

Hara ngākau kino Hate crime

Consultation Paper



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Law Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake
Better law for Aotearoa New Zealand through independent review

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Have your say

MAKING A SUBMISSION

We want to hear your views. Your feedback will help us make recommendations to the Government about the law on hate crime. You can tell us what you think by sending us a submission. You don't need to answer all the questions in this paper. Submissions close at 5pm on 13 March 2025.

You can make a submission by:

- filling out a submission form on [our website](#);
- emailing us at hate.crime@lawcom.govt.nz; or
- writing to us at: Hate crime, Law Commission, PO Box 2590, Wellington 6140.

If these options are not accessible to you or you would like help with making a submission, please get in touch with us by either:

- emailing us at hate.crime@lawcom.govt.nz;
- calling us at 0800 832 526; or
- using the [New Zealand Relay Service](#) if you are deaf, hard of hearing, deafblind or speech impaired or if you find it hard to talk.

Some people may find it emotional or distressing to make a submission. If you want to make a submission, you may want to arrange to have a support person ready to help. If you are upset or distressed, you can also call or text 1737. This is a free helpline service that is available 24 hours a day. You will get to talk or text with a trained counsellor. The service is provided by Whakarongorau Aotearoa | New Zealand Telehealth Services.

WHAT HAPPENS TO YOUR SUBMISSION?

If you send us a submission, we will:

- consider the submission in our review; and
- keep the submission as part of our official records.

We may also:

- refer to your submission in our publications;
- publish your submission on our website; and
- use your submission to inform our work in other reviews.

For further information, visit [our website](#).

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Information held by the Law Commission is subject to the Official Information Act 1982. If we receive a request for information that includes your submission, we must consider releasing it. In evaluating whether we are required to release your submission, we will take into account any request you have made that we do not publish information on our website or in our publications and any reasons you gave for that request. We will also try to consult you.

Privacy Act 2020

Information supplied to the Law Commission is subject to the Privacy Act 2020. Your submission may contain personal information. You have the right to access and correct your personal information.

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Consultation questions

Question 1

Is there anything you would like to tell us about what hate crime is occurring in Aotearoa New Zealand and its impacts?

Question 2

How can we best uphold the Crown's obligations under Te Tiriti o Waitangi | Treaty of Waitangi in this review?

Question 3

What characteristics should be protected by hate crime laws? Why?

Question 4

What do you think about the key reform considerations we have identified for this review?

Question 5

Do you think there are problems with how Aotearoa New Zealand's current hate crime law is working? If so, what are those problems?

Question 6

If there are problems with how Aotearoa New Zealand's hate crime law is working, can they be addressed while keeping the current legal model (sentence aggravation)? If so, how?

Question 7

If specific hate crime offences are adopted, what offences should they cover? Why?

Question 8

Should a different legal model, such as specific hate crime offences or the Scottish hybrid model, be introduced in Aotearoa New Zealand? Why or why not?

Question 9

If specific hate crime offences or the Scottish hybrid model are introduced, should the sentence aggravation model be kept as well?

CHAPTER 1

Our review

INTRODUCTION

- 1.1 Te Aka Matua o te Ture | Law Commission is reviewing the law relating to hate crime, with a focus on whether the law should be changed to create new hate crime offences. Currently, the law in Aotearoa New Zealand responds to hate crime at sentencing.
- 1.2 For the purpose of this review, ‘hate crime’ means conduct that:
 - (a) is already a criminal offence under New Zealand law; and
 - (b) is carried out because of hate or hostility towards a group of people who have a common characteristic (for example, race, colour, nationality, religion, sex, gender identity, sexual orientation, age or disability).
- 1.3 Hate crime can have serious impacts on both the victim and others who have the common characteristic. At the same time, people’s motives for committing crimes can be difficult to prove and are not usually relevant to criminal liability. This (among other things) can complicate how the criminal law should respond to hate crime.
- 1.4 We are seeking feedback from the public about law reform in this area. This Consultation Paper is designed to support that consultation process. It provides some context to the review, asks if there are problems with the current law and outlines potential solutions.

BACKGROUND TO THE REVIEW

- 1.5 This review has its origins in the 15 March 2019 terrorist attack on Christchurch masjidain (Muslim places of worship), which claimed the lives of 51 people, leaving 40 people with gunshot injuries. The murder, attempted murder and wounding of these people is a devastating example of a hate crime. It was committed by an individual with extreme right-wing views and lacking in empathy for “those he was able to ‘other’, most particularly Muslim migrants in Western countries”.¹
- 1.6 A Royal Commission of Inquiry was established to investigate whether public sector agencies had done all they could to protect the people of Aotearoa New Zealand from terrorist attacks and whether more could be done to prevent attacks in the future.

¹ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 231.

- 1.7 As part of its report, the Royal Commission covered several issues relating to social cohesion and Aotearoa New Zealand's changing demographics.² It emphasised the roles of political and public sector leadership in building social cohesion. It also concluded that aspects of Aotearoa New Zealand's legal framework should be improved.³ In relation to hate crime, the Royal Commission recommended the creation of new hate crime offences. These would impose higher maximum penalties for crimes committed because of an offender's hostility towards a group of people who have a common characteristic. Specifically, in recommendation 39, the Royal Commission proposed that hate crime offences be created in:⁴
- (a) the Summary Offences Act 1981, corresponding with the existing offences of offensive behaviour or language, assault, wilful damage and intimidation; and
 - (b) the Crimes Act 1961, corresponding with the existing offences of assaults, arson and intentional damage.
- 1.8 The Royal Commission said these new offences would reflect the seriousness of hate crime and help to deter such offending in the future. It also suggested new hate crime offences may increase reporting of hate crime to Ngā Pirihimana o Aotearoa | New Zealand Police, increase prosecutions and facilitate the creation of tailored rehabilitation programmes for hate crime offenders.⁵
- 1.9 In March 2024, the Minister of Justice asked the Law Commission to review the law relating to hate crime. The Minister asked that we focus our work on whether the law should be changed to create hate crime offences as recommended by the Royal Commission.

SCOPE OF THE REVIEW

- 1.10 The Law Commission is an independent, publicly funded agency that provides law reform advice to the government. We review the law and make recommendations to the government on how to improve it.
- 1.11 In this review, we are reviewing the law relating to hate crime, with a focus on whether the law should be changed to create new hate crime offences. The scope of the review is set out in our terms of reference. These are attached as an appendix to this Consultation Paper. They are also available in a range of languages and accessible versions on our website.
- 1.12 As we explain in detail in Chapter 3, new offences should only be created when there are compelling reasons and where they would achieve a purpose not met by the current law. We therefore need to examine, as part of the review, whether the current law in Aotearoa New Zealand adequately responds to hate crime. Under the current legal model, an offender's hostility towards a group of people who have an enduring common

² At part 9, chs 2 and 3.

³ At 700.

⁴ At 704 and 762 (recommendation 39).

⁵ At 703; and William Young and Jacqui Caine *Hate speech and hate crime-related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

characteristic is taken into account as an aggravating factor at sentencing. This is referred to as the ‘sentence aggravation model’ of hate crime law.

- 1.13 If there are concerns about the operation of the current law, we will need to consider whether they can be addressed by improving the current sentence aggravation model. If they cannot, it may be appropriate to adopt a different legal model such as new hate crime offences (as recommended by the Royal Commission).
- 1.14 In making any recommendations for reform, we will take into account te ao Māori and give consideration to the multicultural character of Aotearoa New Zealand society.
- 1.15 The review will not consider hate speech, including the offence of inciting racial disharmony in the Human Rights Act 1993.⁶ That offence does not fall within our definition of hate crime because the underlying conduct is not otherwise an offence under New Zealand law. A review of hate speech was previously on the Law Commission’s work programme but was withdrawn by the Minister of Justice in March 2024.
- 1.16 Even so, we are aware that some members of the public are concerned any changes to hate crime laws may impact freedom of thought and expression. Under the current law, what an offender said while committing a crime will be relevant at sentencing if it shows the offending was hate-motivated. If specific hate crime offences were adopted (as recommended by the Royal Commission), the same evidence could be used as proof of the defendant’s guilt. Motive is not usually an element of criminal offences. We discuss how legal responses to hate crime might engage the rights to freedom of thought and expression in Chapter 3. We also seek feedback on the implications of adopting specific hate crime offences in Chapter 8.

OUR APPROACH AND NEXT STEPS

- 1.17 We began the review in May 2024. We have researched the current law and how hate crime is dealt with in the criminal justice system in Aotearoa New Zealand, and analysed legal models for recording and prosecuting hate crime in other jurisdictions. We have also analysed the available data about the nature and prevalence of hate crime in Aotearoa New Zealand. This includes recent data from Police that was not available at the time of the Royal Commission’s report.
- 1.18 We have undertaken some preliminary engagement with experts and stakeholders, including prosecutors, Police, Te Tāhū o te Ture | Ministry of Justice and Ara Poutama Aotearoa | Department of Corrections. We have been guided in our approach to te ao Māori by our Māori Liaison Committee and obtained specialist advice on applicable mātauranga and tikanga from Whāia Legal.
- 1.19 Based on our preliminary research, engagement and analysis of the current law, we have identified some issues on which we seek public feedback. This Consultation Paper invites submissions on those issues and forms the basis of our public consultation for the review. We have not yet formed a view on the issues raised in this paper or on how significant they are in practice. Our analysis of the submissions and other feedback we receive will inform our development of proposals for reform.

⁶ Human Rights Act 1993, s 131.

- 1.20 Later in the review, we plan to undertake targeted consultation on any proposals for reform with experts (including legal professional bodies, academics, Police and other relevant agencies). We will also engage with members of the judiciary. The main purpose of this targeted consultation will be to test the practical workability of any changes to the law. We will establish a technical advisory group to support this part of the process.
- 1.21 We will conclude the review by presenting a final report with our advice to the Minister of Justice on any changes we think should be made to the law. We anticipate providing our report to the Minister in mid-2026. The report will also be presented to Parliament and published on our website.

STRUCTURE OF THIS CONSULTATION PAPER

- 1.22 This Consultation Paper is organised into eight chapters:
- (a) In Chapter 2, we explain what hate crime is.
 - (b) In Chapter 3, we identify some key considerations that will help us decide whether reform is needed and, if so, evaluate any options for reform. These considerations include reasons why the law might need to treat hate crime more seriously than other types of offending and what characteristics should be protected by hate crime law.
 - (c) In Chapter 4, we explain how hate crime is currently dealt with in the criminal justice system, including how hate crime is recorded and prosecuted under the current law.
 - (d) In Chapter 5, we explore some possible problems with the current law.
 - (e) In Chapter 6, we outline two broad options for addressing any problems with the current law — either improving the current sentence aggravation model or adopting a different legal model. We also give an overview of three legal models used to address hate crime overseas.
 - (f) In Chapter 7, we discuss ways to improve the current sentence aggravation model.
 - (g) In Chapter 8, we discuss two different legal models for addressing hate crime. These are specific hate crime offences and the Scottish hybrid model (which has features of both the current sentence aggravation model and specific hate crime offences).
- 1.23 We ask questions throughout this Consultation Paper to seek your views. You do not need to respond to all the questions.
- 1.24 Readers should be aware that some of the discussion in this Consultation Paper refers to instances of hate crime, which may be distressing. Please refer to the “Have your say” page at the beginning of this paper for information about how to access wellbeing support and assistance, if needed.
-

CHAPTER 2

Hate crime and its impacts

INTRODUCTION

- 2.1 This chapter provides an overview of hate crime. It discusses:
- (a) what hate crime is;
 - (b) the impacts of hate crime; and
 - (c) what we know about hate crime in Aotearoa New Zealand.

WHAT IS HATE CRIME?

- 2.2 The term ‘hate crime’ means different things to different people. It is used in everyday language and in multiple disciplines including law, criminology and sociology.¹ It is used to refer to criminal acts, hate speech, discrimination and microaggressions.²
- 2.3 Despite the various uses of the term, there is broad agreement that hate crime is focused on the identity (or the perceived identity) of the victim.³ The definition of a hate crime for the purposes of criminal law is also relatively settled. There are two elements:⁴
- (a) First, the act at issue must already be an offence under ordinary criminal law.
 - (b) Second, the underlying criminal act must be committed with a particular ‘hate’ motive. This motive must be directed at a group of people who have a common characteristic such as race, colour, nationality, religion, sex, gender identity, sexual orientation, age or disability. We describe the common characteristic as a ‘protected characteristic’.
- 2.4 The term ‘hate’ can be misleading.⁵ Not all hate crimes are motivated by hate. Hate is a specific and intense emotional state and many hate crimes are motivated by prejudice or intolerance towards a particular group.⁶ Similarly, not all crimes motivated by hate are

¹ Jennifer Schweppe “What is a hate crime?” (2021) 7(1) *Cogent Soc Sci* 1 at 1.

² Jennifer Schweppe “What is a hate crime?” (2021) 7(1) *Cogent Soc Sci* 1 at 1.

³ Jennifer Schweppe “What is a hate crime?” (2021) 7(1) *Cogent Soc Sci* 1 at 5–6.

⁴ See Alistair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [2.10]; Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, November 2020) at [23]–[25]; Organization for Security and Cooperation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, 2022) at 15; and Jennifer Schweppe “What is a hate crime?” (2021) 7(1) *Cogent Soc Sci* 1 at 11.

⁵ See Jennifer Schweppe “What is a hate crime?” (2021) 7(1) *Cogent Soc Sci* 1 at 3.

⁶ Organization for Security and Cooperation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, 2022) at 17.

hate crimes. Unless the offender is motivated by hate towards a protected characteristic, it will not be a hate crime.

- 2.5 In this paper, we use the term ‘hate’ broadly to refer to hostility, prejudice or intolerance. We do not use it as a legal term. As we explain in Chapter 5, the current legal test in Aotearoa New Zealand uses the term “hostility” to describe an offender’s motivation. If we decide to recommend changing the law, the best term to describe an offender’s motivation is one thing we would need to consider.

THE IMPACTS OF HATE CRIME

- 2.6 Because hate crime targets the identity of the victim, it is said to have a different impact to other types of offending. Hate crime is said to cause additional harms to the victim, the affected community and wider society.

Harm to the victim

- 2.7 There is evidence that hate crime causes additional psychological harm to victims. Several large-scale studies suggest that victims of hate crime are more likely than victims of other crimes to be affected by the incident and experience emotional effects such as anxiety and depression.⁷ Commentators suggest this may be because the individual is “targeted for who they are”.⁸

Effect on the community

- 2.8 There is also evidence that hate crime causes psychological harm to the community to which the victim belongs.⁹ For example, in one study, participants who knew victims of hate crime but were not victims themselves felt the threat of harm to them had increased as a result of the offending.¹⁰ Studies also show increased feelings of vulnerability, anxiety and anger in affected communities.¹¹ Commentators suggest this may be because “hate crimes are ‘message crimes’ that emit a distinct warning to all members of the victim’s community”.¹² This means that members of the victim’s community “may also feel threatened and intimidated” or “directly targeted”.¹³

⁷ See, for example, James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 25–27.

⁸ Organization for Security and Cooperation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, 2022) at 20.

⁹ See, for example, Mark Walters and others “Group identity, empathy and shared suffering: Understanding the ‘community’ impacts of anti LGBT and Islamophobic hate crimes” (2020) 26(2) *Int Rev Vict* 143.

¹⁰ Amanda Haynes and Jennifer Schweppe “LGB and T? The specificity of anti-transgender hate crime” in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds) *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave MacMillan, London, 2017) 111 at 130.

¹¹ See, for example, Mark Walters and others “Group identity, empathy and shared suffering: Understanding the ‘community’ impacts of anti LGBT and Islamophobic hate crimes” (2020) 26(2) *Intl Rev Vict* 1 at 145.

¹² Barbara Perry and Shahid Alvi “‘We are all vulnerable’: the *in terrorem* effects of hate crimes” (2012) 18(1) *Intl Rev Vict* 57 at 59.

¹³ Organization for Security and Cooperation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, 2022) at 21.

Harm to wider society

- 2.9 Some argue that hate crime causes additional harm to wider society, although this harm is difficult to evidence.¹⁴ It is often explained as decreased social cohesion and an increased risk of social unrest.¹⁵ For example, one commentator argues that hate crime divides communities and reinforces barriers between groups.¹⁶ Others suggest that hate crime can “exacerbate existing intergroup tensions” and lead to retaliatory cycles of violence.¹⁷

WHAT WE KNOW ABOUT HATE CRIME IN AOTEAROA NEW ZEALAND

- 2.10 Hate crime is not a new phenomenon in Aotearoa New Zealand.¹⁸ However, we do not know a lot about what hate crimes have occurred and are still occurring here. This makes it “difficult to have an informed discussion” about the prevalence of hate crime in Aotearoa New Zealand.¹⁹
- 2.11 Between 2004 and 2012, Te Kāhui Tika Tangata | Human Rights Commission brought together media reports of racially and religiously motivated crimes. In 2019, the Human Rights Commission collated these into a discussion document.²⁰ Around 100 incidents were collated, and the Human Rights Commission thought these were likely to be “the tip of the iceberg”.²¹ The incidents included assault, harassment and vandalism of places of worship, cemeteries and houses.
- 2.12 Since then, both Ngā Pirihimana o Aotearoa | New Zealand Police and Te Tāhū o te Ture | Ministry of Justice have begun to systematically collect data relevant to hate crime. As these are recent initiatives, the data only dates back a few years.

