly disturbing when, as is typically the case, the insulted group also suffers from other kinds of systemic disadvantage in that society.

6.2.2 Indirect harms

There are two main harms that have been identified as indirectly resulting from hate speech. The first is that it might lead to violence or public disorder, either because it encourages the commission of hate crimes against members of the targeted groups or because members of the targeted groups themselves respond in a violent or disorderly manner.³³ It is precisely this that was the justification advanced for the creation of the offences that are now contained in sections 18 to 23 of the Public Order Act 1986.³⁴

The difficulty with this argument is that reliably establishing a causal link between hate speech and violence or disorder is very difficult.³⁵ It might also be regarded as unfair to impose criminal liability upon a speaker for such a remote harm, in the sense that the direct cause of the harm is another autonomous agent, who is motivated by the instance of hate speech to engage in violence or public disorder.³⁶

The second indirect harm that might result from hate speech is that by promoting negative stereotypes about the targeted group, it might lead to an increase in

³² A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2009) 134. Duff uses the language of public wrongs rather than that of harms because his account of criminalisation is based on the former rather than the latter. In the present context, however, the difference is not a significant one.

³³ Appiah (n 13) at 174; Knechtle (n 29) at 546; A Tseis, "Dignity and speech: the regulation of hate speech in a democracy" (2009) 44 Wake Forest LR 497 at 505. Some commentators have utilised historical examples to draw a link between hate speech and genocide: see Delgado and Stefancic (n 13) at 370; Webb (n 13) at 467.

³⁴ Law Commission, Appendix B (n 1) para B.60. For discussion of these offences, see sections 2.2.1 and 6.3.1.

³⁵ V Pejchal and K Brayson, "How should we legislate against hate speech? Finding an international model in a globalized world", in J Schweppe and MA Walters (eds), *The Globalization of Hate: Internationalising Hate Crime?* (2016) 247 at 253; Sumner (n 8) at 25.

³⁶ Stanton-Ife, *Criminalising Conduct* (n 1) para 108.

discriminatory treatment of members of that group in society.³⁷ This claim has been met with some scepticism on the basis that there is little evidence that hate speech is a cause of inequality and that, even if this could be established, the harm is too remote to justify criminalisation of the speaker.³⁸

There has been one attempt to demonstrate empirically the proposition that hate speech causes wider societal discrimination. Greenberg and Pyszczynski conducted an experiment where 133 participants (who were all students) watched a debate, before being exposed to either a racist slur, a non-racist slur or no stimulus (from a person who was planted in the experiment).³⁹ Participants were then asked to evaluate the performance of the debater. Those who heard the racist slur rated the black debater's performance significantly lower than those who did not (when all other factors were accounted for).⁴⁰ The small scale of the study and its limited ecological validity, however, mean that it is hard to regard it as convincing evidence of a causal link between hate speech and societal discrimination.

That said, much like the issue of psychological harm to members of the targeted group, while it is difficult to evidence empirically, it is not implausible that the cumulative effect of instances of hate speech over time could be to spread negative attitudes towards members of the targeted group throughout society and that this could translate into instances of discrimination.⁴¹ If such a link can be made, there is convincing evidence that discrimination has further harmful consequences in terms of the mental and physical health of minority groups.⁴²

6.2.3 Harm and the case for criminalisation

As the previous sections have outlined, there are direct and indirect harms that might result from hate speech. In terms of the former, hate speech may result in psychological harm or harm to the dignity of members of the targeted groups. In terms of the latter, hate speech may lead to violence or public disorder or to societal discrimination. None of these claims are easy to evidence empirically, but the case

³⁷ Appiah (n 13) at 174; Tseis (n 33) at 514; Pejchal and Brayson (n 35) at 255.

³⁸ Bennett (n 16) at 478; I Hare, "Crosses, crescents and sacred cows: criminalising incitement to religious hatred" [2006] PL 521 at 531-532.

³⁹ J Greenberg and T Pyszczynski, "The effect of overheard ethnic slur on evaluations of the target: how to spread a social disease" (1985) 21 Journal of Experimental Social Psychology 61 at 65.

⁴⁰ Ibid at 67.

⁴¹ MJ Matsuda "Public response to racist speech: considering the victim's story" (1989) 87 Michigan LR 2320 at 2339; Calvert (n 27) at 11; Parekh (n 3) at 45.

⁴² Y Paradies et al, "Racism as a determinant of health: a systematic review and meta-analysis" (2015) 10(9) PLoS ONE, e0138511; EA Pascoe and L Smart Richman, "Perceived discrimination and health: a meta-analytic review" (2009) 135 Psychological Bulletin 531.

for all of them becomes more convincing when taking into account the cumulative effect of multiple instances of hate speech rather than examining each individual instance in isolation.

As a concluding point, it should be noted that evidence of harm does not necessarily establish the case for criminalisation. There are a number of competing theoretical accounts of how criminalisation decisions should be made, but on all of these accounts additional considerations arise, such as whether the harm or wrong in question is sufficiently serious to warrant the attention of the criminal law, whether criminalisation might have adverse side effects or whether alternative forms of regulation might be more appropriate or effective.⁴³

6.3 Legislative responses to hate speech: the general framework

As the outline below demonstrates, the stirring up offences relating to racial hatred in Scots law are relatively broad when viewed in comparative perspective, in particular because they do not require proof of an intention to stir up racial hatred but permit conviction on the basis that “having regard to all the circumstances racial hatred is likely to be stirred up thereby”.⁴⁴ This is in contrast to requirements of intention or at least recklessness found in many other jurisdictions. Against this, it should be noted that not all legislative frameworks are based on the stirring up of hatred: some Australian jurisdictions include offences which extend to inciting serious contempt or severe ridicule. Requirements of intention or recklessness mean, however, that it would never be sufficient for conviction in these jurisdictions to prove only that the conduct concerned was likely to have this effect.

In contrast to the approach taken to *mens rea*, the Scottish offences are narrower in the range of groups which they protect. Aside from the offence relating to racial hatred, there is an offence of communicating threatening material with the intention of stirring up hatred on religious grounds⁴⁵ (a narrower provision than the suite of offences relating to the stirring up of racial hatred) but, aside from the offences in section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (which can only be committed in the context of a regulated football match), there are no stirring up offences relating to other characteristics such as, for example, sexual orientation, disability or gender

⁴³ For a comprehensive account of the different approaches, and the competing concerns each one raises in respect of hate speech, see Stanton-Ife, *Criminalising Conduct* (n 1) paras 1-119.

⁴⁴ Public Order Act 1986 ss 18(1)(b), 19(1)(b) and 23(1).

⁴⁵ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 s 6.

identity.⁴⁶ This would not, of course, prevent the stirring up of hatred on other grounds being prosecuted as another criminal offence (such as breach of the peace or threatening and abusive behaviour⁴⁷), and such offences could be prosecuted as aggravated ones where the characteristic concerned is encompassed by the existing sentence aggravation provisions.⁴⁸

6.3.1 The “stirring up” offences

The principal offences in the United Kingdom which address hate speech are those which are commonly referred to as the “stirring up” offences. The first such offence was created by section 6(1) of the Race Relations Act 1965, which was in the following terms:

A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins –

- (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
- (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,

being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins.

While current legislation remains based on the concept of “stirring up”, it has developed substantially since then, in the following ways:⁴⁹

- There are now three principal separate offences under sections 18, 19 and 23 of the Public Order Act 1986.⁵⁰ The first two correspond broadly to parts (a) and (b) of section 6(1) of the 1965 Act, dealing with the use of words or behaviour or the display of written material (section 18) and publishing or distributing written material (section 19). Section 23 creates a separate

⁴⁶ These are mentioned here as the three characteristics which are either protected or have been considered by the Law Commission for protection in England and Wales: see section 6.4.5. Section 6.4 outlines the range of characteristics which have been protected in other jurisdictions. Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 is discussed in chapter 8.

⁴⁷ Criminal Justice and Licensing (Scotland) Act 2010 s 38.

⁴⁸ See section 2.1 above.

⁴⁹ See also section 2.2.1 where the text of these provisions is set out in full.

⁵⁰ See also s 20 (public performance of a play); s 21 (distributing, showing or playing a recording), s 22 (broadcasting or including programme in cable programme service).

offence of possession of racially inflammatory material with a view to distribution.⁵¹

- The modern offences do not require proof of an intention to stir up racial hatred: it is sufficient either that the accused had such an intention or that “having regard to all the circumstances racial hatred is likely to be stirred up thereby”.⁵² This followed criticism by Lord Scarman that the requirement for proof of intent (amongst other aspects of the offence under the 1965 Act) rendered the offence “useless to a policeman on the street”.⁵³
- The section 18 offence is not restricted, as the equivalent part of the original offence was, to conduct in public, and may be committed in private “except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling”.⁵⁴

Irish law includes an offence of incitement to hatred, which corresponds closely to the principal relevant offences under the Public Order Act 1986,⁵⁵ but extends beyond the protection of racial groups. (This chapter returns later to the range of groups protected by legislation.⁵⁶)

English law (but not Scots law) has created analogous offences addressing religious hatred (in 2006)⁵⁷ and hatred on the grounds of sexual orientation (in 2008),⁵⁸ both of which are now contained in the Public Order Act 1986. There are, however,

⁵¹ Or similar: the section extends to (a) the display, publication, distribution or inclusion in a cable programme service of written material and (b) the distribution, showing, playing or inclusion in a cable programme service of a recording.

⁵² Public Order Act 1986 ss 18(1)(b), 19(1)(b) and 23(1). Lack of awareness of this may be a defence: see ss 18(5), 19(2) and 23(3) (the exact formulation of the defence varies between the offences).

⁵³ *The Red Lion Square Disorders of 15 June 1974: Report of Inquiry by the Rt Hon Lord Justice Scarman, OBE* (Cmnd 5919: 1975) para 125. The Race Relations Act 1976 supplemented the requirement of intent with the alternative of proof that racial hatred was likely to be stirred up.

⁵⁴ Public Order Act 1986 s 18(2). A person has a defence if “he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling”: s 18(4).

⁵⁵ Prohibition of Incitement to Hatred Act 1989 s 2(1).

⁵⁶ See section 6.4.

⁵⁷ Racial and Religious Hatred Act 2006, inserting a series of new offences into the Public Order Act 1986.

⁵⁸ Criminal Justice and Immigration Act 2008 s 74 and Sched 16, amending the Public Order Act 1986.

significant differences between these offences and those relating to racial hatred, which are noted below.⁵⁹

Although the religious hatred offence in the Public Order Act does not extend to Scotland, section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 creates an offence of communicating threatening material where the person communicating it “intends by doing so to stir up hatred on religious grounds”.⁶⁰ The legislation contains an express provision protecting freedom of expression.⁶¹

6.3.2 Australia: offences of serious vilification

A number of Australian jurisdictions have offences of “serious vilification”. Although the terminology at first sight differs from “stirring up”, there is a close similarity despite this superficial difference.⁶² The New South Wales offence of “serious racial vilification”, for example – the first such offence to be created in Australia⁶³ – is in the following terms:⁶⁴

- A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:
- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
 - (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

⁵⁹ Section 6.4.5. These differences are not present in the Northern Irish legislation, which largely mirrors sections 18-23 of the Public Order Act 1986 but covers arousing fear in addition to inciting hatred, and extends to race, religion, sexual orientation and disability: Public Order (Northern Ireland) Order 1987 arts 8-13. See section 7.5.2 below.

⁶⁰ Section 6(5)(b). The offence is committed either by a person who communicates material to another while satisfying either “Condition A” or “Condition B”. This is Condition B. Condition A is concerned with threats or incitement to carry out seriously violent acts. For further discussion of the offence see section 2.2.3, where the text of the offence is set out in full. See also the “stirring up” offences in section 1(2)(a) and (b) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, which are discussed in chapter 8.

⁶¹ Section 6(6).

⁶² So, for example, comparative work by the Australian Human Rights and Equal Opportunity Commission describes the UK legislation as creating vilification offences: Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975* (2008) ch 6.

⁶³ L McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) 6.

⁶⁴ Anti-Discrimination (Racial Vilification) (Amendment) Act 1989 (NSW) s 3.

A very similar offence of racial vilification exists in South Australia.⁶⁵ While these offences are broader than their British counterparts insofar as they extend to inciting serious contempt or severe ridicule, they are otherwise rather narrower: they require incitement, rather than only conduct which is likely to have the prohibited effect (equivalent offences in the Australian Capital Territory, Queensland and Victoria are less narrow on this point),⁶⁶ the offender's conduct must specifically include threats of physical harm or to property, and it must be a public act.

6.3.3 Canada: hate propaganda

The Canadian Criminal Code includes offences of the public incitement of hatred and the wilful promotion of hatred,⁶⁷ both of which are discussed later in this report.⁶⁸ Again, these offences are defined with a narrower mental element than their British equivalents, in that they require incitement or wilful promotion.⁶⁹ It would not, on its own, be enough that the conduct was likely to have that effect. Both offences also have a slightly narrower public act requirement than the British ones – public incitement of hatred requires “communicating statements in any public place”, and wilful promotion of hatred applies only to statements “other than in private conversation”. Again, although the language of “stirring up” does not feature in the legislation itself, it can be characterised in such terms.⁷⁰

6.3.4 New Zealand: inciting racial disharmony

New Zealand has a statutory offence of inciting racial disharmony, which covers “matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, [a] group of persons in New Zealand on the ground of the colour, race, or

⁶⁵ Racial Vilification Act 1996 (SA) s 4.

⁶⁶ Criminal Code (ACT) s 750(1) (recklessness as to whether the act will have the prohibited effect suffices); Anti-Discrimination Act (Qld) 1991 s 131A(1) (“knowingly or recklessly” inciting suffices); Racial and Religious Tolerance Act 2001 (Vic) s 24 (knowledge that the act is likely to have the prohibited effect suffices).

⁶⁷ Sections 319(1) and 319(2) respectively.

⁶⁸ Section 7.2.3. There is also an offence of advocating genocide: s 318.

⁶⁹ The offence of public incitement of hatred also requires that the incitement “is likely to lead to a breach of the peace”: s 319(1).

⁷⁰ See *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100 at para 104, discussing section 319(2) and observing that “[a]lthough the causal connection need not be proven, the speaker must desire that the message stir up hatred”.

ethnic or national origins of that group of persons".⁷¹ The offence requires that the offender have intended that their conduct have this effect.

6.4 Legislative responses to hate speech: which groups are protected?

While "stirring up" and similar offences are primarily grounded in considerations of racial hatred, many jurisdictions have extended their offences (or created analogous offences) protecting groups other than racial groups.⁷²

In some instances, the extension of hate speech provisions beyond race will give rise to objections based on freedom of speech,⁷³ and the English provisions relating to the stirring up of hatred on the grounds of religion or sexual orientation include express provisions protecting freedom of speech. The provision in respect of religion is in the following terms:⁷⁴

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

The provision in respect of sexual orientation states as follows:⁷⁵

- (1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

⁷¹ Human Rights Act 1993 s 133. See section 7.4.2.

⁷² Cf New Zealand, where the relevant offence only extends to exciting "hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins": s 133(1) of the Human Rights Act 1993 (discussed in section 7.4.2).

⁷³ For a detailed review, see Law Commission, *Hate Crime: The Case for Extending the Existing Offences; Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights* (2013).

⁷⁴ Public Order Act 1986 s 29J. A similar provision is found in s 7(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. In contrast, express provisions of this nature are not found in the Northern Irish or Irish legislation, despite those provisions covering religious hatred.

⁷⁵ Public Order Act 1986 s 29JA.

- (2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

The Law Commission has noted that it is difficult to assess the scope of both sets of provisions given the rarity of prosecutions and the absence of judicial interpretation.⁷⁶

6.4.1 Australia

The groups protected by hate speech legislation (where it exists) vary between different Australian jurisdictions, as follows:

- Australian Capital Territory: the offence of serious vilification applies to the grounds of disability, gender identity, HIV/AIDS status, intersex status, race, religious conviction and sexuality.⁷⁷
- New South Wales: there are separate offences of serious racial vilification,⁷⁸ serious transgender vilification,⁷⁹ serious homosexual vilification⁸⁰ and serious HIV/AIDS vilification.⁸¹
- Queensland: the offence of serious vilification applies to the grounds of race, religion, sexuality and gender identity.⁸²
- South Australia: there is a single offence of racial vilification.⁸³
- Victoria: there are separate offences of serious racial vilification⁸⁴ and serious religious vilification.⁸⁵
- Western Australia: there are a range of specific offences relating to incitement to racial hatred.⁸⁶

⁷⁶ Law Commission, *Hate Crime* (n 1) paras 2.46-2.49.

⁷⁷ Criminal Code (ACT) s 750(1).

⁷⁸ Anti-Discrimination Act 1977 (NSW) s 20D.

⁷⁹ Anti-Discrimination Act 1977 (NSW) s 38T.

⁸⁰ Anti-Discrimination Act 1977 (NSW) s 49ZTA.

⁸¹ Anti-Discrimination Act 1977 (NSW) s 49ZXC.

⁸² Anti-Discrimination Act 1991 (Qld) s 131A(1).

⁸³ Racial Vilification Act 1996 (SA) s 4.

⁸⁴ Racial and Religious Tolerance Act 2001 (Vic) s 24.

⁸⁵ Racial and Religious Tolerance Act 2001 (Vic) s 25.

⁸⁶ These are set out at section 7.1.8.

