

REVIEW OF HATE CRIME LEGISLATION: DEPARTMENT OF JUSTICE RESPONSE TO RECOMMENDATIONS

NB:

- where recommendations are linked, this has been noted for ease of reference
- due to the variety of elements contained within some of the recommendations, the status of Accept/ Accept in Principle/ Partially Accept/Not Accepted/ To be considered further is used to reflect the Department's position for the majority of the recommendation

No	Strategic Theme	Recommendation	Accept/ Accept in Principle/ Partially Accept/ Not Accepted/ To be considered further	DOJ Comment
1	A New Hate Crime Model for NI	A hate crime may be defined as a criminal act perpetrated against individuals or communities with protected characteristics based on the perpetrator's hostility, bias, prejudice, bigotry or contempt against the actual or perceived status of the victim or victims.	Accept in principle	<p>The Department agrees that there are benefits to defining the term hate crime, particularly in the context where a hate crime is a criminal act against individuals or communities with protected characteristics (linked to recommendations 9-11) based on the actual or perceived status of the victim. There are currently a range of working definitions of hate crime, utilising a number of interchangeable expressions of motivation/thresholds including hostility, bias, and prejudice. One agreed definition will improve consistency of approach within the criminal justice system.</p> <p>Further work will be required, as part of the legal clearance for drafting Bill provisions, on the threshold of the perpetrator's motivation and /or attitudes'.</p> <p>Linked to Recommendation 5.</p>
2	A New Hate Crime Model for NI	Statutory aggravations should be added to all existing offences in Northern Ireland following the model adopted in Scotland and become the core method of prosecuting hate crimes in Northern	Accept	The Department recognises that the current enhanced sentencing model for dealing with hate crime is not working effectively and is under-used. This issue was also explored in the Department's Sentencing Review Policy Way Forward consultation, including how hate

		Ireland. This would mean that any criminal offence could be charged in its aggravated form.		crimes could be better recognised and reflected in sentencing. That consultation has concluded that 'the Sentencing Review Team will work with DoJ colleagues dealing with Judge Marrinan's review', given the number of responses to his consultation. The Department agrees current powers should be repealed and replaced with a statutory aggravation model as recommended.
3	A New Hate Crime Model for NI	If the recommendation at 2 is accepted and made into law, the enhanced sentencing provisions of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 would be unnecessary and should be repealed and replaced by suitably drafted consolidated hate crime provisions. For the avoidance of doubt, those Articles of the 2004 Order providing for higher maximum sentences for certain criminal offences should be retained.	Accept	Linked to Recommendations 2, 3, 4, 7 and 8.
4	A New Hate Crime Model for NI	If the recommendations at 2 and 3 above are accepted, no increase in maximum sentences for any criminal offence is required.	Accept	
5	A New Hate Crime Model for NI	While I am content to retain the notion of 'hostility', I am satisfied that the introduction of a wider range of attitudes such as 'bias, prejudice, bigotry and contempt' may well prove beneficial, particularly as there is no standard legal definition of 'hostility'.	Accept in Principle	As per Recommendation 1, further work will be required, as part of the legal clearance for drafting Bill provisions, on the threshold of the perpetrators motivation and /or attitudes. Linked to Recommendation 1.
6	A New Hate Crime Model for NI	I am persuaded that a variation of the 'by reason of' threshold should be added as a third threshold to supplement the current thresholds of (a) demonstration of hostility, and (b) motivation.	To be considered further	Section 2 of the current Criminal Justice (No.2) (Northern Ireland) Order 2004 provides for two thresholds for proving aggravation (currently by hostility) – where the offender 'demonstrates' hostility towards the victim or where the offence is 'motivated (wholly or partly) by' hostility. The rationale for including 'by reason of' as a third threshold for proving aggravation appears to be made based on protecting vulnerability and equality groups, particularly disability victims. However, there are various counter-arguments in the Report on the merits and