Police data

- 2.13 Since 2019, Police has been able to flag on its database that a reported offence is perceived to be hate-motivated. If the victim, police officer or anyone else perceives

¹⁴ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 32–33.

¹⁵ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 32, citing Paul Iganski “Why make hate a crime?” (1999) 19 *Crit Soc Policy* 386 at 389.

¹⁶ Barbara Perry “Exploring the community impacts of hate crime” in Nathan Hall and others (eds) *The Routledge International Handbook on Hate Crime* (Routledge, New York, 2015) 47 at 53.

¹⁷ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 32–33

¹⁸ For example, some have described the killing of Ngāti Oneone rangatira Te Maro by an *Endeavour* crew member on 9 October 1769 as the first recorded race-based violent crime in Aotearoa New Zealand: Tina Ngata, Arama Rata and Dilwin Santos “Race-Based Hate Crime in Aotearoa” (2021) 10(2) *MAIJ* 207 at 209.

¹⁹ Te Kāhui Tika Tangata | Human Rights Commission *It Happened Here: Reports of race and religious hate crime in New Zealand 2004-2012* (June 2019) at 1.

²⁰ Te Kāhui Tika Tangata | Human Rights Commission *It Happened Here: Reports of race and religious hate crime in New Zealand 2004-2012* (June 2019).

²¹ At 1.

reported behaviour as motivated by hostility or prejudice, Police will record the offending as a potential hate crime.

2.14 There are several preliminary points to make about Police data:

- (a) Police data only shows the number of perceived hate crimes that have been reported to Police, but victims of hate crime do not always report the offending to Police.²² Any unreported offences will not be captured in Police data.
- (b) Police has a quality assurance process to ensure the perceived hate crime flag is used correctly. The quality assurance review began in 2021, so we do not refer to earlier data in this paper.
- (c) The increase in reports of perceived hate crimes should not necessarily be interpreted as an increase in hate crime in Aotearoa New Zealand. It could be attributed to increased awareness and improved reporting and recording practices.

2.15 The table below shows the number of reported offences flagged as perceived hate crimes from 2021 to 2024.

NUMBER OF REPORTED OFFENCES FLAGGED AS PERCEIVED HATE CRIMES			
2021	2022	2023	2024
3,464	4,499	5,019	5654

2.16 Perceived hate crimes are only a small proportion (around 0.9 per cent) of the total number of reported offences.

2.17 The types of offences most flagged as perceived hate crimes are harassment and other related offences against a person (such as intimidation), public order offences (such as disorderly behaviour), acts intended to cause injury, and property damage. From 2021 to 2024, these accounted for over 90 per cent of perceived hate crimes.

2.18 The table below shows the percentage of perceived hate crimes that related to each protected characteristic from 2021 to 2024. More than one protected characteristic can be targeted in a reported offence. For example, if a gay Asian person experiences a hate crime, they may perceive they were targeted because of both their race or ethnicity and sexual orientation.

PERCENTAGE OF PERCEIVED HATE CRIME OFFENCES TARGETING EACH PROTECTED CHARACTERISTIC ²³				
	2021	2022	2023	2024
Age	1%	1%	1%	0%
Disability	1%	2%	2%	2%

²² William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 714.

²³ Percentages in this table are rounded to the nearest whole number.

Gender identity	3%	4%	4%	4%
Race/ethnicity	82%	79%	78%	79%
Religion/faith	7%	6%	6%	5%
Sexual orientation	7%	9%	9%	10%

- 2.19 Since 2022, Police has recorded further detail on the protected characteristics perceived to be targeted such as the type of race or religion. From 2022 to 2024, the most recorded ethnicities were South Asian (including Indian) and Asian. These accounted for approximately 29 per cent and 16 per cent of perceived hate crimes targeting race/ethnicity, respectively. Islam and Judaism were the most recorded religions, accounting for approximately 54 per cent and 17 per cent of perceived hate crimes targeting religion, respectively.
- 2.20 Since 2021, 12–18 per cent of perceived hate crime offences were both investigated to the point that there was enough evidence to charge a person with an offence and Police decided to take action. In relation to these perceived hate crime offences:
- Approximately half of the offences were prosecuted. Other actions such as a formal or informal warning were also common. For example, in 2024, 58.5 per cent of perceived hate offences with sufficient evidence to charge were prosecuted, 13.6 per cent had formal warnings and 9.9 per cent had informal warnings.
 - Approximately 75 per cent of the alleged hate crime offenders were men. Māori were disproportionately represented as alleged hate crime offenders. Approximately 40 per cent of alleged hate crime offenders were Māori, while Māori make up 19.6 per cent of Aotearoa New Zealand’s population.²⁴ The remainder were mostly European/Pākehā, who made up approximately 38 per cent of alleged hate crime offenders.

New Zealand Crime and Victims Survey

- 2.21 The Ministry of Justice has been carrying out the New Zealand Crime and Victims Survey (NZCVS) since 2018. This survey collects information about New Zealanders’ experience of crime.²⁵
- 2.22 There are several preliminary points to make about the NZCVS data:
- The data does not only capture crimes that are reported to Police. As the Ministry of Justice surveys people directly, the data also captures unreported crimes.

²⁴ The census provides counts of Māori in two ways: Māori descent and Māori ethnicity. Māori descent is based on whakapapa while affiliation to the Māori ethnic group is a self-determined cultural affiliation. In the 2023 Census, people of Māori descent made up 19.6 per cent of the population, and 17.8 per cent identified as having Māori ethnicity: Tauranga Aotearoa | Stats NZ “[2023 Census population counts \(by ethnic group, age, and Māori descent\) and dwelling counts](https://www.stats.govt.nz/news/2023-census-population-counts-by-ethnic-group-age-and-maori-descent-and-dwelling-counts)” (29 May 2024) <stats.govt.nz>.

²⁵ The NZCVS only surveys people aged 15 years and over.

- (b) The data does not include public order offences (such as disorderly behaviour). As noted above, public order offences are among the most common perceived hate crimes reported to Police.
- (c) The survey asks whether the victim perceived an alleged offence happened, at least partly, because of the offender's attitudes towards a particular characteristic such as race or sexuality. While we discuss this data below, we think it captures more than hate crime offences. It would capture all offences that occur because of a particular characteristic rather than because of *hate based on* the characteristic. For example, elder abuse can occur because of hate towards a person based on their age. However, it can also occur because of the victim's perceived vulnerability. In both situations, the offence happened because of the offender's attitude towards the victim's age, but it will only be a hate crime if the offence was motivated by hate towards elderly people.
- 2.23 Since 2018, the proportion of alleged offences perceived by the victim to have happened because of the offender's attitudes towards a particular characteristic has ranged from around 11–20 per cent.
- 2.24 The most common offences perceived to be motivated by an offender's attitudes towards a particular characteristic were sexual assault, threats and property damage, and physical offences (such as assault and robbery). For example, in 2023, 78 per cent of sexual assaults, 33 per cent of threats and property damage and 26 per cent of physical offences were perceived to be motivated by an offender's attitudes towards a particular characteristic.
- 2.25 The survey also looks at what percentage of these alleged offences related to particular characteristics, as shown in the table below.²⁶ As with Police data, more than one characteristic can be recorded for a single alleged offence.

CHARACTERISTICS TARGETED IN ALLEGED OFFENCES PERCEIVED TO BE MOTIVATED BY OFFENDER'S ATTITUDE ²⁷						
	2018	2019	2020	2021	2022	2023
Race, ethnicity or nationality	29%	36% # ²⁸	31% #	35% #	15% #	37% #
Sexuality or sexual orientation	30%	37% #	36% #	40% #	17% #	25%

²⁶ The percentage is out of the total alleged offences perceived to be motivated by the offender's attitude towards a characteristic.

²⁷ Percentages in this table are rounded to the nearest whole number.

²⁸ '#' means estimates with a margin of error of 10–20 percentage points or a relative standard error of 20–50 per cent. These estimates should be used with caution.

Age	38%	41% #	40% #	35% #	S ²⁹	34%
Gender or sex	68%	57% #	55% #	53% #	72% #	51% #
Religion	11%	11% #	10% #	11% #	20% #	14% #
Disability	6%	13% #	12% #	21% #	7% #	10% #
Race/religion or political opinion	35%	40%	33% #	40% #	S	42% #

2.26 The characteristics perceived to be targeted in the NZCVS survey are quite different to the characteristics perceived to be targeted in Police data. We are unsure why this is. However, as we discuss above, the NZCVS data captures different offending to Police data. It captures unreported crimes, and it does not include public order offences. As we also explained above, we think the NZCVS data captures more than hate crime offences.

Question 1

Is there anything you would like to tell us about what hate crime is occurring in Aotearoa New Zealand and its impacts?

²⁹ 'S' means suppressed estimates, as they either have a margin of error of 20 percentage points or greater, a relative standard error of 50 per cent or greater or an underlying sample count of fewer than six, making them too unreliable for general use.

CHAPTER 3

Key reform considerations

INTRODUCTION

- 3.1 In Aotearoa New Zealand, hate motivation is considered at sentencing. As we explain in Chapter 1, this review will consider whether the law in Aotearoa New Zealand adequately responds to hate crime. If there are concerns about the operation of the current law, we will consider whether they should be addressed through legislative or operational measures.
- 3.2 In this chapter, we identify some key considerations that will help us decide whether reform is needed and, if so, evaluate any options for reform. These are:
- (a) the need to treat hate crime more seriously than other crime;
 - (b) guidance on when it is appropriate to create new offences;
 - (c) ngā tikanga;
 - (d) Te Tiriti o Waitangi | Treaty of Waitangi;
 - (e) human rights; and
 - (f) what characteristics should be protected by hate crime laws.
- 3.3 We are interested in feedback on whether these are useful considerations and whether there is anything else we should think about.

THE NEED TO TREAT HATE CRIME MORE SERIOUSLY THAN OTHER CRIME

- 3.4 Hate crime laws treat hate crime more seriously than other types of offending. Hate crime laws can do this in multiple ways, such as through specific hate crime offences or treating hate motivation as an aggravating factor at sentencing (as is the case in Aotearoa New Zealand).
- 3.5 The reasons for treating hate crime more seriously than other crime are relevant to deciding whether law reform is needed. It may be that our law does not treat hate crime seriously enough.
- 3.6 Four reasons are commonly given for why hate crime should be treated differently to other types of offending.¹

¹ For a summary of the literature and a more detailed explanation of these reasons, see James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 27–37.

- 3.7 First, some argue that hate crime should be treated more seriously because it causes additional types of harm. As we discussed in Chapter 2, there is evidence that hate crime causes additional harm to victims and the targeted group. There are also arguments that hate crime causes harm to wider society.
- 3.8 Second, hate crime offenders are said to be more morally blameworthy, such that a harsher response is required. For example, some commentators argue those who cause additional harm are more worthy of punishment. Others argue that hate motivation is more culpable than other types of motivations.
- 3.9 Third, hate crime is said to require additional denunciation. In other words, hate crime law should send the message that hate crime is a serious wrong. Relatedly, hate crime law is said to have symbolic value by sending a message that victims and affected communities are equally valued and that the State is committed to protecting them.
- 3.10 Lastly, sometimes treating hate crime differently is justified on the basis it will deter future hate crime. We are cautious about the weight that can be given to deterrence. There is evidence that heightened sentences do not generally deter offending.² Some commentators have even suggested that treating hate crime more seriously may have the opposite effect and act as a “badge of honour” for offenders.³ That said, even if a heightened sentence does not directly deter conduct, more severe punishment may still decrease the number of incidents over time by sending the message that hate crime is unacceptable.⁴
- 3.11 These reasons were all discussed in the legislative history of Aotearoa New Zealand’s current hate crime law (contained in the Sentencing Act 2002). For example, the Select Committee report explained that hate crime offenders “need to be punished/dissuaded further as prejudice presents a long-term threat” and that focusing on hate crimes “has the effect of both denouncing them and encouraging awareness of their existence”.⁵ During the parliamentary debates, ministers mentioned the additional harm caused by hate crime and the need for denunciation.⁶
- 3.12 However, as noted above, it may be that our law does not treat hate crime seriously enough. A question in this review is whether a different model such as specific hate crime offences is required. The reasons for treating hate crime more seriously than other types of offending are relevant to that assessment. For example, as we discuss in Chapter 5, some may consider the current law does not do enough to denounce hate crime.

² James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 37.

³ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 37.

⁴ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 37.

⁵ Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 12.

⁶ See (1 May 2002) 600 NZPD 15909 (Sentencing and Parole Reform Bill — Third Reading, Paul Swain); and (17 April 2002) 599 NZPD 15596 (Sentencing and Parole Reform Bill — Committee of the Whole House, Phil Goff).

WHEN IS IT APPROPRIATE TO CREATE NEW OFFENCES?

- 3.13 As this review will consider whether the law in Aotearoa New Zealand should be changed to create new hate crime offences, it is necessary to consider guidance on when it is appropriate to create new offences. The starting point when considering new offences is the Legislation Design and Advisory Committee's *Legislation Guidelines* (LDAC Guidelines).⁷
- 3.14 The LDAC Guidelines explain that the purpose of an offence is "to punish, deter and publicly denounce conduct that society considers to be blameworthy and harmful".⁸ They suggest it may be appropriate to create an offence for conduct that is harmful (to individuals or to public or private interests) and/or morally blameworthy (for example, because the harm is intended or foreseeable).⁹
- 3.15 However, offences should only be introduced if there are "compelling reasons".¹⁰ Criminal conviction "can have a serious impact on individuals" and result in a significant public cost in the criminal justice system.¹¹ Particularly relevant to this review, conduct that is already an offence should not be further criminalised unless it would serve some additional purpose not achieved by the current law.¹²
- 3.16 Several other considerations may be relevant when deciding whether to create new criminal offences and, if so, what their scope should be. These include:¹³
- (a) **Can new offences achieve their purpose?** The purpose of new offences will depend on the problems with the current law (if any), which we discuss in Chapter 5. For example, some may consider the current law does not do enough to ensure hate crimes are investigated and prosecuted as such. That on its own would not be enough to justify recommending new offences. We would need to be satisfied that new offences would lead to hate motivation being investigated and addressed in prosecutions more often.
 - (b) **Are there less restrictive ways to achieve the same outcome?** We discuss whether any problems with the current law could be sufficiently addressed without creating new offences in Chapter 7.
 - (c) **Do the costs of creating new offences outweigh the benefits?** This refers to both financial and social costs. We discuss the potential advantages and disadvantages of creating hate crime offences in Chapter 8.

⁷ The Legislation Design and Advisory Committee is responsible for providing guidelines that promote good legislative standards, reviewing Bills after they are introduced in Parliament and providing advice to departments on legislative design.

⁸ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121.

⁹ At 123.

¹⁰ At 122.

¹¹ At 121.

¹² At 123.

¹³ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121–127; AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [2.1] and [21.5]–[21.7]; Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at [1.3]; and Asaf Harduf "How Crimes Should Be Created: A Practical Theory of Criminalisation" (2013) 49(1) *Criminal Law Bulletin* 31.

- (d) **Are new offences consistent with the rule of law and constitutional principles?** This includes Aotearoa New Zealand's obligations under Te Tiriti o Waitangi | Treaty of Waitangi and human rights law, which we discuss below. Other relevant principles include:
- (i) **The need for certainty in the criminal law.** Offences must be clearly defined so that people can know in advance what is prohibited and the maximum penalty for non-compliance. As we discuss in Chapter 8, this means hate crime offences overseas are limited in scope — they only apply to certain protected characteristics and offence types.
 - (ii) **The principle of fair labelling.** It should be clear to defendants and the public what the defendant has done wrong, why they are being punished and what conduct the state is denouncing. This may be seen as a reason to have specific hate crime offences.

NGĀ TIKANGA

- 3.17 It is well established that the impact of policy proposals on tikanga should be analysed as part of good law-making in Aotearoa New Zealand.
- 3.18 Tikanga means the right way of doing things.¹⁴ It includes a system of values and principles that govern relationships in te ao Māori (the Māori world). It is a source of rights, obligations and authority. Tikanga is lived and practised today by whānau, hapū, iwi and other Māori communities and collectives.¹⁵
- 3.19 Tikanga may involve both:¹⁶
- (a) tikanga Māori, being values and principles that are broadly shared and accepted by Māori; and
 - (b) localised tikanga that are shaped by the unique knowledge, experiences and circumstances of individual Māori groups (such as waka, iwi, hapū, marae or whānau).
- 3.20 The LDAC Guidelines advise those designing legislation to consider tikanga and to ensure new legislation is, as far as practicable, consistent with tikanga.¹⁷ The Law Commission Act 1985 also directs Te Aka Matua o te Ture | Law Commission, when making its recommendations, to have regard to te ao Māori (which includes tikanga).¹⁸
- 3.21 The kind of recommendations the Law Commission makes in respect of tikanga can differ substantially depending on the scope and nature of a particular review.¹⁹ Within the

¹⁴ It derives from the word tika, which means 'right' or 'correct': Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 29.