6.4.2 Canada

Both the offences of public incitement of hatred and the wilful promotion of hatred refer to an “identifiable group”, which is defined as “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability”.⁸⁷

6.4.3 Ireland

The offence of incitement to hatred defines “hatred” as “hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation”.⁸⁸

6.4.4 Northern Ireland

The stirring up offences in Northern Ireland – which cover arousing fear in addition to inciting hatred – extend to race, religion, sexual orientation and disability.⁸⁹

6.4.5 England and Wales

The position in England and Wales is more complicated than in other jurisdictions, because while the stirring up offences protect multiple groups they do so in different ways. Offences addressing religious hatred were created in 2006⁹⁰ and offences addressing hatred on the grounds of sexual orientation were created in 2008.⁹¹

⁸⁷ Canadian Criminal Code s 318(4).

⁸⁸ Prohibition of Incitement to Hatred Act 1989 s 1(1).

⁸⁹ Public Order (Northern Ireland) Order 1987, SI 1987/463 (NI 7) arts 8-13.

⁹⁰ Racial and Religious Hatred Act 2006, inserting a series of new offences into the Public Order Act 1986. The question of extending racial hatred offences to cover religious hatred had been regularly discussed in debates on legislation from the Race Relations Act 1965 onwards. The relevant debates are summarised in Law Commission, *Hate Crime: The Case for Extending the Existing Offences; History of Hate Crime Legislation* (Law Com CP No 213, Appendix B) paras B.132-B.184.

⁹¹ Criminal Justice and Immigration Act 2008 s 74 and Sched 16, amending the Public Order Act 1986. The first prosecution under these provisions was *R v Ali, Javed and Ahmed* (Derby Crown Court, 2012), relating to the distribution of written material. The judge’s sentencing remarks are available at <https://www.judiciary.gov.uk/wp->

These offences do not simply replicate the provisions relating to racial hatred in respect of the newly protected groups. The Law Commission has noted three key differences between these offences and those relating to racial hatred:⁹²

- (1) the words or conduct must be threatening (not merely abusive or insulting);
- (2) there must have been an intention to stir up hatred (a likelihood that it might be stirred up is not enough); and
- (3) there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.

The express provisions referred to in the Commission's third point were set out earlier in this chapter.⁹³ These differences from the racial hatred offences are also present in section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. This criminalises the communication of threatening material where the person communicating it "intends by doing so to stir up hatred on religious grounds",⁹⁴ and contains an express provision protecting freedom of expression.⁹⁵

In England and Wales, the Law Commission's 2014 report *Hate Crime: Should the Current Offences be Extended?* examined the case for extending the stirring up offences to include stirring up hatred on the grounds of disability or gender identity.⁹⁶ The Commission concluded that there would be a justification in principle for such an extension if a practical need could be shown,⁹⁷ but considered that this had not been established, stating that:⁹⁸

Unsurprisingly, given how rarely the existing stirring up offences are prosecuted or reported on in the media, there is widespread

<content/uploads/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf>. See also Crown Prosecution Service, *Hate Crime and Crimes against Older People Report 2011-2012* (2012) 31.

⁹² Law Commission (n 1) para 2.39.

⁹³ See section 6.4. See also section 7.3.3.

⁹⁴ Section 6(5)(b).

⁹⁵ Section 6(6). Section 6 is discussed in more detail in sections 2.2.3 and 6.3.1.

⁹⁶ The Law Commission's terms of reference were narrow: it was not able to examine the rationale for the existing offences, whether they should be extended to cover characteristics other than disability or gender identity, or whether they should be otherwise amended. See Law Commission (n 1) para 1.8. On the rationale for hate speech offences generally, however, see the separate paper prepared for the Commission by Stanton-Ife, *Criminalising Conduct* (n 1).

⁹⁷ Law Commission, *Hate Crime* (n 1) para 1.65.

⁹⁸ Ibid paras 1.66-1.68.

misunderstanding about the conduct that new stirring up offences could be used to prosecute. Of the examples provided to us by consultees, while many could satisfy the requirements of existing offences such as harassment and the use of threatening, abusive or insulting language, there was little, if any, evidence of conduct that would clearly satisfy the very different elements of the stirring up offences.

We have no doubt that the examples consultees provided to illustrate a practical need to extend the offences would be seen as highly offensive by most people. However, they do not amount to clear evidence of the widespread existence of conduct intended or likely to stir up hatred on grounds of transgender identity or disability. Most of the examples would be capable of being prosecuted (and adequately sentenced) under the existing law.

We also conclude that, if new offences of stirring up hatred on the grounds of disability and transgender identity were created, there would be very few successful prosecutions. We base this on the following considerations:

- (1) There are very few prosecutions for the existing offences of stirring up hatred.⁹⁹
- (2) The type of hate speech typically found in relation to disability and transgender identity is unlikely to satisfy the requirements for a stirring up offence. Commonly it amounts to (often highly offensive) statements of opinion that are intended to provoke comment or debate and are not clearly intended or likely to cause others to hate disabled or transgender people.
- (3) Many of the examples brought to our attention would be covered by other offences.
- (4) Therefore, there would be still fewer successful prosecutions for the new stirring up offences than there are now for the existing ones.

Accordingly, the deterrent and communicative effects of the new offences and any other impacts as to reporting of hate crime would be very limited indeed.

⁹⁹ Here, the Commission noted that between 2008 and 2012, “only 113 charges of stirring up racial hatred and 21 charges of stirring up hatred on the ground of religion or sexual orientation reached a first hearing in a magistrates’ court”, in contrast with “over 75,000 charges for the aggravated offences over the same period”: *ibid* para 1.68, n 45.

The Commission went on to add that:¹⁰⁰

In reaching this conclusion we do not overlook the scale of hostility, abuse and prejudice that exist against disabled and transgender people, or the extent of the criminal behaviour motivated by, or involving demonstration of, hostility towards disabled or transgender people. We recognise that this is a serious social problem requiring a strong and coordinated response from the criminal justice system. However, we are not satisfied that the high requirements of proof set by the stirring up offences would be met by the speech and conduct concerned.

6.5 Online hate crime

The extent to which the internet provides a platform or breeding ground for hate speech is well-recognised. This is not simply an alternative outlet which can be assessed without distinction from offline hate speech: the nature of the internet is such that online hate speech has a number of distinctive features from that which occurs online. Brown identifies these features as being principally the potential for anonymity, invisibility,¹⁰¹ the development of community (that is, hate groups) and the instantaneousness of online communication.¹⁰² These features do not necessarily warrant a different response in terms of the criminal law: as Brown notes, in considering the stirring up offences and other crimes in English law, and their development against a background of rapid change in online speech hate behaviours:¹⁰³

Nevertheless, it is not clear that this rapidity of change and the challenge of combating online hate speech by means of legislation and criminal prosecutions is significantly different for online as compared to offline hate speech. Hate speakers who prefer to do their hate speaking face-to-face can also exhibit ingenuity, creativity, playfulness, and innovating in context, and this too can pose a problem for legislators and legal professionals. Think of the hate speaker who prefers to perform his hate speech to large audiences in person – where his charisma can shine – but who also knows full well that in order to be convicted of religious hatred offences in England and Wales, say,

¹⁰⁰ Ibid para 1.70.

¹⁰¹ Resulting from the physical distance between speaker and audience, although Brown acknowledges that this is not unique to online communication: A Brown, “What is so special about online (as compared to offline) hate speech?” *Ethnicities*, in press (published online 19 May 2017) at 4.

¹⁰² Ibid at 2-10.

¹⁰³ Ibid at 13.

public prosecutors must prove both *intent* to stir up hatred and the use of *threatening* words or behaviour. Such a hate speaker has reason to be ingenious in how he or she goes about performing acts of hate speech in order to stay one step ahead of the authorities, whether he or she engages in online or offline hate speech.

Much work on responses to online hate speech has emphasised the need for multi-faceted responses which go beyond the criminal law,¹⁰⁴ noting the limits of criminal law alone as compared to broader regulatory efforts¹⁰⁵ or even action by other internet users.¹⁰⁶ Rather than proposing the creation of bespoke offences, criminal law responses have normally focused on the potential applicability of existing hate speech offences (which may be used rarely both offline and online in jurisdictions which require intention on the accused's part for a conviction)¹⁰⁷ while noting that particular problems can arise in respect of jurisdiction over acts which take place abroad.¹⁰⁸ In addition, there are in the United Kingdom certain offences short of the stirring up offences which may have particular use in respect of online activity. Given the use of existing rather than bespoke offences, there is relatively little that can be said in a report such as this which focuses on legislative responses, which is not intended to downplay the significant real-world problem of online hate speech. The remainder of this section outlines the issues relating to jurisdiction and the use of charges short of the stirring up offences.

6.5.1 Jurisdiction

In its 2014 report, the Law Commission noted the issues which could arise in respect of jurisdiction over hate speech as follows:¹⁰⁹

¹⁰⁴ See e.g. B Perry and P Olsson, "Cyberhate: the globalization of hate" (2009) 18 Information and Communications Technology Law 185 at 195-197, who note a range of legal strategies, comment (at 196) that "law is not the only – or perhaps even the most effective – weapon available to counter cyberhate", and note "four key mechanisms": filtering, monitoring organisations, "hate speech hotlines" and internet service provider self-regulation (which they draw from J Bailey, "Strategic alliances: the inter-related roles of citizens, industry and government in combating internet hate" 2006 (Spring) Canadian Issues 56-59). See also a recent UNESCO report: I Gagliardone, D Gal, T Alves and G Martinez, *Countering Online Hate Speech* (2015).

¹⁰⁵ See e.g. J Banks, "Regulating hate speech online" (2010) 24 International Review of Law, Computers and Technology 233 at 238-239.

¹⁰⁶ R Delgado and J Stefancic, "Hate speech in cyberspace" (2014) 39 Wake Forest LR 319 at 342-343.

¹⁰⁷ See e.g. F Aumueller, "Hate propaganda law and internet-based hate" (2000) 44 Crim LQ 92.

¹⁰⁸ See e.g. Aumueller (n 107) at 95-97.

¹⁰⁹ Law Commission, *Hate Crime* (n 1) para 2.50.

Cases involving activity over the internet may cause jurisdictional difficulties, with the stirring up offences as with other criminal offences. The principle adopted by the Court of Appeal is that where a substantial measure of the conduct constituting a crime takes place in England and Wales, the English and Welsh courts have jurisdiction (unless comity requires otherwise). It is clear that mere use of a foreign web server to upload content prepared in England and Wales, and intended for a domestic audience, is not enough to prevent prosecution here. However the case law does not resolve the position regarding material intended or likely to incite racial hatred in England and Wales but created elsewhere.

The approach of the Scottish courts to criminal jurisdiction is broadly similar to that of the English courts but the lack of reported case law makes it difficult to state the position with precision.¹¹⁰ The Law Commission's comments regarding use of a foreign web server are based on the 2010 case of *R v Sheppard*,¹¹¹ where it was held to be no bar to a prosecution under section 19 of the Public Order Act 1986 (publishing or distributing written material intended to or likely to stir up racial hatred) that the material was hosted on a server in California.

6.5.2 The Communications Act 2003

Under section 127(1) of the Communications Act 2003, which applies to Scotland, a person commits an offence if he or she:¹¹²

- (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) causes any such message or matter to be so sent.

¹¹⁰ See GH Gordon, *The Criminal Law of Scotland*, volume 1, 3rd edn by MGA Christie (2000) at para 3.47, where it is submitted "that the present position in relation to completed crimes is as follows: where there has been conduct amounting to the *actus reus* of a crime under Scots law on the part of an accused person, the Scottish courts may try the case... if the totality of that conduct occurring in Scotland plays a material part in the fulfilment of that accused's criminal plan, or, in relation to such conduct occurring outside Scotland, if that conduct is designed to have a practical effect somewhere and does have a practical effect in Scotland, provided perhaps that such foreign conduct is also criminal according to the law of the place where it was actually performed".

¹¹¹ [2010] 1 WLR 2779.

¹¹² Maximum sentence: on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both: s 127(3).

This offence is clearly capable of being applied to speech on the internet,¹¹³ and the Law Commission noted it as one route for prosecuting “sufficiently serious cases of on-line abuse and cyber-bullying”.¹¹⁴ The other offence identified in this respect by the Commission was section 1 of the Malicious Communications Act 1988 (sending letters etc with intent to cause distress or anxiety).¹¹⁵ This offence does not extend to Scotland but such conduct could potentially be prosecuted as threatening or abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, an offence which carries much higher maximum penalties than section 127(1) of the Communications Act 2003.¹¹⁶

¹¹³ See e.g. *Chambers v DPP* [2013] 1 WLR 1833 at para 25, where Twitter was held to amount to “a public electronic communications network”, although the communication in that case (a joke about blowing up an airport following the defendant’s flight being delayed) was held not to be “menacing”.

¹¹⁴ Law Commission, *Hate Crime* (n 1) para 7.123.

¹¹⁵ The offence extends to the sending of a “letter, electronic communication or article of any description”: s 1(1) (as amended by the Criminal Justice and Police Act 2001 s 43(1)).

¹¹⁶ The maximum penalty following conviction on indictment under s 38 of the 2010 Act is five years’ imprisonment and a fine: s 38(4).

CHAPTER 7: HATE CRIME LEGISLATION IN SELECTED JURISDICTIONS

This chapter reviews hate crime legislation in a variety of jurisdictions. For each one, it includes a summary box which sets out (a) the general approach to hate crime legislation in that jurisdiction; (b) the threshold required for any sentence aggravation or penalty enhancement provisions to apply; (c) which characteristics the relevant legislation protects; and (d) whether the legislation includes provision for the protection of a “residual category” applicable to groups which are not expressly listed as being protected.

The Scottish legislation set out in chapter 2 above can, on this basis, be summarised as follows:

Approach: Sentence aggravation applicable across the board of offending categories, along with standalone offences relating to the stirring up of racial hatred, racially-aggravated harassment and threats intended to stir up hatred on religious grounds.

Threshold: The sentence aggravation provisions require that the offender has evinced malice or ill will based on the victim’s protected characteristic, or that the offence is motivated (wholly or partly) by malice and ill-will towards members of a protected group based on their membership of that group.

Protected characteristics: The sentence aggravation provisions apply in respect of race, religion, disability, sexual orientation and transgender identity. Standalone offences exist in respect of race and religion and (solely in the context of offences committed in relation to a regulated football match) sexual orientation, transgender identity and disability.

Residual category: No.

7.1 AUSTRALIA

This section sets out the law in each of Australia's six states and two territories separately.

7.1.1 AUSTRALIAN CAPITAL TERRITORY

Approach: Standalone offence of serious vilification.

Protected characteristics: Disability, gender identity, HIV/AIDS status, intersex status, race, religious conviction, sexuality.

Residual category: No.

The Australian Capital Territory does not have penalty enhancement or sentence aggravation provisions, but does have a standalone offence of serious vilification under section 750(1) of the Criminal Code, which provides as follows:

A person commits an offence if—

- (a) **the person intentionally carries out an act; and**
- (b) **the act is a threatening act; and**
- (c) **the person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following:**
 - (i) **disability;**
 - (ii) **gender identity;**
 - (iii) **HIV/AIDS status;**
 - (iv) **intersex status;**
 - (v) **race;**
 - (vi) **religious conviction;**
 - (vii) **sexuality; and**
- (d) **the act is done other than in private; and**
- (e) **the person is reckless about whether the act is done other than in private.**

This provision was created in 2016.¹ Prior to this, a similar offence was found in the Discrimination Act 1991, but its scope was limited to race, sexuality, gender identity and HIV/AIDS status.²

¹ Discrimination Amendment Act 2016 (ACT) Sch 1. For the background to the 2016 Act, see ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT), Final Report* (2015).

7.1.2 NEW SOUTH WALES

Approach: Sentence aggravation applicable across the board of offending categories, along with standalone offences of serious racial vilification, serious homosexual vilification and serious HIV/AIDS vilification.

Threshold: The offence must have been “motivated by” hatred or prejudice.

Protected characteristics: Religion, racial or ethnic origin, language, sexual orientation, age and having a particular disability.

Residual category: Yes, in the sense that the protected characteristics are presented as a non-exhaustive list. A recent proposal by the NSW Law Commission would amend the list of protected characteristics and make the list exhaustive.

The main hate crime legislation in New South Wales is contained in section 21A of the Crimes (Sentencing Procedure) Act 1999 (in force since February 2003),³ which makes general provision relating to aggravating, mitigating and other factors in sentencing. It provides, in relevant part, as follows:

(1) General

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court...

(2) Aggravating factors

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:...

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic

² Discrimination Act 1991 (ACT) s 67. In addition, this provision did not include the words “revulsion of” found in section 750(1)(c) of the Criminal Code. Section 67 reproduced provisions in New South Wales: M Jones, “The legal response: dealing with hatred – a user’s guide”, in C Cunneen, D Fraser and S Tomsen (eds), *Faces of Hate: Hate Crime in Australia* (1997) 214 at 224.

³ G Mason, “Hate crime laws in Australia: are they achieving their goals?” (2009) 33 Criminal Law Journal 326, part C. Note the comments of S Bronitt and J Stellios, “Sedition, security and human rights: ‘unbalanced’ law reform in the ‘war on terror’” (2006) 30 Melbourne University LR 923 at 948: “While appearing to be a progressive development from an anti-discrimination policy perspective, the political pressure for these new powers stemmed from the moral panic about the rise of ‘ethnically’ motivated Lebanese gang rape in Sydney.”

origin, language, sexual orientation or age, or having a particular disability)

In contrast to the other Australian jurisdictions, these provisions have been discussed by the courts in a number of cases.⁴ The courts have decided that the provision applies only to cases where hatred of a group, rather than the victim, is evidenced;⁵ that intra-group prejudice can be covered;⁶ and that an opportunistic belief, such as one that members of a particular group are likely to have property worth stealing, is not sufficient.⁷ There are also two controversial decisions where it was held that section 21A(1)(2)(h) could apply to paedophiles as a group.⁸ While the text of the legislation may be broad enough to warrant such an interpretation, the decisions have been criticised as being inconsistent with the principles on which hate crime legislation is based.⁹ In a recent report, the New South Wales Law Reform Commission described this interpretation as “troubling”, and made the following recommendation:¹⁰

Recommendation 4.8: Hate crimes to be addressed separately

A revised Crimes (Sentencing) Act should contain a stand-alone provision to the effect that the court, when sentencing for an offence that was motivated wholly or partly by hatred for or prejudice against a group of people to which the offender believed the victim belonged or with which the offender believed the victim was associated (being people of a particular religious belief, racial, ethnic or national origin, age, sexual orientation, transgender status or having a particular disability or illness), should take that motivation

⁴ See generally Mason, “Hate crime laws in Australia” (n 3).

