Hate Crime and Public Order (Scotland) Bill: A Report for the Justice Committee

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EXECUTIVE SUMMARY

- This report is a summary of hate crime and hate speech provisions in selected jurisdictions, written to support scrutiny of the Hate Crime and Public Order (Scotland) Bill.
- The report covers hate crime and hate speech separately as they raise different issues. Hate crime is crime committed against a member (or members) of a specific group with an accompanying motive of hatred. The 'baseline' conduct is already criminal – it is the motive of the perpetrator that marks it out as hate crime and as deserving greater punishment. Hate speech is speech (or other behaviour) likely to stir up hatred against a defined group of individuals. Hate speech offences generally criminalise conduct that was not criminal already and they raise distinct issues of freedom of expression that are not engaged by hate crimes.

Hate crime

- There are three justifications for punishing hate crimes more severely than parallel non-hate crimes: (1) they cause additional physical, psychological or behavioural harm to victims and the wider community (2) the offender is more culpable because of his/her motivation and (3) denunciation – it sends a message to minority groups that they are valued and respected.
- There are four decisions that need to be taken in formulating hate crime legislation: the way in which the criminal law marks out a crime as being a hate crime, the choice of hate crime model, the formulation of the hate crime threshold and the choice of protected characteristics.
- *Models of hate crime legislation*. There are three broadly recognised models: (1) penalty enhancement (hate crimes have a higher maximum penalty); (2) sentence aggravation (the hate element of a crime is taken into account in sentencing but the maximum penalty is unchanged); (3) substantive offences (standalone criminal offences are created). The sentence aggravation model was the dominant model across the jurisdictions we reviewed. The Scottish hate crime legislation is primarily a sentence aggravation model, although the fact that the aggravation is formally recorded as part of the conviction has led some commentators to (positively) characterise it as a hybrid of (2) and (3).
- *The threshold (1): discriminatory selection or animus?* In some jurisdictions, a hate crime is a crime where a victim is selected because they belong to a protected group (a discriminatory selection model). This is rare: in most jurisdictions a hate crime is one where the offender is motivated by or demonstrates prejudice against a protected group (an animus model).
- *The threshold (2): subjective or objective?* Where an animus model is applied, some jurisdictions require proof that the offender was motivated by prejudice (a subjective approach). Others require either proof that the offender was so motivated or that they expressed hostility in connection with the offence, for example by using racist language (an objective approach). The objective model is used in the UK and Western Australia. As it will normally be easier to prove hate crime where an objective approach is used, hate crime statistics may differ very significantly between jurisdictions and so are not readily comparable.
- *Protected characteristics.* The most commonly protected characteristics in other jurisdictions are those that are currently protected in Scotland: race, religion, sexual orientation, disability and transgender identity. 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.

Hate speech

- There are two main justifications for the creation of hate speech offences: (1) the direct harm that is caused to protected groups by being exposed to hate speech and (2) the indirect harm that might result, such as an increase in hate crimes or discriminatory treatment towards members of protected groups, or general public unrest.
- There are five principal issues that need to be determined when creating hate speech offences: the mental element required, whether the offence is restricted to particular types of underlying act such as 'threatening' acts, whether there is a 'privacy' exception, whether there is express protection for freedom of expression and which characteristics are protected.
- *The mental element*. There is no consistent practice amongst the jurisdictions we reviewed. Some require proof of an intention to cause the prohibited effect of stirring up hatred (or an equivalent of stirring up hatred). Others apply requirements of recklessness, knowledge, or simply that the act was likely to have the prohibited effect.
- *The underlying act*. There is variation between jurisdictions as to whether the underlying act must be "threatening", "threatening, abusive, or insulting", or whether any conduct which is likely to have the prohibited effect is captured, whether threatening (etc) or not.
- *Privacy*. Six of the jurisdictions we reviewed included some form of express protection for things said or done in private, so that these could not form the basis of a hate speech offence. One of those jurisdictions (Northern Ireland) has recently consulted on whether this protection (a "dwelling defence" similar to that presently found in Scotland) should be removed. The other jurisdictions include no such express protection in their legislation.
- *Freedom of expression.* Most jurisdictions we reviewed did not include express freedom of expression protection in legislation. Such provisions exist in Canada and England and Wales.
- *Protected characteristics.* The most commonly protected characteristics in other jurisdictions are race, religion and sexual orientation. Some jurisdictions protect disability, gender identity and/or intersex status. Canada protects age and Ireland includes membership of the travelling community. In some jurisdictions the characteristics that are protected under hate speech law are the same as those protected under hate crime law, but in some they are not.

The ECHR and freedom of expression

- The principal Convention right relevant in this context is article 10 (freedom of expression). This is not an absolute right and may be restricted as "necessary in a democratic society".
- The European Court of Human Rights has frequently relied on article 17 (abuse of rights) to conclude that hate speech is not protected by the Convention and can be criminalised. In other cases it has concluded that the speech in a specific case is not covered by article 17 but that criminalisation may still be justified as necessary in a democratic society. The case law is concerned primarily with race and religion; there is also case law relating to sexuality.
- In relation to race and sexuality, the Court has approached alleged hate speech on a case by case basis and in context. It has occasionally recognised violations of article 10 in cases of journalistic and political activity, but has regularly rejected applications from persons convicted of incitement to racial hatred or analogous offences by invoking article 17 or by concluding that interference with article 10 could be considered necessary in a democratic society.
- In relation to religion, the Court has held that democratic societies may go so far as to criminalise "gratuitously offensive" speech in some cases. Cases going beyond offence are likely to be dealt with robustly, and as with speech relating to race and sexuality, article 17 may exclude the speech concerned from protection entirely.
- While criminalisation of mere insult is liable to contravene article 10, the reference to "insulting" behaviour in the existing and proposed stirring up racial hatred offences does not do this as the offences also require an intention to or likelihood of stirring up racial hatred.

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SCOPE, PURPOSE AND METHODOLOGY

This report is written at the request of the Justice Committee, to support its scrutiny of the Hate Crime and Public Order (Scotland) Bill. The purpose of the report is to summarise (a) approaches to hate crime and hate speech laws in other jurisdictions; and (b) the interaction between the European Convention on Human Rights and measures aimed at tackling hate speech.