¹⁵ See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.8].

¹⁶ See Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [1.22] and figure 1.

¹⁷ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 19 and 29–30.

¹⁸ Law Commission Act 1985, s 5(2)(a). See also Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023), ch 9.

¹⁹ See, for example, Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death* (NZLC R145, 2021) at [2.127] where the Law Commission recommended weaving together tikanga Māori with other values to make new law for all New Zealanders.

limited scope of this review, we are primarily interested in whether there is any tikanga that might inform how the law should perceive and respond to hate crime.

Key tikanga concepts

- 3.22 Before discussing tikanga and hate crime, it is important to note there are limits to our discussion of tikanga in this chapter. Tikanga operates as a complete, interrelated system within a worldview that is fundamentally different to the Western worldview. Tikanga concepts cannot be explained readily in English. Our focus in this review is on hate crime and our discussion of tikanga is limited to this context.
- 3.23 Our preliminary research suggests that tikanga did not traditionally have an equivalent concept of hate crime.²⁰ Consequently, we have thought about how a hate crime might be considered under tikanga today.
- 3.24 Definitions of unacceptable behaviour according to tikanga are drawn from the broad values and principles that underpin it. As such, a general understanding of these values and principles helps us understand how unacceptable behaviours may be understood within te ao Māori. In particular, it is important to consider whakapapa, whanaungatanga, tapu and mana:
- (a) Whakapapa connects all things past, present and future to each other and to atua Māori (gods or ancestors). Whakapapa connects people to te taiao (the natural world) and defines their collective affiliations to iwi, hapū and whānau. Whakapapa frames a person's identity and purpose and signifies expected roles, shared responsibilities and obligations.²¹
 - (b) Whanaungatanga, or familial obligations, strengthens whakapapa connections.²² Whanaungatanga indicates that the individual is secondary to the collective.²³ It is an inclusive concept that emphasises relationships and connections within whakapapa rather than dividing or excluding people. Tikanga requires people to act in ways that strengthen and maintain relationships with others and with te taiao.²⁴ Maintaining balance between all these aspects is one of the key ideals in tikanga Māori.²⁵
 - (c) According to a Māori worldview, every Māori person is born with an inherent tapu and mana. Tapu has been described as “the sacred life force which supports the mauri (spark of life)” and is present in people, places and things.²⁶ Tapu is closely

²⁰ For an explanation of the tikanga relevant to offending, see Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: He arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: A review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.7]–[2.23].

²¹ Tāmāti Kruger *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai me ngā ōta nō muri whakawhiu | Public Safety and Serious Offenders: a Review of Preventive Detention and Post-Sentence Orders* (wānanga held in Wellington, 19 October 2022).

²² Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 337.

²³ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 337.

²⁴ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 337.

²⁵ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 14.

²⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 51.

associated with mana, which is a broad concept representing a person’s authority and associated responsibilities, reputation and influence.²⁷ A person can enhance, maintain or diminish their mana through their actions – particularly in relation to the collective.²⁸

- 3.25 More specifically, the concepts of hara, kanga and kōhuru deal with particular types of unacceptable behaviour.
- 3.26 Hara²⁹ is an offence “primarily resulting from the violation of tapu” or any action that disrupts relational stability.³⁰ The definitions of hara have arisen from a framework of social relationships based on group rather than individual concerns. This means the impacts of offending are experienced by both the victim’s³¹ and offender’s wider whakapapa.³² Responses to hara will consider what might be needed to address the relational instability and achieve a state of ea or balance.
- 3.27 Kanga and kōhuru are both specific types of hara. Kanga covers verbal abuse and angry denouncements, including placing a curse on someone.³³ Kōhuru has been defined as causing injury or harm to another person without feeling any remorse or justification.³⁴ In the past, both kanga and kōhuru were considered significant hara.³⁵
- 3.28 These concepts suggest that, while there is no direct comparison, the behaviour we now understand as hate crime would be considered a serious hara under tikanga. A hate crime would have the effect of denigrating the mana and tapu of the victim. There would be no legitimate basis to commit an offence against someone because of hate towards a group of people to which they belong.

²⁷ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 338.

²⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 50 and 56–57.

²⁹ Also denoted by the word hē.

³⁰ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 7. See also Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim” (Wai 2540, #A28, 4 May 2016) at [54].

³¹ Moana Jackson “Criminality and the Exclusion of Māori” (1990) (3)20 VUWLR Monograph 23 at 27.

³² Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 339.

³³ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 115.

³⁴ He Pātaka Kupu “[kōhuru](http://www.hepatakakupu.nz)” <www.hepatakakupu.nz> and Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 141.

³⁵ Both kanga and kōhuru could result in a severe response. See, for example, Te Rangi Hiroa *The Coming of the Maori* (Whitcombe and Tombs, Wellington, 1949) at 394; and Edward Tregear *The Maori Race* (AD Willis Ltd, Wanganui, 1926) at 367–368 (cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 123 and 143).

TE TIRITI O WAITANGI | TREATY OF WAITANGI

- 3.29 The Treaty is an integral part of the constitutional framework of Aotearoa New Zealand.³⁶ Analysis of Treaty implications has been an expectation of good policy design in Aotearoa New Zealand for nearly four decades.³⁷ We aim to give practical effect to the Treaty in our work within the limits of our statutory function.
- 3.30 There are both Māori and English language versions of the Treaty and significant differences between them. The Law Commission takes the view that, where there are differences, the Māori version is more authoritative.³⁸ This is because it was the version signed by most Māori signatories (following debate in te reo Māori) and by Lieutenant-Governor Hobson.
- 3.31 The Law Commission also treats the text rather than Treaty ‘principles’ as its primary point of reference. Treaty principles have emerged in recent decades from the work of various agencies, especially Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal.³⁹ They can be helpful in “enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.⁴⁰ Ultimately, however, the Crown’s obligations under the Treaty are contained in its text.⁴¹

The obligations under the Treaty

- 3.32 In article 1, Māori rangatira granted the Crown kāwanatanga. Kāwanatanga has been translated as government or governorship.⁴² The Waitangi Tribunal has said that governance includes the power to make laws for the “good order and security” and “peace and good order” of Aotearoa New Zealand.⁴³ We think this includes laws relating to hate crime. The criminal law, in prohibiting and punishing certain conduct, relates to the peace, good order and security of Aotearoa New Zealand.
- 3.33 In article 2, the Crown undertook to protect the exercise by Māori of tino rangatiratanga over their lands, villages and all their treasures. Tino rangatiratanga has been translated as the unqualified exercise of the chieftainship of rangatira (chiefs) in accordance with their customs.⁴⁴ It can also involve the authority and responsibilities of Māori collectives,

³⁶ See, for example, Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 28.

³⁷ See, also, *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 37, which sets out the obligation on states to honour and respect treaties and agreements entered into with indigenous people.

³⁸ For example, Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: Rights to a person’s property on death* (NZLC R145, 2021) at [2.61]–[2.62].

³⁹ See Treaty of Waitangi Act 1975, s 6.

⁴⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

⁴¹ See Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: He arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: A review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.37].

⁴² IH Kawharu “Translation of Maori text” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 at 319.

⁴³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 25; and Waitangi Tribunal *The Manukau Report* (Wai 8, 1985) at 66.

⁴⁴ IH Kawharu “Translation of Maori text” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 at 319.

including hapū, whānau and non-tribal/non-kin groups.⁴⁵ According to the Waitangi Tribunal, tino rangatiratanga requires the Crown “to allow Māori to manage their own affairs in a way that aligns with their customs and values”.⁴⁶

- 3.34 We think tino rangatiratanga is engaged in this review because rangatiratanga, through the relevant tikanga, was traditionally exercised to respond to or manage behaviour that we now characterise as criminal offending.⁴⁷ Hate crime also impacts Māori individuals and communities. Some hate crimes are committed by Māori today, and Māori have been victims of hate crime for a long time. For example, a 2021 report summarising community and police perspectives on hate crime noted that “hate crime is nothing new to New Zealand” and “Māori have been living with this for decades”.⁴⁸
- 3.35 Lastly, under article 3, the Crown undertook to protect Māori and to give Māori the same rights and duties of citizenship as British subjects.⁴⁹ Article 3 obliges the government to exercise its kāwanatanga (governorship) both to care for Māori and to ensure outcomes for Māori are equivalent to those enjoyed by non-Māori.⁵⁰ It is a guarantee of equity that obliges the Crown to address disparities between Māori and other New Zealanders.⁵¹ These obligations are often considered in the context of the Treaty principles of equity and active protection.⁵²
- 3.36 Article 3 is relevant because we are reviewing laws that may have a disproportionate impact on Māori. Māori are overrepresented at all levels of the criminal justice system as victims and offenders.⁵³ As we discussed in Chapter 2, Māori are also disproportionately represented within Police data as perceived hate crime offenders.

Impact on this review

- 3.37 Much has been written about the Treaty and the criminal justice system. The focus of that commentary is on how the system does not give effect to the Crown’s article 2 obligations to protect the exercise of tino rangatiratanga and its article 3 obligations to address disparities between Māori and other New Zealanders. The criminal justice system was

⁴⁵ See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 26.

⁴⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 28.

⁴⁷ See Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 9–17; and Moana Jackson *The Maori and the Criminal Justice System | He Whaipanga Hou – A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 37–44.

⁴⁸ Ngā Pirihimana o Aotearoa | New Zealand Police *Improving Our Response to Hate Crime: Views and Opinions of Our People and Our Communities* (August 2021) at 17.

⁴⁹ See IH Kawharu “Translation of Māori Text” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 at 320–321.

⁵⁰ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 33–35.

⁵¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

⁵² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 33–34.

⁵³ See Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 28–30 for an explanation of how and why Māori are overrepresented in the criminal justice system.

built on Pākehā attitudes and values, not Māori notions of justice.⁵⁴ It does not therefore recognise “Māori as having their own system of law and cultural traditions pertaining to justice”.⁵⁵ Some have also argued the system “fosters a clear perception of discrimination and institutional racism” towards Māori.⁵⁶ These issues have contributed to the overrepresentation of Māori within the criminal justice system.⁵⁷ For example, Māori are 11 per cent more likely to be prosecuted than New Zealand Europeans if other variables remain the same (such as the type of offence committed and the person’s criminal history).⁵⁸

- 3.38 A challenge for this review, given its limited scope, is how to give effect to the Crown’s Treaty obligations. Commentators have repeatedly said the Treaty requires radical reform of the criminal justice system such as creating a new system that reflects tikanga Māori.⁵⁹ However, this review is only looking at hate crime. While we acknowledge the systemic failings of the criminal justice system, radical reform is outside the scope of this review.
- 3.39 We welcome views on ways to better uphold the Crown’s Treaty obligations within the constraints of this review. For example, there may be ways to promote the exercise of tino rangatiratanga by Māori communities by better involving those communities in the response to hate crime. Some commentators have suggested that Māori community organisations should be resourced “to monitor hate-related incidents and to undertake victimisation surveys to capture under-reporting”.⁶⁰ Commentators have also suggested Māori communities should be funded to design interventions to prevent hate crime and to provide support to hate crime victims.⁶¹
- 3.40 In addition, the Crown’s obligations to address disparities between Māori and other New Zealanders may help us evaluate possible options for reform. As we discuss in Chapter 8, the risk of further overcriminalisation of Māori may point against introducing specific hate crime offences.

⁵⁴ Moana Jackson *The Maori and the Criminal Justice System | He Whaipaanga Hou — A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988).

⁵⁵ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 44.

⁵⁶ Moana Jackson *The Maori and the Criminal Justice System | He Whaipaanga Hou — A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988) at 154. See also Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 3–5.

⁵⁷ See Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 4–5, 28–30 and 45–46 for an explanation of how and why Māori are overrepresented in the criminal justice system.

⁵⁸ Paul Brown *Understanding Policing Delivery: The Assessment of Factors Influencing Police Prosecution Decision-Making* (August 2024) at 27–29.

⁵⁹ See, for example, Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 79; Moana Jackson *The Maori and the Criminal Justice System | He Whaipaanga Hou — A New Perspective: Part 2* (Department of Justice, Study Series 18, 1988); *Turuki! Turuki! Move together! Transforming our criminal justice system: The second report of Te Uepū Hāpai i Te Ora | Safe and Effective Justice Advisory Group* (Ministry of Justice, 2019); and Ināia Tonu Nei *Hui Māori Report* (2019).

⁶⁰ Tina Ngata, Arama Rata and Dilwin Santos “Race-based hate crime in Aotearoa” (2021) 10(2) MAI Journal 208 at 213.

⁶¹ Tina Ngata, Arama Rata and Dilwin Santos “Race-based hate crime in Aotearoa” (2021) 10(2) MAI Journal 208 at 213.

HUMAN RIGHTS OBLIGATIONS

3.41 Law reform should also be consistent with Aotearoa New Zealand’s human rights obligations.⁶² Broadly speaking, human rights obligations are relevant to hate crime in two ways:

- (a) On the one hand, there is a growing consensus that international human rights obligations require hate crime laws.
- (b) On the other hand, there are arguments that hate crime laws infringe the rights to freedom of thought, expression and association, and the right to equality before the law.

Growing consensus that human rights obligations require hate crime laws

3.42 International law expressly requires race-based hate crime to be recognised in criminal law.⁶³ There is also growing consensus that international law requires criminal law to recognise hate crime against other characteristics.⁶⁴

3.43 Hate crime is said to violate the rights to equality and non-discrimination because the offender targets members of certain groups based on prejudice or bias towards that group.⁶⁵ In turn, this engages states’ obligations to eliminate all forms of discrimination and to provide effective remedies for human rights breaches.⁶⁶

3.44 There is a growing view that hate crime laws of some kind are needed to meet these obligations.⁶⁷ They may act both as a mechanism for eliminating discrimination and as a remedy to discriminatory offending. Several human rights committees (the bodies responsible for monitoring international human rights treaties) have criticised legal frameworks where the criminal law does not expressly recognise hate motivation.⁶⁸

⁶² Legislation Design and Advisory Committee *Legislation Guidelines* (2021), at chs 6 and 9. Aotearoa New Zealand’s human rights obligations are found in both domestic and international law.

⁶³ International Convention on the Elimination of Racial Discrimination (CERD) 660 UNTS 1 (opened for signature 21 December 1965, entered into force 4 January 1969), art 4(a).

⁶⁴ See Organization for Security and Cooperation in Europe *Prosecuting Hate Crimes: A Practical Guide* (2014) at 37–39; and Office of the United Nations High Commissioner for Human Rights and Equal Rights Trust *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) at 167–170.

⁶⁵ See Organization for Security and Cooperation in Europe *Prosecuting Hate Crimes: A Practical Guide* (2014) at 15–16; and Alistair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [2.1]–[2.9].

⁶⁶ See, for example, International Covenant of Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(3)(a); Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 1 (opened for signature 18 December 1979, entered into force 3 September 1981), art 2; United Nations Human Rights Committee *General Comment No 18: Non-discrimination* (10 November 1989) at [10]; and Committee on Economic, Social and Cultural Rights *General Comment No 20: Non-discrimination in economic, social and cultural rights* E/C12/GC/20 (20 July 2009) at [8]–[9].

⁶⁷ Office of the United Nations High Commissioner for Human Rights and Equal Rights Trust *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) at 167.

⁶⁸ See, for example, United Nations Human Rights Committee *Concluding observations on the fourth periodic report of Estonia* CCPR/C/EST/CO/4 (18 April 2019) at [12]; Committee on the Elimination of Racial Discrimination *Concluding observations on the combined seventeenth to twenty-first periodic reports of Qatar* CERD/C/QAT/CO/17-21 (2 January 2019) at [13]; and Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland* CRPD/C/GBR/CO/1 (3 October 2017) at [39(b)].

- 3.45 International law does not prescribe how hate crime should be recognised in criminal law. It could be done through the creation of specific offences or the recognition of hate motivation at sentencing.⁶⁹ Since New Zealand law already recognises hate motivation at sentencing, it is unlikely reform is required to comply with these obligations.