⁵ *R v MAH* [2005] NSWSC 871.

⁶ *R v El Mostafa* [2007] NSWDC 219. The court does not engage in any discussion of this point (or refer to any concept of intra-group prejudice), but simply notes that the riot with which the case was concerned involved hatred against Shiite Muslims, while the defendant was a Sunni Muslim (and also hatred related to political views): para 16. The case is taken as support for the intra-group principle by New South Wales Law Reform Commission, *Sentencing* (Report 139, 2013) para 4.176.

⁷ *Aslett v R* [2006] NSWCAA 49.

⁸ *R v Robinson* [2004] NSWSC 465; *Dunn v R* [2007] NSWCCA 312. The point is dealt with in passing in *Robinson*, where a wide range of aggravating factors were alleged by the Crown. It is considered directly in *Dunn*. For an analysis of the latter case, see G Mason, “Prejudice and paedophilia in hate crime laws: *Dunn v R*” (2009) 34 Alternative LJ 253. See also N Chakraborti and J Garland, *Hate Crime: Impact, Causes and Responses*, 2nd edn (2015) 140-142.

⁹ G Mason, “Victim attributes in hate crime law: difference and the politics of justice” (2014) 54 BJ Crim 161 at 171.

¹⁰ New South Wales Law Reform Commission, *Sentencing* (n 6) 112-113.

into account when assessing the need for the sentence to contain an additional element of deterrence, denunciation and/or community protection from the offender, and also when assessing the offender's prospects of rehabilitation.

In addition to reversing the position regarding paedophilia, this would make a number of other changes: it would extend the protection of the law to people associated with a particular group, even if they were not a member of it,¹¹ change the list prescribed by legislation to a closed list rather than one of examples, and within that list, delete "language" as a specific factor,¹² while adding "illness" ("intended to capture issues such as HIV/AIDS status")¹³ and "transgender status". The Commission concluded that the test should continue to be one of motivation, and rejected a "demonstration of hostility" test:¹⁴

In many cases evidence of the demonstration of hostility immediately before, during or immediately after the offending conduct, for example, through speech, will be available to make good the motivation test. In other cases however that behaviour may be unrelated to the reason for the offence, and involve little more than spontaneous insult.

In addition to these sentencing provisions, New South Wales has a number of standalone vilification offences. The first of these, the offence of serious racial vilification, was created in 1989¹⁵ and was the first such offence to be created in Australia.¹⁶ It is in the following terms:¹⁷

A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or

¹¹ Para 4.189 gives the example of a person who goes to the assistance of another person who is being assaulted, or a person who provides advocacy or support services for a group.

¹² Para 4.187: the Commission concluded that the term "language" in the statute "has an indeterminate reach... does not necessarily denote minority or vulnerable status, and... is likely to add little to the "racial, ethnic or national" origin criterion".

¹³ Para 4.187.

¹⁴ Para 4.183.

¹⁵ Anti-Discrimination (Racial Vilification) (Amendment) Act 1989 (NSW) s 3.

¹⁶ L McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) 6, who notes (at 199) that there had been no prosecutions for the offence at the time of writing.

¹⁷ Anti-Discrimination Act 1977 (NSW) s 20D.

- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Additional offences have since been created, in similar terms, of serious transgender vilification,¹⁸ serious homosexual vilification¹⁹ and serious HIV/AIDS vilification.²⁰

7.1.3 NORTHERN TERRITORY

Approach: Discretionary sentence aggravation applicable across the board of offending categories.

Threshold: The offence must have been “motivated by hate against a group of people”.

Protected characteristics: No specific characteristics specified: the legislation refers only to “a group of people”.

Residual category: Not applicable given the formulation of the legislation.

The main hate crime legislation in the Northern Territory is found in **section 6A** of the Sentencing Act 1995. Mason notes that this provision, introduced under section 6 of the Justice Legislation (Group Criminal Activities) Act 2006, “arrived with a minimum of fanfare... Parliamentary Hansard reveals no discussion of s6, focusing instead on the larger body of amendments relating to group criminal activities”.²¹ The section provides as follows:²²

Without limiting section 5(2)(f), any of the following circumstances in relation to the commission of an offence may be regarded as an aggravating factor for that section...

- (e) the offence was motivated by hate against a group of people

¹⁸ Anti-Discrimination Act 1977 (NSW) s 38T, as inserted by the Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 (NSW) s 3.

¹⁹ Anti-Discrimination Act 1977 (NSW) s 49ZTA, as inserted by the Anti-Discrimination (Homosexual Vilification) Amendment Act 1993 s 3.

²⁰ Anti-Discrimination Act 1977 (NSW) s 49ZXC, as inserted by the Anti-Discrimination (Amendment) Act 1994 s 3.

²¹ Mason, “Hate crime laws in Australia” (n 3), introduction and n 11.

²² Section 5(2)(f) of the Act provides that in sentencing an offender, a court must have regard to “the presence or absence of any aggravating or mitigating factor concerning the offender”.

In contrast to the other Australian states and territories, the Northern Territory has no anti-vilification offence.²³

7.1.4 QUEENSLAND

Approach: Standalone offence of serious vilification.

Protected characteristics: Race, religion, sexuality, gender identity.

Residual category: No.

Queensland does not have penalty enhancement or sentence aggravation provisions, but does have a standalone offence of serious vilification under section 131A(1) of the Anti-Discrimination Act 1991,²⁴ which provides as follows:

- A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes—**
- (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
 - (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons

²³ Bronitt and Stellios (n 3) at 946.

²⁴ Inserted by the Anti-Discrimination Amendment Act 2001 (Qld) s 10, but then extending only to race or religion. References to sexuality and gender identity were added by the Discrimination Law Amendment Act 2002 (Qld) s 24. McNamara, *Regulating Racism* (n 16) 304 notes that “free speech themes dominated parliamentary debate” on the 2001 Act.

7.1.5 SOUTH AUSTRALIA

Approach: Standalone offence of racial vilification.

Protected characteristics: Race.

Residual category: No.

South Australia does not have penalty enhancement or sentence aggravation provisions, but does have a standalone offence of racial vilification under section 4 of the Racial Vilification Act 1996,²⁵ which provides as follows:

- A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by—**
- (a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or
 - (b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.

“Threat” is defined as including “conduct in which a threat is implicit” and “a conditional threat”.²⁶

7.1.6 TASMANIA

Approach: No directly relevant criminal provisions. A 2011 report recommended the introduction of sentence aggravation provisions but this has not yet been implemented.

Tasmania does not have penalty enhancement or sentence aggravation provisions. Section 19 of the Anti-Discrimination Act 1996 prohibits “incit[ing] hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons” on the ground of race, disability, sexual orientation or lawful sexual activity, religious belief, affiliation or religious activity, but this is a civil rather than a criminal prohibition.²⁷

²⁵ McNamara, *Regulating Racism* (n 16) 280 notes that this offence is identical to that found in the Anti-Discrimination Act 1977 (NSW) s 20D (noted above, section 7.1.2).

²⁶ Racial Vilification Act 1996 (SA) s 3.

²⁷ The orders which may be made by the Anti-Discrimination Tribunal in such circumstances are set out at section 89 of the Act.

A 2011 report by the Tasmania Law Reform Institute recommended that sentence aggravation provisions be introduced in Tasmania, based on equivalent provisions in Victoria,²⁸ “but extended to cover all situations of racist aggravation, including where the victim was selected because of their presumed membership of a particular group or where the offender demonstrated hostility at the time of, or immediately before or after, the offence”.²⁹ In proposing this formulation, the Institute sought to avoid a choice between the various possible models of sentencing aggravation provisions, identifying possible models as being “the motive model; the group selection model; [and] the demonstration of hostility model” and concluding that including all three tests would have the “advantage of avoiding problems of proof”.³⁰ These proposals have not yet been implemented.³¹

7.1.7 VICTORIA

Approach: Sentence aggravation applicable across the board of offending categories, along with standalone offences of serious racial vilification and serious religious vilification.

Threshold: The sentence aggravation requires the offence to have been motivated wholly or partly by prejudice.

Protected characteristics: The sentence aggravation provision applies in respect of “a group of people with common characteristics”. The vilification offences apply to race and religion.

Residual category: No.

Section 5(2) of the Sentencing Act 1991 provides as follows:

In sentencing an offender a court must have regard to...
(daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with

²⁸ Sentencing Act 1991 (Vic) s 5(2)(daaa). See below, section 7.1.7.

²⁹ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No 14, 2011) 46 (recommendation 6).

³⁰ Para 5.6.23.

³¹ See P Billings, “Demand for Liberals to honour election promise on racially motivated crime”, *Mercury* 21 June 2016, noting that the Liberal government had pledged to act on the 2011 recommendations in the lead-up to the 2014 election but that no timeline had yet been provided for the changes.

which the victim was associated or with which the offender believed the victim was associated.

This provision, introduced in 2009,³² followed advice from the Victorian Sentencing Advisory Council,³³ which had been asked to have particular regard to the sentencing aggravation provision applicable in New South Wales.³⁴ The Council's recommendations innovated on the New South Wales formulation in two ways in particular: first, it recommended that the provision should apply to cases of *partial* motivation,³⁵ and secondly, it recommended that the provision should apply to cases where the victim was (or believed to be) associated with the group, and not only cases where the victim was a member of it.³⁶ The Council suggested that a "partial motivation" test was appropriate in order to accommodate cases which would alternatively be covered by a demonstration of hostility test: it gives the example of a theft motivated by the desire to obtain property but which is accompanied by verbal abuse about the victim's sexuality and partner.³⁷

Victoria also has offences of serious racial vilification³⁸ and serious religious vilification.³⁹ The first of these offences is defined as follows:

- (1) **A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely—**
 - (a) **to incite hatred against that other person or class of persons;**
and
 - (b) **to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.**

³² Sentencing Amendment Act 2009 (Vic).

³³ Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice* (2009).

³⁴ Para A.13, referring to the Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2) (see above, section 7.1.2).

³⁵ Paras D.1-D.13.

³⁶ Paras F.1-F.11.

³⁷ Para D.5. A difficulty here is that it is not clear that the demonstration of hostility is itself a motivation of any sort for the offence, as opposed to the way in which the offence is carried out. The Council offers a second "case study" of a person who is convicted of rape, having explained in interview "that he decided to rape the victim because she is 'Western' and he believes that 'all Western women are sexually promiscuous'." The Council describes this as a case of "partial" motivation (para D.6) but it is unclear why it considers it to be such a case.

³⁸ Racial and Religious Tolerance Act 2001 (Vic) s 24.

³⁹ Racial and Religious Tolerance Act 2001 (Vic) s 25.

- (2) **A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.**

The offence of serious religious vilification is similarly defined, referring instead to “the ground of the religious belief or activity of another person or class of persons”.

7.1.8 WESTERN AUSTRALIA

Approach: A range of standalone offences relating to racial harassment and racial hatred, along with penalty enhancement provisions for a range of offences when committed in circumstances of racial aggravation.

Threshold: The penalty enhancement provisions require the offender to have demonstrated hostility based on the victim’s membership of a racial group or have been motivated by hostility.

Protected characteristics: Race.

Residual category: No.

Western Australia has been described as having “the largest regime of hate crime laws”⁴⁰ in Australia, albeit that these extend only to race-related offences. The legal regime applicable in that jurisdiction has two parts.

First, a series of specific offences relating to racial harassment and incitement to racial hatred, dating from legislation in 1990,⁴¹ and which were revised and expanded in 2004.⁴² The offences are currently as follows: conduct intended to incite racial animosity or racist harassment,⁴³ conduct likely to incite racial animosity or racist harassment,⁴⁴ possession of material for dissemination with intent to incite racial animosity or racist harassment,⁴⁵ possession of material for dissemination that is likely to incite racial animosity or racist harassment,⁴⁶ conduct intended to racially

⁴⁰ Mason (n 8) at 253.

⁴¹ Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990 (WA). See McNamara, *Regulating Racism* (n 16) 232-242.

⁴² Criminal Code Amendment (Racial Vilification) Act 2004 (WA).

⁴³ Criminal Code Compilation Act 1913 (WA) s 77.

⁴⁴ Criminal Code Compilation Act 1913 (WA) s 78.

⁴⁵ Criminal Code Compilation Act 1913 (WA) s 79.

⁴⁶ Criminal Code Compilation Act 1913 (WA) s 80.

harass,⁴⁷ conduct likely to racially harass,⁴⁸ possession of material for display with intent to racially harass,⁴⁹ and possession of material for display that is likely to racially harass.⁵⁰ It is a defence to certain of these offences that the accused person acted reasonably and in good faith for a genuine academic, artistic, religious or scientific purpose, any purpose in the public interest, or in making or publishing a fair and accurate report or analysis of any event or matter of public interest.⁵¹

Secondly, for certain specified offences in the Criminal Code, the maximum penalty is increased if they are committed “in circumstances of racial aggravation”.⁵² These are: assault,⁵³ assault causing bodily harm,⁵⁴ assault with intent,⁵⁵ criminal damage,⁵⁶ and threats.⁵⁷ “Circumstances of racial aggravation” is defined as circumstances in which “(a) immediately before or during or immediately after the commission of the offence, the offender demonstrates hostility towards the victim based, in whole or part, on the victim being a member of a racial group; or (b) the

⁴⁷ Criminal Code Compilation Act 1913 (WA) s 80A.

⁴⁸ Criminal Code Compilation Act 1913 (WA) s 80B.

⁴⁹ Criminal Code Compilation Act 1913 (WA) s 80C.

⁵⁰ Criminal Code Compilation Act 1913 (WA) s 80D.

⁵¹ Criminal Code Compilation Act 1913 (WA) s 80G. The defences are applicable to the offences under ss 78, 80, 80B and 80D.

⁵² For the assault offences, the penalties are similarly increased if the offences are committed “in circumstances of aggravation”. This encompasses cases of family or domestic violence, cases where a child was present, cases where the offender’s conduct breached a restraining order, and cases where the victim is of or over the age of 60 years: Criminal Code Compilation Act 1913 (WA) s 221.

⁵³ Criminal Code Compilation Act 1913 (WA) s 313 (normal maximum: 18 months’ imprisonment and a fine of \$18,000; enhanced maximum: three years’ imprisonment and a fine of \$36,000).

⁵⁴ Criminal Code Compilation Act 1913 (WA) s 313 (normal maximum: five years’ imprisonment; enhanced maximum: seven years’ imprisonment).

⁵⁵ Criminal Code Compilation Act 1913 (WA) s 317A (normal maximum: five years’ imprisonment; enhanced maximum: seven years’ imprisonment). The offence encompasses assault with intent to commit or facilitate the commission of another crime, assault with intent to do grievous bodily harm to any person, and assault with intent to resist or prevent the lawful arrest or detention of any person.

⁵⁶ Criminal Code Compilation Act 1913 (WA) s 444. In cases where the property is destroyed or damaged by fire, the maximum penalty is life imprisonment in all cases. In all other cases, the normal maximum is ten years’ imprisonment and the enhanced maximum fourteen years’ imprisonment.

⁵⁷ Criminal Code Compilation Act 1913 (WA) s 338B. For threats to kill, the normal maximum is seven years’ imprisonment and the enhanced maximum fourteen years’ imprisonment (s 339B(a)). For other criminal threats, the normal maximum is three years’ imprisonment and the enhanced maximum six years’ imprisonment (s 339B(b)).

offence is motivated, in whole or part, by hostility towards persons as members of a racial group".⁵⁸

7.2 CANADA

Approach: Mandatory sentence aggravation applicable across the board of offending categories; penalty enhancement for criminal mischief in relation to religious property; standalone offences of incitement to hatred and promotion of hatred.

Threshold: The sentence aggravation requires that the offence must have been "motivated by bias, prejudice or hate".

Protected characteristics: Race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation (for both the sentence aggravation and the incitement/promotion offences)

Residual category: Yes – "any other similar factor" to those listed (for the sentence aggravation only)

7.2.1 Sentence aggravation

The main hate crime legislation in Canada is contained in **section 718.2(a)** of the Canadian Criminal Code. This is the section of the Code that deals with general sentencing principles and it provides that:

a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

...

- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,**

...

shall be deemed to be aggravating circumstances;

The provision was approved by Parliament in 1995 and came into force in 1996.⁵⁹ The approach taken here is one of mandatory sentence aggravation, although if sentence is to be aggravated on this basis, the aggravation must be proved beyond

⁵⁸ Criminal Code Compilation Act 1913 (WA) s 80I.