				<p>workability of this, some of which are dependent on the agreed definition being extended beyond hostility which may lower the threshold (Recommendation 1); inclusion of other protected characteristics, such as gender, which could potentially make the test too broad and dilute the symbolic power of specific hate crime legislation (Recommendation 9); and, whilst recognising crimes against vulnerable people are unacceptable, the potential for alternative provisions for sentencing.</p> <p>Further work will be required on the impact of inclusion (or not) of this threshold and any consequences when considered alongside decisions on related Recommendations as outlined.</p> <p>Linked to Recommendations 1, 7, 9.</p>
7	A New Hate Crime Model for NI	<p>Adopting Section 28 of the Crime and Disorder Act 1998 as a starting point, its equivalent in Northern Ireland could read:</p> <p>. . . Any offence (the basic offence) may be aggravated in relation to (one or more of the protected characteristics) for the purposes of this Article if:</p> <p>(a) At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of one or more of (name the protected characteristic/s); or</p> <p>(b) The offence is motivated (wholly or in significant part) by hostility, bias, prejudice, bigotry or contempt towards members of (name the</p>	Accept in Principle	<p>Further work will be required, as part of the legal clearance for drafting Bill provisions, on the aggravation of offences for protected characteristics.</p> <p>Section 28 of the Crime and Disorder Act 1998 relates to separate offences for crimes aggravated by the victim's (presumed) race or religion and provides the meaning for racially or religiously aggravated offences. This Recommendation offers direction on draft provisions for similar aggravated offences for protected characteristics (Recommendations 9-11) in NI and thresholds for proving aggravation, based on the proposed definition of hate crime at Recommendation 1.</p> <p>Sub-sections (a) and (b) of the Recommendation are similar to current provisions at Section 2 of The Criminal Justice (No.2) (Northern Ireland) Order 2004 but introduces the new motivations outlined in Recommendation 1 and the concept of intersectionality (Recommendation 11).</p>

		<p>protected characteristic/s) based on their membership (or presumed membership) of that group/s; or</p> <p>(c) The offence is committed (wholly or in significant part) by reason of hostility, bias, prejudice, bigotry or contempt based on the victim's membership (or presumed membership) of (one or more of the protected characteristic/s).</p> <p>(d) However, if:</p> <p>(i) the basic offence is proved but;</p> <p>(ii) the aggravation is not proved, the offender's conviction is as if there was no reference to the aggravation and the conviction will be solely for the basic offence.</p>		<p>Sub-section (c) of the Recommendation proposes a new threshold of 'by reason of' for proving the aggravation. This issue is considered under Recommendation 6.</p> <p>Sub-section (d) of the Recommendation proposes similar draft provisions to the aggravation provisions in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 to ensure an alternative is available for a conviction if aggravation not proved.</p> <p>Linked to Recommendation 1, 2, 5, 6 and 11</p>
8	A New Hate Crime Model for NI	<p><u>Consequences of Aggravation</u> A consequential section to that described in Recommendation 7 should read:</p> <p>(1) When it is proved that the offence is so aggravated, the court must –</p> <p>(i) State on conviction that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by which the offence is aggravated by reference to one or more of the protected characteristics;</p> <p>(ii) Record the conviction in a way that shows that the offence is so aggravated and the type of hostility, bias, prejudice, bigotry or contempt by</p>	Accept	<p>This recommendation will support the new model to ensure that aggravation, as defined, is taken fully into account on conviction and at sentencing. Recording the conviction of the aggravated offence on the offender's criminal record will inform rehabilitative work and act as a deterrent for potential perpetrators/ reoffending.</p> <p>In relation to (1)(iv)(a), further consideration will be given to stating the difference in sentence due to aggravation, noting Section 15 in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021, which provides for an explanation of how the aggravated offence affects the sentence imposed as opposed to stating the difference, is now operational and may provide evidence of workability and victim confidence.</p>