Concerns that hate crime laws infringe human rights

- 3.46 There are also concerns that hate crime laws infringe human rights.
- 3.47 One concern is that hate crime laws infringe the right to freedom of thought because they punish the offender’s motives and beliefs behind the offending.⁷⁰ This argument was raised when the Sentencing Act was introduced. For example, one MP stated that “this measure is a route for the thought police. The Government will be able to punish people ... for what they think”.⁷¹
- 3.48 Another related argument is that hate crime laws infringe the rights to freedom of expression and association. This argument arises because, to prove the offender was motivated by hate, the prosecution may need to introduce evidence of the offender’s speech, including past statements, or prior associations with other people and groups.⁷² As the offender’s sentence may be increased in light of that evidence, it is said hate crime laws may cause people to restrict their speech or who they associate with.⁷³
- 3.49 Finally, some argue that hate crime laws breach the right to equality before the law. There are two parts to this argument. First, hate crime laws are said to breach the right to equality before the law because they single out some victims as more deserving of additional protection than others.⁷⁴ Second, they may violate the right to equality before the law because people who are convicted of a hate crime are treated differently to those convicted of the same offence without the hate motivation.⁷⁵ These sorts of arguments were also raised when the Sentencing Act was introduced.⁷⁶
- 3.50 It is important to note that most rights (including the rights engaged by hate crime laws) are capable of some limitation, and there can be good reasons to limit rights.⁷⁷ For example, Te Kōti Pira | Court of Appeal has said the limits Aotearoa New Zealand’s current hate crime law places on the right to freedom of expression is justified given the important

⁶⁹ Office of the United Nations High Commissioner for Human Rights and Equal Rights Trust *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) at 170.

⁷⁰ See Gail Mason “Legislating Against Hate” in Nathan Halland and others (eds) *The Routledge International Handbook on Hate Crime* (Routledge, New York, 2015) 56 at 66.

⁷¹ (17 April 2002) 599 NZPD 15596 (Sentencing and Parole Reform Bill — Committee of the Whole House, Owen Jennings).

⁷² See John Ip “Debating New Zealand’s Hate Crime Legislation: Theory and Practice” (2005) 21 NZULR 575 at 588.

⁷³ See John Ip “Debating New Zealand’s Hate Crime Legislation: Theory and Practice” (2005) 21 NZULR 575 at 588.

⁷⁴ See Desmond Marrinan *Hate crime legislation in Northern Ireland: An Independent Review — Consultation Document* (Department of Justice, January 2020) at [1.13].

⁷⁵ Desmond Marrinan *Hate crime legislation in Northern Ireland: An Independent Review — Consultation Document* (Department of Justice, January 2020) at [1.13].

⁷⁶ See (2002) 599 NZPD 15596, where ACT MP Owen Jennings stated that hate crime legislation “contradicts the ... principle of equality before the law”; and (2002) 599 NZPD 15453, where National MP Wayne Mapp stated that hate crime laws are “a departure from the cherished value of equality before the law”.

⁷⁷ Domestically, see New Zealand Bill of Rights Act 1990, s 5. Internationally, see, for example, United Nations Human Rights Committee *General Comment No 10 Freedom of Expression* UN Doc HRI/GEN/1/Rev.9 (29 June 1983).

objectives of hate crime law.⁷⁸ Similar views have also been reached by some commentators.⁷⁹ Human rights concerns may, however, be relevant when considering whether to change Aotearoa New Zealand’s hate crime law. We discuss this further in Chapter 8.

PROTECTED CHARACTERISTICS

- 3.51 In considering whether reform is needed and, if so, what that might look like, we need to think about what characteristics should be protected by Aotearoa New Zealand’s hate crime law.
- 3.52 New Zealand’s current hate crime law applies to offending motivated by hostility towards a group of people who have an “enduring common characteristic”.⁸⁰ It lists as examples of enduring common characteristics “race, colour, nationality, religion, gender identity, sexual orientation, age, or disability”. If we decide to recommend a new legal model for addressing hate crime such as specific hate crime offences, we will need to decide what characteristics should be protected. As we explain in Chapter 8, hate crime offences only cover specified characteristics (as opposed to an open category such as any “enduring common characteristic”) because of the need for certainty about the conduct prohibited. If we decide the current legal model should be kept, we could still consider changing how it defines the characteristics protected if this is unclear or if there are concerns about the scope of the law. We discuss this in Chapter 7.
- 3.53 Several overseas jurisdictions have looked at what characteristics should be protected by hate crime laws and have identified criteria to guide this assessment. These include:⁸¹
- (a) Whether there is a demonstrable need for people with a particular characteristic (a targeted group) to be protected by hate crime laws. This includes looking at the prevalence and severity of hate crime against a targeted group.
 - (b) Whether there is evidence that hate crime against a targeted group causes additional harm to the victim, members of the targeted group and wider society.
 - (c) Whether the kind of hostility shown towards a targeted group is such that society (through Parliament) would wish the group to be protected by hate crime laws.
 - (d) Whether hate crime laws are an appropriate response to the offending against a targeted group. This includes looking at the broader criminal law framework, whether it would be workable in practice to address the offending through hate crime laws and whether it would be an efficient use of criminal justice system resources.
- 3.54 When the Royal Commission recommended creating new hate crime offences, it did not specify the characteristics those offences should cover. The England and Wales model

⁷⁸ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [48]–[52].

⁷⁹ See John Ip “Debating New Zealand’s Hate Crime Legislation: Theory and Practice” (2005) 21 NZULR 575 at 591–597.

⁸⁰ Sentencing Act 2002, s 9(1)(h).

⁸¹ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [3.45]–[3.90]; Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [4.3]; and Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, November 2020) at [7.14]–[7.27].

the Royal Commission proposed to replicate currently only covers race and religion.⁸² The Law Commission of England and Wales has recommended extending this to also cover sexual orientation, disability and transgender identity.⁸³

- 3.55 The protection of some characteristics such as sex, gender and age have been contentious overseas. With respect to sex and gender, there is variation in how these terms are understood and what should be protected.⁸⁴ For example, the Law Commission of England and Wales recommended transgender identity should be a protected characteristic for hate crime offences. However, it considered “sex or gender” should not be protected by hate crime laws. The Commission used the terms ‘sex’ and ‘gender’ interchangeably and was primarily concerned with violence against women. While it recognised violence against women is a significant problem, it found hate crime laws were not the appropriate response.⁸⁵ Among other things, it noted that all violence against women and girls may be seen as closely linked to sex or gender-based prejudice and inequality. This is already reflected in the high maximum penalties for sexual offences. Treating some of these offences as hate crimes but not others, depending on whether there has been a clear demonstration of gender-based hostility, could send the wrong message.⁸⁶
- 3.56 In Scotland, transgender identity has been protected by hate crime law since 2009.⁸⁷ The Scottish review of hate crime laws recommended keeping this approach.⁸⁸ It also recommended “gender” be included as a protected characteristic because violence against women is a significant problem.⁸⁹ The Scottish review understood gender to include women, men and non-binary people.⁹⁰
- 3.57 There has also been disagreement about whether age should be a protected characteristic. The Law Commission of England and Wales recommended that age not be included as a protected characteristic. It found that, while crimes were committed against people because of their age, this was more commonly motivated by the victim’s

⁸² William Young and Jacqui Caine *Hate speech and hate crime-related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 15–16; and Crime and Disorder Act 1998 (UK), ss 28–32. Hate crime offences apply only to race in Western Australia (Criminal Code Act Compilation Act 1913 (WA), ss 80I, 313, 317, 317A, 338B and 444) and to race, religion, sexuality, sex characteristics or gender identity in Queensland (Criminal Code Act 1899 (Qld), ss 52B, 69, 75, 207, 335, 339, 359, 359E and 469).

⁸³ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at 320 (recommendation 12).

⁸⁴ For a more detailed discussion of the meanings of these terms, see Te Aka Matua o te Ture | Law Commission *Ia Tangata | A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2023) at ch 2.

⁸⁵ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [5.5] and [5.378]–[5.381]

⁸⁶ For a full discussion of the reasons, see Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [12.116]–[12.188].

⁸⁷ Offences (Aggravation by Prejudice) Act 2009, s 2 (Scotland). Note the Act has since been repealed and replaced by the Hate Crime Public Order Act 2021 (Scotland).

⁸⁸ The only change was to remove outdated terms from the definition of transgender identity: Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at vi (recommendation 4).

⁸⁹ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [4.35].

⁹⁰ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [4.43].

vulnerability rather than hate.⁹¹ Conversely, the Scottish review recommended age be included on the basis there was sufficient evidence that offending against the elderly was motivated by hate or hostility.⁹²

- 3.58 We welcome views on which characteristics should be protected by Aotearoa New Zealand’s hate crime law. This will help us decide whether any changes are needed to the current law, whether it is appropriate to adopt a different legal model and how any new model should be implemented. We discuss legal models for addressing hate crime in Chapters 6–8.

Question 2

How can we best uphold the Crown’s obligations under Te Tiriti o Waitangi | Treaty of Waitangi in this review?

Question 3

What characteristics should be protected by hate crime laws? Why?

Question 4

What do you think about the key reform considerations we have identified for this review?

⁹¹ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [6.129]–[6.133].

⁹² Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at vii (recommendation 10) and [4.66].

CHAPTER 4

How is hate crime dealt with in the criminal justice system now?

INTRODUCTION

- 4.1 This chapter outlines the current law and practice in Aotearoa New Zealand relating to hate crime. It provides context for later chapters, in particular Chapter 5, which seeks feedback on whether there are problems with the current law. This chapter discusses:
- (a) the current law, which requires the courts to take any hate motivation into account when sentencing an offender;
 - (b) how Ngā Pirihimana o Aotearoa | New Zealand Police recognises, records and investigates hate crime;
 - (c) how hate crime is prosecuted;
 - (d) how the courts sentence hate crime offenders; and
 - (e) how Ara Poutama Aotearoa | Department of Corrections seeks to rehabilitate hate crime offenders.

THE CURRENT LAW

- 4.2 As we explained in Chapter 1, we use the term ‘hate crime’ to refer to conduct that is already a criminal offence under New Zealand law and, additionally, is carried out because of hate or hostility towards a group of people who have a common characteristic.
- 4.3 Aotearoa New Zealand does not have specific hate crime offences. Instead, the courts take hate motivation into account at sentencing for any criminal offence. There is a separate offence of inciting racial disharmony, but that is not a hate crime under our definition because it applies to conduct (that is, some types of hate speech) that is not otherwise a criminal offence.¹ It is therefore outside the scope of this review.

¹ Human Rights Act 1993, s 131.

Hate crime as an aggravating factor when sentencing an offender

- 4.4 The Sentencing Act 2002 requires a court, when sentencing an offender, to take into account certain aggravating factors if they apply.² Aggravating factors can increase the sentence imposed on the offender. The courts are not required to increase the sentence by any particular amount (or at all). The extent of any increase depends on the significance of the aggravating factor in the circumstances of the case.³
- 4.5 One of the aggravating factors relates to hate motivation. Where applicable, it requires the court to take into account:⁴
- ... that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
- (i) the hostility is because of the common characteristic; and
- (ii) the offender believed that the victim has that characteristic: ...
- 4.6 We refer to this as the ‘hate crime aggravating factor’. The current approach in Aotearoa New Zealand of treating hate motivation as an aggravating factor at sentencing is often called the ‘sentence aggravation model’ for addressing hate crime. As we discuss in Chapters 6 and 7, it is the most common legal model in overseas jurisdictions we tend to compare ourselves to. It is used in most Australian jurisdictions, Canada and Northern Ireland. It is also used in England and Wales alongside specific hate crime offences.
- 4.7 The wording of Aotearoa New Zealand’s hate crime aggravating factor is reasonably broad. Three features are worth highlighting:
- (a) It applies where an offence is committed “partly or wholly because of” hostility towards a group of people who have an enduring common characteristic. The hostility need not be the only reason for the offending provided there is some link.
- (b) While it lists types of “enduring common characteristics”, the list is not exhaustive. Offending based on other characteristics may also engage the aggravating factor. We refer to characteristics covered by the aggravating factor as ‘protected characteristics’.
- (c) The offender must have “believed that the victim has that characteristic”. The aggravating factor can apply if the offender was mistaken in that belief.
- 4.8 The aggravating factor can apply to any offence the offender has been convicted of. It does not create any new offences or increase the maximum penalty for the relevant offence. For example, if an offender is convicted of injuring with intent to injure and the aggravating factor applies, the sentence imposed cannot exceed the existing maximum penalty for that offence (five years’ imprisonment).⁵ Maximum penalties for offences

² Sentencing Act 2002, s 9(1).

³ See *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [37]–[44]; and *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [50] (in relation to the hate crime aggravating factor specifically). There are guideline judgments for some types of offending that help the courts determine the appropriate starting point for a sentence taking into account aggravating factors relating to the offence (for example, see *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [34]–[41] in relation to serious violent offending).

⁴ Sentencing Act 2002, s 9(1)(h).

⁵ Crimes Act 1961, s 189(2).

should be set high enough to allow for a case where all potentially relevant aggravating factors (and no mitigating factors) apply.⁶

- 4.9 We discuss how the courts have applied the hate crime aggravating factor later in this chapter. In Chapter 5, we seek feedback on potential problems with the application of the aggravating factor.

Other aggravating factors considered by the courts

- 4.10 The hate crime aggravating factor is one of many factors the courts take into account when sentencing an offender. There are 15 other aggravating factors, which include:⁷
- (a) actual or threatened violence or use of a weapon;
 - (b) unlawful entry into or presence in a dwelling place;
 - (c) particular cruelty in the commission of the offence;
 - (d) that the victim was particularly vulnerable (due to their age, health or any other factor known to the offender); and
 - (e) that the offence was committed as part of a terrorist act.
- 4.11 The courts are not required to give any particular factor greater weight than others. In a hate crime case, other aggravating factors may also apply depending on the circumstances. To illustrate, suppose a man carries out a violent attack on a teenage girl who is at home alone during a burglary. During the attack, he makes a derogatory remark about the victim's race. The hate crime aggravating factor may apply if the court considers the attack was carried out partly because of the victim's race. However, other aggravating factors may carry equal or greater weight in the context of the case such as the vulnerability of the victim, the use of violence and the offender's unlawful entry into the victim's home. The court will consider all these aggravating factors when deciding on the appropriate sentence.

Sentencing for hate crimes involving murder

- 4.12 Different considerations apply when an offender is being sentenced for murder. The courts are required to impose a sentence of life imprisonment for murder unless it would be manifestly unjust.⁸ Offenders sentenced to life imprisonment for murder must serve a "minimum period of imprisonment" (MPI),⁹ after which the Parole Board considers whether to release them on parole.¹⁰ The MPI must be at least 10 years and must meet the purposes of accountability, denunciation, deterrence and community protection.¹¹
- 4.13 Because of the requirement to impose a sentence of life imprisonment unless it would be manifestly unjust, the hate crime aggravating factor does not usually apply directly to sentencing for murder. However, hate motivation may be relevant when the court is

⁶ Te Aka Matua o te Ture | Law Commission *Maximum penalties for criminal offences* (NZLC SP21, 2013) at [4.17].

⁷ Sentencing Act 2002, s 9(1).

⁸ Crimes Act 1961, s 172; and Sentencing Act 2002, s 102(1).

⁹ Sentencing Act 2002, s 103.

¹⁰ Parole Act 2002, ss 20–21. Offenders sentenced to life imprisonment who are released on parole remain subject to parole conditions for their whole life (ss 29(4)(b)) and may be recalled to prison at any time (ss 61 and 66).

¹¹ Sentencing Act 2002, s 103(2).

setting an MPI. The Sentencing Act requires the courts to impose an MPI of at least 17 years in certain circumstances unless it would be manifestly unjust.¹² These circumstances include where the murder was committed with a high level of brutality or callousness, as part of a terrorist act or against a victim who was particularly vulnerable. It also includes any other “exceptional circumstances”. Hate crime is not specifically listed as a circumstance requiring an MPI of at least 17 years. Nonetheless, in some cases, the courts have found that hate-motivated murder engaged the requirement (on the basis that the hate motivation showed a high degree of callousness).¹³

- 4.14 Where a court considers that an MPI would be insufficient to meet the purposes set out in the Sentencing Act, it may sentence an offender to life imprisonment without parole.¹⁴ This has only occurred once, when sentencing the perpetrator of the 15 March 2019 terrorist attack on Christchurch masjidain.¹⁵ The Court referred to the fact that the offending was a hate crime, alongside other aggravating factors, in reaching the view that life imprisonment without parole was appropriate.¹⁶

RECOGNISING, RECORDING AND INVESTIGATING HATE CRIME

What the Royal Commission said

- 4.15 The report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 considered the reporting and recording of hate crime. In particular, the Royal Commission repeatedly heard that people were reluctant to report hate crime and that there was a lack of data about hate-motivated offending and harassment.¹⁷ Police only began recording hate crime in its National Intelligence Application system in 2019. When the Royal Commission published its report in 2020, Police’s recording of hate motivations was incomplete and inconsistent.¹⁸ The Royal Commission felt this was in part because police officers had limited training on hate crime.¹⁹
- 4.16 The Royal Commission said that accurate recording of reported hate crime was desirable, as it would enhance community trust and increase reporting rates.²⁰ It recommended

¹² Sentencing Act 2002, s 104.

¹³ *R v Flewellen* HC Christchurch CRI-2008-042-2328, 29 April 2010 at [3]–[4]. The defendant was sentenced to an MPI of 16 years and three months after applying a guilty plea discount off the minimum term of imprisonment (at [8] and [10]). See also *R v McKenzie* HC Greymouth CRI 2008-018-981, 5 December 2008, where Flewellen’s co-defendant was sentenced to an MPI of 21 years’ imprisonment. The hate motivation was treated as a significant factor (at [15]–[17] and [21]).