⁵⁹ JV Roberts and AJA Hastings, "Sentencing in cases of hate-motivated crime: an analysis of subparagraph 718.2(a)(i) of the Criminal Code" (2001) 27 Queen's LJ 93 at 94.

reasonable doubt.⁶⁰ The offence must have been “*motivated* by bias, prejudice or hate” – it is not sufficient that the offender simply selected the victim on the basis of his or her membership of the targeted group (in other words, Canada adopts an *animus* model rather than a discriminatory selection model). Whether hate/bias/prejudice must be the *sole* motivating factor is unclear. Lawrence and Verdun-Jones, in an analysis of the relevant case law, conclude that the degree of motivation needed for section 718.2(a) has not been consistent.⁶¹ The courts have held variously that for section 718.2(a) to apply, the offence must have been motivated “solely” by bias (or prejudice/hate), that bias must have been “a significant motivating factor” and that bias must have motivated the offence “in part”.⁶²

The list of protected characteristics in section 718.2(a) is relatively broad, including (as well as the commonly protected characteristics of race, ethnic origin, language, colour, religion, disability and sexual orientation) the less commonly protected characteristics of age and sex. It does not, however, include transgender identity.⁶³

The legislation is notable in that it includes a residual category of “any other similar factor”. Lawrence and Verdun-Jones, writing in 2011, were only able to identify one reported case in which this had been used by the courts, that of *R v S(J)*.⁶⁴ The offender was part of a group of young men who went to a park for the purpose of finding and assaulting people who he referred to variously as “peeping tom guys” and “voyeurs”.⁶⁵ The group encountered the victim, a homosexual man, on the night of the offence. He was naked at the time in an area of the park where homosexual men reportedly met for sexual encounters. The accused and his cohort attacked the victim, who died as a result of his injuries. The sentencing judge (Judge Romilly) stated:⁶⁶

⁶⁰ Canadian Criminal Code s 724(3)(e) – see also the cases cited in n 35 of MS Lawrence and SN Verdun-Jones, “Sentencing hate: an examination of the application of s.718.2(a)(i) of the Criminal Code on the sentencing of hate-motivated offences (2011) 57 Crim LQ 28 at 38.

⁶¹ Lawrence and Verdun-Jones (n 60) at 50 (see table 4).

⁶² Ibid. Although cf. *R v Taylor* 2015 ONCJ 741 (Ontario Court of Justice), where the sentencing judge held that s 718.2(a)(i) applied because the offender “chose to target women” (at para 5), a test more akin to that associated with the discriminatory selection model (see section 4.1.1).

⁶³ Unless this might be covered by “sex” – or by the residual category of “any other similar factor” discussed below.

⁶⁴ 2003 BCPC 442 (Provincial Court of British Columbia (Youth Court)), discussed by Lawrence and Verdun-Jones (n 60) at 36.

⁶⁵ *S(J)* at para 9.

⁶⁶ *S(J)* at para 50.

The attack and beating of [the victim] was in fact a ‘hate crime’ as set out in section 718.2(a)(i) of the Criminal Code. I am aware that the Crown has conceded that since [the offender] stated that [he] went to the park looking for ‘peeping toms’ or ‘voyeurs’ and that he did not know that this area was frequented by homosexuals, she has no way of establishing that his was a ‘hate crime’. I disagree.

I am of the opinion that this crime was motivated by ‘bias, prejudice or hate’ based on a factor similar to sexual orientation and is covered by this section of the Criminal Code. It strikes me that this section contemplates hatred against ‘peeping toms’ and/or ‘voyeurs’ as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but is a sexual lifestyle all the same.

In *R v Cran*,⁶⁷ however, the Supreme Court of British Columbia expressed the view that Judge Romilly had erred in law. Humphries J, delivering the judgment of the court, stated that:⁶⁸

With the greatest of respect to the youth court judge who referred to this as a hate crime, I can only say that I am not aware of any authority in the Criminal Code or otherwise which would allow this court to declare a particular crime ‘a hate crime’.

I am aware that the death of [the victim] has had a significant effect on the gay community. However, there was no evidence before the court of [the victim’s] sexual orientation, other than what might be inferred from his presence at [the locus]. As well, there was no evidence before the court that [the offender’s] motive for attacking [the victim] was his sexual orientation. In order to consider such a motivation as an aggravating factor on sentence, I must be satisfied beyond a reasonable doubt that such a motive has been proven.

There is also no basis on the evidence before the court to equate ‘peeping toms and voyeurs’ to gay people in the mind of [the offender], in the absence of evidence and in the face of evidence to the contrary.

There has subsequently been another reported case in which the “other similar factor” provision has been utilised, this time to cover members of a political party. In *R v Bain*,⁶⁹ the offender fired a gun at a group of people attending an election night

⁶⁷ 2005 BCSC 171, discussed by Lawrence and Verdun-Jones (n 60) at 36-37.

⁶⁸ *Cran* at paras 8-10.

⁶⁹ 2016 QCCS 5785 (Superior Court, Quebec).

rally organised by the Parti Québécois, killing one of those present.⁷⁰ In sentencing, the court relied on section 718.2(a)(i),⁷¹ stating that “it is obvious that the offences had a political purpose and were motivated by bias, prejudice or hate based on the political thought, belief or opinion of the members of the Parti Québécois”.⁷²

Finally, Lawrence and Verdun-Jones note that the court retains a common law power to treat evidence of hate motivation as an aggravating factor in sentencing even where the victim was not a member of one of the protected groups,⁷³ citing *R v Cornakovic*⁷⁴ (where the offender was motivated in his attack by “an abiding bias or prejudice against judges”⁷⁵) as a case where this power was used.⁷⁶

7.2.2 Penalty enhancement

Aside from the sentencing aggravation provision in section 718.2, there is also an aggravated offence of “criminal mischief in relation to religious property” in section 430(4.1) of the Criminal Code, which provides that:⁷⁷

Everyone who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,

- (a) **is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or**

⁷⁰ Bain at paras 13-15.

⁷¹ Bain at para 92.

⁷² Bain at para 93.

⁷³ Lawrence and Verdun-Jones (n 60) at 37.

⁷⁴ 67 WCB (2d) 340 (Ontario Superior Court of Justice), discussed by Lawrence and Verdun-Jones (n 60) at 37.

⁷⁵ *Cornakovic* at para 66.

⁷⁶ This case has sometimes been described as a case where the court used the residual “any other similar factor” category contained in s 718.2(a)(i): see A Haynes et al, ‘*Out of the Shadows’ Legislating for Hate Crime in Ireland: Preliminary Findings*’ (2015) 67. From a reading of the case, however, it seems unlikely that the court is doing this. It refers (at para 66) to the offender’s hatred for judges as being “closely allied to the aggravating factor identified in Section 718.2(a)(i) of the Criminal Code” (emphasis added), rather than it being similar in nature to the factors listed there. It is more likely, therefore, that this is an example of the use of the common law power.

⁷⁷ Criminal mischief itself is defined in s 430(1) of the Code.

- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.**

The maximum sentence of ten years' imprisonment is significantly higher than the normal maximum of two years.⁷⁸

7.2.3 Standalone offences

The Canadian Criminal Code contains a number of hate speech offences in a section of the Code labelled "hate propaganda".⁷⁹ Section 318 criminalises advocating genocide; section 319(1) criminalises the public incitement of hatred; and section 319(2) criminalises the wilful promotion of hatred.⁸⁰

Section 318(1) provides that everyone "who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years". Genocide is defined in section 318(2) of the Act. There is no Canadian jurisprudence dealing with this section and it does not appear to have been the subject of any prosecutions in practice,⁸¹ so will not be discussed further here.

Section 319(1) (public incitement of hatred) provides that everyone who "by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" is guilty of a criminal offence. Section 319(2) (wilful promotion of hatred) provides that everyone who "by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group" is guilty of a criminal

⁷⁸ Section 430(4), although that is increased to ten years in respect of property which is a testamentary instrument or the value of which exceeds \$5,000: s 430(3). A maximum sentence of ten years is also prescribed for mischief in relation to war memorials (s 430(4.11)) and cultural property (s 430(4.2)).

⁷⁹ For detailed discussion of these offences, see e.g. S Anand, "Expressions of racial hatred and criminal law: proposals for reform" (1997) 40 Crim LQ 215; CS MacMillan, MG Claridge and R McKenna, "Criminal proceedings as a response to hate: the British Columbia experience" (2002) 45 Crim LQ 419.

⁸⁰ The history of these provisions is discussed in detail in *R v Keegstra* [1990] 3 SCR 697, per Dickson CJ at 722-726; Law Reform Commission of Canada, *Hate Propaganda* (Working Paper 50, 1986) 4-7.

⁸¹ See *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100 at para 82. *Mugesera* itself is an appeal against a deportation order and concerned speeches made by the appellant while he was resident in Rwanda.

offence. Both offences carry a maximum penalty of imprisonment for a term not exceeding two years when prosecuted on indictment.⁸²

The main difference between the two offences is that section 319(1) requires that the accused's conduct is likely to result in some sort of public disorder (a "breach of the peace"⁸³) whereas section 319(2) requires only that the accused wilfully promoted hatred. "Wilfully promotes" has been held to mean "actively supports or instigates".⁸⁴ The offence does not require that the conduct of the accused actually caused hatred: "[the] intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused".⁸⁵ What is required is that the communication expressed hatred (on an objective test) and that the accused desired "that the message stir up hatred".⁸⁶ Recklessness as to the stirring up of hatred is not sufficient.⁸⁷ The accused must have either intended to promote hatred or foresee "as substantially certain, a direct and active stimulation of hatred against an identifiable group".⁸⁸

In *R v Keegstra*,⁸⁹ a majority of the Canadian Supreme Court upheld the constitutionality of the section 319(2) offence. Dickson CJ, in the majority judgment, found that it did impinge on freedom of expression as protected by section 2(b) of the Canadian Charter of Rights and Freedoms.⁹⁰ The restriction, however, was justified under section 1 of the Charter (the Charter's limitation provision) because it served the important purpose of preventing the spreading of hate propaganda⁹¹ and advanced this goal rationally and with minimal impairment to freedom of expression.⁹² In relation to the first point (the purpose of the legislation), Dickson CJ set out what the majority saw as the harm caused by hate speech as follows:⁹³

Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the

⁸² Canadian Criminal Code s 319(1)(a) (public incitement of hatred); s 319(2)(a) (wilful promotion of hatred).

⁸³ There is no specific criminal offence of breach of the peace in Canadian law and the language of breach of the peace has been criticised as vague: see Law Reform Commission of Canada (n 80) 34.

⁸⁴ *Mugesera*, at para 101.

⁸⁵ *Mugesera*, at para 102.

⁸⁶ *Mugesera*, at para 104.

⁸⁷ *Keegstra*, per Dickson CJ at 775.

⁸⁸ *Keegstra*, per Dickson CJ at 777.

⁸⁹ [1990] 3 SCR 697. For detailed discussion of the case, see R Moon, "Hate speech regulation in Canada" (2008) 36 Florida State University LR 79 at 85-89.

⁹⁰ *Keegstra*, per Dickson CJ at 730.

⁹¹ *Keegstra*, per Dickson CJ at 795.

⁹² *Keegstra*, per Dickson CJ at 766.

⁹³ *Keegstra*, per Dickson CJ at 746-747.

emotional damage caused by words may be of grave psychological and social consequence ... a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs.

The derision, hostility and abuse encouraged by hate propaganda ... have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

A second harmful effect of hate propaganda ... is its impact on society at large. It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society.

In relation to the second point (the extent of the limitation placed on freedom of expression by section 319(2)), it was relevant that the mental element of the section 319(2) offence (wilful promotion) is narrow in scope and captures "only the most intentionally extreme forms of expression".⁹⁴ As such, the limitations placed on freedom of expression by section 319(2) are minimal.

There are a number of defences to the section 319(2) offence set out in section 319(3), which provides that:

No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;**
- (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;**
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or**

⁹⁴ *Keegstra*, per Dickson CJ at 783.

- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Aside from the differences discussed above, sections 319(1) and 319(2) have some definitional provisions in common. They both refer to an identifiable group, which means “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability”.⁹⁵ This list of characteristics is identical to those protected under section 718(2)(a)(i) (the hate crime sentencing provisions), the only difference being the absence of a residual category. “Hatred” means “only the most intense forms of dislike”⁹⁶ such as “emotion of an intense and extreme nature that is clearly associated with vilification and detestation”.⁹⁷ “Communicating” includes “communicating by telephone, broadcasting or other audible or visible means” and “statements” includes “words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations”.⁹⁸

7.3 ENGLAND AND WALES

Approach: Sentence aggravation provisions, penalty enhancement provisions and standalone offences relating to the stirring up of hatred.

Threshold: The sentence aggravation and penalty enhancement provisions require the offender to have demonstrated or have been motivated by hostility.

Protected characteristics: The sentence aggravation provisions apply in respect of race, religion, sexual orientation, disability and transgender identity; the penalty enhancement provisions apply in respect of race and religion; the stirring up offences apply in respect of race, religion and sexual orientation.

Residual category: No.

England and Wales has a complex legislative scheme, including examples of all three models of hate crime legislation (sentence aggravation, penalty enhancement, and substantive offences).⁹⁹ Each of these will be considered in turn.

⁹⁵ Canadian Criminal Code s 318(4).

⁹⁶ *Mugesera*, at para 101.

⁹⁷ *Keegstra*, per Dickson CJ at 777.

⁹⁸ Canadian Criminal Code s 319(7).

⁹⁹ See section 4.1.4 above.

7.3.1 Sentence aggravation

Statutory provision for sentence aggravation in cases of racist crime was made by the Crime and Disorder Act 1998,¹⁰⁰ reflecting a manifesto commitment of the Labour government elected the previous year.¹⁰¹ This was not a new principle: the Court of Appeal had already said that it “cannot be too strongly emphasised... that where there is a racial element in an offence of violence, that is a gravely aggravating feature”.¹⁰² The legislation, however, gave that principle a statutory basis, applicable to all criminal offences¹⁰³ (not just ones of violence) and formally requiring the fact that the offence was aggravated to be stated in open court.

Further statutory provision for sentence aggravation has since been made in respect of religion (in 2001),¹⁰⁴ sexual orientation and disability (both in 2003),¹⁰⁵ and transgender identity (in 2012).¹⁰⁶ The relevant law is now found in sections 145 and 146 of the Criminal Justice Act 2003. Section 145 applies to racial and religious aggravation and section 146 to disability, sexual orientation and transgender identity.

Section 145 (increase in sentences for racial or religious aggravation) is in the following terms:

- (1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).**
- (2) If the offence was racially or religiously aggravated, the court—**
 - (a) must treat that fact as an aggravating factor, and**
 - (b) must state in open court that the offence was so aggravated.**
- (3) Section 28 of the Crime and Disorder Act 1998 (meaning of “racially or religiously aggravated”) applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.**

¹⁰⁰ Section 82.

¹⁰¹ Labour, *New Labour: Because Britain Deserves Better* (1997) 23.

¹⁰² *Attorney-General's References (Nos 29, 30 and 31 of 1994)* (1995) 16 Cr App R (S) 698 at 702.

¹⁰³ With the exception of the offences created by ss 29-32 of the Act (racially-aggravated assaults, racially-aggravated criminal damage and racially-aggravated public order offences), where the racial aggravation is itself part of the crime. See below, section 7.3.2.

¹⁰⁴ Anti-terrorism, Crime and Security Act 2001 s 39.

¹⁰⁵ Criminal Justice Act 2003 s 146.

¹⁰⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 65.

This cross-references to the definition of racial and religious aggravation in section 28 of the Crime and Disorder Act 1998, which is in the following terms:

- (1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if—
 - (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or
 - (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.
- (2) In subsection (1)(a) above—
 - “membership”*, in relation to a racial or religious group , includes association with members of that group;
 - “presumed”* means presumed by the offender.
- (3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
- (4) In this section *“racial group”* means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.
- (5) In this section *“religious group”* means a group of persons defined by reference to religious belief or lack of religious belief.

It has been observed that section 28 “intended a broad non-technical approach, rather than a construction which invited nice distinctions”.¹⁰⁷ For that reason, the House of Lords rejected a claim that a defendant who called three young Spanish women “bloody foreigners” and told them to “go back to your own country” had not acted in a racially aggravated fashion. It was wrong, the House of Lords concluded, to argue that a racial group must be defined by what it is rather than what it is not. As Baroness Hale pointed out, “[w]hether the group is defined exclusively by reference to what its members are not or inclusively by reference to what they are, the criterion by which the group is defined – nationality or colour – is the same”.¹⁰⁸ She added:¹⁰⁹

¹⁰⁷ *R v Rogers* [2007] 2 AC 62 at para 11 per Baroness Hale of Richmond.

¹⁰⁸ *Rogers* at para 10. So, similarly, a defendant who had assaulted the victim after calling him an “immigrant doctor” was held to have committed racially-aggravated assault in *Attorney-General’s*

This flexible, non-technical approach makes sense, not only as a matter of language, but also in policy terms. The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as “other”. This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.

One distinction found in section 28 is, however, particularly important, and that is the difference between section 28(1)(a) and 28(1)(b). Paragraph (a) allows an offence to be classified as racially aggravated because of a *demonstration of hostility*; paragraph (b) allows it to be so classified because of a *hostile motivation*. In *R v H(S)*,¹¹⁰ where the defendant was alleged to have threatened to stab the complainant calling him a “monkey” and a “black monkey”, the trial judge upheld a submission of no case to answer, on the basis that the defendant might have been motivated by personal animosity rather than racial hostility. As the Court of Appeal pointed out, this is a straightforward confusion of paragraphs (a) and (b): the Crown’s case was based on paragraph (a), and all that mattered was whether the defendant had demonstrated hostility. Whether he had any other motive would be irrelevant, as section 28(3) makes clear. It may be possible, however, to conclude on the facts of a particular case that the use of “vulgar abuse” does not amount to a demonstration of hostility.¹¹¹

Section 146 (increase in sentences for aggravation related to disability, sexual orientation or transgender identity) is in the following terms:

- (1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).**
- (2) Those circumstances are—**
 - (a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—**

Reference (No 4 of 2004) [2005] 1 WLR 2810. See also *DPP v M* [2004] 1 WLR 2758 (“bloody foreigners”).