		<p>which the offence is aggravated, by reference to one or more of the protected characteristics;</p> <p>(iii) In determining the appropriate sentence, treat the fact that the offence is so aggravated as an aggravating factor that increases the seriousness of the offence; and</p> <p>(iv) In imposing sentence, state (a) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for the difference or (b) otherwise, the reasons for there being no such difference.</p>		
9	Protected Characteristics	<p>All current protected characteristics in Northern Ireland - race, religion, disability and sexual orientation - should continue to receive protection under the proposed model set out in Recommendation 2 above, together with the new recommended protected characteristics of age, sex/gender and variations in sex characteristics. For the avoidance of doubt, the protected characteristic of sex/gender includes transgender identity. The protected characteristics will be protected for all purposes including any amended public order provisions.</p>	Partially Accept/To be considered further	<p>The Department agrees that the current protected groups (racial, religious, sexual orientation, disability) should continue to be included in legislation and that transgender identity should be included as a protected group - the PSNI already capture this information.</p> <p>Further work will be required on the inclusion of age and sex/gender (excluding transgender) which will be subject to further consultation.</p> <p>Linked to Recommendations 10 and 11.</p>
10	Protected Characteristics	<p>Provision should be made for any future legislation to be framed in such a way so as to allow any other protected characteristic to be added to the list of protected characteristics referred to in Recommendation 9 above by statutory</p>	Accept	<p>The Department recognises the need to ensure that protection is in place for any groups identified as requiring protection at a future date. The proposed method of how this should be done will be subject to further legal advice and Assembly scrutiny.</p>

		instrument if sufficient evidence emerges to show such a group or groups are victims of hate crime or hate speech. The reasoning behind this recommendation is to allow suitable protection to be provided in the changing circumstances of the time.		Linked to Recommendations 9 and 11.
11	Protected Characteristics	Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences referred to in Recommendation 2 above.	Accept	<p>The Department agrees with the need to provide recognition of victims that are subject to hate crime on account of more than one actual/presumed memberships of a protected group and that this should be taken into account in the legislation.</p> <p>Linked to Recommendations 7, 9 and 10.</p>
12	Sectarianism	The findings of the report of the Working Group on defining sectarianism in Scots law in November 2018 should be applied in Northern Ireland – subject to any necessary adjustments.	Accept in Principle	<p>The Final Report of the Working Group on Defining Sectarianism in Scots Law provides a definition of sectarianism. The Department agrees that there should be a definition in Northern Ireland legislation and a statutory aggravation for sectarian prejudice (subject to agreement of the definition of sectarianism).</p>
13	Sectarianism	There should be a new statutory aggravation for sectarian prejudice as set out in chapter 8 of this review. It is recommended that the introduction of the new offence of statutory aggravation for sectarian prejudice should be carefully monitored by the proposed Hate Crime Commissioner on an annual basis and provide an annual report to the Northern Ireland Assembly.	Accept in Principle	<p>In relation to monitoring a new statutory aggravation for sectarian prejudice, a consultation on Victims and Witness strategy and establishment of Victims Commissioner for Northern Ireland launched in May 2021 and includes recognition of the importance of hate crime within the proposed role for a Victims Commissioner. The outcome of this consultation and subsequent scrutiny will determine the way forward for the proposed Victims of Crime Commissioner.</p> <p>These recommendations will need to be considered in conjunction with relevant recommendations in the Flags, Identity, Culture, Tradition (FICT Report), once published.</p> <p>Further work will be required, as part of the legal clearance for drafting Bill provisions.</p>