The research on which this report is based was (apart from section 11) undertaken by Professors James Chalmers and Fiona Leverick for Lord Bracadale's Independent Review of Hate Crime Legislation in Scotland ('the Review'). This report summarises that research and, where relevant, updates it. As such, more detail on the issues covered here can be found in Chalmers and Leverick's report to the Review.[1] Section 11, dealing with ECHR issues, draws on specific sources cited in that section.[2]

The jurisdictions covered in this report are the eight Australian jurisdictions (each Australian state/territory has its own legal system with different hate crime provisions), Canada, England and Wales, Ireland, New Zealand, Northern Ireland and South Africa. We also draw occasional examples from the United States, but given the vast range of legislative provisions in the 50 US states, along with the District of Columbia and federal legislation, we do not attempt to provide a comprehensive account of the full range of hate crime provisions there.[3]

In this report we deal with hate crime and hate speech separately. 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. An example would be the perpetrator who physically assaults a member of an minority ethnic group while shouting racial slurs. The 'baseline' conduct (the assault) 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, is speech (or other behaviour) that is likely to stir up hatred against a defined group of individuals. An example is the perpetrator who gives a public speech advocating for the elimination of all members of a particular religious group. Hate is primarily relevant not as the motive for the crime, but as a possible effect of the perpetrator's conduct. Hate speech offences generally criminalise conduct that was not criminal already and they raise distinct issues of freedom of expression that are not engaged by hate crimes.

In the remainder of this report, we discuss hate crime legislation in Part A. Hate speech is discussed in Part B. An Appendix contains links to all of the relevant legislation in the jurisdictions included in the analysis.

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[1] J Chalmers and F Leverick, A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review (2017). Subsequently "Report to the Hate Crime Legislation Review".

[2] The interaction between the European Convention on Human Rights and hate speech was not covered in the research Chalmers and Leverick undertook for the Review.

[3] The analysis in our fuller report was restricted to those US jurisdictions which expressly protect characteristics not explicitly protected in any of the hate crime legislative provisions discussed in the other jurisdictions which we reviewed: see Report to the Hate Crime Legislation Review, at 127-128.

PART A: HATE CRIME

1. What is hate crime legislation and how is it justified?

Hate crime is crime committed against a member (or members) of a specific group either with an accompanying motive of hatred, prejudice or ill-will or where the victim was specifically chosen because of their membership of that group.[4] The 'baseline' conduct (such as assault or threatening behaviour) is already criminal – it is the motive of the perpetrator that marks it out as hate crime and therefore as deserving a more serious punishment. The reasons why we might want to treat hate crimes as more serious than parallel non-hate crimes can be grouped into three broad categories: harm, culpability and denunciation.

The first refers to the additional harm that hate crime causes – harm over and above the harm that would have resulted from the underlying offence alone. This could occur on one or all of three levels – (a) harm to the direct victim (physical or – more likely – psychological), (b) harm to the group to which the victim belonged (by making them fearful and perhaps leading them to change their behaviour to avoid being targeted), and (c) harm to the wider community (by increasingly the risk of social unrest).[5] There is robust empirical evidence for (a): a number of large-scale studies have demonstrated that hate crimes are more psychologically harmful to victims than parallel non-hate crimes.[6] There is also some empirical evidence for (b).[7] Effect (c) is harder to evidence empirically.

The culpability justification is that those who perpetrate hate crimes are more morally blameworthy than those who perpetrate equivalent non-hate crimes, either on the basis of the additional harm they cause[8] or on the basis of their reprehensible motivation.[9]

The denunciatory argument is that punishing hate crime more severely conveys an important message to members of protected groups.[10] It communicates that the state values them as equal members of society who are worthy of respect and that it is committed to eradicating disadvantage and prejudice.

2. Hate crime legislation internationally

There was wide variation across the jurisdictions we studied in terms of the existence and nature of hate crime laws.[11] Some jurisdictions have no specific hate crime provisions at all – namely some of

[4] Section 4 discusses these two different formulations.
[5] See e.g. P Iganski, "Hate crimes hurt more" (2001) 45 American Behavioral Scientist 626.
[6] See Report to the Hate Crime Legislation Review, at 17-19, where this evidence is summarised.
[7] See Report to the Hate Crime Legislation Review, at 19-21, where this evidence is summarised.
[8] See e.g. G Mason, "Victim attributes in hate crime law: difference and the politics of justice" (2014) 54 British Journal of Criminology 161 at 165.
[9] See e.g. D M Kahan, "Two liberal fallacies in the hate crimes debate" (2001) 20 Law and Philosophy 175 at 187.
[10] See e.g. M Al-Hakim and S Dimock, "Hate as an aggravating factor in sentencing" (2012) 15 New Criminal Law Review 572 at 604.
[11] This section only covers hate crime – hate speech is discussed in sections 7 to 11.

the Australian states and territories (Australian Capital Territory, Queensland, South Australia and Tasmania); Ireland; and South Africa. It should be noted that most of these jurisdictions do have criminal offences relating to hate *speech* – these are discussed in Part B.

In South Africa a Bill to introduce hate crime provisions and hate speech offences has been under consideration since 2016 but had not, at the time of writing, been passed.[12] There are no ongoing law reform exercises in any of these Australian jurisdictions or in Ireland.

All of the other jurisdictions (New South Wales, Northern Territory, Victoria, Western Australia, Canada, England and Wales, New Zealand and Northern Ireland) have hate crime provisions of some form, although they vary in terms of the model that is used and the particular characteristics that are covered. The detail of these provisions will be examined in sections 3 to 6.

3. Models of hate crime legislation

In implementing a decision to create hate crime legislation, there are three broad models which a jurisdiction can adopt:[13]

- A *penalty enhancement* model. In such cases, when a crime is a hate crime, the maximum penalty applicable to the offence is increased.
- A *sentence aggravation* model. In such cases, the fact that the crime is a hate crime must be taken into account in sentencing, but the range of penalties available to the sentencing judge is unchanged.
- A *substantive offence* model. Unlike the prior two models, which rely on identifying existing criminal offences as being "hate crimes" when committed in specified ways or circumstances, this approach involves the creation of bespoke criminal offences which *only* cover (specified) hate crimes and have their own distinct sentencing provisions.

The current Scottish legislative framework does not include penalty enhancement. It is primarily one of sentence aggravation, with the additional feature that the hate crime element of the offence is formally recorded: it is part of the conviction itself and not only a factor to be taken into account in sentencing. The Scottish framework also includes an example of the substantive offence model in the form of the offence of racially aggravated harassment (under section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995). The "stirring up" offences under Part III of the Public Order Act 1986 and Part 2 of the present Bill are also examples of substantive offences, although hate speech offences of this nature are generally regarded as raising distinct issues and discussed separately from hate crime more generally, an approach followed in this report, where hate speech offences are covered in Part B.

[12] The Prevention of Hate Crimes and Hate Speech Bill (B9-2018). At the time of writing, the Bill was on hold pending a decision of the South African Constitutional Court relating to hate speech (which is covered by the civil law in South Africa): Qwelane versus South African Human Rights Commission and Another, heard by the Court on 2 September 2020 (judgment pending).