¹⁰⁹ *Rogers* at para 12.

¹¹⁰ [2011] 1 Cr App R 14.

¹¹¹ *R v Rogers* [2007] 2 AC 62 at [17]; *R v H(S)* [2011] 1 Cr App R 14 at para 29, although it is not entirely clear in what circumstances such a conclusion might be reached.

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
 - (ii) a disability (or presumed disability) of the victim, or
 - (iii) the victim being (or being presumed to be) transgender,
- or
- (b) that the offence is motivated (wholly or partly)—
 - (i) by hostility towards persons who are of a particular sexual orientation,
 - (ii) by hostility towards persons who have a disability or a particular disability, or
 - (iii) by hostility towards persons who are transgender.
- (3) The court—
- (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
 - (b) must state in open court that the offence was committed in such circumstances.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
- (5) In this section “disability” means any physical or mental impairment.
- (6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

This adopts broadly the same approach to defining aggravation as the provisions on racial and religious aggravation, again permitting this to be demonstrated either by evidence of motivation or by a demonstration of hostility.

In addition to these provisions, there is a statutory rule that where a murder is “racially or religiously aggravated or aggravated by sexual orientation, disability or transgender identity”, the appropriate starting point for determining the minimum term is 30 years.¹¹²

¹¹² Criminal Justice Act 2003 Sch 21 para 5(2)(g), so long as the offender was aged 18 or over when the offence was committed. This is one of a series of circumstances which will give rise to that starting point, the others including murders involving the use of a firearm or explosive, murder done for gain, murder intended to obstruct or interfere with the course of justice, murder involving sexual or sadistic conduct and the murder of two or more persons. This provision does not apply in cases where the starting point is a whole life order, as set out in para 4 of the same provision.

7.3.2 Penalty enhancement

In addition to the creation of sentence aggravation provisions, another aspect of the Crime and Disorder Act 1998 was the creation of racially aggravated versions of offences of assault, criminal damage and public order offences. The effect of these provisions is that the offender, if charged under them, can be convicted of a distinct offence with a higher maximum penalty. These provisions were extended to cover religious aggravation in 2001.¹¹³ The definition of racial or religious aggravation for these purposes is found in section 28 of the 1998 Act, discussed in the previous section.

The following table is adapted from the Law Commission's 2014 report, *Hate Crime: Should the Current Offences be Extended?*¹¹⁴ It sets out the offences which may be aggravated in this way and the maximum custodial sentence (or, in the case of one offence punishable only by a fine, the maximum fine) for the non-aggravated and the aggravated versions of the offences.

Offence	Maximum penalty	
	Non-aggravated	Aggravated
Malicious wounding / grievous bodily harm (Offences against the Person Act 1861 s 20)	5 years	7 years
Actual bodily harm (1861 Act s 47)	5 years	7 years
Common assault (Criminal Justice Act 1988 s 39)	6 months	2 years
Criminal damage (Criminal Damage Act 1971 s 1)	10 years	14 years
Fear or provocation of violence (Public Order Act 1986 s 4)	6 months	2 years
Intentional harassment, alarm or distress (1986 Act s 4A)	6 months	2 years
Harassment, alarm or distress (1986 Act s 5)	£1,000 fine ¹¹⁵	£2,500 fine
Harassment (Protection from Harassment Act 1997 s 2)	6 months	2 years
Stalking (1997 Act s 2A)	6 months	2 years
Putting people in fear of violence (1997 Act s 4)	5 years	7 years
Stalking involving fear of violence or serious alarm or distress (1997 Act s 4A)	5 years	7 years

¹¹³ Anti-terrorism, Crime and Security Act 2001 s 39.

¹¹⁴ Law Com No 348, para 2.29.

¹¹⁵ That is, level 3 on the standard scale: s 5(6) of the 1986 Act, while the maximum penalty for the aggravated offence is a fine of level 4 on the standard scale: Crime and Disorder Act 1998 s 31(5).

In its 2014 report, the Law Commission considered the question of whether these offences should be extended to cover aggravations on the basis of sexual orientation, disability or transgender identity. It noted the argument, made by many consultees, that “it was inherently unfair and discriminatory not to have aggravated offences in place for hostility-based offending on grounds of transgender identity, sexual orientation and disability, when they exist for hostility on the grounds of race and religion”,¹¹⁶ and concluded that this would be a “compelling argument for immediate extension of the offences, were it not for the serious concerns that have been raised about the current aggravated offences”.¹¹⁷ The Commission identified a range of difficulties with the existing offences:¹¹⁸ they were considered by many consultees to be complex provisions which caused difficulties in practice. In particular, it was suggested that defendants were reluctant to plead guilty to the aggravated offences and juries were reluctant to convict, meaning that a jury would convict of the non-aggravated alternative and the sentencing judge would not then be able to apply the sentencing aggravation provisions of section 145 of the Criminal Justice Act 2003.¹¹⁹

The Commission therefore concluded that a full-scale review of the operation of the aggravated offences (something outwith its remit) would be appropriate before a decision was taken as to whether to extend the offences.¹²⁰

7.3.3 Standalone offences

As noted in the chapter on Scotland,¹²¹ the Public Order Act 1986 creates a series of offences – often referred to as the “stirring up offences” – which cover certain types of conduct likely to stir up racial hatred. The substantive offences are identical in Scotland and England and so are not set out further here.

¹¹⁶ Law Commission, *Hate Crime* (n 114) para 4.200.

¹¹⁷ Para 4.201.

¹¹⁸ Paras 4.158-4.185.

¹¹⁹ Para 4.175 and see *R v McGillivray* [2005] 2 Cr App R (S) 60, holding that in such circumstances it would not be appropriate for the court to sentence the offender as if they had in fact been convicted of the offence of which they were acquitted.

¹²⁰ Para 4.203: “Extending prior to such review would, in our view, represent a less valuable reform option and one that would have limited benefits for victims of hate crime and some potential adverse consequences.”

¹²¹ See section 2.2.1.

English law, however, differs from Scotland in that it has created similar offences addressing religious hatred (in 2006)¹²² and hatred on the grounds of sexual orientation (in 2008).¹²³ The Law Commission notes that there are three key differences between these offences and those relating to racial hatred:¹²⁴

- (1) the words or conduct must be threatening (not merely abusive or insulting);
- (2) there must have been an intention to stir up hatred (a likelihood that it might be stirred up is not enough); and
- (3) there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.

The express provisions referred to in the Commission's third point are formulated as follows.¹²⁵ First, in relation to religion:¹²⁶

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

And in relation to sexual orientation:¹²⁷

- (1) **In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.**

¹²² Racial and Religious Hatred Act 2006, inserting a series of new offences into the Public Order Act 1986.

¹²³ Criminal Justice and Immigration Act 2008 s 74 and Sched 16, amending the Public Order Act 1986.

¹²⁴ Law Commission, *Hate Crime* (n 114) para 2.39.

¹²⁵ In both cases, they followed extensive debates in Parliament regarding freedom of speech in the context of these offences: these are detailed in full in Law Commission, *Hate Crime: The Case for Extending the Existing Offences; History of Hate Crime Legislation* (Law Com CP No 213, Appendix B).

¹²⁶ Public Order Act 1986 s29J.

¹²⁷ Public Order Act 1986 s29JA.

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

In its 2014 report, the Law Commission considered the question of whether new “stirring up” offences should be created in respect of disability and transgender identity. It concluded that there would be very few successful prosecutions, noting that existing “stirring up” prosecutions are rare in comparison to prosecutions for aggravated offences¹²⁸ and arguing that “the type of hate speech typically found in relation to disability and transgender status is far less likely to satisfy the requirements for a stirring up offence than that found in relation to race and religion; and that such examples as have been brought to our attention would mostly be covered by other offences”.¹²⁹ It concluded, therefore, that new offences would have very limited deterrent and communicative value and that the law should not be extended.¹³⁰

7.4 NEW ZEALAND

Approach: Sentence aggravation applicable across the board of offending categories; substantive offence of inciting racial disharmony.

Threshold: Sentence aggravation applies when the offence was committed “partly or wholly because of hostility” towards the protected group.

Protected characteristics: The sentence aggravation provision applies to race, colour, nationality, religion, gender identity, sexual orientation, age, disability (for the sentence aggravation). The incitement offence applies only to race.

Residual category: Yes (the sentence aggravation provision covers any group with an “enduring common characteristic” such as those noted above).

7.4.1 Sentence aggravation

The relevant legislative provision in New Zealand is section 9(1) of the Sentencing Act 2002, which provides that, in sentencing an offender, the court “must take into account” any of a number of listed aggravating factors that are applicable in the case, including:

¹²⁸ Law Commission, *Hate Crime* (n 114) para 7.178.

¹²⁹ Ibid.

¹³⁰ Ibid, para 7.179. See also section 6.4.5.

- (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and**
 - (i) the hostility is because of the common characteristic; and**
 - (ii) the offender believed that the victim has that characteristic.**

The approach taken is one of sentencing aggravation and the model is one of animus rather than discriminatory selection – the offender must have committed the offence “because of hostility”. The requirement is that the sentencing judge must take the offender’s hostility “into account” in sentencing – weaker language than the equivalent Canadian provisions which provide that sentence “should be increased” if such an aggravating factor is present. Ip argues that this language means that the legislation simply codified existing sentencing practice and has had a “limited effect”.¹³¹ He also states that it is “impossible to clarify” in practice the extent to which the aggravation made any difference to the sentence.¹³²

In terms of the protected characteristics, the list is relatively wide ranging, covering race, colour, nationality, religion, gender identity, sexual orientation, age and disability. The one notable exception is gender. There has been some discussion among commentators as to whether this might be covered by gender identity,¹³³ but if it is not, it seems that it would be covered by analogy. The New Zealand legislation is drafted around the concept of a “group of persons who have an enduring common characteristic”, of which the specified factors are merely examples, and there is case law to suggest that gender has been included on this basis.¹³⁴ Unlike in Canada, however, it has been held that membership of a political party is not captured by section 9(1)(h). This was made clear in *Lawrence v Police*,¹³⁵ where the offender had written threatening emails to three different members of the National Party government.¹³⁶ The High Court held on appeal that they did “not consider that membership of a political party is captured by s 9(1)(h) as being ‘an

¹³¹ J Ip, “Debating New Zealand's hate crime legislation: theory and practice” (2005) 21 New Zealand Universities LR 575 at 581.

¹³² Ibid.

¹³³ See e.g. C Brown, “Legislating against hate crime in New Zealand: the need to recognise gender-based violence” (2004) 35 Victoria University of Wellington LR 591 at 595.

¹³⁴ See *R v Johnston* 05/08/03, Priestly J, HC Auckland T023336 where the judge stated that the offender’s “hostility to women” was an aggravating factor (at para 17), noted by Ip (n 131) in fn 25 at 580.

¹³⁵ [2015] NZHC 1122.

¹³⁶ *Lawrence* at para 4.

enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability”¹³⁷, but gave no reason for this decision.

Finally, it is worth noting that, separately to the hate crime aggravation, section 9(1)(g) of the Sentencing Act 2002 lists victim vulnerability (specifically that “the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender”) as an aggravation that the court must take into account when sentencing. Age is included here as an example of a characteristic that might make a victim vulnerable, but it is also included as one of the protected characteristics in the hate crime provision.

7.4.2 Standalone offence

In addition to the aggravated sentencing provision, New Zealand has a criminal offence of inciting racial disharmony. Section 133 of the Human Rights Act 1993 provides as follows:

Inciting racial disharmony

- (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,**
 - (a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or**
 - (b) uses in any public place ..., or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—**
- being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.**

¹³⁷ Lawrence at para 29.

Like the equivalent Canadian provision, the offence can only be committed by an accused who *intended* that his or her conduct would have the effect of inciting hostility or ill-will towards a specified group or bringing that group into contempt or ridicule. The offence is, however, wider than its Canadian equivalent in that it extends not just to hatred, but to words or other material likely to cause “hostility or ill-will” or “contempt or ridicule”.

The criminal offence extends only to inciting *racial* disharmony. There are no equivalent provisions relating to other groups. The Human Rights Act contains some civil provisions relating to hate speech, although again only in relation to racial groups. Section 61 contains a provision on racial disharmony near identical to the criminal offence in section 133, save that it does not require any intent to excite hostility or ill-will or to bring into contempt or ridicule. Section 63 prohibits racial harassment, but again provides only a civil remedy.

7.5 NORTHERN IRELAND

Approach: Sentence aggravation provisions and standalone offences relating to the stirring up of hatred or fear.

Threshold: The sentence aggravation provisions require the offender to have demonstrated or have been motivated by hostility.

Protected characteristics: Both the sentence aggravation provisions and stirring up offences apply in respect of race, religion, sexual orientation and disability.

Residual category: No.

The law relating to hate crime in Northern Ireland is separate and distinct from that applicable in England and Wales, although it is closely related. It has two principal aspects, as follows:

7.5.1 Sentence aggravation

Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 provides as follows:

- (1) This Article applies where a court is considering the seriousness of an offence.
- (2) If the offence was aggravated by hostility, the court–
 - (a) shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and

- (b) shall state in open court that the offence was so aggravated.
- (3) For the purposes of this Article an offence is aggravated by hostility if–
- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on–
- (i) the victim's membership (or presumed membership) of a racial group;
- (ii) the victim's membership (or presumed membership) of a religious group;
- (iii) the victim's membership (or presumed membership) of a sexual orientation group;
- (iv) a disability or presumed disability of the victim; or
- (b) the offence is motivated (wholly or partly) by hostility towards–
- (i) members of a racial group based on their membership of that group;
- (ii) members of a religious group based on their membership of that group;
- (iii) members of a sexual orientation group based on their membership of that group;
- (iv) persons who have a disability or a particular disability.
- (4) It is immaterial for the purposes of sub-paragraph (a) or (b) of paragraph (3) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that sub-paragraph.
- (5) In this Article–
- “disability” means any physical or mental impairment;
- “membership”, in relation to a racial, religious or sexual orientation group, includes association with members of that group;
- “presumed” means presumed by the offender;
- “racial group” has the same meaning as in the Race Relations (Northern Ireland) Order 1997;
- “religious group” means a group of persons defined by reference to religious belief or lack of religious belief;
- “sexual orientation group” means a group of persons defined by reference to sexual orientation.

This legislation follows the model of the English sentence aggravation provisions,¹³⁸ although it does not extend to offending aggravated by hostility towards transgender identity.¹³⁹

7.5.2 Standalone offences

The Public Order (Northern Ireland) Order 1987¹⁴⁰ created a series of offences which mirror those found in sections 18-23 of the Public Order Act 1986¹⁴¹ in their structure, but with two differences: they cover arousing fear in addition to inciting hatred, and extend both to race and religion.¹⁴² These offences were extended further in 2004 to cover sexual orientation and disability.¹⁴³ Rather than (as in England and Wales) creating new offences, the extension was achieved simply by amending the definitions of “fear” and “hatred” to extend to groups defined by reference to sexual orientation and disability. This means that the differences between the “stirring up” offences in relation to (on the one hand) race and (on the other) religion or sexual orientation which were identified by the Law Commission for England and Wales¹⁴⁴ are not found in the Northern Ireland legislative scheme.

¹³⁸ See section 7.3.1 above.

¹³⁹ See N Jarman, *Criminal Justice Responses to Hate Crime in Northern Ireland* (2012) 4, noting that the Police Service of Northern Ireland has collected data on transgender hate crime since 2006-07, and recommending that the Northern Ireland legislation should be extended to cover transgender identity. In June 2016, the Justice Minister announced a “major review of policy issues in relation to sentencing”, including the legislative framework governing hate crime: Department of Justice, “Justice minister announces sentencing review”, 9 June 2016, available at <https://www.justice-ni.gov.uk/news/justice-minister-announces-sentencing-review>. On the operation of the provisions in practice, see Northern Ireland Human Rights Commission, *Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland* (2013) 53-58.

¹⁴⁰ SI 1987/463 (NI 7).

¹⁴¹ See section 2.2.1 above.

¹⁴² Public Order (Northern Ireland) Order 1987 arts 8-13. Article 8, as amended by subsequent legislation, defines “fear” as meaning “fear of a group of persons defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins”, and “hatred” as meaning “hatred against a group of persons defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins”. Both concepts were initially defined by reference to “a group of persons in Northern Ireland”, but the words “in Northern Ireland” were deleted by the Anti-terrorism, Crime and Security Act 2001 s 38.

¹⁴³ Criminal Justice (No. 2) (Northern Ireland) Order 2004 (SI 2004/1991 (NI 15)) art 3.

¹⁴⁴ See section 7.3.3 above.

7.6 REPUBLIC OF IRELAND

Approach: Standalone offence of stirring up hatred.

Protected characteristics: Race, colour, nationality, religion, ethnic or national origins, membership of the travelling community, sexual orientation.

Residual category: No

The Republic of Ireland has no specific hate crime legislation aside from the provisions noted below that target hate speech¹⁴⁵ and there are no immediate plans to change this. The Hate and Hostility Research Group at the University of Limerick was commissioned by the Irish Council for Civil Liberties to investigate the case for introducing hate crime legislation in Ireland.¹⁴⁶ It concluded that hate crime legislation should be introduced and proposed a draft hate crime Bill,¹⁴⁷ but this has not reached the stage of being a formal legislative proposal.