				Linked to Recommendations 33 and 34.
14	Stirring Up Offences / Freedom of Expression	<p>The Public Order (Northern Ireland) Order 1987, or its replacement in a new Hate Crime and Public Order (Northern Ireland) Bill, should be amended to:</p> <p>(a) include all the current and proposed protected characteristics referred to in Recommendation 9;</p> <p>(b) introduce articles equivalent to Sections 4, 4(a) and 5 (as amended) of the Public Order Act 1986 with the proviso that the dwelling defences in those sections be removed.</p> <p>(c) repeal Article 8 (2);</p> <p>(d) repeal the dwelling defence in Article 9 (3);</p> <p>(e) include a specific defence for private conversations.</p> <p>(f) the test of hatred for the stirring up offences should remain unchanged.</p> <p>(g) all decisions on whether or not to prosecute these offences should be taken personally by the Director of Public Prosecutions.</p> <p>(h) there should be no express defences for freedom of expression in relation to religion, sexual orientation or any other of the protected characteristics. However,</p> <p>(l) there should be formal statutory recognition of the importance of freedom of expression Article 10 rights and all other rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, in particular, rights guaranteed under Articles 6, 8, 9 and 14.</p>	Accept in principle/To be considered further	<p>This recommendation covers a number of policy areas in relation to Stirring Up Hatred which garnered contrasting views in Judge Marrinan’s consultation and will require further consideration to balance the need for protection for victims and ensure freedom of expression.</p> <p>The Department agrees that all protected groups should be included in Stirring Up Hatred provisions (a).</p> <p>Further discussion with the PPS will be required on the personal involvement of the Director of Prosecutions, following their consideration (g).</p> <p>As suggested at 14(j), the term ‘publication’ in article 10 should be amended to include ‘posting’ or ‘uploading material online’ similar to Recommendation 30.</p> <p>Further discussion will be required on the thresholds; the dwelling defence/private conversation; freedom of expression defences; and the consequences of intending to stir up hatred taking into consideration legal advice on the standard of legal definition, which will be subject to public consultation.</p>

		<p>(j) the term 'publication' in article 10 should be amended to include 'posting' or 'uploading material online'.</p> <p>(k) intentionally stirring up hatred or arousing fear should be treated differently to the use of words or behaviour likely to stir up hatred or arouse fear:</p> <p>(1) where it can be shown that the speaker intended to stir up hatred or arouse fear, it should no longer be necessary to demonstrate that the words used were threatening, abusive or insulting.</p> <p>(2) where intent to stir up hatred or arouse fear cannot be proven, it should be necessary for the prosecution to demonstrate that:</p> <p>(i) the defendant's words or behaviour were threatening or abusive;</p> <p>(ii) the defendant's words or behaviour were likely to stir up hatred or arouse fear;</p> <p>(iii) the defendant knew or ought to have known that his words or behaviour were threatening or abusive; and</p> <p>(iv) the defendant knew or ought to have known that his words or behaviour were likely to stir up hatred or arouse fear.</p>		
15	Duty to Remove Hate Expression	There should be a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove	Accept in Principle	Consultation with the relevant organisations will be required on the impact and practical out-workings of the recommendation and will also need to be considered in conjunction with relevant recommendations in the Flags, Identity, Culture, Tradition (FICT Report), once published.