[13] G Mason, "Legislating against hate", in N Hall et al (eds), *The Routledge International Handbook on Hate Crime* (2015) 59 at 60.

The sentence aggravation model was the dominant model across jurisdictions included in our analysis, being found in various Australian jurisdictions (New South Wales, the Northern Territory and Victoria), Canada, England and Wales, New Zealand and Northern Ireland. A separate review of Commonwealth jurisdictions, including a number not included in our analysis, demonstrated a similar pattern.[14] It may be noted, however, that the Scottish approach goes further than most such jurisdictions, because in addition to taking the aggravation into account in determining the appropriate sentence the court must record the conviction in a way that shows the offence was aggravated. Because this means that the hate crime element becomes an aspect of the conviction rather than only a matter relevant to sentence, this has led two commentators to classify the Scottish legislation as a "hybrid" model, combining features of both the sentence enhancement and substantive offence model.[15]

4. Identifying when an existing crime becomes a hate crime

As the previous section explains, hate crime is generally (although not always) defined by reference to *existing* criminal offences. Hate crime legislation does not expand the scope of the criminal law, but instead requires that conduct which already meets the definition of a criminal offence be dealt with in a particular way. That means the law must apply a test to decide when a crime is a hate crime. There are two broad approaches across jurisdictions with hate crime legislation, although there is considerable variation in exactly how the relevant test is drafted:

- A *discriminatory selection model*: a crime is a hate crime where the victim is selected because of their membership of a protected group.
- An *animus* model: a crime is a hate crime where the offender is motivated by, or demonstrates, prejudice against a protected group.

A discriminatory selection model is relatively rarely used; most jurisdictions with hate crime legislation take an animus approach. Within that approach, however, there is a second broad distinction:

- A *subjective* approach, requiring proof that the offender was motivated in a particular way.
- An *objective* approach, requiring *either* proof that the offender was so motivated *or* that the offender expressed hostility in connection with the offence.

The practical difference between these approaches is very significant, because it may be substantially easier to prove that an offender demonstrated hostility (for example, by the use of racist language while committing an offence) than to prove that the offence was actually *motivated* by prejudice. Although an objective test, as defined here, *can* be met by evidence of the offender's motivation, it is likely that in practice the "evincing of malice and ill will" will be easier to prove, for

[14] K Goodall and M Walters, *Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth* (2019) 33.

[15] Goodall and Walters, *Legislating to Address Hate Crimes against the LGBT Community* (n 14) 32-33. Of the eighteen Commonwealth jurisdictions reviewed in Goodall and Walters' report, Scotland is the only one whose hate crime legislation the authors classify as "hybrid", aside from draft legislation in South Africa. The authors evaluate the hybrid approach positively and consider it preferable to sentence aggravations: ibid 56-57.

example by the use of racial epithets or other language demonstrating prejudice. This practical distinction was evidenced by early research into the English legislation on racially aggravated offending, where stipendiary magistrates and judges reported that very few cases had evidence of a racist motive and "the difficulty of finding admissible evidence of motivation was acknowledged".[16] The objective approach precludes any argument by the accused that prejudicial language was "merely" something said in the heat of the moment and not reflective of their "real" motivation.

The objective animus approach is the one taken in the UK jurisdictions, but is relatively rare elsewhere (the only other jurisdiction our review identified which adopted such an approach was Western Australia). This means that the legal definition of a hate crime is significantly wider in the UK jurisdictions than in most other countries. The practical consequences of this distinction can be seen in a comparison made by Goodall and Walters between the recording of sexual orientation hate crimes in England and Wales and Canada. In England and Wales, 11,000 such crimes were officially recorded over one year (2017-18) compared to 195 such crimes in Canada in 2017.[17] The Canadian legislation defines a hate crime as one where there is "evidence that the offence was motivated by bias, prejudice or hate",[18] while the relevant English legislation defines a hate crime as one where the offender demonstrated hostility towards the victim based on (in this case) their sexual orientation, *or* that the offence was motivated wholly or partly by such hostility.[19]

This means that great care should be taken with comparing hate crime statistics between jurisdictions, particularly in relation to the potential inclusion of additional protected characteristics. If, for example, there is evidence that the inclusion of a particular protected characteristic in legislation in another jurisdiction has led in practice only to a small number of offences being labelled as hate crimes, that may be purely a consequence of that jurisdiction taking a narrow approach to the definition of hate crime and say nothing of any value as to how many offences would be labelled as a hate crime as a result of that characteristic being protected under the Scottish legislative framework.

The contrast between such statistics may give rise to the question of whether the broad approach taken in the UK jurisdictions is appropriate. The use of this broad test can be justified on the basis that "it matters not whether the offender holds any deeply felt animosity against the victim's group identity":[20] the demonstration of hostility, or evincing of malice and ill-will, means that they are aware they have made the victim's "difference" part of their wrongdoing, with the additional harm that this entails, as noted in section 1 above. Lord Bracadale's review stressed that the underlying conduct "must amount to an offence… The significance of the demonstration of hostility is that it highlights the context of that offending behaviour."[21]

[16] E Burney and G Rose, *Racist Offences – How is the Law Working?* (Home Office Research Study 244, 2002) 93-94.
[17] Goodall and Walters, *Legislating to Address Hate Crimes against the LGBT Community* (n 14) 60. The authors note that this is the case despite Canada's population being greater than 50% of the UK's.
[18] Canadian Criminal Code s 718.2(a)(i).
[19] Criminal Justice Act 2003 s 146.
[20] M A Walters, "Conceptualising 'hostility' for hate crime law: minding 'the minutiae' when interpreting section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34 Oxford Journal of Legal Studies 47 at 73.
[21] *Independent Review of Hate Crime Legislation in Scotland: Final Report* (2018) para 3.8.

5. The legal formulation of the hate crime threshold

At present, Scots law identifies a crime as a hate crime where the offender "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". As explained in section 4, this is an objective approach.

Lord Bracadale recommended that Scots law should adopt the language of "demonstrating hostility" (or motivation by hostility) on the basis that it was "more easily understood" by a layperson than "evincing malice and ill-will", while stressing that he did not regard this as a substantive change in meaning: the two formulations were found in the same initial piece of United Kingdom legislation and intended to have the same effect, with "evincing malice and ill-will" being adopted for Scotland on the basis that it was a phrase already familiar to the Scottish courts.[22] That recommendation has not been adopted in the Bill.