At common law, a motive of hate can be taken into account as an aggravating factor in sentencing, although this was only made clear relatively recently, in *DPP v Elders*.¹⁴⁸

The Republic of Ireland does have a criminal offence of incitement to hatred, which is contained in section 2(1) of the Prohibition of Incitement to Hatred Act 1989 (PIHA).¹⁴⁹ It provides as follows:

It shall be an offence for a person—

- (a) **to publish or distribute written material**
- (b) **to use words, behave or display written material—**
 - (i) **in any place other than inside a private residence, or**
 - (ii) **inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence, or**

¹⁴⁵ G Ellison and L Smith, “Hate Crime Legislation and Violence Against Sex Workers in Ireland: Lessons in Policy and Practice” (Queen's University Belfast Law Research Paper No. 2017-03) 1.

¹⁴⁶ Haynes et al, *Out of the Shadows* (n 76) 1.

¹⁴⁷ Ibid 63-79.

¹⁴⁸ [2014] IECA 6, discussed by Haynes et al, *Out of the Shadows* (n 76) 52.

¹⁴⁹ The background to and scope of the offence are discussed in detail in ch 3 of J Scheweppe and D Walsh, *Combating Racism and Xenophobia through the Criminal Law* (2008). For critical commentary, see T Daly, “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part I” (2007) 17 Irish Crim LJ 16.

- (c) to distribute, show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

The offence is drafted in similar terms to the offence of stirring up racial hatred under the Public Order Act 1986,¹⁵⁰ but there are two key differences. First, the protected groups covered by the provision are wider: under section 1(1) “hatred” means “**hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation**”. Secondly, the offence is defined in exactly the same way, regardless of the group concerned – unlike the equivalent provisions in England and Wales no special provision is made in respect of religious hatred or hatred based on sexual orientation (or indeed in respect of the other protected groups). In England and Wales,¹⁵¹ stirring up hatred on the basis of religion or sexual orientation requires that the words or conduct must have been threatening (whereas under the PIHA abusive or insulting words or conduct are sufficient) and that there must have been an intention to stir up hatred (whereas under the PIHA a likelihood that it might be stirred up is enough). There are also no express provisions in the PIHA protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct. This has led to criticism of the Act for failing to accord sufficient respect to the right to freedom of expression.¹⁵²

Various defences are provided in section 2(2) as follows:

- (a) In proceedings for an offence under subsection (1), if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.
- (b) In proceedings for an offence under subsection (1) (b), it shall be a defence for the accused person—

¹⁵⁰ See section 2.2.1 above.

¹⁵¹ See section 2.2.1 above.

¹⁵² Daly (n 149) at 18 (and see T Daly, “Reform of the Prohibition of Incitement to Hatred Act 1989 – Part II” (2007) 17 Irish Crim LJ 16 for a more detailed discussion of freedom of expression issues).

- (i) to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the residence, or
- (ii) if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behaviour or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

Section 3 contains a similar offence relating to broadcast material and section 4 a similar offence relating to preparation and possession of material.¹⁵³ All of the offences carry a maximum penalty of two years' imprisonment when prosecuted on indictment.¹⁵⁴ Only a very small number of convictions have been secured under the Act,¹⁵⁵ leading one academic to note that there is "what I would describe as 'an expectations gap' and 'a frustration gap' between community aspirations from this legislation and the reality of its limited application and implementation to date".¹⁵⁶

7.7 SOUTH AFRICA

Approach: no directly relevant criminal provisions but a draft Bill which would introduce what appears to be a sentence aggravation provision and an offence of stirring up hatred is under consideration.

At the time of writing, there is no specific hate crime legislation in South Africa, neither in terms of sentence aggravation¹⁵⁷ nor specific criminal offences.¹⁵⁸ Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 prohibits speech that promotes or propagates hatred on the grounds of race, gender

¹⁵³ Both are discussed in detail in Scheweppe and Walsh, *Combating Racism and Xenophobia* (n 149) 64-68.

¹⁵⁴ Prohibition of Incitement to Hatred Act 1989 s 6(b).

¹⁵⁵ J Scheweppe, A Haynes and J Carr, *A Life Free From Fear – Legislating for Hate Crime in Ireland: An NGO Perspective* (2014) 12; Daly (n 149) at 2.

¹⁵⁶ S Taylor, *Responding to Racist Incidents and Racist Crimes in Ireland: An Issues Paper for the Equality Authority* (2010) para 5.2.21.

¹⁵⁷ D Breen and JA Nel, "South Africa – a home for all? The need for hate crime legislation" (2011) 38 South African Crime Quarterly 33 at 33; D Breen et al, "Hate crime in transitional societies: the case of South Africa", in J Scheweppe and MA Walters (eds), *The Globalization of Hate: Internationalising Hate Crime?* (2016) 126 at 126.

¹⁵⁸ J Botha and A Govindjee, "Regulating cases of extreme hate speech in South Africa: a suggested framework for a legislated criminal sanction" (2014) 27 South African Journal of Criminal Justice 117 at 117.

or disability, but provides only for a civil remedy. Only if the hate speech fell under the general criminal provisions on incitement could it be prosecuted as a criminal offence.¹⁵⁹ The South African Government has, however, published a draft hate crime Bill, the Prevention of Hate Crimes and Hate Speech Bill,¹⁶⁰ on which it has invited comment. The Bill is unlikely to be passed in its present form, given that commentators have pointed out that it is unclear whether it is creating new offences or mandatory sentencing aggravations,¹⁶¹ but some aspects are worthy of note. The Bill contains two main provisions. The first of these is in section 3(1) which provides as follows:

Offence of hate crime

Section 3(1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated on the basis of that person's prejudice, bias or intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member:

- (a) Race;**
- (b) gender;**
- (c) sex, which includes intersex;**
- (d) ethnic or social origin;**
- (e) colour;**
- (f) sexual orientation;**
- (g) religion;**
- (h) belief;**
- (i) culture;**
- (j) language;**
- (k) birth;**
- (l) disability;**
- (m) HIV status;**
- (n) nationality;**
- (o) gender identity;**
- (p) albinism; or**
- (q) occupation or trade.**

¹⁵⁹ Hate Crimes Working Group, *Submission of the Hate Crimes Working Group: Prevention and Combatting of Hate Crimes and Hate Speech Bill* (2017) 11-12. For further discussion of all of these measures, see Botha and Govindjee (n 158) at 125-127.

¹⁶⁰ The text of which is available at <http://www.justice.gov.za/legislation/hcbill/hatecrimes.html>.

¹⁶¹ Hate Crimes Working Group, *Submission of the Hate Crimes Working Group* (n 159) 14.

Section 3(2)(a) Any person who commits a hate crime is guilty of an offence and liable on conviction to a sentence as contemplated in section 6.

Under section 6 of the Bill, if an offender is convicted “of an offence referred to in section 3”, the court that imposes the sentence “must ... regard the fact that the person has been convicted of a hate crime, as an aggravating circumstance”.¹⁶²

As those commenting on the Bill have pointed out, it is unclear whether the Bill is creating a new criminal offence or a mandatory aggravating factor in sentencing.¹⁶³ The latter seems much more likely – no specific maximum sentence is set out in the Bill for the “offence of hate crime” and it is difficult to conceive of how the legislation would operate if it is creating a stand-alone offence.¹⁶⁴

Section 3 above is drafted in terms of a requirement for conduct to be “motivated on the basis of ... prejudice, bias or intolerance” – the animus model rather than the discriminatory selection model. The list of protected characteristics is wider than is contained in any of the other legislation examined – notably it covers HIV status, occupation or trade and some very broad general categories such as “belief”, as well as more standard characteristics – but unlike some of the other legislation it does not include a residual category. It cannot be assumed, however, that all of these characteristics will be protected in the legislation as passed (or indeed that the draft Bill will be passed at all).

The second provision of note in the draft Prevention of Hate Crimes and Hate Speech Bill is section 4 which would, if passed, introduce a criminal offence of hate speech. The text of the draft section 4 is as follows:¹⁶⁵

Offence of hate speech

4(1)(a) Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that –

- (i) advocates hatred towards any other person or group of persons; or**
- (ii) is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to –**

¹⁶² Draft Bill s 6(2)(a)(iii).

¹⁶³ Hate Crimes Working Group, *Submission of the Hate Crimes Working Group* (n 159) 14.

¹⁶⁴ The Hate Crimes Working Group (*ibid*) gives the example of someone who, on the facts, has committed rape with a motivation of bias and ask whether that person would be charged with rape, a hate crime or both?

¹⁶⁵ Section 4(1)(b) contains a similar provision targeting the intentional distribution or making available of an electronic communication.

**(aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or
(bb) stir up violence against, or bring into contempt or ridicule, any person or group of persons, based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade, is guilty of the offence of hate speech.**

The proposals have, however, proved controversial, with the Hate Crimes Working Group (a group composed of academics and interest groups such as Amnesty International and victim support organisations) actively opposing its introduction, taking the view that the available civil and criminal remedies noted above are sufficient to address the problem of hate speech.¹⁶⁶

7.8 UNITED STATES OF AMERICA

Given the vast range of legislative provisions in the 50 states of the United States, along with the District of Columbia and federal legislation, this section does not attempt to provide a comprehensive account of the full range of hate crime provisions in the United States. Such provisions are well-established and have survived constitutional challenge.¹⁶⁷ A comprehensive account of state statutes governing hate crimes as at 2010, prepared by the Congressional Research Service, is available online.¹⁶⁸ A more up to date summary table of relevant provisions is available from the Anti-Defamation League.¹⁶⁹

Instead, this section provides detail on those jurisdictions within the United States which expressly protect characteristics which are not explicitly protected in any of

¹⁶⁶ Hate Crimes Working Group, *Submission of the Hate Crimes Working Group* (n 159) 11.

¹⁶⁷ See in particular *Wisconsin v Mitchell* 508 US 476 (1993), rejecting an argument that Wisconsin's hate crime statute was an unconstitutional interference with free speech rights. At 487-488: "the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm... The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."

¹⁶⁸ AM Smith and CL Foley, *State Statutes Governing Hate Crimes* (2010), available at <https://fas.org/sgp/crs/misc/RL33099.pdf>.

¹⁶⁹ Anti-Defamation League, "Anti-Defamation League State Hate Crime Statutory Provisions" (April 2016), available at <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/ADL-2016-State-Hate-Crime-Statutes.pdf>.

the hate crime legislative provisions discussed earlier in this chapter,¹⁷⁰ albeit that they might in some instances be covered by residual category rules which allow for the legislation to be applied to groups other than those expressly mentioned.¹⁷¹ The section is concerned only with provisions providing for sentence aggravation or penalty enhancement: the regulation of hate speech in the United States is very limited given the constitutional protection of freedom of speech.¹⁷²

In each case, the full range of characteristics protected by legislation is provided for context, along with detail as to the operation of the hate crime provisions in question. This allows this section of the report to provide a range of examples of the operation of hate crime provisions in the United States more generally, indicating the model of hate crime employed and the potential effect on sentencing of an act being classified as a hate crime. The distinctive characteristics – those not expressly protected by any legislation referred to earlier in this chapter – are placed in bold type.

There are three characteristics which recur in this analysis, although all remain protected only in a small minority of states: homelessness; “gender identity or expression” (a potentially broader term than “gender identity” alone) and political affiliation.

In the **District of Columbia**, “bias-related crime” is defined as “a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, **marital status, personal appearance**, sexual orientation, gender identity **or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation** of a victim of the subject designated act”.¹⁷³ These provisions have been described as “perhaps the broadest”

¹⁷⁰ This is based on reviewing legislation for each state where the Anti-Defamation League's summary table (n 169) had identified the state's legislation as making provision for crimes motivated by “other”.

¹⁷¹ See e.g. the “any other similar factor” category in s 718.2(a) of the Canadian Criminal Code, discussed in section 7.2.1 above.

¹⁷² See TJ Webb, “Verbal poison – criminalizing hate speech: a comparative analysis and a proposal for the American system” (2011) 50 Washburn LJ 445. Other standalone offences do exist, however: the Congressional Research Service review (Smith and Foley, *State Statutes* (n 168)) includes an extensive list of provisions relating to institutional vandalism (typically covering vandalism of places of worship), while the Anti-Defamation League (n 169) additionally catalogues provisions criminalising cross-burning.

¹⁷³ DC ST § 22-3701(1). A “designated act” is “a criminal act, including arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry”: § 22-3701(2). It has been held that, given the word “including”, this list is merely

in the United States.¹⁷⁴ Where a person is convicted of a bias-related crime, the normal maximum penalty is enhanced by 50%.¹⁷⁵

In **Florida**, the penalty for a felony or misdemeanour is reclassified “if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, **homeless status, or advanced age** of the victim”.¹⁷⁶ Although “age” is found in other hate crime legislation,¹⁷⁷ the reference to “advanced age” only is distinctive. The effect of reclassification is to enhance the penalties applicable to the offence: for example, an offence which would normally be a misdemeanour of the second degree, carrying a maximum period of imprisonment of 60 days, becomes a misdemeanour of the first degree, carrying a maximum period of imprisonment of one year.¹⁷⁸

In **Hawaii**, a defendant who has committed an offence against the person, property rights, or public order¹⁷⁹ is to be regarded as a “hate crime offender” if they “intentionally selected a victim or, in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity **or expression**, or sexual orientation of any person”.¹⁸⁰ Classification as a hate crime offender enables the court to impose an extended term of imprisonment on a person convicted of a

illustrative, and so *any* criminal act is within the scope of the legislation: *Aboye v United States*, 121 A.3d 1245 (2015). “Homelessness” is defined so as to include persons who have a “permanent nighttime residence” but one which is of the nature of a shelter, institution, or a place not designed for or ordinarily used as regular sleeping accommodation: § 22-3701(4).

¹⁷⁴ KC Simmons, “Subverting symbolism: the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and cooperative federalism” (2012) 49 American Crim LR 1863 at 1876.

¹⁷⁵ DC ST § 22-3703: “A person charged with and found guilty of a bias-related crime shall be fined not more than 1 1/2 times the maximum fine authorized for the designated act and imprisoned for not more than 1 1/2 times the maximum term authorized for the designated act.”

¹⁷⁶ Fla Stat § 775.085. This provision was introduced in 1989: see generally ED Rosenberg, “Hate crimes, hate speech and free speech – Florida’s bias-intended crime statute” (1992) 17 Nova LR 597. The reference to “homeless status” was added in 2010: 2010 Fla Sess Law Serv Ch 2010-46 (H.B. 11).

¹⁷⁷ See e.g. Canadian Criminal Code s 718.2(a); Sentencing Act 2002 s 9(1) (New Zealand).

¹⁷⁸ Fla Stat §§ 775.085(1)(a) and 775.082(4).

¹⁷⁹ That is a crime under chapter 707, 708 or 711 of the penal code: § 706-662(6)(a).

¹⁸⁰ Haw Rev Stat § 706-662(6)(b). The section goes on to provide that “gender identity or expression’ includes a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth”.

felony “if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public”.¹⁸¹

In **Iowa**, “hate crime” is defined as one of certain specified offences¹⁸² when the offence is “committed against a person or a person’s property because of the person’s race, color, religion, ancestry, national origin, **political affiliation**, sex, sexual orientation, age, or disability, or the person’s association with a person of a certain race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability”.¹⁸³ Hate crimes are subject to distinctive penalty enhancements depending on the offence in question. For example, an assault is normally (in the absence of any other aggravating features) a simple misdemeanour,¹⁸⁴ carrying a maximum sentence of thirty days’ imprisonment and a fine of \$625.¹⁸⁵ If treated as a hate crime, it is (again in the absence of any other aggravating features) a serious misdemeanour,¹⁸⁶ carrying a maximum sentence of one year’s imprisonment and a fine of \$1875.¹⁸⁷

In **Louisiana**, a “hate crime” is one of a fixed list of offences¹⁸⁸ where the victim was selected “because of actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry of that person **or the owner or occupant of that property** or because of **actual or perceived membership**

¹⁸¹ Haw Rev Stat §§ 706-662 and 706-661. For example, this raises the potential maximum penalty for a class C felony from its normal five years (§ 706-660(1)(b)) to ten years (§ 706-661(4)).

¹⁸² These are: assault; “violations of individual rights under section 712.9” (arson in the second or third degree; reckless use of fire or explosives; explosive or incendiary materials or devices; false reports; threats); criminal mischief and trespass: § 729A.2.

¹⁸³ Iowa Code § 729A.2.

¹⁸⁴ Iowa Code § 708.2(6).

¹⁸⁵ Iowa Code § 903.1(1)(a).

¹⁸⁶ Iowa Code § 708.2C(5).

¹⁸⁷ Iowa Code § 903.1(1)(b).

¹⁸⁸ “first or second degree murder; manslaughter; battery; aggravated battery; second degree battery; aggravated assault with a firearm; terrorizing; mingling harmful substances; simple, forcible, or aggravated rape; sexual battery, second degree sexual battery; oral sexual battery; carnal knowledge of a juvenile; indecent behavior with juveniles; molestation of a juvenile or a person with a physical or mental disability; simple, second degree, or aggravated kidnapping; simple or aggravated arson; communicating of false information of planned arson; simple or aggravated criminal damage to property; contamination of water supplies; simple or aggravated burglary; criminal trespass; simple, first degree, or armed robbery; purse snatching; extortion; theft; desecration of graves; institutional vandalism; or assault by drive-by shooting”: La Rev Stat § 14:107.2A.

or service in, or employment with, an organization".¹⁸⁹ While references to "ancestry" or an equivalent are common in hate crime legislation, the extension to cover cases where the crime was motivated by the ancestry of the owner or occupant of property is distinctive. The penalty enhancement depends on whether the offence in question is a misdemeanour or a felony. If it is a misdemeanour, the court may impose an additional penalty of up to six months' imprisonment and a fine of \$500.¹⁹⁰ If it is a felony, the court may impose an additional penalty of five years' imprisonment and a fine of \$5000.¹⁹¹ In both cases, the imprisonment will run consecutively to the sentence for the underlying offence.¹⁹²

In **Maine**, the Criminal Code includes a statement that one of the general purposes of the sentencing provisions is to "permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of... the selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or **homelessness of that person or of the owner or occupant of that property**".¹⁹³ The reference to homelessness was added in 2006, and is the first such reference to be found in hate crime legislation in the United States.¹⁹⁴ The Maine legislation differs from most of the other state legislation noted here, in that it indicates certain factors are to be taken into account in sentencing but does not prescribe penalty enhancements.