¹⁴ Sentencing Act 2002, s 103(2A).

¹⁵ *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [133].

¹⁶ *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [145], [156] and [179].

¹⁷ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 714–715.

¹⁸ At 715. Note [78] says the *reporting* of hate motivations remains incomplete and somewhat inconsistent, but it appears from the context the Royal Commission intended to say *recording*.

¹⁹ At 715.

²⁰ At 715.

Police improve how it records hate crime so that hate motivations can be easily captured and searched.²¹ It also recommended Police train frontline staff on hate crime.²²

- 4.17 In response, Police set up Te Raranga, a four-year programme aimed at improving Police's response to hate crime, hate incidents and hate speech.²³ With respect to hate crime, Police has:
- (a) updated its definition of a hate crime;
 - (b) updated Police instructions and standard operating procedures to include guidance on how to investigate and record hate crime;
 - (c) established the Hate Crime Quality Assurance team, which completes daily audits of hate-related records;
 - (d) introduced hate crime training (we discuss this further below); and
 - (e) developed 'Standing Together Against Hate' resources for communities, to highlight the harm hate causes and to help prevent the behaviour from occurring.²⁴

Recognising hate crime

- 4.18 Police defines hate crime as "any offence which is perceived, by the victim or any other person, to be motivated, wholly or in part, by hostility or prejudice based on a person's particular characteristic such as race, religion, sexual orientation, gender identity, disability or age".
- 4.19 Police's definition of a hate crime is perception-based. This means if the victim, police officer or anyone else perceives the reported behaviour was motivated by hostility or prejudice, Police will record the reported offending as a potential hate crime.
- 4.20 In 2022, Police introduced a formal policy on how to recognise and record hate crimes and updated the Police Instructions and Standard Operating Procedures. Training has also been developed and introduced. For example:
- (a) all new recruits are trained and assessed on hate crime;
 - (b) Police buildings have posters on how to recognise hate crime;
 - (c) line-ups (where frontline police officers meet before a shift to discuss issues, trends and handover information) include information on how to recognise, record and respond to hate crime;
 - (d) hate crime training is regularly integrated into training days;
 - (e) Police apps and digital notebooks have information about hate crime; and
 - (f) hate crime is part of promotional exams.

²¹ At 764 (recommendation 42).

²² At 764 (recommendation 42).

²³ Ngā Pirihimana o Aotearoa | New Zealand Police *Action Plan: Improving our Reponse to Hate Crime Report* (November 2021) at 3.

²⁴ Ngā Pirihimana o Aotearoa | New Zealand Police "[Standing Together Against Hate](http://www.police.govt.nz)" <www.police.govt.nz>.

Recording hate crime

- 4.21 All possible crimes reported to Police are recorded in the National Intelligence Application. Since 2019, Police has recorded whether a possible crime was perceived to be motivated by hate, using the ‘perceived hate’ flag. In addition, Police record the type of prejudice that was perceived to motivate the offending and any further information about the hate motivation (such as any specific words or symbols used).
- 4.22 Police’s Hate Crime Quality Assurance team completes daily quality assurance checks of the hate crime flag. This includes looking for reported offences that should have been flagged as perceived hate crimes. Among other things, the team fixes any errors and identifies ways to improve Police’s recording of hate crime.

Investigating hate crime

- 4.23 Police is responsible for investigating reported hate crime. Investigating may include recording statements, checking CCTV footage and interviewing offenders. Police instructions explain the investigation file should state in the subject line or first paragraph that it is “hate related” and any information about the hate motivation should be recorded in the National Intelligence Application.
- 4.24 Police instructions also say that, when a person reports a hate crime, Police should offer them a referral to support agencies such as Manaaki Tāngata | Victim Support. Police has liaison officers, whose role includes forming relationships with minority communities. Liaison officers are made aware of any reported hate crime and are involved in the investigation as appropriate.
- 4.25 Once a matter has been investigated, Police decides how to respond. Sometimes there will not be enough evidence to prosecute the offence. Sometimes Police may consider that alternatives such as a formal warning are more appropriate.

PROSECUTING HATE CRIME

- 4.26 When Police wish to prosecute a hate crime, the investigating police officer files charges. The charges are then reviewed by a prosecutor who decides whether to proceed with a prosecution. The charges do not refer to the hate motivation. As we explained above, hate motivation is considered at sentencing. It is not proved as part of the offence.
- 4.27 Like other crimes, not all hate crimes will be prosecuted. An offence should only be prosecuted if:²⁵
- (a) there is enough evidence to prove the charge beyond reasonable doubt; and
 - (b) the public interest requires prosecution.
- 4.28 When determining the public interest, one of the factors the prosecutor must consider is the seriousness of the offence. In assessing the seriousness of an offence, the potential

²⁵ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General’s Prosecution Guidelines: Principal Guideline | Te Aratohu Aru a te Rōia Mātāmua o te Karauna: Aratohu Mātāmua* (1 January 2025) at [22].

presence of any sentencing aggravating factor, including hate motivation, will be relevant.²⁶

- 4.29 Prosecutors rely on the investigating police officer to provide evidence of the hate motivation. If the prosecutor is unaware of the hate motivation or considers there is insufficient evidence of it, they may not consider the hate motivation when deciding whether to prosecute and may not raise the hate crime aggravating factor at sentencing.
- 4.30 Offences are generally prosecuted either by the Police Prosecution Service or by Crown solicitors. Most offences are prosecuted by the Police Prosecution Service. Crown solicitors prosecute the most serious offences and those where the defendant elects a jury trial.²⁷

SENTENCING HATE CRIME OFFENDERS

Process for establishing hate motivation

- 4.31 If a defendant is found guilty, the court determines at a sentencing hearing whether the hate crime aggravating factor applies. The prosecutor must identify any applicable aggravating factors in a memorandum filed in advance of the hearing.²⁸ The court may also consider other factors that appear relevant based on the facts of the case.²⁹
- 4.32 When deciding whether offending was hate-motivated, the court can take into account any facts covered by evidence presented at the trial and any facts agreed on by the prosecution and the defence.³⁰ If there is a significant dispute about the facts, the parties may present further evidence.³¹ The prosecution must prove any disputed facts beyond reasonable doubt.³²
- 4.33 Based on our review of sentencing decisions and preliminary engagement, our impression is that evidence of hate motivation is often not disputed by the defence. It appears hate motivation is usually inferred by the sentencing judge based on the summary of facts or evidence presented at trial. We are interested in feedback on this.

²⁶ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General's Prosecution Guidelines: Decisions to prosecute* | *Te Aratohu Aru a te Rōia Mātāmua o te Karauna: Te whakatau ki te aru* (1 January 2025) at [29] and [33].

²⁷ Crown Prosecution Regulations 2013, reg 4.

²⁸ Criminal Procedure Rules 2012, r 5A.5(1)(c).

²⁹ Sentencing Act 2002, s 9(1) provides that the court must take the listed aggravating factors into account to the extent they are applicable in the case. This is not limited to situations where the aggravating factor is raised by the prosecutor. In practice, however, the court may be unaware an aggravating factor is applicable if no relevant evidence has been presented.

³⁰ Sentencing Act 2002, s 24(1)(a). Agreed facts include those in a summary of facts accepted by the defendant when entering a guilty plea (see Criminal Procedure Rules 2012, s 5A.1).

³¹ Sentencing Act 2002, s 24(2). If the defendant disputes a fact relied on by the prosecutor, the court first indicates to the parties what weight it is likely to attach to the disputed fact if it is proved and its significance for the sentence (s 24(2)(a)). If the prosecutor still wishes to rely on the fact, the parties may adduce further evidence unless the court is satisfied sufficient evidence was adduced at trial (s 24(2)(b)).

³² Sentencing Act 2002, s 24(2)(c).

How the courts have applied the aggravating factor

- 4.34 As explained above, the hate crime aggravating factor applies to offending committed “wholly or partly because of” hostility towards a group of people who have an enduring common characteristic. The courts have interpreted this reasonably broadly.³³ Te Kōti Pira | Court of Appeal has described the aggravating factor as targeting “offending that *demonstrates* hostility towards a particular group or groups in society”.³⁴
- 4.35 The courts do not tend to undertake a detailed assessment of the offender’s motivation or reasons for the offending. It will generally be sufficient if there is evidence that the offender showed hostility towards the victim based on a common characteristic. For example, the courts have taken evidence of the following into account when applying the hate crime aggravating factor:
- (a) Racist or homophobic comments made by the offender to the victim before or during the offending.³⁵
 - (b) Comments made by the offender to police officers or Corrections staff after the offending showing hostility towards a group of people to which the victim belonged (such as Muslims, Asians or trans people).³⁶
 - (c) Deliberate targeting of victims based on a protected characteristic such as religion.³⁷
 - (d) A pattern of offending against victims of a particular ethnicity³⁸ or at a religious site.³⁹
 - (e) Evidence of established hostile views towards Muslims.⁴⁰
 - (f) Membership of a white supremacist Neo-Nazi group.⁴¹

Effect of the aggravating factor on sentences

- 4.36 The courts generally consider all aggravating factors relating to an offence together when deciding on the appropriate starting point for the sentence. The court does not usually state how much an individual factor (such as hate motivation) has affected the starting

³³ See *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [55] and [57].

³⁴ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [55] (emphasis added).

³⁵ *Police v Kelland* [2024] NZDC 17908; *R v Davidoff* [2024] NZDC 19266; *Solicitor-General v Milne* [2020] NZCA 134; *R v Angelich* [2018] NZHC 2429; *R v Landon* [2018] NZCA 264; *R v Uili* CA 148/06, 26 October 2006; and *Whitwell v Police* HC Nelson CRI-2005-442-5, 15 September 2005.

³⁶ *R v Arps* [2019] NZDC 11547; *Galloway v R* [2011] NZCA 309; *R v Sanders* HC Wellington CRI-2009-078-824, 10 December 2010; *Whitwell v Police* HC Nelson CRI-2005-442-5, 15 September 2005; and *R v Johansen* HC Auckland CRI-2004-83-1849, 2 June 2005.

³⁷ *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15; and *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010.

³⁸ *R v Kaitapere* [2017] NZDC 23907.

³⁹ *Bryan v Police* HC Auckland CRI 2009-404-45, 3 April 2009.

⁴⁰ *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15; and *R v Arps* [2019] NZDC 11547.

⁴¹ *R v McKenzie* CRI-2008-018-981 HC Greymouth, 5 December 2008 (upheld in *R v McKenzie* [2009] NZCA 169).

point.⁴² This makes it difficult to draw conclusions about the weight the courts give to hate motivation.

- 4.37 It is likely that the weight given to the hate crime aggravating factor differs depending on the circumstances of the case. For example, clear targeting of victims on ideological grounds appears to be given more weight than an expression of hostility that may not reflect the offender's main motivation for the offending.⁴³

Case example: *Police v Kelland*⁴⁴

Mr Kelland approached the 18-year-old victim at the Dunedin Bus Hub and began verbally abusing him, asking if he was Māori and using a racial slur. Mr Kelland tried to get the victim to share his drink, and when the victim refused, he began to punch and kick him. City Safety Officers eventually managed to pull Mr Kelland away from the victim. The attack left the victim with bruising, swelling and broken skin around the face and head. It also caused him to avoid the bus hub subsequently.

Mr Kelland was convicted of injuring with intent to injure, for which the maximum penalty is five years' imprisonment. The sentencing Judge found four aggravating factors applied to the offending — the unprovoked nature of the assault, the fact that it involved attacks to the victim's head, the vulnerability of the victim and the fact that the attack was a hate crime. Taking these four aggravating factors into account, the Judge adopted a sentence starting point of two years' imprisonment. A six-month discount was applied for Mr Kelland's guilty plea, resulting in a final sentence of 18 months' imprisonment.

How often the aggravating factor is applied

- 4.38 We do not know how many times the courts have applied the hate crime aggravating factor. Neither Police nor Tāhū o te Ture | Ministry of Justice data systems record the factors taken into account at sentencing, including hate motivation.
- 4.39 We have identified 24 sentencing decisions that applied the hate crime aggravating factor, but there are almost certainly others.⁴⁵ That is because most sentencing notes issued by Te Kōti-ā-Rohe | District Court are not searchable on online databases. A significant proportion of hate crime offenders are likely to be sentenced in the District Court. As we discussed in Chapter 2, many of the offences involved in hate crimes are relatively low-level (such as public order offences and property damage). While some

⁴² An exception is *R v Davidoff* [2024] NZDC 19266 (at [18]), where the sentencing judge adopted a starting point of 10 months' imprisonment for the violence itself and applied an uplift of two months (20 per cent) for the hate motivation. We understand this decision is under appeal.

⁴³ Compare *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [121], [125] and [156]–[157] and *R v McKenzie* CRI-2008-018-981 HC Greymouth, 5 December 2008 (clear targeting on ideological grounds) to *Galloway v R* [2011] NZCA 309 at [38] and [44] (expressions of hostility).

⁴⁴ *Police v Kelland* [2024] NZDC 17908.

⁴⁵ Some of these decisions did not expressly refer to s 9(1)(h) of the Sentencing Act 2002 but it appears from the court's reasons that the hate crime aggravating factor was applied.

District Court decisions sentencing hate crime offenders are referred to in media reporting or published online, we do not know how many others exist.

- 4.40 Our impression, however, is that hate crime cases are not common in the courts. During our preliminary engagement with prosecutors, we found few who could recall dealing with a hate crime case.

Types of hate crime recognised in case law

- 4.41 Race, ethnicity, colour or nationality were by far the most common grounds for applying the aggravating factor in sentencing decisions we located. Other cases related to sexual orientation, religion, gender identity, sex and gang membership. (We discuss potential concerns around the recognition of gang membership as an enduring common characteristic in Chapter 5.)
- 4.42 None of the cases we found involved hostility based on age or disability, which are also given as examples of enduring common characteristics in the Sentencing Act. The victim's age or disability are, however, often taken into account under a different aggravating factor that focuses on the vulnerability of the victim.⁴⁶
- 4.43 The hate crime cases we identified involved the following types of offences:
- (a) Murder, attempted murder and manslaughter.
 - (b) Assault, wounding and injury offences.
 - (c) Intimidation, unlawful assembly and threatening acts.
 - (d) Carrying out a terrorist act.
 - (e) Kidnapping.
 - (f) Robbery and burglary.
 - (g) Possession and use of explosives.
 - (h) Distributing objectionable publications.
 - (i) Sexual violation.
 - (j) Attempt to corrupt a juror.
- 4.44 As explained above, less serious offending is prosecuted in the District Court so was not well represented in our case searches. This includes offences under the Summary Offences Act 1981 such as offensive behaviour or language, wilful damage and graffiti vandalism. We do not know how often the courts have applied the hate crime aggravating factor to these types of offences.

REHABILITATING HATE CRIME OFFENDERS

Rehabilitative support offered by Corrections

- 4.45 Corrections manages all people who are serving sentences for criminal offending whether they are subject to imprisonment or a community-based sentence. One of its roles is to

⁴⁶ Section 9(1)(g) of the Sentencing Act 2002 refers to the victim's vulnerability due to their age, health or any other factor known to the offender. It can apply to children, elderly people and people suffering from a medical or mental health condition or disability: see *Sheppard v R* [2013] NZCA 639 at [15].

assist in the rehabilitation of offenders by providing programmes and other interventions.⁴⁷

- 4.46 The rehabilitative support available to offenders depends on several factors, including their overall risk of reoffending and (re)imprisonment, any specific features of their offending (such as violence), the availability of programmes at the offender's location and their willingness or ability to participate in rehabilitation. Rehabilitation is also currently limited by ongoing staff shortages (including shortages of Corrections officers, psychologists and programme facilitators).
- 4.47 Corrections provides offence-focused rehabilitative programmes that aim to change the attitudes and behaviours that contributed to an individual's offending. These include general rehabilitation programmes for offenders with a medium risk of reoffending as well as specific programmes for high-risk violent and sexual offenders, female offenders and youth offenders. There is also a general programme grounded in te ao Māori (Mauri Tū Pae). Offenders may receive individual treatment by a psychologist if their rehabilitative needs cannot be adequately addressed through group programmes.
- 4.48 Rehabilitative programmes are usually only available to offenders who are assessed as having a medium or high risk of reoffending and (re)imprisonment. Focusing rehabilitative efforts on low-risk offenders is considered to be counterproductive. For example, there may be a contamination effect if low-risk offenders are placed into a group of other offenders with anti-social behaviour.
- 4.49 Low-risk offenders may be referred for a psychological assessment or to a community-based service if Corrections has concerns about pervasive issues driving their behaviour. Examples of community-based services include social cohesion and connectedness groups for youth offenders and He Aranga Ake, a multi-agency early intervention programme for people who may pose a violent extremist or terrorist threat of harm to a community or themselves.