		hate expression from their own property and, where it engages their functions, broader public space.		
16	Restorative Justice	There should be a new statutory scheme for restorative justice for over 18s, organised and delivered on lines similar to the Youth Justice Agency in Northern Ireland.	To be considered further	<p>Any work to deliver on the restorative justice recommendations will be undertaken in the delivery of the Department's Adult Restorative Practice Strategy work. The Department and relevant partners, who were engaged in developing the Adult Restorative Practice Strategy consultation paper, will consider the restorative justice issues raised in the Hate Crime Legislation Review summary of responses and use the views expressed to inform the development of a draft Adult Restorative Practice Strategy and associated Action Plan. To date, no decision has been made on the statutory position (Recommendation 16). We would also wish to consider the important role that a Centre of Restorative Excellence could play in the development of restorative practice amongst adult offenders.</p> <p>A Working Group, which developed the Adult Restorative Practice Strategy consultation document, is currently being re-established to inform this work. It has been agreed that the restorative justice recommendations on hate crime will be included as part of Working Group's wider considerations.</p> <p>Recommendations 16-22 are linked.</p>
17	Restorative Justice	It is desirable that such a statutory restorative justice framework be established with the necessary financial funding.	To be considered further	
18	Restorative Justice	The new statutory scheme for restorative justice should be independent of the Department of Justice.	To be considered further	
19	Restorative Justice	As such a scheme will involve referrals from the Public Prosecution Service and the Courts, it is recommended that it should be run by a statutory agency such as the Probation Service for Northern Ireland.	To be considered further	
20	Restorative Justice	The presently accredited restorative justice groups should continue to provide community support and support to the statutory agency, which would take the lead in any such collaboration.	To be considered further	
21	Restorative Justice	There should be further consideration of the benefits of establishing a Centre of Excellence for Restorative Justice.	Accept	
22	Restorative Justice	Diversion from prosecution is an appropriate method of dealing with low-level hate crimes. The model as per the practice in Scotland appears to offer an efficient and practical template.	To be considered further	
				<p>The Restorative Justice practice in Scotland refers to the model whereby the prosecutor, if they consider such a scheme to be appropriate and likely to be effective in a particular case, offers restorative justice to the defendant - limited to low level and youth offending. If the offender engages effectively with the programme, he/she will not be prosecuted and the behaviour in question will not be reflected on any criminal record. However, if he/she does</p>

				<p>not engage effectively, the Procurator Fiscal can still decide to proceed with the prosecution. This will be considered further along with work on the review of sentencing. The Department and relevant partners who were engaged in developing the Adult Restorative consultation paper will consider the issues raised in the summary of responses and use the views expressed to inform the development of a draft Adult RJ Strategy and associated Action Plan.</p> <p>Recommendations 16-22 are linked.</p>
23	Victims of Hate Crime	<p>The work of the Hate Crime Advocacy Service should be expanded and placed on a permanent statutory footing to ensure a more sustainable funding model with specialised advocates appointed to support victims for all protected characteristics thus ensuring that the right to advocacy acknowledged in the Victim's Charter is guaranteed. For the avoidance of doubt, such specialised advocates should include a dedicated religious hate crime advocate who can also deal with sectarian hatred. The proposed dedicated advocate for sex/gender could also deal with any victims regarding variation of sex characteristics.</p>	Accept in Principle	<p>The Service will not be placed on a statutory footing as the delivery of services is not effectively dealt with through legislation. However, the Department agrees with the principle of the recommendation which aims to place the Service on a more sustainable financial footing. Therefore, the PSNI and DoJ are currently in the process of moving to a publicly tendered commercial arrangement for provision of the advocacy service from April 2022 for up to five years. The tender documentation recognises the Hate Crime review recommendations, including the need to adapt to any future legislative changes for new protected categories.</p>
24	Victims of Hate Crime	<p>Complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration of special measures when giving evidence, including the use of live links or screens. Protection for complainants in hate crime/hate speech criminal proceedings should be provided as follows:</p>	Accept	<p>Provision to include eligibility of special measures for victims of hate crime will be included in the Hate Crime Bill, similar to the inclusion of provisions in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021.</p>