Of the jurisdictions included in our analysis, there were only three – England and Wales, Northern Ireland, and Western Australia – which adopted the objective approach, and all three of these jurisdictions used a test similar to that recommended by Lord Bracadale. (Two US jurisdictions in our analysis also adopted tests which were satisfied by the demonstration or evidencing of prejudice, with no alternative limb referring to proof of motivation.)

A number of US jurisdictions in our analysis identified a hate crime as one which occurred *because* of the victim's protected characteristic, or where the victim was selected because of that characteristic. All of the non-US and non-UK jurisdictions which we reviewed (aside from Western Australia) applied a test which required proof of the offender's motivation.[23] As explained in section 4, that is likely to have the result of significantly narrowing the number of cases which are identified as hate crimes.

6. Which characteristics are protected by hate crime legislation?

6.1 Approaches to choosing protected characteristics

Determining which groups should be protected by hate crime legislation is not an easy question. This is because hate crime legislation has a symbolic function. Including a particular group potentially sends the message to members of that group that they are valued and worthy of protection, but also by implication might send a message to excluded groups that they are *not* worthy of protection.[24] It also has a labelling function in terms of the offender – he/she is marked out as someone who has committed a "hate crime".

There are a number of different principled approaches that might be taken. At the most basic level, what is required is a group that share common characteristics. But this alone is not enough – it

[22] *Independent Review of Hate Crime Legislation in Scotland: Final Report* (2018) para 3.10 and Recommendation 2.
[23] A full list of the various formulations can be found in the Report to the Hate Crime Legislation Review, at 46-47 (table 1).
[24] J Schweppe, "Defining characteristics and politicizing victims: a legal perspective" (2012) 10 Journal of Hate Studies 173 at 178.

would include, for example, all people with brown eyes. More is required and there are two broad approaches.

The first is to select groups on the basis that they have historically suffered oppression or discrimination.[25] This would encompass obvious characteristics such as race, sexual orientation or sex. A slightly different formulation would be to place less stress on the need for a long history of discrimination, including groups who have not been historically disadvantaged, but are nonetheless stigmatised or marginalised in society, which would open the door to including characteristics such as gender identity (and possibly age).[26] Care does have to be taken here, as this approach could also encompass less sympathetic groups who suffer prejudice, such as those who are targeted because they have committed sexual offences against children. This is not a hypothetical concern. In New South Wales, where the list of protected groups includes a residual category (see section 6.2), two controversial legal cases have extended hate crime legislation to paedophiles as a group.[27] This is 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. As such, it has been suggested that a better approach is to select groups on the basis that they are *unjustly* marginalised in society.[28]

The second approach is to extend protection to all groups who are vulnerable to attack due to their perceived difference.[29] This would bring into the ambit of protection groups who may not qualify for protection under the stigmatisation model, such as the homeless, the elderly or people who dress in a way that marks them out as different (such as 'goths'). The argument against this approach is that it would make the ambit of protection too wide and dilute the symbolic message of hate crime legislation. It also suffers from the same problem as approaches based purely on stigmatisation, in that it would encompass less sympathetic groups such as paedophiles.

Finally, it has sometimes been suggested that the groups protected by hate crime legislation should be the same as those protected under civil equality legislation.[30] In the UK jurisdictions (including Scotland), the Equality Act 2010 currently protects age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It would seem uncontroversial to protect most of these. However, including marriage and civil partnership status (and possibly also pregnancy and maternity) as protected characteristics would seem unnecessary. There is no evidence of hate crimes being committed against these groups and including them may dilute the symbolic message that hate crime legislation sends to members of the other protected groups.

[25] See e.g. F Lawrence, Punishing Hate: Bias Crime Under American Law (1999) 12.
[26] See e.g. M Al-Hakim, "Making a home for the homeless in hate crime legislation" (2015) 30 Journal of Interpersonal Violence 1755 at 1771.
[27] *R v Robinson* [2004] NSWSC 465 (Supreme Court of New South Wales); *Dunn v The Queen* [2007] NSWCCA 312 (Court of Criminal Appeal of New South Wales).
[28] G Mason, "Victim attributes in hate crime law: difference and the politics of justice" (2014) 54 British Journal of Criminology 161 at 175.
[29] See e.g. N Chakraborti and J Garland, "Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference'" (2012) 16 Theoretical Criminology 499.
[30] C Bakalis, "The victims of hate crime and the principles of the criminal law" (2017) 37 Legal Studies 718 at 734.

6.2 Which characteristics are protected in other jurisdictions?

A very small minority 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" or (in the case of Victoria) any "group of people with common characteristics". This is a very broad approach and risks the label of hate crime losing its symbolic significance.

The vast majority of jurisdictions specify particular characteristics. In terms of which characteristics feature in that list, the characteristics that are currently protected in Scotland (**race**, **religion**, **sexual orientation**, **disability** and **transgender identity**[31]) 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**.

Age is protected in New South Wales, Canada, New Zealand and a number of US states. In both England and Wales and Northern Ireland, ongoing law reform exercises are consulting on whether age should be added to the list of protected characteristics.[32] Almost all of the jurisdictions that protect age do so in a neutral way, simply listing "age" as the protected characteristic, which means that crimes targeting both older and younger people would be included. In Florida, however, the protected characteristic is "advanced age", meaning that the hate crime provisions only cover older people.

Sex/gender is protected in Canada (which protects "sex") and in a number of US states. It is also included in the draft Bill under consideration in South Africa (which protects both "sex" and "gender"). The Law Commission of England and Wales has proposed adding sex/gender to the list of protected characteristics and, at the time of writing, is consulting on whether to use "sex", "gender" or both terms.[33] In Northern Ireland, there is, at the time of writing, an ongoing consultation as to whether "gender" should be added to the list of protected characteristics there.[34]

In terms of other possibilities, there are four characteristics that are not presently covered in Scotland, but that are protected in more than one other jurisdiction included in our analysis, namely **homelessness** (all in the US – the District of Columbia, Florida, Maine and Maryland), **political affiliation** (again, all in the US – the District of Columbia, Iowa and West Virginia), **language** (in New South Wales and Canada) and **HIV/AIDS status** (in Australian Capital Territory and New South Wales). The law reform exercises underway in England and Wales and in Northern Ireland are both consulting on whether homelessness should be added to the list of protected characteristics.[35] In England and Wales, they are also consulting on whether **sex workers**, **alternative sub-cultures** and

[31] Transgender identity is defined widely in the existing Scottish legislation 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": Offences (Aggravation by Prejudice) (Scotland) Act 2009 s 2(8).

[32] Law Commission, *Hate Crime Laws: A Consultation Paper* (CP 250, 2020) 306; *Hate Crime Legislation in Northern Ireland: An Independent Review, Consultation Paper* (2020) 117.