How hate motivation impacts rehabilitation

- 4.50 Corrections does not have specific rehabilitative programmes for hate crime offenders. During our preliminary engagement with Corrections, it described several reasons for this:
- (a) It is unlikely there would be enough offenders serving a sentence for hate crime at any one time who could be grouped together safely (having regard to the nature of their beliefs and their individual needs).
 - (b) The pathways into hate crime behaviours vary. Some of these offenders have specific needs or vulnerabilities (such as learning disabilities) that mean group-based treatment is not suitable for them. Individual treatment (or modified group treatment) may be more appropriate.
 - (c) Rehabilitative programmes do not seek to challenge a person's fundamental beliefs about ideology. They address the patterns of thought that contribute to offending (for example, that it is permissible to use violence to advance one's beliefs) and how to manage emotions (such as anger or contempt). Existing rehabilitative programmes can therefore already accommodate hate crime offenders.

⁴⁷ Corrections Act 2004, s 5(1)(c).

- 4.51 The fact that an offence was hate-motivated may affect Corrections' assessment of the offender's risk of reoffending and their eligibility for rehabilitative programmes or individual treatment. Even if an offender is assessed as low risk, unusual features of their offending — such as hate motivation — may prompt a more in-depth assessment of their rehabilitative needs. Depending on the outcome of that assessment, they may receive individual psychological treatment.

How Corrections identifies hate crime offenders

- 4.52 Corrections told us that, currently, it is not automatically notified if offending has been identified by Police or the courts as a hate crime. Corrections may become aware that offending was hate-motivated in several ways:
- (a) For offenders assessed as having a medium or high risk of reoffending, Corrections reviews the court's sentencing notes and the summary of facts, which may refer to the offender's hate motivation (for example, if the hate crime aggravating factor was applied at sentencing). No such review usually occurs for low-risk offenders.
 - (b) Case managers or probation officers speak with all offenders and try to understand what led to their offending. Hate motivation may become apparent through that process. For high-risk offenders, a psychological assessment is also conducted.
 - (c) The Corrections intelligence team (which works alongside Police) may identify concerns relating to a particular offender.
- 4.53 There is no guarantee, however, that an offender's hate motivation will be identified by Corrections. This is particularly so for low-risk offenders where there is no established process of reviewing the sentencing notes and other background material that might identify hate motivation as an issue. We discuss this further in Chapter 5.
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CHAPTER 5

Are there problems with the current law?

INTRODUCTION

- 5.1 This chapter seeks feedback on whether there are problems with Aotearoa New Zealand's hate crime law. As we discussed in Chapter 4, under the current law, an offender's hate motivation must be taken into account when they are sentenced. This is referred to as the sentence aggravation model of hate crime law.
- 5.2 The Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 considered the current law is inadequate because it does not reflect the seriousness of hate crime. It recommended creating new hate crime offences. To help us decide whether any changes to the law are needed, we need to assess whether there are problems with the current law and what practical impact they are having or could have.
- 5.3 We have identified a number of possible problems with the current law through preliminary engagement, legal analysis and research (including our review of overseas law reform reports). This chapter seeks feedback on whether these are real problems in Aotearoa New Zealand and how significant they are in practice. We welcome submissions on other problems as well. The issues discussed are:
- (a) denouncing hate crime;
 - (b) encouraging reporting of hate crime;
 - (c) ensuring hate motivation is addressed in relevant cases;
 - (d) collecting information about hate crime cases;
 - (e) applying the aggravating factor; and
 - (f) assessing the rehabilitative needs of offenders.
- 5.4 We have not yet formed a view on these issues or on how any problems should be addressed. We discuss possible ways to improve the sentence aggravation model in Chapter 7 and whether to adopt a different legal model for addressing hate crime in Chapter 8.

DENOUNCING HATE CRIME

- 5.5 It may be argued that the current law fails to adequately denounce or condemn hate crime. There are two aspects to this. First, it may be said that the current law fails to communicate the true nature of the offending to the public because it does not clearly label offending as a hate crime. Second, some may consider the current approach to sentencing hate crime offenders does not do enough to show the public's condemnation of hate crime. We invite feedback on whether the current law adequately denounces hate crime and, if not, why that is the case.
- 5.6 We also seek feedback on a related issue about how hate crimes are recorded in criminal conviction history reports provided by Te Tāhū o te Ture | Ministry of Justice.

Communicating the nature of the offending

- 5.7 Some consider hate crimes must be clearly labelled as such to adequately denounce the offending and that sentence aggravation does not achieve this.¹ Under the current law, hate motivation does not form part of the offence a person is charged with and convicted of. For example, a person who commits a hate-motivated assault is convicted of assault. The Royal Commission said this means the conviction does not capture the full blameworthiness (or culpability) of the offender, which limits the signalling effect of the prosecution.²
- 5.8 An alternative argument is that the offender's hate motivation can be clearly communicated and recorded under the sentence aggravation model.³ In criminal proceedings generally, a person's conviction for an offence is communicated to the public through court hearings, the court's written decisions or sentencing notes, and media reporting. Although hate motivation does not currently form part of the offence a person is convicted of, the fact that an offence was a hate crime may be communicated to the public in similar ways:
- (a) Evidence of the defendant's hate motivation may be presented at their trial or at a disputed facts hearing before sentencing.
 - (b) The courts are required to give reasons for imposing a sentence in open court (that is, in a court hearing the public and media can attend).⁴ If the hate crime aggravating factor affects the offender's sentence, that will usually be explained at the sentencing hearing and recorded in the court's sentencing notes (although this is not specifically required).

¹ See James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 37–38.

² William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703.

³ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 38.

⁴ Sentencing Act 2002, s 31.

(c) The media sometimes reports on the courts' treatment of offending as a hate crime.⁵ There has also been media reporting about police investigations or prosecutions of offending believed to be hate-motivated.⁶ Media reporting may be the most effective way of communicating the blameworthiness of the offender to the general public, who are unlikely to attend court or read sentencing notes.

5.9 We invite feedback on whether there are problems with the current law that mean an offender's hate motivation is not adequately communicated to the public. For example, while the courts usually identify the aggravating factors they are relying on when sentencing an offender, this is not a requirement and may not always be done clearly or at all.⁷ We are aware of a case in Te Kōti-ā-Rohe | District Court where the court appears to have accepted the prosecutor's written submission that the hate crime aggravating factor applied but did not refer to it at the sentencing hearing or in the sentencing notes.⁸ We are interested to know whether this has occurred in other cases.

Imposing harsher penalties for hate crime

5.10 When an offender is convicted of a hate crime, the courts may show the public's condemnation of the offender's conduct by imposing a harsher penalty than they would have without the hate motivation. This can occur under the sentence aggravation model. However, we have identified three features of the current law that could limit the denunciatory effect of sentencing.

5.11 First, where the hate crime aggravating factor applies, the courts are not required to increase an offender's sentence by any particular amount (or at all). While this allows the courts to take a fact-specific approach, it could mean hate motivation is not always given enough weight.

5.12 Second, the sentences imposed on offenders who have committed hate crimes cannot exceed the maximum penalty for the offence they were convicted of. It might be argued that the existing maximum penalties are not high enough to adequately denounce hate crime. Whether this is the case might vary for different types of offending. For example, serious violent offences already carry high maximum penalties.⁹ At the other end of the spectrum, offences such as offensive behaviour or language, graffiti vandalism and

⁵ See, for example, Rob Kidd "[Violent bus hub attack a 'hate crime'](#)" *Otago Daily Times* (online ed, Dunedin, 31 July 2024); Leighton Keith "[Angry man who used racist slur during hate crime had previously bashed old man at swimming pool](#)" *The New Zealand Herald* (online ed, Auckland, 19 May 2022); and Chelsea Boyle "[Hate crime: More jail time for Fraser Milne who caused horrific crash in racist road rage attack](#)" *The New Zealand Herald* (online ed, Auckland, 1 May 2020).

⁶ See, for example, "[Auckland crime: Police investigating 'hate-motivated' daylight attack on Queen St](#)" *NZ Herald* (online ed, Auckland, 13 September 2024); Raphael Franks "[Police charge woman after alleged racist abuse on Auckland bus caught on video](#)" *The New Zealand Herald* (online ed, Auckland, 31 July 2024); Jaime Lyth "[Auckland bus attack: 39-year-old woman arrested in 'hate-motivated crime'](#)" *The New Zealand Herald* (online ed, Auckland, 8 July 2024); and Lyric Waiwiri-Smith "[Man arrested following K'Rd rainbow crossing 'hate crime'](#)" *Stuff* (online ed, Wellington, 12 April 2024).

⁷ See, for example, *Landon v R* [2018] NZCA 264 at [59], where Te Kōti Pira | Court of Appeal noted the High Court judge had not referred to the hate crime aggravating factor "although it may well have been in his mind".

⁸ We were provided with a copy of the prosecution's sentencing submissions, which proposed a starting point that took account of the hate crime aggravating factor. The judge accepted that starting point, suggesting he agreed the factor applied.

⁹ For example, wounding with intent to cause grievous bodily harm is punishable by up to 14 years' imprisonment (Crimes Act 1961, s 188(1)). Murder is punishable by imprisonment for life (Crimes Act 1961, s 172).

intimidation have relatively low maximum penalties, so there may be less scope for the courts to impose a sentence that reflects the seriousness of the hate motivation.¹⁰ We are interested to understand whether the existing maximum penalties are causing problems in practice. There is nothing in the sentencing decisions we reviewed to suggest they are inadequate. For example, the sentences imposed in hate crime cases are not routinely near the maximum. However, as we explained in Chapter 4, we have not had access to many District Court decisions relating to less serious offending.

- 5.13 Third, under the current law, the courts consider hate motivation alongside other aggravating and mitigating factors relating to the offence when sentencing an offender. Sentencing decisions do not usually state how much the hate crime aggravating factor on its own affected the sentence.¹¹ This may mean sentencing decisions do not clearly convey that the offender's hate motivation has led to a harsher penalty or the extent of any increase in sentence.
- 5.14 We seek feedback on whether these issues limit the denunciatory effect of sentencing decisions for hate crimes.

Criminal records

- 5.15 There is a related issue about how offending is recorded on a person's criminal record. Criminal records are not publicly available, so they are unlikely to have a general signalling effect. However, a person may choose to disclose their criminal record to a third party such as a potential employer (or be required to do so as a condition of employment). A criminal conviction history report can be requested from the Ministry of Justice by the person or the third party (with the person's consent).
- 5.16 Under the current law, the fact that an offence was hate-motivated (and that this increased a person's sentence, where applicable) would not appear on a criminal conviction history report. We invite feedback on whether this is likely to cause problems in practice. For example, it may be that some potential employers need to know if a person has committed a hate crime to ensure the safety and wellbeing of others they may interact with at work.

¹⁰ Offensive behaviour or language is punishable by a fine of up to \$1,000 (Summary Offences Act 1981, s 4(1)). Graffiti vandalism is punishable by a community-based sentence or a fine up to \$2,000 (Summary Offences Act 1981, s 11A). Intimidation is punishable by up to 3 months' imprisonment or a fine up to \$2,000 (Summary Offences Act 1981, s 21).

¹¹ John Ip "Debating New Zealand's Hate Crime Legislation: Theory and Practice" (2005) 21 NZULR 575 at 581–582. An exception is *R v Davidoff* [2024] NZDC 19266 (at [18]), where the sentencing judge adopted a starting point of 10 months' imprisonment for the violence itself and applied an uplift of two months (20 per cent) for the hate motivation. We understand this decision is under appeal.

ENCOURAGING REPORTING OF HATE CRIME

- 5.17 The Royal Commission found that hate crime is often not reported to Police.¹² It considered that creating specific hate crime offences would help increase reporting by signalling that hate crime is taken seriously and encouraging more “energetic” responses by Ngā Pirihiimana o Aotearoa | New Zealand Police.¹³
- 5.18 We do not have New Zealand data on the percentage of people who report hate crime or the reasons why they choose not to. However, the Royal Commission heard that people may not report because:¹⁴
- (a) hate crimes, although unpleasant, may be brief and may not reach a threshold where reporting is a priority for the victim;
 - (b) they may be unable to identify the offender; or
 - (c) they may have previously reported hate crime to Police and had no tangible result.
- 5.19 England and Wales have had specific hate crime offences since 1998 but there are still concerns around low reporting rates. In a 2014 study, only 24 per cent of respondents had reported their most recent experience of hate crime to the police.¹⁵ The most common reasons people gave for not reporting hate crime were that they believed the police would not take them seriously, that they could deal with the incident themselves or with the help of others, or that the police could not have done anything (for example, because the victim could not identify the perpetrator or there were no witnesses).¹⁶
- 5.20 Some of these issues are not unique to hate crime. The most recent New Zealand Crime and Victims Survey found that victims of crime reported around 28 per cent of alleged offending to Police.¹⁷ The main reasons given for not reporting alleged offending included that it was too trivial, Police could not do anything or Police would not be interested. Other research has identified bias and inequities in policing practices.¹⁸ This may impact public trust and confidence in Police and people’s willingness to report crime. The New Zealand Crime and Victims Survey shows that Māori, some other ethnic groups and rainbow communities have less trust and confidence in Police than the general population.¹⁹

¹² William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 715.

¹³ At 703; and William Young and Jacqui Caine *Hate speech and hate crime-related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

¹⁴ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 715.

¹⁵ Neil Chakraborti, Jon Garland and Stevie-Jade Hardy *The Leicester Hate Crime Project: Findings and Conclusions* (University of Leicester, 2014) at 66.

¹⁶ Neil Chakraborti, Jon Garland and Stevie-Jade Hardy *The Leicester Hate Crime Project: Findings and Conclusions* (University of Leicester, 2014) at 70–73. See also European Union Agency for Fundamental Rights *Encouraging hate crime reporting: The role of law enforcement and other authorities* (Luxembourg, 2021) at 30–38.

¹⁷ Te Tāhū o te Ture | Ministry of Justice *New Zealand Crime and Victims Survey key results 2023 (Cycle 6)* (Wellington, June 2024) at iv and 48.

¹⁸ Ngā Pirihiimana o Aotearoa | New Zealand Police *Understanding Policing Delivery: Independent Panel Report 1* (August 2024) at 44–48.

¹⁹ Ngā Pirihiimana o Aotearoa | New Zealand Police *New Zealand Crime and Victims Survey — Police Module: 2023 Data Tables — Summary Results by demographic* (June 2024).

- 5.21 To the extent that hate crimes are not being reported due to negative experiences with or perceptions of Police, we are interested to understand whether cultural change within Police may help to address this over time. As we discussed in Chapter 4, since the Royal Commission report, Police has been working to improve its response to hate crime. It now has training and guidance for police officers on how to recognise, record and respond to hate crime. The Police instructions on hate crime direct officers to treat all reports of hate crime seriously, record and investigate them thoroughly and provide appropriate support and referrals for victims. The instructions also encourage proactive community engagement and public awareness initiatives.
- 5.22 Police data shows the number of perceived hate crimes recorded each year is increasing. However, it is unclear whether this is due to an increase in reporting of hate crime, more consistent recording practices or an increase in the number of hate crimes occurring.
- 5.23 We seek feedback on whether there are still barriers to reporting hate crime and, if so, whether the current law is part of the reason for this. For example, it may be that some people who experience hate crime believe it will not be taken seriously because there is no specific hate crime offence (particularly if the offence the conduct would currently be charged under is relatively minor such as graffiti vandalism).

ENSURING HATE MOTIVATION IS ADDRESSED IN RELEVANT CASES

- 5.24 We are interested to understand whether hate crimes are investigated and prosecuted as such in a consistent way. This is difficult to assess since there is currently no data on how often hate motivation is raised at sentencing for perceived hate crimes.
- 5.25 If hate motivation is being addressed inconsistently, there could be several reasons for this. First, Police may not identify a reported offence as a hate crime or gather enough evidence of the offender's hate motivation during the investigation. Second, evidence of hate motivation may not be provided to the prosecutor (for example, Police may omit to include it in the summary of facts based on which a defendant pleads guilty). Third, the prosecutor may not raise hate motivation at sentencing. In some cases, there may be good reasons for not raising hate motivation — for example, there may not be enough evidence to support it. In other cases, the investigating police officer or prosecutor might simply be unfamiliar with the hate crime aggravating factor or the process for raising it.
- 5.26 We seek feedback on whether hate motivation is being addressed consistently in the investigation and prosecution of relevant offences. We acknowledge, however, that it may be too early to assess the impact of recent changes within Police. As noted above, since the Royal Commission's report, Police has been working to improve its response to hate crime. This includes improved training and guidance on how to identify, record, investigate and prosecute hate crime. We are interested in feedback on whether these changes are likely to improve the consistency with which hate motivation is investigated by Police and raised by prosecutors as an aggravating factor at sentencing.
- 5.27 We also seek feedback on whether hate motivation should be considered at other stages of court proceedings. For example:
- (a) the fact that an alleged offence was hate-motivated could be relevant when the court is deciding whether to grant a defendant bail; and

(b) the fact that a previous offence was hate-motivated could be relevant when sentencing the same offender again for a different hate crime.