In **Maryland**, the relevant legislation extends to crimes committed because of "race, color, religious beliefs, sexual orientation, gender, disability, or national origin, **or because another is homeless**".¹⁹⁵ The legislative technique employed is a distinctive one, creating a separate crime which will almost certainly overlap with the underlying offence. The legislation provides as follows:¹⁹⁶

¹⁸⁹ "Organization" is defined as "(1) Any lawful corporation, trust, company, partnership, association, foundation, or fund; (2) Any lawful group of persons, whether or not incorporated, banded together for joint action on any subject or subjects; [or] (3) Any entity or unit of federal, state, or local government": La Rev Stat § 14:107.2D.

¹⁹⁰ La Rev Stat § 14:107.2B.

¹⁹¹ La Rev Stat § 14:107.2C.

¹⁹² La Rev Stat § 14:107.2B-C.

¹⁹³ Me Rev Stat tit 17A § 1151(8).

¹⁹⁴ National Coalition for the Homeless, *Hate, Violence, and Death on Main Street USA* (2009) 43.

¹⁹⁵ Md Code, Crim Law § 10-304. Homelessness was added in 2009: 2009 Maryland Laws Ch 201 (SB 151).

¹⁹⁶ Md Code, Crim Law § 10-304.

Because of another's race, color, religious beliefs, sexual orientation, gender, disability, or national origin, or because another is homeless, a person may not:

- (1) (i) commit a crime or attempt to commit a crime against that person;
 - (ii) damage the real or personal property of that person;
 - (iii) deface, damage, or destroy, or attempt to deface, damage, or destroy the real or personal property of that person; or
 - (iv) burn or attempt to burn an object on the real or personal property of that person; or
- (2) commit a violation of item (1) of this section that:
 - (i) except as provided in item (ii) of this item, involves a separate crime that is a felony; or
 - (ii) results in the death of the victim.

Violation of part (1) of these provisions is a misdemeanour carrying a penalty of up to three years' imprisonment and a fine of \$5,000. Violation of part (2) is a felony carrying a penalty of (for para (i)) up to ten years' imprisonment and a fine of \$10,000 or (for para (ii)) up to twenty years' imprisonment and a fine of \$20,000.¹⁹⁷ Such sentences "may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of [these provisions]".¹⁹⁸

In **Nevada**, where one of a specified list of crimes¹⁹⁹ is committed "because the actual or perceived race, color, religion, national origin, physical or mental disability, sexual orientation or gender identity **or expression** of the victim was different from that characteristic of the perpetrator", then the court may impose an additional term of imprisonment of not less than one year and not more than twenty years.²⁰⁰

In **Vermont**, enhanced penalties are applicable in respect of a person "who commits, causes to be committed, or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, **service in the U.S. Armed Forces**, disability as defined by 21 V.S.A. § 495d(5), sexual orientation, or gender

¹⁹⁷ Md Code, Crim Law § 10-306.

¹⁹⁸ Md Code, Crim Law § 10-307.

¹⁹⁹ These are identified in Nev Rev Stat § 193.1675 by reference to the relevant provisions of Nevada legislation.

²⁰⁰ Nev Rev Stat § 193.1675.

identity".²⁰¹ The enhanced penalty depends on the maximum penalty for the underlying crime, as follows:²⁰²

- One year's imprisonment or less: the defendant is subject to a maximum of two years' imprisonment and a fine of \$2,000.
- More than one year's imprisonment, but less than five: the defendant is subject to a maximum of five years' imprisonment and a fine of \$10,000.
- Five years' imprisonment or more: the penalty for the underlying crime applies but the motivation of the defendant is to be considered as a factor in sentencing.

In **West Virginia**, legislation provides that “[t]he fact that a person committed a felony or misdemeanor, or attempted to commit a felony, because of the victim's race, color, religion, ancestry, national origin, **political affiliation** or sex, shall be considered a circumstance in aggravation of any crime in imposing sentence”.²⁰³

²⁰¹ Vt Stat tit 13 § 1455.

²⁰² Vt Stat tit 13 § 1455(1)-(3).

²⁰³ W Va Code § 61-6-21(d).

CHAPTER 8: APPROACHES TAKEN IN OTHER JURISDICTIONS RELEVANT TO THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) ACT 2012

8.1 The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

8.1.1 Background

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (subsequently the OBFA) creates two offences – the offence of offensive behaviour at a regulated football match (in section 1) and the offence of threatening communications (in section 6). It is the section 1 offence that is the primary focus here.¹ The offence is unusual in that it only concerns behaviour that takes place in the context of a regulated football match.

The idea for football specific legislation was initially discussed at a meeting (involving the First Minister and representatives from Scottish football's governing bodies, football clubs and the police) that was held in 2011 to discuss a number of issues relating to Scottish football, including sectarianism, alcohol misuse and violence.² Shortly after the meeting was held, there were a number of incidents in which people associated with Celtic football club (the then manager and two of the players) were sent bullets and explosive devices through the post and were targeted with online abuse.³ This led the Scottish Government to accelerate its plans for legislation, stating that such incidents required a "serious and immediate response".⁴ A draft Bill was introduced in June 2011,⁵ passed by the Scottish Parliament on 14 December 2011 and the Act came into force on 1 March 2012.

¹ For discussion of the s 6 offence, see section 2.2.3.

² Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Policy Memorandum, para 10.

³ Policy Memorandum (n 2) para 11; M McBride, "The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 – assessing the case for repeal" (2017) 21 Edin LR 234 at 234-235.

⁴ Policy Memorandum (n 2) para 11.

⁵ As noted in chapter 2, this was initially proposed as emergency legislation, in order for the provisions to be in force for the start of the impending football season, but this plan was subsequently abandoned.

Although the term “sectarian” is not used anywhere in the legislation, the OBFA was introduced primarily to address the issue of sectarianism in football.⁶ As the Policy Memorandum accompanying the Act stated, its objective:⁷

...is to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred. These measures are intended to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society.

Defining sectarianism, especially in the Scottish context, is not an easy task.⁸ As the anti-sectarian charity Nil by Mouth put it in its submission to the Justice Committee, it is a complex “fusion of religion, politics, identity and ignorance”.⁹ Even on the widest definition of sectarianism, however, the reach of the Act extends beyond it, owing to the incorporation under section 1(2)(d) and (e) of offensive conduct with no link to hatred of a particular group.¹⁰ This was acknowledged in the Policy Memorandum, which stated that:¹¹

What is crucial about the measures in this Bill is that they do not rest on any such definition. We intend that these measures will cover all offensive or threatening behaviour at football matches, regardless of whether it is “sectarian”. This means offensive or threatening behaviour likely to incite public disorder, whether that is through songs and chants, displaying banners or otherwise.

⁶ Policy Memorandum (n 2) para 2.

⁷ Ibid.

⁸ As noted by the Justice Committee when scrutinising the legislation, whole books have been written on the subject. The Justice Committee did not cite any examples, but see e.g. M Rosie, *The Sectarian Myth in Scotland: Of Bitter Memory and Bigotry* (2004); S Bruce, T Glendinning and M Rosie, *Sectarianism in Scotland* (2004); B Murray, *The Old Firm: Sectarianism, Sport and Society in Scotland* (1984).

⁹ Justice Committee, Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2 (1st Report, 2011) para 33.

¹⁰ See section 8.1.2 below.

¹¹ Policy Memorandum (n 2) para 4.

8.1.2 Section 1 of the Act

Section 1 of the 2012 Act provides that:¹²

- (1) A person commits an offence if, in relation to a regulated football match—
 - (a) the person engages in behaviour of a kind described in subsection (2), and
 - (b) the behaviour—
 - (i) is likely to incite public disorder, or
 - (ii) would be likely to incite public disorder.
- (2) The behaviour is—
 - (a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—
 - (i) a religious group,
 - (ii) a social or cultural group with a perceived religious affiliation,
 - (iii) a group defined by reference to a thing mentioned in subsection (4),
 - (b) expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of a group mentioned in any of sub-paragraphs (i) to (iii) of paragraph (a),
 - (c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those sub-paragraphs,
 - (d) behaviour that is threatening, or
 - (e) other behaviour that a reasonable person would be likely to consider offensive.
- (3) For the purposes of subsection (2)(a) and (b), it is irrelevant whether the hatred is also based (to any extent) on any other factor.
- (4) The things referred to in subsection (2)(a)(iii) are—
 - (a) colour,
 - (b) race,
 - (c) nationality (including citizenship),
 - (d) ethnic or national origins,
 - (e) sexual orientation,

¹² The account of s 1 that follows is based heavily on that in J Chalmers and F Leverick, *The Criminal Law of Scotland, Volume II*, 4th edn (2017) paras 49.16-49.17, where the Act is discussed in detail.

- (f) transgender identity,
 - (g) disability.
- (5) For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—
- (a) measures are in place to prevent public disorder, or
 - (b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.

An offender convicted under section 1 is liable, following conviction on indictment, to imprisonment for a term not exceeding five years, or to a fine, or to both, or, following summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.¹³

Section 1 only covers conduct that takes place in relation to a regulated football match. Under section 2, a “regulated football match” has the same meaning as it is given in relation to football banning orders under section 55(2) of the Police, Public Order and Criminal Justice (Scotland) Act 2006. The match must be one taking place in Scotland or involving a registered Scottish team or the Scottish national team outside of Scotland.¹⁴ The reach of the Act extends beyond conduct within a football ground. The offence can be committed at the football match itself, but it can also be committed at any point on a journey to or from the match,¹⁵ or at “any place (other than domestic premises) at which such a match is televised”.¹⁶ A journey for the purposes of section 1 can include overnight breaks.¹⁷

The accused does not have to attend or be planning to attend the match. Under section 2(4)(a), a person can be regarded as having been on a journey to or from a regulated football match “whether or not the person attended or intended to attend the match”. Conduct directed towards a person “entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held”¹⁸ or a person who is “on a journey to or from the regulated football match”¹⁹ is also covered, even if the accused did not attend or travel to the match or intend to do so. Collectively these provisions include those who “travel to towns and cities

¹³ OBFA s 1(6).

¹⁴ OBFA s 2(1)(b).

¹⁵ OBFA s 2(2)(a)(iii).

¹⁶ OBFA s 2(3).

¹⁷ OBFA s 2(4)(b).

¹⁸ OBFA s 2(2)(b)(ii).

¹⁹ OBFA s 2(2)(b)(iii).

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 where football matches are being played solely to indulge in violence or other offensive behavior”²⁰ and “the person entirely unconnected and unaware of any football match who either joins in with football fans they encounter (on a train or on the street or in a pub) or acts in a threatening/offensive etc manner towards football fans”.²¹

Under section 1(2) of the Act, the behavior in question must fall into one of five categories. The first two are effectively hate speech offences. They prohibit behaviour expressing hatred of, or stirring up hatred against, a group of persons (section 1(2)(a)) or an individual (section 1(2)(b)) based on their membership (or presumed membership) of a particular group. The group in question must be a religious group,²² a “social or cultural group with a perceived religious affiliation”,²³ or a group defined by reference to the attributes listed in section 1(4), namely colour, race, nationality (including citizenship), ethnic or national origins, sexual orientation, transgender identity and disability. Under section 1(1)(b), the behaviour must also be “likely to incite public disorder”²⁴ or would be likely to incite public disorder²⁵ were it not for measures in place to prevent this or an absence of persons likely to be incited to public disorder.²⁶

The third category (section 1(2)(c)) comprises behaviour “motivated (wholly or partly) by hatred of” any of the groups listed in the preceding paragraph. As for sections 1(2)(a) and (b), the behaviour must be likely to incite public disorder or would be likely to incite public disorder were it not for measures in place to prevent this or an absence of persons likely to be incited to public disorder. This is more akin to a hate crime sentence aggravation provision, where behaviour likely to incite public disorder (effectively a breach of the peace) is aggravated by being motivated by hatred.

The last two categories are somewhat wider, referring as they do to “behaviour that is threatening” (section 1(2)(d)) or “other behaviour that a reasonable person would be likely to consider offensive” (section 1(2)(e)). There is no requirement under these two sub-sections for a link with hatred of a particular group. These are general

²⁰ Lord Advocate’s Guidelines on the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, 3.

²¹ Ibid.

²² OBFA s 1(2)(a)(i).

²³ OBFA s 1(2)(a)(ii).

²⁴ OBFA s 1(1)(b)(i).

²⁵ OBFA s 1(1)(b)(ii).

²⁶ OBFA s 1(5).

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 public order offences, limited only by the requirement that the behaviour is likely to incite public disorder (or would be likely to incite public disorder were it not for measures in place to prevent this or an absence of persons likely to be incited to public disorder). The inclusion of this last category makes the reach of section 1 extremely wide²⁷ and potentially takes it some way beyond its stated purpose of tackling sectarianism in football.

Although some limits are placed on the offence by section 1(1)(b) which, as set out above, provides that the behaviour must be likely to incite public disorder or would be likely to incite public disorder were it not for measures in place to prevent this or an absence of persons likely to be incited to public disorder, in *MacDonald v Cairns*,²⁸ it was held that it was irrelevant that particular persons in a football ground could not actually hear an offensive song being sung.²⁹ It is also the case that, for a conviction under section 1 based on singing an offensive song, there is “no need for proof of knowledge that the particular supporter was aware of the law or the status of the song”.³⁰

Further guidance on when prosecutions will be brought under section 1 can be found in the Lord Advocate’s Guidelines on the Act. In relation to section 1(2)(a)-(c) (the provisions targeting hatred), the Guidelines state that:³¹

It is a matter for the judgement of a police officer, at the time of the commission of the offence, having regard to the nature and words of the song, including any non-standard lyrics or “add ons”, the surrounding circumstances and the context in which it is being sung, to determine whether a song or lyrics are threatening or expressing hatred ... The following are examples of the types of songs and lyrics which are likely to be threatening or express hatred:

- Songs/lyrics which promote or celebrate violence against another person’s religion, culture or heritage
- Songs/lyrics which are hateful towards another person’s religion or religious leaders, race, ethnicity, colour, sexuality, heritage or culture.

In relation to section 1(2)(e) of the Act (behaviour that a reasonable person would be likely to consider offensive), the Guidelines state that:³²

²⁷ It was described by the court in *MacDonald v Cairns* 2013 SLT 929 as having “an extremely long reach” (at para 11).

²⁸ 2013 SLT 929.

²⁹ At para 12.

³⁰ *Donnelly v Dunn* 2015 JC 266 at para 13.

³¹ Lord Advocate’s Guidelines (n 20) 4.

In order for a criminal offence to be committed, it is not sufficient that an individual or individuals are (or claim to be) offended by a song or other behaviour; the behaviour must be of a character which a reasonable person would be likely to consider offensive. Officers should have regard to proportionality, legitimate football rivalry and common sense when assessing whether the conduct would cause offence to the reasonable person.

They continue:³³

While it is a matter for the judgement of a police officer whether a song or other behaviour, including the display of offensive flags or banners, is likely to be offensive to a reasonable person having regard to the nature of the material or song, including its lyrics and any “add ons”, the surrounding circumstances and the context in which it is being displayed or sung, the following are examples of the type of displays, songs and chants which are likely to be offensive to a reasonable person.

- Flags, banners, songs or chants in support of terrorist organisations
- Flags, banners, songs or chants which glorify, celebrate or mock events involving the loss of life or serious injury.

It should be noted that in order for this offence to be committed, in addition to the display, song or chant being offensive or threatening, it must be likely to incite public disorder.

In practice, section 1 has been the subject of far more charges than section 6 of the Act:³⁴ in 2015-16, there were 287 charges under section 1 reported to Crown Office.³⁵ Prior to the OBFA coming into force, much of the conduct covered by section 1 was already criminal and would have been charged as either breach of the peace³⁶ or under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (the offence of threatening and abusive behaviour).³⁷ In the Lord Advocate’s Guidelines on the Act, however, it is stated that section 1 should now be libeled in

³² Ibid at 4.

³³ Ibid at 5.

³⁴ For charges brought under s 6, see section 2.2.3.

³⁵ Scottish Government, *Charges Reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2015-16* (2016) 8. At the time that report was written, court proceedings had commenced in respect of 214 of the 287 charges: 86 had concluded and there were 73 convictions (a conviction rate of 85%) (ibid, at 26). There were 193 charges in 2014-15, 206 in 2013-14 and 267 in 2012-13 (ibid, at 8).

³⁶ Chalmers and Leverick *Criminal Law* (n 12) para 48.10 for discussion of prosecuting football related conduct as breach of the peace.

³⁷ See Chalmers and Leverick *Criminal Law* (n 12) para 49.05.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 preference to either of these alternatives,³⁸ and the relative frequency of prosecutions under section 1 suggests that this is what is happening in reality.