[33] Law Commission (n 32) 277.

[34] Northern Ireland Independent Review (n 32) 116.

[35] Law Commission (n 32) 337; Northern Ireland Independent Review (n 32) 118.

philosophical beliefs (such as humanism, atheism and veganism) should be included.[36] None of these characteristics are presently protected in any of the other jurisdictions we looked at, although personal appearance is protected in the District of Columbia and occupation or trade is protected in Louisiana.

Three of the jurisdictions included in our analysis (New South Wales, Canada and New Zealand) list particular characteristics, but 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). 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, sexual orientation, age or disability" (emphasis added). 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".

This approach means that the list of protected groups is not closed and has the advantage that the courts can respond to societal changes or other unforeseen circumstances. The disadvantage is that it can lead to unanticipated and unwanted consequences. For example, in New South Wales, the fact that the list of protected groups is not exhaustive allowed the extension of hate crime provisions to crimes motivated by hostility towards paedophiles (see section 6.1). The New South Wales Law Commission recommended that the law be amended so that the list of protected groups becomes a closed list without a residual category,[37] but this recommendation was not taken forward in the new hate crime legislation passed in New South Wales in 2018.

PART B: HATE SPEECH

7. What are hate speech offences and how are they justified?

Hate speech has been defined as speech that "expresses, encourages, stirs up, or incites hatred against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality, and sexual orientation".[38] Although the term hate speech is used here for simplicity, 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 material online. The inclusion of online "hate speech" is especially significant as it has the potential to reach a much larger audience and to be accessible over a very long period of time, even permanently.

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

[36] Law Commission (n 32) 320 (sex workers), 328 (alternative sub-cultures) and 348 (philosophical beliefs).
[37] New South Wales Law Reform Commission, Sentencing (Report 139, 2013) para 4.186.
[38] 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.

to hate speech is whether there is a case for its criminalisation at all. There are two broad approaches to justifying hate speech offences – by focusing on the direct harm and/or the indirect harm that hate speech might cause.

Direct harms are those that might result from members of the targeted community being exposed to hate speech. This might be psychological harm – if members of the targeted group are directly exposed to hate speech, this could result in the same sort of psychological harm that has been shown to result from hate crime, such as depression or low self-esteem.[39] Evidencing this effect empirically, however, is far more difficult to do than it is for hate crime, where it has been possible to compare hate crime victims with a control group of parallel non-hate crime victims.[40] Alternatively, the harm might be thought of as harm to the dignity and sense of security of members of the targeted groups.[41]

Indirect harms are those that might result from persons outside the targeted group changing their behaviour or attitudes towards members of the targeted group. There are two senses in which this might occur. The first is that hate speech might lead to violence or public disorder, either because it encourages the commission of hate crimes against members of the targeted group or because members of the targeted group themselves respond in a violent or disorderly manner.[42] The second is that by promoting negative stereotypes about the targeted group, hate speech might lead to an increase in discriminatory treatment of members of that group in society.[43]

8. Hate speech offences internationally

Almost all of the jurisdictions in our sample have criminal offences covering hate speech – the only exceptions being two very small Australian jurisdictions (Northern Territory and Tasmania) and South Africa (where a Bill that would introduce them was under consideration at the time of writing[44]). In these three jurisdictions, protection against hate speech is provided under the civil law (so a court could, for example, award damages), but not the criminal law.

The UK jurisdictions and Ireland have a range of "stirring up" offences, which are similar in content, although the characteristics that are protected vary. Most Australian jurisdictions have offences of "serious vilification" – these are defined in a similar way to the stirring up offences but the range of characteristics that are protected varies. In Canada, there are offences of public incitement of hatred and wilful promotion of hatred that cover a wide range of groups. In New Zealand there is a single statutory offence of inciting racial disharmony. The way in which these offences are framed in these jurisdictions varies both in terms of whether they require the perpetrator to have intended to stir up hatred and in terms of whether they apply only to the stirring up of hatred, or to other feelings, such as contempt or ridicule. The way in which offences are defined and the range of characteristics protected are considered in sections 9 to 11.

[39] See e.g. K A 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.
[40] For a summary of the evidence that does exist in relation to the psychological harm of hate speech, see Report to the Hate Crime Legislation Review, at 48-49.
[41] The leading proponent of this argument is J Waldron, The Harm in Hate Speech (2012).
[42] See e.g. Appiah (n 39) at 174.
[43] Ibid.
[44] See section 2.

Aside from these general hate speech provisions, context specific offences exist in a very small minority of jurisdictions. Until it was repealed in 2018, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 contained an offence of offensive behaviour at a regulated football match.[45] There are still specific offences relating to football chanting in England and Wales (where they cover indecent and racialist chanting at designated football matches) and in Northern Ireland (where they cover indecent and sectarian chanting at designated football, rugby union or gaelic games matches). This approach is unusual – other jurisdictions have responded to issues of hate speech at sporting events by using the existing law, rather than creating football or sport specific offences.

9. How are hate speech offences defined?

Although the term "hate speech" is used here and elsewhere, these offences are not defined solely by reference to "speech". They may cover simply, for example, an "act" (Australian Capital Territory) or more specific formulations such as to "publish or distribute written material [or] to use words, behave or display written material" (Ireland). The legislation will identify a prohibited effect in relation to a protected characteristic, such as "hatred" (Canada), "hatred… serious contempt… or severe ridicule" (Queensland), or "excit[ing] hostility or ill-will… or bring[ing] into contempt or ridicule" (New Zealand) and criminalise a person who – depending on the formulation of the legislation – intends to bring that effect about, risks bringing it about, or is likely to bring it about.

There are five principal issues where comparisons can be drawn between this legislation across the jurisdictions we reviewed:

- What is the mental element (*mens rea*) required? Does the offence require an intention to bring about the prohibited effect, or is a lesser test applied?
- Is the offence restricted to particular types of underlying act, such as "threatening" acts?
- Does the legislation contain express protection for privacy?
- Does the legislation contain express protection for freedom of expression?
- Which characteristics are protected by the legislation?

The first four of these questions are considered in the remainder of this section; the protected characteristics are considered in section 10.

9.1 The mental element

When the offence of incitement to racial hatred was created in 1965, it required proof of an intention to stir up racial hatred.[46] Lord Scarman suggested that this made it "useless to a policeman on the street"[47] and the offence was in 1976 reformulated to allow it to be established either by proof of intent or by proof that hatred was likely to be stirred up having regard to all the

[45] The history and scope of this legislation is considered in detail in Report to the Hate Crime Legislation Review, at 93-98.
[46] Race Relations Act 1965 s 6.
[47] *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.

circumstances.[48] This formulation has not, however, been replicated for the newer English offences relating to religious hatred and hatred on the ground of sexual orientation.