5.28 It is not clear that information about an offender's hate motivation would be available to the courts in these contexts currently. We understand prosecutors may raise hate motivation in relation to current offending when the court is considering whether to grant the defendant bail. However, when an offender is being sentenced, the prosecutor is unlikely to raise that any previous convictions were for hate crimes. This is because there is no easy way to tell whether earlier offending was hate-motivated without reviewing individual case files.

COLLECTING INFORMATION ABOUT HATE CRIME CASES

5.29 One of the criticisms sometimes made of the sentence aggravation model is that it may make it difficult to collect accurate data on reported hate crimes and case outcomes.²⁰ This is because hate motivation does not form part of the offence a person is charged with or convicted of.

5.30 The Royal Commission found there was a lack of accurate recording of reported hate crimes and data about them.²¹ It noted Police had been recording perceived hate crimes since 2019 but said recording was incomplete and inconsistent. The Royal Commission suggested better recording of hate motivations would help ensure they are brought to the attention of the sentencing judge and allow links to be made between different events involving the same offender or victim. It would also, alongside data on how complaints are resolved, help to assess the Police response and assure targeted communities that their complaints are being treated seriously.

5.31 The Royal Commission thought creating hate crime offences would facilitate the recording of reported hate crimes, although it noted the absence of such offences did not make recording impossible.²² It recommended the Government direct Police to revise how it records complaints of criminal conduct to capture hate motivation and to provide training for staff.²³

5.32 Since the Royal Commission report, Police has implemented training and instructions for staff on how to identify and record hate crime. It also has a quality assurance process to ensure hate crime is being recorded accurately. This has allowed Police to release data on the number and nature of perceived hate crimes,²⁴ some of which has been reported in the media.²⁵ There has been a significant increase in the number of perceived hate

²⁰ Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at [5.14] and [5.27]; and Department of Justice (Ireland) *Learnings from Approaches to Hate Crime in Five Jurisdictions* (December 2020) at 62.

²¹ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 715–716.

²² At 715–716.

²³ At 764 (recommendation 42).

²⁴ Ngā Pirihimana o Aotearoa | New Zealand Police "[Hate-motivated Crimes Official Information Act Responses](https://www.police.govt.nz)" <www.police.govt.nz>.

²⁵ Finn Blackwell "[Police log more than 20,000 hate crimes in NZ since 2020](https://www.rnz.co.nz)" (20 August 2024) Radio New Zealand <www.rnz.co.nz>; and Charlotte Graham-McLay "[Racism, homophobia fuelling thousands of crimes in New Zealand each year, figures show](https://www.theguardian.com)" *The Guardian* (online ed, London, 7 June 2023).

crimes being recorded each year. Data collection will likely continue to improve as Police training is rolled out further.

- 5.33 There is still a gap in information about the outcome of hate crime prosecutions (for example, whether the defendant was convicted and what sentence was imposed) and whether hate motivation was taken into account at sentencing. Currently, Police does not record data on the outcome of prosecutions for offences tagged as perceived hate crimes (other than in individual case files), nor do the courts record data on the aggravating factors taken into account at sentencing such as hate motivation. In Chapter 7, we discuss an option to flag hate crime cases in the court system, which could allow this kind of data to be captured without changing the sentence aggravation model.
- 5.34 It is therefore not clear to us that the sentence aggravation model is inhibiting the recording of hate crimes and collation of accurate data on them. However, we welcome feedback on this and on whether there remain barriers to accurate recording and data collection.

APPLYING THE AGGRAVATING FACTOR

- 5.35 The hate crime aggravating factor applies to offending committed partly or wholly because of hostility towards a group of people who have an enduring common characteristic (such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability).²⁶ For the factor to apply, the hostility must be because of the protected characteristic and the offender must have believed the victim had that characteristic.
- 5.36 We are interested to understand how well the legal test set out in the hate crime aggravating factor works in practice. Based on our preliminary analysis and research, we have identified three issues in particular that we seek feedback on. These relate to how the courts decide whether an offence was hate-motivated, which characteristics are protected and whether the victim must be a member of the relevant group. We discuss each of these below. We also welcome feedback on any other issues with the factor.

Deciding whether an offence was hate-motivated

- 5.37 The aggravating factor applies to offending committed “partly or wholly because of” the hostility. The courts have approached this by looking at the offender’s motivation for the offending.²⁷ In practice, there is often no direct evidence of an offender’s motivation but it may be inferred from other evidence. As we discussed in Chapter 4, the courts have tended to infer hate motivation if the offender showed hostility towards the victim based on a protected characteristic.
- 5.38 Offenders may have more than one reason for committing an offence. It is enough to engage the aggravating factor if the offender was *partly* motivated by hostility. Commentators have suggested that the New Zealand courts take a reasonably broad

²⁶ Sentencing Act 2002, s 9(1)(h).

²⁷ See, for example, *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [10], [32] and [48]–[49]; and *Solicitor-General v Milne* [2020] NZCA 134 at [41].

approach to satisfying this threshold but have not developed any consistent test.²⁸ Case law tends to confirm there is no strict standard that must be met to show partial motivation. For example, in *R v Milne*, the sentencing judge did not apply the aggravating factor because the victims' race was not shown to be "the underlying and predominant cause" of the offending.²⁹ Te Kōti Pira | Court of Appeal overturned that decision, noting the defendant had repeatedly criticised the victims based on their race and attempted to justify his offending to Police on the same ground.³⁰ This showed the offending was committed "at least in part" because of the victims' race.³¹

- 5.39 One concern raised by commentators is that the relatively broad approach taken by the Court of Appeal could lead to the courts imposing harsher sentences in cases where the hate motivation is only a trivial factor in the offending.³² We have not found any examples of this occurring. We also note that the fact an aggravating factor applies does not automatically increase the offender's sentence. The courts consider the significance of the factor in the context of the case when deciding whether and by how much the sentence should be increased. This may mean that, in practice, there is little risk of offenders receiving sentences that are disproportionate to the level of hate motivation involved.
- 5.40 We are interested in feedback on whether there is a problem with the courts' approach to determining whether an offence was hate-motivated.

Deciding which characteristics are protected

- 5.41 The hate crime aggravating factor can apply to offending targeting any group of people who have an "enduring common characteristic". It gives examples of the characteristics that are covered (race, colour, nationality, religion, gender identity, sexual orientation, age or disability), but these are not exhaustive.
- 5.42 There may be some uncertainty about which characteristics are protected by the aggravating factor. We seek feedback on whether this is a problem in practice. We are particularly interested in the following three issues.

The meaning of "enduring"

- 5.43 First, we are interested in whether there may be uncertainty about which characteristics are "enduring". We found little discussion of this issue in case law since most cases involve one of the characteristics listed in the aggravating factor.
- 5.44 In *R v Pahau*, Te Kōti Matua | High Court took a relatively wide view of "enduring", finding that hate based on the victim's gang membership was covered.³³ The court noted that

²⁸ Gail Mason and Kristin Macintosh "Hate Crime Sentencing Laws in New Zealand and Australia: Is there a Difference?" [2014] NZ L Rev 647 at 678.

²⁹ *R v Milne* [2019] NZHC 1703 at [47]–[48].

³⁰ *Solicitor-General v Milne* [2020] NZCA 134 at [40].

³¹ At [36] and [41].

³² See Gail Mason and Kristin Macintosh "Hate Crime Sentencing Laws in New Zealand and Australia: Is there a Difference?" [2014] NZ L Rev 647 at 678.

³³ *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [39]–[40]. This decision was appealed but the hate crime aggravating factor was not considered in later judgments.

gang membership was a common characteristic of some groups in Aotearoa New Zealand and often an enduring one. It also observed that some of the characteristics listed in the aggravating factor can be changeable and impermanent such as religion and sexual orientation.

- 5.45 More recently, the courts may be taking a stricter view of which characteristics are “enduring”. In *Lawrence v Police*, the High Court found that hate based on political party membership was not covered by the aggravating factor.³⁴ There are also more recent cases involving offending against rival gang members where the hate crime aggravating factor has not been referred to.³⁵

Breadth or vagueness of the definition

- 5.46 Second, we are interested to understand whether the aggravating factor is too broad or vague in how it describes the characteristics that are protected. It is not clear what policy considerations (if any) the courts can take into account when deciding whether a particular characteristic is protected.
- 5.47 The wording of the aggravating factor does not appear to give the courts discretion — it applies to all “enduring common characteristics”. In practice, however, some characteristics that appear to fall within that wording are seldom considered. For example, sex is not listed as an example but appears to be an “enduring common characteristic”.³⁶ We identified only two sentencing decisions applying the hate crime aggravating factor to offending motivated by hostility towards women, and these both occurred more than 20 years ago.³⁷ Many more recent decisions have referred to the offender’s hostility towards women but have not applied the hate crime aggravating factor.³⁸ As we discussed in Chapter 3, there are varying views on whether it is appropriate to treat offending against women as a hate crime.
- 5.48 Uncertainty about which characteristics the aggravating factor should apply to could lead to decisions the public would not expect and Parliament may not have intended. In New South Wales, a similar aggravating factor has been applied to offences motivated by hate towards people believed to have committed child sex offences.³⁹ The New South Wales Law Reform Commission has since recommended amending the aggravating factor to

³⁴ *Lawrence v Police* [2015] NZHC 1122 at [29]. The court did not explain the reasons for this finding.

³⁵ For example, *R v Ormsby-Turner* [2023] NZHC 406; *R v Kahia* [2019] NZHC 1021; and *R v Te Tomo* [2015] NZHC 2671. Although, as discussed below, this may be because there is another aggravating factor that covers the situation.

³⁶ When the hate crime aggravating factor was introduced, it appears some MPs thought “gender” would be covered by the term “gender identity”, which is listed as an example of an enduring common characteristic (see Charlotte Brown “Legislating against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence” (2004) 35 VUWLR 591 at 595). Police does record any gender-based hostility (including hostility against women) under the “gender identity” category when recording a reported hate crime. However, case law suggests sentencing decisions rarely apply the aggravating factor to hostility based on sex. Legislation usually refers to “gender identity” and “sex” separately (see, for example, s 14(1) of the Legislation Act 2019).

³⁷ *R v Coleman* HC Auckland T024701, 25 March 2004 at [15] and [24] (s 9(1)(h) not referred to directly); and *R v Johnston* HC Auckland T023336, 5 August 2003 at [17].

³⁸ See, for example, *R v Robertson* [2021] NZHC 3484 at [53]; *R v Warner* [2021] NZHC 1618 at [69]; *R v Leahy* [2019] NZHC 290 at [53]; *R v Minogue* [2019] NZHC 2921 at [97]; *Evans v R* [2018] NZHC 850 at [30]; *R v Henry* [2018] NZHC 1893 at [49]; and *R v Watene* [2017] NZHC 1301 at [20].

³⁹ *R v Robinson* [2004] NSWSC 465; and *Dunn v R* [2007] NSWCCA 312.

limit it to specific common characteristics.⁴⁰ In Aotearoa New Zealand, the recognition of gang affiliation as an enduring common characteristic in *Pahau* could raise similar concerns (although, as noted above, later decisions have moved away from that approach).

Relationship to other aggravating factors

- 5.49 A third possible issue is that there is a risk the aggravating factor could be applied in a way that overlaps with other aggravating factors, leading to double counting. It is not clear how the courts deal with this currently. For example, there is a factor that specifically addresses gang-related offending.⁴¹ It appears this was applied in *Pahau* in addition to the hate crime aggravating factor.⁴²
- 5.50 There is also an aggravating factor for offending against people who are particularly vulnerable (including due to their age or health).⁴³ This could overlap with hate crimes based on age or disability, which are listed as examples of enduring common characteristics. In practice, we are not aware of any cases that have applied the hate crime aggravating factor to hostility based on age or disability. Age and disability are often considered under the vulnerability factor.⁴⁴

Where the victim is not believed to be a member of the targeted group

- 5.51 The aggravating factor only applies if the offender believed the victim had a protected characteristic. It can apply where the offender was mistaken — for example, if they mistakenly believed the victim had certain religious beliefs. However, it does not apply where the offender did not believe the victim was a member of the targeted group. For example, the victim may be (or be believed to be):
- (a) a person who associates with the relevant group (such as the owner of a bar frequented by members of the rainbow community⁴⁵); or
 - (b) the owner of public-facing property that is vandalised to spread hateful messages.
- 5.52 In March 2024, rainbow-coloured pedestrian crossings in Auckland and Gisborne were painted white by members of the Destiny Church.⁴⁶ The crossings had been installed to celebrate the rainbow community. Police said it was treating the acts of vandalism as hate

⁴⁰ New South Wales Law Reform Commission *Sentencing* (R139, 2013) at [4.186] and recommendation 4.8. In the Commission's view, "the focus of the legislation should be on the minority and vulnerable or subjugated groups in whose interest hate crime laws have traditionally been developed" (at [4.186]). The Commission's recommendation has not yet been implemented. In a 2024 report, the Commission recommended the Government consider reviewing the effectiveness of the aggravating factor (although without specific reference to protected characteristics): New South Wales Law Reform Commission *Serious racial and religious vilification* (R151, 2024) at [8.36]–[8.50] and recommendation 8.1.

⁴¹ Sentencing Act 2002, s 9(1)(hb).

⁴² *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [41] and [66].

⁴³ Sentencing Act 2002, s 9(1)(g).

⁴⁴ See, for example, *Houkamau v Police* [2022] NZHC 152 at [15]; *F (CA691/2021) v R* [2022] NZCA 217 at [41]; and *Pearson v R* [2020] NZCA 573 at [24] and [28].

⁴⁵ We use 'rainbow' as an umbrella term for gender and sexual minorities.

⁴⁶ Radio New Zealand "[Brian Tamaki claims responsibility for defacing Gisborne rainbow crossing](#)" (15 May 2024) <rnz.co.nz>.

crimes.⁴⁷ Arguably, however, hate crime law would not cover the situation since the victims (Auckland Council and Gisborne District Council) were not members of the targeted group.⁴⁸ This issue is yet to be determined by the courts.⁴⁹

- 5.53 We are interested in feedback on whether the requirement that the offender believed the victim had the protected characteristic is causing problems in practice.

ASSESSING THE REHABILITATIVE NEEDS OF OFFENDERS

- 5.54 The Royal Commission was concerned that, because hate motivation is not recorded on a person's conviction, the need for rehabilitative support may not be highlighted.⁵⁰ It suggested specific hate crime offences might “assist in encouraging and facilitating the creation of a specifically designed rehabilitation programme for hate crime offenders”.⁵¹
- 5.55 As we discussed in Chapter 4, there are currently no specific rehabilitative programmes for hate crime offenders. During preliminary engagement, Ara Poutama Aotearoa | Department of Corrections said it is unlikely to be viable to create such a programme. Corrections suggested other rehabilitative support such as general offence-based programmes, individual psychological treatment or community-based services may help to address the factors underlying hate crime and reduce the risk of reoffending.
- 5.56 For offenders assessed as having a medium or high risk of reoffending, Corrections reviews the court's sentencing notes and may identify hate motivation through that process. This is not done as a matter of course for low-risk offenders, although hate motivation may be identified in other ways (for example, through discussions with the offender). Low-risk offenders are not generally eligible for rehabilitative programmes. They may be referred for psychological assessment or to a community-based service if there are specific concerns about pervasive issues underlying their offending.
- 5.57 We seek feedback on whether there are practical difficulties in assessing hate crime offenders' rehabilitative needs. Corrections thought this was unlikely since any information deficit would mainly relate to offenders assessed as low risk (who are not usually eligible for rehabilitative support). It seems possible, however, that some offenders could be classified as low risk and not assessed further when information about their hate motivation might suggest a referral to rehabilitative services is appropriate.
- 5.58 As noted above, there may also be cases where the court's sentencing notes do not refer to the hate crime aggravating factor even though it applies. This could make it more

⁴⁷ 1News “[Police treating K Rd rainbow crossing vandalism as a 'hate crime'](#)” (28 March 2024) <www.1news.co.nz>; and “[Three face charges over Gisborne rainbow crossing vandalism](#)” *The New Zealand Herald* (online ed, Auckland, 29 March 2024).

⁴⁸ 1News “[Hate crime law reforms: Should NZ have new laws?](#)” (7 April 2024) <www.1news.co.nz>.

⁴⁹ The perpetrator of the Auckland vandalism pled guilty and was convicted and discharged (Radio New Zealand “[Man pleads guilty to vandalising K Road rainbow crossing, to pay \\$16,000](#)” (15 April 2024) <rnz.co.nz>). It is not clear whether the hate crime aspect was considered. The perpetrators of the Gisborne vandalism pled not guilty and are awaiting trial (Wynsley Wrigley “[Rainbow crossing accused to have pre-trial hearing](#)” *The New Zealand Herald* (online ed, Auckland, 30 May 2024)).

⁵⁰ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703.

⁵¹ William Young and Jacqui Caine *Hate speech and hate crime-related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

difficult for Corrections to identify that a medium-risk or high-risk offender was hate-motivated, which could affect the initial assessment of their rehabilitative needs. However, their hate motivation may still be identified through further assessments and during treatment, at which point their treatment can be adjusted as needed.