The data collected on section 1 does not record whether the charges were based on sub-sections 1(2)(a), (b), (c), (d) or (e). There has, however, been an attempt to classify the charges on the basis of the notes available in police reports.³⁹ This concluded that, of the 287 charges reported to Crown Office in 2015-16, 83 were based on “hateful behaviour” (classified as such if there was a specific reference to one of the protected characteristics in section 1(4)), 188 were based on “threatening behaviour” (classified as such if the accused threatened another person, was aggressive, or engaged in fighting) and 29 were based on conduct that was “otherwise offensive” (including, for example, expressing support for terrorist groups or glorifying events that resulted in the loss of life).⁴⁰

Section 1 of the OBFA has been the subject of criticism on a number of accounts, including that it was unnecessary (given that much of the conduct it covers was already criminal), that it lacks precision (particularly in relation to “offensive behavior”) and that it unjustly targets football supporters.⁴¹ A Member’s Bill to repeal the Act has been introduced⁴² and a motion urging the Scottish Government to repeal the Act was passed by a narrow margin in the Scottish Parliament.⁴³

The Act has been the subject of a comprehensive evaluation,⁴⁴ which concluded that there was some evidence from research carried out with fans that offensive chanting at football matches had declined since the OBFA came into force.⁴⁵ The evaluation also stated, however, that “whether this reduction was due to the Act

³⁸ Lord Advocate’s Guidelines (n 20) 6.

³⁹ Scottish Government (n 35) at 14.

⁴⁰ Ibid.

⁴¹ The various criticisms of the legislation (and the Justice Committee’s responses to them) are set out in the Justice Committee’s Stage 2 Report (n 9) 14-17. For critical commentary, see also K Goodall, “Tackling sectarianism through the criminal law” (2011) 15 Edin LR 423; McBride (n 3); S Waiton, “Criminalizing songs and symbols in Scottish football: how anti-sectarian legislation has created a new ‘sectarian’ divide in Scotland” (2016) Soccer & Society (advance eprint available online); S Waiton, “Football fans in an age of intolerance”, in M Hopkins and J Treadwell (eds), *Football Hooliganism, Fan Behaviour and Crime* (2014) 201.

⁴² See J Kelly, *Proposed Football Act (Repeal) (Scotland) Bill: A Proposal to Repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, Consultation* (2016). The Bill was introduced into the Scottish Parliament on 21 June 2017.

⁴³ Scottish Parliament, Official Report, 2 November 2016, cols 32-59.

⁴⁴ N Hamilton-Smith et al, *An Evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012* (2015). During the progress of the Bill through parliament, the Scottish Government formally committed to evaluating its implementation and impact: see *ibid* at para 1.31.

⁴⁵ *Ibid* at para 5.2.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 itself or to the policing and prosecution resources put in place sometime before the Act is impossible to answer".⁴⁶

8.2 Approaches taken in other jurisdictions

Section 1 of the OBFA is notable because it targets expressions of hatred and other offensive behaviour that take place in the specific context of a football match. While unusual, the legislation is not unique in this respect. Its closest equivalents are the offences of indecent and racialist chanting in the Football Offences Act 1991 (applicable to England and Wales) and of sectarian chanting in the Justice Act (Northern Ireland) 2011.

Section 3 of the Football Offences Act 1991 provides that:

- (1) **It is an offence to engage or take part in chanting of an indecent or racialist nature at a designated football match.**
- (2) **For this purpose—**
 - (a) **“chanting” means the repeated uttering of any words or sounds (whether alone or in concert with one or more others); and**
 - (b) **“of a racialist nature” means consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins.**

The maximum penalty attached to section 3 (upon summary conviction, a fine not exceeding level 3 on the standard scale⁴⁷) is, however, in no way comparable to that under section 1 of the OBFA (in relation to which, as noted above, the penalty can be up to five years' imprisonment upon conviction on indictment).

The Football Offences Act 1991 came about as a response to the 1989 Hillsborough Stadium disaster:⁴⁸ the creation of the section 3 offence was among the recommendations made in the Taylor Report into that incident.⁴⁹ As such, it was

⁴⁶ Ibid.

⁴⁷ Football Offences Act 1991 s 5.

⁴⁸ See the discussion of the background to the Act in M James and G Pearson, “Legal responses to football crowd disorder and violence in England and Wales”, in A Tsoukala, G Pearson and PTM Coenen (eds), *Legal Responses to Football Hooliganism in Europe* (2016) 35 at 40; M James and G Pearson, “Public order and the rebalancing of football fans’ rights: legal problems with pre-emptive policing strategies and banning orders” [2015] PL 458 at 460.

⁴⁹ Lord Justice Taylor, *Inquiry into the Hillsborough Stadium Disaster 15 April 1989: Final Report* (Cm 962: 1990) 189.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 targeted at football hooliganism more generally rather than specifically at expressions of hatred or offensive chanting. Aside from the indecent and racialist chanting provision, the Football Offences Act also has provisions relating to the throwing of missiles (in section 2) and going onto the playing area without lawful authority or excuse (in section 4). An assessment of section 3 concluded that it has had only a limited effect.⁵⁰ Racist chanting, it was stated, does seem to have been virtually eradicated, but this might simply be due to the fact that fans are policing themselves and spectators with racist views would not now feel comfortable expressing them.⁵¹ Highly indecent and offensive mass chanting, on the other hand, “remains a fundamental feature of English fan culture and there appears little appetite amongst the police to enforce this provision”.⁵²

A similar provision to section 3 of the Football Offences Act is contained in the Justice Act (Northern Ireland) 2011, section 37 of which provides that:

- (1) **It is an offence for a person at any time during the period of a regulated match to engage or take part in chanting falling within subsection (3).**
- (2) **For this purpose “chanting” means the repeated uttering of any words or sounds (whether alone or in concert with one or more others).**
- (3) **Chanting falls within this subsection if—**
 - (a) **it is of an indecent nature;**
 - (b) **it is of a sectarian or indecent nature; or**
 - (c) **it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability.**

There are two main differences between this and the equivalent provision in the Football Offences Act. First, the provision is not limited to football matches. It applies to any “regulated match”, a category which includes association football matches but also extends to Gaelic games and rugby union matches.⁵³ Secondly, the type of chanting caught by the Act is wider. Section 37(3)(b) specifically prohibits “sectarian” chanting and section 37(3)(c) extends beyond racist chanting to include chanting that is threatening, abusive or insulting to a person by reason of that person’s religious belief, sexual orientation or disability. As with section 3 of the

⁵⁰ James and Pearson, “Legal responses to football crowd disorder and violence” (n 48) at 41.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Justice Act (NI) 2011 s 35 and Sch 3.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 Football Offences Act, the maximum penalty following summary conviction is a fine not exceeding level 3 on the standard scale.

Section 37 was part of a package of measures introduced to combat disorder at sporting matches in Northern Ireland.⁵⁴ The Consultation Paper preceding the Act noted that there had been instances of sectarian chanting at football and Gaelic games events and that the danger of such incidents is that they can “spark off wider trouble amongst supporters at a match, making crowd control very difficult”.⁵⁵ While modelled on section 3 of the Football Act in England and Wales, section 37 was drafted “to reflect the particular circumstances of [the Northern Irish] jurisdiction”.⁵⁶ The provision on sectarian chanting was not in the Justice Bill as introduced,⁵⁷ which only included what are now sections 37(3)(a) and (c) of the Act. The specific reference to sectarian chanting was added following the Committee for Justice’s first report on the Bill. The Committee noted that sectarian chanting was already covered by the existing provisions of the Bill as introduced, but recommended that it should be explicitly provided for in order “to send out the right message”.⁵⁸

During the Committee Stage, it was also proposed that the term “sectarian” should be defined in the Act.⁵⁹ An amendment was subsequently tabled which would have provided that “chanting is of a sectarian nature if it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person’s religious belief or political opinion”,⁶⁰ but this was not passed and the term “sectarian” remains undefined in the Act. The Guidance Note accompanying the relevant sections of the Act states that “[i]t will be for the prosecuting authorities and ultimately for the courts to decide whether the matter that was chanted in a particular case is either sectarian or indecent or is otherwise caught by the offence”.⁶¹ To date there have been no reported cases.

⁵⁴ Northern Ireland Office, *Sports Law and Spectator Controls: A Consultation Undertaken by the Northern Ireland Office* (2009) para 3.3.

⁵⁵ Ibid at para 4.8.

⁵⁶ Ibid at para 4.9.

⁵⁷ See Justice Bill, as introduced, available at

http://archive.niassembly.gov.uk/legislation/primary/2010/nia1_10.htm

⁵⁸ Committee for Justice, First Report on the Justice Bill, Volume 1, 10 February 2011, para 112.

⁵⁹ Ibid at para 2582.

⁶⁰ Committee for Justice (n 58) para 4025 (and see also the Notice of Amendments tabled on 16 February 2011 for Consideration Stage). Goodall (n 51) argues that this definition does not adequately capture the meaning of the term sectarian in the Scottish context (at 424).

⁶¹ Justice Act (NI) 2011 – Sports Provisions – Guidance for Sports Authorities, 5.

A further set of legislative provisions that target specifically football related misconduct are those concerning Football Banning Orders (FBOs). These exist in Scotland (in the Police, Public Order and Criminal Justice (Scotland) Act 2006), England and Wales (in the Football Spectators Act 1989) and Northern Ireland (in the Justice Act (Northern Ireland) 2011).⁶² Under the Police, Public Order and Criminal Justice (Scotland) Act, FBOs can be imposed either following conviction for a football related offence (via section 51) or on application to a sheriff without any requirement for the person against whom the order is sought having been convicted of a criminal offence (via section 52).⁶³ In the latter case, what is required is that:⁶⁴

- (a) the person against whom the order is sought has at any time contributed to any violence or disorder in the United Kingdom or elsewhere; and
- (b) there are reasonable grounds to believe that making the order would help to prevent violence or disorder at or in connection with any football matches.

The provisions relating to FBOs on application are an example of a hybrid civil-criminal measure: the application for an Order is made under civil procedure, but breach of any of the conditions of the Order is a criminal offence.⁶⁵ The conditions that can be imposed in a FBO relate primarily to preventing banned individuals from attending regulated football matches,⁶⁶ but an FBO may, if the court making it “considers it would help to prevent violence or disorder at or in connection with any football matches” impose additional requirements on the person concerned.⁶⁷ A similar provision exists in England and Wales,⁶⁸ but in the Northern Irish legislation, a banning order can only be made following conviction of an offence that involved

⁶² In the case of Northern Ireland they are not confined to football, but can be made in the context of any regulated match, which includes association football, Gaelic games and rugby union: see Justice Act (NI) 2011 s 35 and Sch 3.

⁶³ For the FBO provisions governing England and Wales, see the Football Spectators Act 1989 s 14A (following conviction) and s 14B (on application).

⁶⁴ Police, Public Order and Criminal Justice (Scotland) Act 2006 s 52(4).

⁶⁵ For discussion, see M Hopkins and N Hamilton-Smith, “Football Banning Orders: the highly effective cornerstone of a preventative strategy?”, in M Hopkins and J Treadwell (eds), *Football Hooliganism, Fan Behaviour and Crime* (2014) 222; James and Pearson, “Public order and the rebalancing of football fans’ rights” (n 48).

⁶⁶ Police, Public Order and Criminal Justice (Scotland) Act 2006 s 53(1).

⁶⁷ Police, Public Order and Criminal Justice (Scotland) Act 2006 s 53(4).

⁶⁸ Football Spectators Act 1989 s 14B.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 violence or disorder at a regulated match.⁶⁹ There is similar legislation providing for FBOs in a number of other European jurisdictions.⁷⁰

Outside the specific context of football, there are provisions in Scots law that target drinking at sporting fixtures and the possession of hazardous materials. These are contained in the Criminal Law (Consolidation) (Scotland) Act 1995, which criminalises the possession of alcohol at a designated sports ground (section 20(2)); entering or attempting to enter a designated sports ground while drunk (section 20(7));⁷¹ and the possession at a designated sporting event of what are termed “controlled containers” (in section 20(1))⁷² or “controlled articles or substances” (in section 20(3)-(4)).⁷³ Similar provisions can be found in England and Wales,⁷⁴ Northern Ireland⁷⁵ and many other common law⁷⁶ and European jurisdictions.⁷⁷

In terms of jurisdictions that have adopted measures to address the football-related sectarian conduct that the OBFA is intended to tackle, it is difficult to find any countries that have done this specifically in the football or wider sporting context, other than the prohibition on sectarian chanting relating to Northern Ireland discussed above. In Australia, problems with racist abuse and ethnic conflict have

⁶⁹ Justice Act (NI) 2011 s 41(4) and see Justice Act (NI) 2011 – Football Banning Order Provisions – General Guidance, para 9.

⁷⁰ See e.g. IC Winter, “Legal and policing responses to football crowd disorder in Austria”, in A Tsoukala, G Pearson and PTM Coenen (eds), *Legal Responses to Football Hooliganism in Europe* (2016) 127 at 141; A Tsoukala, “Controlling football-related violence in France: law and order versus the rule of law” (2013) 16 Sport in Society 140 at 143; M Noli, “Legal measures and strategies against violence at football events in Germany”, in Tsoukala, Pearson and Coenen (*ibid*) 53 at 63-67; A Sale, “Return to ‘Radio Nostalgia’: twenty years of ‘anti-violence’ legislation in Italian stadia”, in Tsoukala, Pearson and Coenen (*ibid*) 19 at 22; PTM Coenen, “Football-related disorder in the Netherlands”, in Tsoukala, Pearson and Coenen (*ibid*) 107 at 112; A Shvets, “Legal responses to ‘football hooliganism’ in Ukraine”, in Tsoukala, Pearson and Coenen (*ibid*) 147 at 158.

⁷¹ There are also provisions relating to the possession and drinking alcohol on vehicles carrying spectators to a designated sporting event (in s 19).

⁷² Essentially containers containing liquid that would be capable of causing injury if thrown at a person on the pitch – see s 20(8).

⁷³ Essentially pyrotechnic devices – see s 20(8).

⁷⁴ Aside from those in the Football Offences Act 1991, see the Sporting Events (Control of Alcohol) Act 1985.

⁷⁵ See e.g. the Justice Act (Northern Ireland) 2011 s 36 (articles capable of causing injury), s 37 (pyrotechnic articles) and s 40 (alcohol).

⁷⁶ See e.g. the Major Sporting Events Act 2009 (Vic); the Major Events Act 2014 (ACT); the Major Events Act 2013 (SA). The last two of these are not restricted to sporting venues, but apply more generally to major events.

⁷⁷ For discussion of the provisions in other European jurisdictions, see e.g. Winter (n 70) at 142 (Austria); Sale (n 70) at 24 (Italy); D Antonowicz and M Grodecki, “Missing the goal: policy evolution towards football-related violence in Poland (1989–2012)” (2016) International Review for the Sociology of Sport (advance eprint available online); Shvets (n 70) at 151 (the Ukraine).

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 been documented at football matches,⁷⁸ as well as at other sporting fixtures such as Australian Rules Football matches⁷⁹ and tennis matches,⁸⁰ but this has to date been addressed under the law relating to hate crime generally, rather than by measures specific to the sporting context.⁸¹ An independent inquiry in New South Wales into an incident at a football match involving two teams with primarily Croatian and Serbian support recommended the introduction of tighter restrictions on the display of inflammatory national material and political flags at sporting events, but this has not been implemented.⁸² In the Ukraine, disorder stemming from ethnic tensions between Russian and Ukrainian supporters has been an issue at football matches involving the national team and also at domestic level between supporters of clubs that have links with Russian teams and supporters of other clubs.⁸³ A Bill was proposed that would have criminalised, among other things, xenophobic, racial, anti-semitic, and discriminatory chants and other demonstrations (including those of a political content) at football matches,⁸⁴ but this has not been passed, leaving such conduct to be targeted by existing administrative offences or crimes that do not relate specifically to football.⁸⁵ Other jurisdictions that have experienced similar issues have also responded to these using the existing law on hate crime, rather than creating football or sport specific offences.⁸⁶

⁷⁸ I Warren and R Hay “‘Fencing them in’: the A-League, policing and the dilemma of public order” (2009) 10 Soccer & Society 124 at 125.

⁷⁹ L McNamara, “Sport, spectators and traditions of hatred: responding to racist abuse” (2001) 10 Griffith LR 99 at 104.

⁸⁰ T Taylor and K Toohey, “Ensuring safety at Australian sport event precincts: creating securitised, sanitised and stifling spaces?” (2011) 48 Urban Studies 3259 at 3270.

⁸¹ See McNamara (n 79) at 104; Warren and Hay (n 78) at 125.

⁸² See Independent Soccer Inquiry NSW, *Report of the Independent Panel of Inquiry into the Crowd Disturbances at the Sydney United Sports Centre on Sunday 13 March 2005* (2005), discussed by Warren and Hay (n 78) at 126.

⁸³ Shvets (n 70) at 151; MR Watson, “The dark heart of Eastern Europe: applying the British model to football related violence and racism” (2013) 27 Emory International LR 1055 at 1086.

⁸⁴ Shvets (n 70) at 160.

⁸⁵ Ibid. Watson (n 83) argues for the introduction of something akin to the Scottish OBFA in Poland and the Ukraine to deal with these issues (at 1086).

⁸⁶ R Llopis-Goig, “Racism, xenophobia and intolerance in Spanish football: evolution and responses from the government and the civil society” (2013) 14 Soccer & Society 262; DM Ullian, “‘A rope, a tree, hang the referee!’: exploring the First Amendment boundaries of offensive fan speech regulation in college sports” (2016) 23 Sports Law Journal 1 at 17. In the US, legislation akin to the OBFA would be near impossible to introduce anyway, given the weighty protection given to freedom of speech in the constitution: see Ullian (ibid) and HM Wasserman, “Fan, free expression, and the wide world of sports” (2005) 67 University of Pittsburgh LR 525.