		(i) no person charged with any aggravated or stirring up offence may in any criminal proceedings cross-examine a witness who is the complainant either – (a) in connection with that offence or (b) in connection with any other offence with which that person is charged in the proceedings		
25	Online Hate Speech	The proposals contained in the United Kingdom Government's 'Online Harms' White Paper (2019) should be implemented in full. Given that legislation in this area is a reserved matter, the Assembly in Northern Ireland should consider whether or not to encourage implementation of these proposals by the Government of the United Kingdom, or, in the alternative, seek the agreement of the Secretary of State for Northern Ireland to allow the Assembly to enact appropriate legislation on this issue in Northern Ireland.	Accept	Issues in relation to telecommunications legislation is a reserved matter. The Minister has written to the Home Office and Department for Digital, Culture, Media and Sport (DCMS) seeking assurance that Northern Ireland's views on these issues will be included in the forthcoming Online Safety Bill. The Minister has also written to the Executive and the Speaker on this issue given the interest of Northern Ireland departments on wider online safety issues (hate crime is only one element) in the Bill which deals with illegal and legal but harmful online material. Given the overlaps with criminal justice policy, the DoJ will act as the cross departmental lead for engagement with DCMS on their Online Safety Bill. Recommendations 25-30 are linked.
26	Online Hate Speech	In terms of jurisdiction for dealing with online hate speech, the law should be clarified to confirm that any online material downloadable in Northern Ireland is acknowledged to be within the jurisdiction of the courts of Northern Ireland.	Accept	
27	Online Hate Speech	There should be a legal requirement on social media companies to ensure that potential users who wish to avail of their services must provide verifiable personal information before they are permitted to use those services.	To be considered further	

		As this recommendation involves legislating in respect of a reserved matter, see Recommendation 25 above.		
28	Online Hate Speech	There should be a mechanism by which the offending behaviour must be removed from the Internet by the offender, or through a court order imposed on the relevant social media company.	To be considered further	
29	Online Hate Speech	The PPS should make their prosecution guidelines for cases involving electronic communications public and disseminate them in an appropriate way.	Accept	PPS has confirmed it is reviewing it guidelines for prosecuting cases involving electronic communications with a view to publishing them on the PPS website in due course. Recommendations 25-30 are linked
30	Online Hate Speech	Article 3 of the Malicious Communications (Northern Ireland) Order 1988 should be amended to explicitly bring electronic communications within its ambit. The word 'publication' should be amended to refer to 'posting' or 'uploading material online'.	Accept	The Department agrees that legislation in Northern Ireland should be brought into line with legislation in England and Wales in relation to posting/uploading material online. The legislation is being reviewed in England and Wales by the Law Commission and their final recommendations will be considered along with any other considerations when developing this legislation for Northern Ireland. Recommendations 25-30 are linked
31	Legislation and Scrutiny	All hate crime and hate speech law – including public order legislation, apart from law dealing with reserved matters – should be consolidated into a new Hate Crime and Public Order (Northern Ireland) Bill.	Accept	The Department intend to develop and bring forward a consolidated Bill within the next Assembly mandate.
32	Legislation and Scrutiny	There should be post-legislative scrutiny by the Assembly to monitor the effectiveness of any new legislation on hate crime and hate speech. It is recommended that such scrutiny should occur regularly at three-year intervals	Accept in Principle	The Department recognises the role of the Assembly and Justice Committee in scrutinising the proposed legislation. The timescale and roles will be subject to discussion as part of that process

		and, if possible, include an element of public consultation.		
33	Victims of Hate Crime	An office of a Hate Crime Commissioner for Northern Ireland should be established. I believe that the issues involved in the area of hate crime and hate speech fully justify such a dedicated post.	Partially Accept	The Department has commencement engagement with interested stakeholders in relation to the establishment of a Victims of Crime Commissioner for Northern Ireland. A consultation on a Victims and Witness Strategy and establishment of a Victims of Crime Commissioner for Northern Ireland launched in May 2021 and is seeking feedback on the role a Victims of Crime Commissioner should have in focusing on victims of hate crime (and victims of domestic and sexual abuse) as a particularly vulnerable group. The outcome of this consultation and subsequent scrutiny will determine the way forward for the proposed Victims of Crime Commissioner.
34	Victims of Hate Crime	In the alternative, I recommend that the role of such a Commissioner could properly be shared and that, therefore, there should be established a joint shared post of Hate Crime and Domestic Abuse Commissioner. I believe this would work well because the remit for this post relates to specific criminal contexts which are not dissimilar.	Partially Accept	