Some jurisdictions (England and Wales (except for racial hatred) and New Zealand) require an intention to bring about the prohibited effect. Legislation in New South Wales and South Australia applies a similarly high threshold, requiring that the accused threatened or incited physical harm. The Canadian legislation requires either that the accused publicly "incites hatred" or "wilfully promotes hatred".

Other jurisdictions apply less exacting tests. The Australian Capital Territory requires either an intention to bring about the prohibited effect or recklessness as to whether the act has that effect. Victoria requires knowledge that the act is likely to have that effect; Northern Ireland and Western Australia require that the act was likely to have that effect.

9.2 Does the accused's act need to be of a particular character?

The current offence of stirring up racial hatred requires that the accused's "words or behaviour", or the written material which he displays, be "threatening, abusive, or insulting".[49] The Bill as introduced retains that test in respect of racial hatred but restricts the offence of stirring up hatred in respect of other characteristics to "threatening or abusive" behaviour or material. This distinction is similar but not identical to that currently found in English law, where the offences of stirring up religious hatred and hatred on the ground of sexual orientation are limited to "threatening" conduct and do not (unlike the offence of stirring up racial hatred) cover abusive or insulting conduct. No such distinction between the different stirring up offences is found in Northern Ireland, where the general formulation of "threatening, abusive or insulting" applies across the board.

The New Zealand offence of inciting racial disharmony refers to "threatening, abusive, or insulting" matter or words. The Irish offence of incitement to hatred is similarly defined, as is the draft South African offence of hate speech. In contrast, some Australian jurisdictions (ACT, New South Wales, Queensland and South Australia) restrict their offences to conduct which is "threatening".

Other legislation has no such requirement at all, but simply applies to *any* type of conduct which may have the prohibited effect. For example, the offences of conduct likely to incite racial animosity or racial harassment in Western Australia apply to "any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group". The Canadian offence of wilful promotion of hatred applies to a person who "by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group". In Victoria, the offences also apply to any "conduct" but in that case the prohibited effect is more narrowly drawn than in other jurisdictions.[50]

It has been suggested that the use of the word "insulting" in the definition of the Scottish offence of stirring up racial hatred may be incompatible with Convention rights, and we return to that in section 11.3 below. As explained there, we do not believe that this suggestion is well-founded, but this does

[48] Race Relations Act 1976 s 70.
[49] Public Order Act 1986 s 18.
[50] It must be conduct that the offender knows is likely to incite hatred and to threaten, or incite others to threaten, physical harm.

not in itself mean that the use of the word "insulting" in the legislation is necessary. In his review, Lord Bracadale recommended that this word could safely be removed from the legislation for consistency with the proposed stirring up offences relating to other protected characteristics, suggesting that this could be done without undermining the ability of the Crown to bring prosecutions.[51]

9.3 Privacy

Section 18 of the Public Order Act 1986, which criminalises the use of words or behaviour or display of written material intended to or likely to stir up racial hatred, contains a "dwelling defence": "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". The offence of stirring up hatred in section 3 of the present Bill does not include an equivalent defence.

The "dwelling defence" has occasionally been a matter of some debate: the recent Northern Irish consultation on hate crime legislation commented that it "is unclear why stirring up hatred inside a building is considered acceptable when the same expression outside a building would be considered an offence", and asked consultees whether the defence should be retained.[52] In 1992, a Working Party established by the Board of Deputies suggested that it was inappropriate that a defence should be available where a person held a meeting in a private house to which the public were invited, and concluded that "the total repeal of this exception would constitute an unacceptable invasion of privacy but… this exception should only be retained to the extent that there is no invitation to the general public to attend a meeting on private premises".[53]

Of the jurisdictions which we reviewed beyond the United Kingdom, four include some form of explicit protection of privacy in the way which their offences of hate speech are formulated. The Australian Capital Territory requires that the act be "done otherwise than in private"; Queensland requires a "public act"; and Ireland requires that the relevant act be "in any place other than inside a private residence" or "inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence". Canada, which has two relevant offences, restricts one (public incitement of hatred) to statements communicated in a "public place" and the other (wilful promotion of hatred) to statements communicated "other than in private conversation".

9.4 Freedom of expression

Express protections for freedom of expression were relatively rare in the jurisdictions we reviewed, although the perceived need for such provisions is not a free-standing question and may differ depending on the breadth of the underlying offence.

The Canadian offence of wilful promotion of hatred (but not the separate offence of public incitement of hatred) includes defences of truth, good faith argument on a religious issue, a public interest defence where the statements were believed on reasonable grounds to be true, and a

[51] *Independent Review of Hate Crime Legislation in Scotland: Final Report* (2018) para 5.41.
[52] *Hate Crime Legislation in Northern Ireland: An Independent Review, Consultation Paper* (2020) para 11.50, consulting on the equivalent provision under article 9(3) of the Public Order (Northern Ireland) Order 1987.
[53] See Home Affairs Committee, *Racial Attacks and Harassment: Third Report, Volume II, Minutes of Evidence and Appendices* (1994) 101.

defence of in good faith, intending to "point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group".

The English offences concerning the stirring up of religious hatred and hatred on the grounds of sexual orientation include provisions protecting freedom of expression. While the present Bill does likewise (sections 11 and 12), different formulations are used. The English proviso regarding religious hatred expressly protects "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse", in contrast to the Bill's reference to "discussion or criticism". The English proviso regarding hatred on the grounds of sexual orientation is broadly similar to the Bill but with the addition of express protection for "any discussion or criticism of marriage which concerns the sex of the parties to marriage".

10. Which characteristics are protected by hate speech offences?

In terms of the characteristics protected by hate speech offences there is much variation, both in terms of the actual characteristics protected and whether the same characteristics are protected by hate crime laws and hate speech offences.

The most common characteristic covered by hate speech offences is **race**, which is protected by every jurisdiction in our analysis that has hate speech offences. Some jurisdictions such as South Australia, Western Australia and New Zealand only protect race. Of these jurisdictions, neither South Australia nor Western Australia have hate crime provisions. New Zealand does – and the range of characteristics protected under hate crime provisions there is much wider (namely race, religion, sexual orientation, age and disability).

The next most commonly protected characteristic in hate speech offences is **religion**, which is covered by all of the jurisdictions in our analysis except those that only protect race. In Victoria only race and religion are protected (whereas their hate crime sentencing provision is very wide, requiring only a group of people with common characteristics).

The next most commonly protected characteristic in hate speech legislation is **sexual orientation**. This is protected in Australian Capital Territory, New South Wales, Queensland, Canada, Ireland, Northern Ireland and England and Wales. In England and Wales, race, religion and sexual orientation are presently the only characteristics covered by hate speech offences. The range of characteristics protected in England and Wales under hate crime sentencing provisions is wider, also including disability and transgender identity. The Law Commission for England and Wales has proposed that disability, transgender identity and sex or gender be added to the list of characteristics protected by hate speech offences.[54]

Other characteristics protected by more than one of the jurisdictions in our sample are **disability** (Australian Capital Territory, Canada and Northern Ireland), **gender identity** (Australian Capital Territory, New South Wales and Queensland) and **intersex status** (Australian Capital Territory and New South Wales).

[54] Law Commission, *Hate Crime Laws: A Consultation Paper* (CP 250, 2020) 477 (transgender identity and disability) and 480 (sex or gender).

In Canada, **age** is protected – the only one of our jurisdictions to do so under hate speech offences (the characteristics protected under hate crime law and hate speech offences in Canada are the same). In Ireland, **membership of the travelling community** is protected (Ireland does not currently have hate crime provisions).

11. What does the ECHR say about hate speech offences?

As this report has been completed in a very short time scale, a full review of ECHR case law and relevant material has not been undertaken. Instead, this section draws in particular on the European Court of Human Rights Press Unit's summary of case law relating to hate speech,[55] and a recently published analysis of the case law of the Court.[56]

11.1 The human rights framework

The principal right which is relevant in this context is article 10 (freedom of expression). The right is not absolute and may be restricted by law as "necessary in a democratic society" for a range of reasons set out in the article.

In addition, the case law of the European Court of Human Rights in this area has often relied on article 17 (prohibition of abuse of rights), which provides that the Convention rights cannot be interpreted as implying "any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". In a case where a teacher was convicted of incitement to racial hatred after writing a racist article in a school's internal newspaper, the Court declared an application claiming a breach of article 10 to be manifestly ill-founded, observing that there is "no doubt that any remark directed against the Convention's underlying values would be removed from the protection of article 10 by article 17".[57]

The Court's case law is concerned primarily with hate speech in relation to race and religion. It was observed in 2019 that there was a "dearth of ECHR case law" on other types of offensive speech,[58] although there has been additional case law this year in respect of homophobic hate speech. Section 11.2 discusses the case law relating to race, sexuality and religion in turn: the last of these categories has been dealt with differently from the first two.

11.2 ECHR case law on race, religion and sexuality

Race

In the context of racial hate speech, it has been observed that "there does not seem to be a clear general approach" in the Court's case law and that the Court "has approached racial hate speech on

[55] European Court of Human Rights Press Unit, *Factsheet – Hate Speech* (September 2020).
[56] P Y Kuhn, "Reforming the approach to racial and religious hate speech under article 10 of the European Convention on Human Rights" (2019) 19 Human Rights Law Review 119.
[57] App 57383/00 *Seurot v France,* 18 May 2004. The decision is in French; the quote is a translation provided by the Press Unit (n 55).
[58] Kuhn (n 56) at 120-121 (the point is made here specifically in relation to gender and LGBT hate speech but would seem to apply more widely).

a case-by-case basis, considering mainly the nature of the offensive or hateful speech in question and the context in which it was made".[59] The Court upheld a claim that article 10 had been breached by a criminal prosecution of a journalist in respect of a television documentary featuring xenophobic and racist comments,[60] and has on occasion emphasised the importance of freedom of political speech.[61] Such cases may be considered atypical given their "political dimensions",[62] and the Court has regularly rejected applications from persons convicted of incitement to racial hatred or analogous offences, either on the basis that article 17 means their actions cannot be protected by article 10 or because the restriction of their right to freedom of expression could be considered necessary in a democratic society.[63]

Sexuality

The Court's approach to hate speech in the context of sexuality appears to be similar to that adopted in respect of race.[64] An example is the recent case of *Lilliendahl v Iceland,*[65] where a man who wrote comments below an online news article regarding secondary school education on matters concerning those who identified as LGBT was, on the basis of the content of those comments, convicted of and fined for an offence of publicly threatening, mocking, defaming and denigrating a group of persons on the basis of their sexual orientation and gender identity. His complaint of a violation of article 10 was rejected by the Court. The Court held that article 17 was inapplicable, because it was "not immediately clear" that his comments were "aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention". However, the interference with his freedom of expression was one which could be justified as necessary in a democratic society given the finding of the Supreme Court of Iceland that his comments were "serious, severely hurtful and prejudicial" along with the importance of the protection of gender and sexual minorities from hateful and discriminatory speech.

Religion

In the leading case of *Otto-Preminger Institute v Austria,* criminal proceedings were issued (albeit later dropped) against the institute in connection with proposed public showings of a satirical film which the Austrian courts held to be an abusive attack on the Roman Catholic religion. In holding by a majority that article 10 had not been violated by the seizure or forfeiture of the film, the Court observed:[66]

> …whoever exercises the rights and freedoms enshrined in the first paragraph of [article 10] undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering

[59] Kuhn (n 56) at 126.
[60] *Jersild v Denmark* (1995) 19 EHRR 1.
[61] See e.g. App No 23556/94 *Ceylan v Turkey,* 8 Jul 1999; App No 16853/05 *Temel v Turkey,* 1 Feb 2011. This of course does not mean that politicians cannot be convicted of hate speech offences: see e.g. App 15615/08 *Féret v Belgium,* 16 July 2009; App 18788/09 *Le Pen v France,* 20 Apr 2010.
[62] Kuhn (n 56) at 127.
[63] See the case law reviewed by the Press Unit (n 55) especially at 13-16.
[64] See Kuhn (n 56) at 127. The court in *Lilliendahl* (n 65) relied on cases involving racist hate speech in its analysis.
[65] App No 29297/18, 12 May 2020.
[66] (1995) 19 EHRR 34 at [49].

> progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration…

It has been observed that there has been a "firm tendency" in subsequent cases to "frame the central question as one of whether the expression in question is 'gratuitously offensive'" and that "expressions critical of religion seem to have been treated more favourably where journalistic or scholarly, rather than creative or artistic, in nature".[67] The "gratuitously offensive" approach means that there may be greater scope to, in a manner compatible with article 10, restrict speech in relation to religion than there may be in respect of other forms of hate speech, but again the Court's case-by-case approach, which makes it difficult to analyse the area in such generalities, must be emphasised.

Where speech goes beyond the offensive, the application of article 17 means that the Court is likely to take an even more robust approach to a claim of a breach of article 10. An example is the case of *Norwood v United Kingdom*,[68] where the European Court declared inadmissible an application by a man who between November 2001 and January 2002 displayed a BNP poster in his window and was convicted of an offence under section 5 of the Public Order Act 1986. The court observed:

> The poster in question in the present case contained a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.

11.3 The use of "insulting" in the definition of stirring up racial hatred

As noted in section 9.2, the use of the word "insulting" in the formulation of the offence of stirring up racial hatred (both in the existing law and the Bill) has drawn some criticism, including concern about its compatibility with Convention rights. We understand that the Committee has been pointed to the case of *Fáber v Hungary* in that regard.[69] In that case, the applicant was convicted of an offence of disobeying police instructions as a result of the display of a flag in the proximity of an anti-racism demonstration. The European Court of Human Rights held that there had been a violation of the applicant's right to freedom of expression under the Convention. It has been suggested to the Committee that this decision is difficult to "square away" with the criminalisation of insult.[70]

[67] Kuhn (n 56) 123, where the case law is reviewed at 123-126.
[68] App No 23131/03 *Norwood v United Kingdom*, 16 Nov 2004. (Article 14, referred to in the quote presented here, prohibits discrimination in the enjoyment of rights.)
[69] App No 40721/08, 24 July 2012.
[70] In oral evidence taken on 3 November 2020.

The offence of stirring up racial hatred, however – whether at present or as formulated in the Bill – does not criminalise insult. It requires *in addition* to an insult (or threat or abuse) that the conduct be intended to stir up hatred or that it is likely that racial hatred will be stirred up. Any conduct criminalised under this offence would be very different from the conduct in *Fáber*, which the Hungarian government characterised as "irritating" in its submissions to the European Court of Human Rights.[71]

The court in *Fáber* expressly noted that an "abusive element" to a display could mean that, by virtue of article 17 of the Convention (abuse of rights, discussed in section 11.1 above), the conduct would not be protected by article 10. Even if the conduct were not characterised by the court as "abusive", the question of whether its criminalisation could be justified as "necessary in a democratic society", meaning that there would be no breach of article 10, would remain. The court in *Fáber* rejected this argument on the facts of that case, concluding that "ill feelings or even outrage" could not amount to a "pressing social need".[72] This is, however, very different from the offence of stirring up racial hatred, because of the additional requirement to prove an intent to stir up such hatred or that it is likely that such hatred will be stirred up. Proof of such an intent would mean that article 10 protection would likely cease to apply as a result of article 17, while combating the likelihood of such hatred being stirred up could be expected to be recognised as a pressing social need.

We therefore do not see how *Fáber* could be relied upon for the conclusion that the reference to insult in the offence of stirring up racial hatred is incompatible with Convention rights. While the criminalisation of insult is likely to be incompatible with the Convention, the offence of racial hatred does not criminalise insult alone. The requirement of threatening, abusive or insulting conduct is a *limitation* on the offence: it means that conduct intended or likely to stir up racial hatred is not criminal *unless* it is in addition proved that the conduct was threatening, abusive, or insulting. It would be possible, as the examples from other jurisdictions in section 9.2 illustrate, to define the offence so that it simply referred to "conduct" intended to or liable to stir up racial hatred, without referring to threat, abuse, or insult at all.

This conclusion does not of itself amount to a positive case for the use of the word "insulting" in the definition of the offence. As section 9.2 notes, practice in this regard varies across jurisdictions and Lord Bracadale recommended that the word be deleted from the definition of the offence.

[71] At para 55.
[72] At para 56.

APPENDIX: LINKS TO RELEVANT HATE CRIME LEGISLATION

AUSTRALIA

Australian Capital Territory
Criminal Code 2002 s 750 (offence of serious vilification)

New South Wales
Crimes (Sentencing Procedure) Act 1999 s 21A (aggravating, mitigating and other factors in sentencing)
Crimes Act 1900 s 93Z (offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex, or HIV/AIDS status)

Northern Territory
Sentencing Act 1995 s 6A (aggravating factors in sentencing)

Queensland
Anti-Discrimination Act 1991 s 131A (offence of serious vilification)

South Australia
Racial Vilification Act 1996 s 4 (offence of racial vilification)

Tasmania
No hate crime or hate speech provisions in criminal law

Victoria
Sentencing Act 1991 s 5(2) (sentencing guidelines)
Racial and Religious Tolerance Act 2001 ss 7 and 8 (offences of serious racial vilification and serious religious vilification)

Western Australia
Criminal Code Compilation Act 1913 ss 77, 78 (conduct intended to/likely to incite racial animosity or racist harassment), ss 79, 80 (possession of material for dissemination with intent to incite/that is likely to incite racial animosity or racist harassment), ss 80A, 80B (conduct intended to/likely to racially harass), ss 80C, 80D (possession of material for display with intent to/that is likely to racially harass).
Criminal Code Compilation Act 1913 s 221 (sentencing for crimes committed in circumstances of racial aggravation)

CANADA
Criminal Code s 718.2(a) (sentencing principles – aggravating and mitigating circumstances)
Criminal Code s 430(4.1) (offence of criminal mischief in relation to religious property)
Criminal Code ss 318(1), 319(1), 319(2) (offences of hate propaganda)

ENGLAND AND WALES
Criminal Justice Act 2003 ss 145, 146 (increase in sentences for racial and religious aggravation, aggravation related to disability, sexual orientation or transgender identity)

Crime and Disorder Act 1998 ss 29-31 (racially or religiously aggravated assaults, criminal damage, public order offences, harassment etc)
Public Order Act 1986 ss 18-22 (acts intended or likely to stir up racial hatred), s 23 (possession of racially inflammatory material), ss 29B-29F (acts intended to stir up religious hatred or hatred on the grounds of sexual orientation), s 29G (possession of inflammatory material – religious or sexual orientation)
Football Offences Act 1991 s 3 (indecent or racialist chanting at a football match)

IRELAND
Prohibition of Incitement to Hatred Act 1989 s 2(1) (incitement to hatred)

NEW ZEALAND
Sentencing Act 2002 s 9(1) (aggravating and mitigating factors in sentencing)
Human Rights Act 1993 s 131 (offence of inciting racial disharmony)

NORTHERN IRELAND
Criminal Justice (No 2) (Northern Ireland) Order 2004 article 2 (increase in sentence for offences aggravated by hostility)
Public Order (Northern Ireland) Order 1987 articles 8-13 (acts intended or likely to stir up hatred or arouse fear)
Justice Act (Northern Ireland) 2011 s 37 (indecent or sectarian chanting at a regulated match)

SOUTH AFRICA
No hate crime or hate speech provisions in criminal law.
Draft Bill under consideration: The Prevention of Hate Crimes and Hate Speech Bill (B9-2018).