Question 5

Do you think there are problems with how Aotearoa New Zealand's current hate crime law is working? If so, what are those problems?

CHAPTER 6

Overview of reform options

INTRODUCTION

- 6.1 In Chapter 5, we sought feedback on whether there are problems with Aotearoa New Zealand's current hate crime law. If there are problems, there are several ways these might be addressed. In this chapter, we provide an overview of different reform options, which we discuss in further detail in Chapters 7 and 8. This chapter outlines:
- (a) two broad approaches to reform — improving the current legal model (sentence aggravation) or adopting a different legal model; and
 - (b) three legal models used to address hate crime overseas — sentence aggravation, specific hate crime offences and the Scottish hybrid model.

IMPROVING THE CURRENT LEGAL MODEL OR CHANGING THE MODEL

- 6.2 As we discussed in Chapter 4, Aotearoa New Zealand currently uses the sentence aggravation model of hate crime law. This means an offender's hate motivation is taken into account when they are sentenced.
- 6.3 Broadly, the two options for addressing any problems with the current law are:
- (a) improving how the sentence aggravation model works by making changes to the law or operational practice; or
 - (b) adopting a different legal model such as specific hate crime offences or the Scottish hybrid model.
- 6.4 We explained in Chapter 3 that new offences should only be created when there are compelling reasons and where they would achieve a purpose not met by the current law. Because of this, we need to consider whether any problems with the current law can instead be addressed by improving the sentence aggravation model. In Chapter 7, we discuss the potential advantages of keeping the sentence aggravation model and seek feedback on whether it could be improved to address any problems with the current law.
- 6.5 On the other hand, there could be problems with the current law that stem from key features of the sentence aggravation model. If that is the case, we will need to consider whether a different legal model would work better. Each legal model has trade-offs to consider. In Chapter 8, we discuss the potential advantages and disadvantages of two

other legal models — specific hate crime offences and the Scottish hybrid model — and seek views on whether they should be adopted.

THREE LEGAL MODELS FOR ADDRESSING HATE CRIME

- 6.6 There are three main legal models used to address hate crime in jurisdictions we commonly compare ourselves to:
- The sentence aggravation model (currently used in Aotearoa New Zealand).
 - Specific hate crime offences (as recommended by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019).
 - The Scottish hybrid model, which combines aspects of the sentence aggravation model and the specific offence model.
- 6.7 These models are not mutually exclusive. Specific offences or the Scottish hybrid model could be combined with the sentence aggravation model. For example, in England and Wales, there are specific hate crime offences but sentence aggravation is also available for other hate crimes not covered by those offences.

Comparing the models

- 6.8 We compare some key features of the models in the table below and then briefly describe each model. For further detail on the models, see Chapters 7 and 8.

LEGAL MODELS FOR ADDRESSING HATE CRIME			
	Sentence aggravation	Specific offences	Scottish hybrid model
Which offences are covered?	All offences	Only specified offences	All offences
Which characteristics are protected?	Any enduring common characteristic	Only specified characteristics	Only specified characteristics
Is hate motivation recorded as part of the conviction?	No	Yes	Yes
Is there a higher maximum penalty for hate crimes?	No	Yes	No
Where is this model currently used?	Aotearoa New Zealand, Australia (New South Wales, Victoria, South Australia, Tasmania and Northern Territory), England and Wales (alongside specific offences), Canada, Northern Ireland	Australia (Western Australia and Queensland), England and Wales (alongside sentence aggravation)	Scotland

Sentence aggravation

- 6.9 Under this model, an offender’s hate motivation is taken into account as an aggravating factor when they are sentenced. This may increase the sentence imposed on the offender. However, the maximum penalty for an offence is the same whether it is hate-motivated or not. Because hate motivation is not an element of the offence, it does not need to be proven at trial and is not recorded as part of the conviction. Instead, it is determined by the sentencing judge.
- 6.10 Sentence aggravation often applies to a wider range of hate crime cases than the other two models. It can apply to any type of offence, and depending on how the law is worded, the characteristics or groups of people protected may be open-ended. For example, the current law in Aotearoa New Zealand applies to any “enduring common characteristic”. In some Australian jurisdictions, sentence aggravation provisions apply to hate against any “group of people”¹ or any “group of people with common characteristics”.²

Specific hate crime offences

- 6.11 Under this model, hate motivation is part of the offence a person is charged with. It must be proven at trial beyond reasonable doubt (unless the defendant pleads guilty). If the defendant is convicted, their hate motivation is recorded on their criminal record. Hate crime offences are usually based on existing offences (such as assault) but have a higher maximum penalty.
- 6.12 Laws that create offences must be reasonably specific so it is clear to the public what conduct is prohibited.³ In addition, a maximum penalty needs to be set out for each individual offence. Because of this, specific hate crime offences only cover specified offences and protected characteristics. This means they do not apply to all hate crimes.

The Scottish hybrid model

- 6.13 Under this model, any offence can be identified as ‘hate-aggravated’. The prosecutor must state the offence was hate-aggravated when the defendant is charged, and the aggravation must be proven at trial (unless the defendant pleads guilty). The judge must take the hate motivation into account when an offender is sentenced and record it on their conviction. However, like the sentence aggravation model, the maximum penalty for the offence does not change.
- 6.14 The Scottish hybrid model can apply to any offence, so it covers more hate crimes than specific offences do. However, like specific offences, it only applies to specified protected characteristics. We discuss the possible reasons for this and invite feedback on whether it is a necessary feature of a hybrid model in Chapter 8.

¹ New South Wales (Crimes (Sentencing Procedure) Act 1999, s 21A(2)(h)); and Northern Territory (Sentencing Act 1995, s 6A(1)(e)).

² Victoria (Sentencing Act 1991, s 5(2)(daaa)).

³ As we discussed in Chapter 3, there is a general principle that offences should be clearly defined so that people can know in advance what is and is not prohibited: Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 123–124; Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at [1.3.1.1]; and AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [2.1.3].

CHAPTER 7

Improving the current legal model

INTRODUCTION

7.1 This chapter:

- (a) sets out some possible advantages of keeping Aotearoa New Zealand's current legal model for addressing hate crime — the sentence aggravation model; and
- (b) seeks feedback on whether there are ways to improve the sentence aggravation model to address some of the potential problems raised in Chapter 5.

7.2 A key focus for this review is whether the law should be changed to create new hate crime offences, as recommended by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019. As we explained in Chapter 3, new offences should only be created when there are compelling reasons and where they would achieve a purpose not met by the current law. Because of this, before recommending any new offences, we need to consider whether any problems with the current law can instead be addressed by improving the sentence aggravation model.

ADVANTAGES OF KEEPING THE SENTENCE AGGRAVATION MODEL

7.3 Sentence aggravation is the legal model currently used to address hate crime in Aotearoa New Zealand. Under this model, an offender's hate motivation is taken into account as an aggravating factor when they are sentenced. Hate motivation does not form part of the offence a defendant is charged with and is not recorded as part of their conviction. The maximum penalty for the offence does not change.

7.4 Sentence aggravation is the most common way to address hate crime in other jurisdictions we tend to compare ourselves to. It is used in five Australian jurisdictions (New South Wales, Victoria, South Australia, Tasmania and Northern Territory), England and Wales (alongside some specific hate crime offences) and Canada.¹ It is also currently

¹ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h); Sentencing Act 1991 (Vic), s 5(2)(daaa); Sentencing Act 2017 (SA), s 11(1)(ca); Sentencing Act 1997 (Tas), s 11B; Sentencing Act 1995 (NT), s 6A(1)(e); Sentencing Act 2020 (UK), s 66; and Criminal Code RSC 1985 c C-46, s 718.2(a)(i). In 2024, the New South Wales Law Reform Commission recommended the Government consider reviewing the aggravating factor to ensure its effectiveness (New South Wales Law Reform Commission *Serious racial and religious vilification* (R151, 2024) at [8.36]–[8.50] and recommendation 8.1).

used in Northern Ireland, although this is likely to change in favour of the Scottish hybrid model (discussed in Chapter 8).²

- 7.5 The sentence aggravation model has several possible advantages over other models such as specific hate crime offences. We are interested in feedback on whether these are significant in practice. They include that the model is:
- (a) **Flexible:** It can apply to any offence and, depending on how the aggravating factor is drafted, it may define the characteristics protected in an open-ended way. The other legal models we discuss in Chapter 8 (specific hate crime offences and the Scottish hybrid model) are more specific and therefore usually more limited in scope than an open-ended sentence aggravation provision. The flexibility of the sentence aggravation model may make it more adaptable to changing social conditions and help to avoid unequal treatment of different groups of people.
 - (b) **Fact-specific:** The courts consider the seriousness of the hate motivation on the facts of the case and assess the offender's individual culpability. There is no default increase in the offender's sentence. This may reduce the likelihood of relatively minor expressions of hostility being punished disproportionately.
 - (c) **Efficient:** Hate motivation is determined by the sentencing judge (rather than being proven at trial). The sentencing judge can infer hate motivation from the summary of facts or evidence given at trial. If the defence challenges a fact relied on by the prosecutor to show the offence was hate-motivated, the prosecutor must prove that fact beyond reasonable doubt.³ As we discussed in Chapter 4, however, our impression is that such challenges are infrequent.
 - (d) **Consistent with the wider sentencing regime:** Hate motivation is considered at the same time as other aggravating factors. As we discussed in Chapter 4, some of these other factors may have an equal or greater impact on the seriousness of the offending, depending on the facts of a case.
 - (e) **Simple:** The sentence aggravation model avoids filling the statute book with numerous specific offences that would overlap with existing, more generic offences.
- 7.6 There may also be some general advantages to keeping the current legal model. People working in the justice system — including police officers, judges and lawyers — are already familiar with it. Any new model would need time to bed in and may create uncertainty in the beginning. Keeping the current model would avoid the cost and resourcing implications of major law reform.

ARE THERE WAYS TO IMPROVE THE SENTENCE AGGRAVATION MODEL?

- 7.7 In Chapter 5, we discussed some potential problems with the sentence aggravation model as it currently operates in Aotearoa New Zealand. In summary, some people think the current law does not:

² The Criminal Justice (No 2) (Northern Ireland) Order 2004, s 2. In relation to proposed changes to the law, see Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at 10 (recommendation 2); and Department of Justice (Northern Ireland) *Review of hate crime legislation in Northern Ireland — departmental response* (July 2021) at [9].

³ Sentencing Act 2002, s 24(2)(c).

- (a) provide strong enough denunciation of hate crime;
 - (b) encourage people to report hate crime;
 - (c) ensure hate motivation is consistently addressed in relevant cases;
 - (d) enable the collection of information about hate crime cases;
 - (e) provide enough clarity about how the hate crime aggravating factor should be applied; or
 - (f) ensure an offender's hate motivation is considered when assessing their rehabilitative needs.
- 7.8 If there are problems with the current law, we will need to consider whether they can be addressed while keeping the sentence aggravation model. We explore some options below. We invite feedback on whether these options — or others — could help to address any problems with the current law.

Denouncing hate crime

- 7.9 Some may consider the current law does not do enough to denounce hate crime because it does not communicate the nature of the offending to the public or adequately punish hate motivation. We discuss below three possible ways to strengthen the denunciatory effect of the current law.
- 7.10 In Chapter 5, we also explained that hate motivation is not included in criminal conviction history reports provided by Te Tāhū o te Ture | Ministry of Justice to the person concerned or to a third party with the person's consent (for example, for employment purposes). None of the options below would change that since criminal conviction history reports only refer to the type of offence. They do not record aggravating factors such as hate motivation. If this is causing significant problems in hate crime cases, it may be an argument in favour of adopting a different legal model (which we discuss in Chapter 8).

Require sentencing courts to state when they are relying on the aggravating factor

- 7.11 As we explained in Chapter 5, while the courts usually identify the aggravating factors they are relying on when sentencing an offender, that does not always occur. One option might be to require sentencing judges to state in open court (that is, in a court hearing the public and media can attend) when they are relying on the hate crime aggravating factor. This would also be recorded in the court's sentencing notes. This approach is taken in England and Wales, and Northern Ireland.⁴ It could help ensure that sentencing decisions consistently convey the seriousness of the offending to the public.

Review maximum penalties for existing offences

- 7.12 There may be a concern that the maximum penalties for certain offences are too low, so the courts cannot properly denounce the offender's conduct in hate crime cases. If this is an issue, the maximum penalties for those offences could be reviewed and increased if necessary. The maximum penalty for an offence should be high enough to allow all aggravating factors that are present in any case to be taken into account when

⁴ Sentencing Act 2020 (UK), s 66(2)(b); and The Criminal Justice (No 2) (Northern Ireland) Order 2004 (UK), s 2(2)(b).

sentencing an offender.⁵ Maximum penalties for certain offences were increased in Northern Ireland to ensure the hate crime aggravating factor could be adequately reflected.⁶

Require sentencing courts to explain the impact of hate motivation on the sentence

- 7.13 Finally, there may be concern that the current law fails to adequately denounce hate crime because it is not clear how much an offender’s hate motivation affected the sentence imposed. If that is the case, one solution might be to require the courts to state the difference the aggravating factor has made to the sentence (if any) and the reasons for that.⁷ This approach is taken in Scotland.⁸
- 7.14 This would be a significant change from the courts’ current sentencing practice. Sentencing courts generally consider all aggravating factors relating to an offence together when setting a starting point for the sentence. The impact of each individual aggravating factor is not quantified.

Increasing reporting of hate crime

- 7.15 In Chapter 5, we sought feedback on whether the work Police is doing to improve its response to hate crime may help to change the perception among some communities that hate crime is not taken seriously. Over time, this could increase reporting of hate crime by victims and witnesses. If there are still barriers to reporting hate crime, we are interested in feedback on how they can best be addressed. We discuss two options below.

Public awareness campaign

- 7.16 A public awareness campaign may be an option to encourage reporting of hate crime.⁹ It could inform the public about hate crime and the harm it causes, the fact that Aotearoa New Zealand already has hate crime laws and the different reporting options available (for example, reporting to Police face to face, online or anonymously through the organisation Crime Stoppers). It could send a message that any reports of hate crime will be treated seriously. This may help victims feel more supported by the wider community and more confident in reporting. It may also increase people’s willingness to speak up when they witness hate crime, which may encourage victims to report.¹⁰
- 7.17 Police has already produced some information resources about hate crime, but a larger-scale national campaign could reach a wider audience.¹¹ Hate crime awareness campaigns

⁵ Te Aka Matua o te Ture | Law Commission *Maximum penalties for criminal offences* (NZLC SP21, 2013) at [4.17].

⁶ See Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, September 2020) at [16.29] and The Criminal Justice (No 2) (Northern Ireland) Order 2004, s 4.

⁷ John Ip “Debating New Zealand’s Hate Crime Legislation: Theory and Practice” (2005) 21 NZULR 575 at 581–582.

⁸ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 2(2)(d).

⁹ See Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [5.298]. The Commission considered that raising awareness of reporting options was not a convincing argument for changing the law and a public awareness campaign may be a more targeted response to reporting concerns.

¹⁰ European Union Agency for Fundamental Rights *Encouraging hate crime reporting: The role of law enforcement and other authorities* (Luxembourg, 2021) at 46.

¹¹ Nga Pirihimana o Aotearoa | New Zealand Police “[Standing Together Against Hate](http://www.police.govt.nz)” <www.police.govt.nz>.

have been used overseas with some success.¹² In Aotearoa New Zealand, the “It’s not OK” campaign increased reporting of family violence.¹³

Alternative ways of reporting

- 7.18 Alternative ways of reporting could also be considered. In some countries, people can report hate crime through a third-party reporting service if they do not feel comfortable speaking to Police directly or disclosing their identity.¹⁴ These services are often run by community-based organisations and offer in-person or phone-based support. They can report a crime on behalf of a victim or other person and connect them with victim support services. This may be one way of involving Māori communities in the response to hate crime, as we discussed in Chapter 3. In Aotearoa New Zealand, hate crime (like other crime) can already be reported anonymously through Crime Stoppers.
- 7.19 Anonymous reporting has limitations. Police may be unable to investigate a crime properly if they do not know who the victim and/or witnesses are. However, anonymous reporting may still allow Police to monitor hate crime trends in different areas and against different groups of people. Third-party services may also be able to encourage people to share more information with Police by explaining the benefits of doing so and supporting them through the process.

Ensuring hate motivation is addressed in relevant cases

- 7.20 In Chapter 5, we sought feedback on whether hate motivation is being consistently addressed in investigations and prosecutions. To the extent that Police investigations may be an issue, it is likely too early to tell whether this will be resolved by recent changes in police training and guidance. There may, however, be ways to ensure that hate motivation is addressed more consistently by prosecutors and the courts.

Advice for prosecutors

- 7.21 One option might be for the Solicitor-General to provide advice to Crown solicitors on prosecuting hate crime. Police already has instructions on hate crime that include guidance for Police prosecutors. This may improve consistency in how Police prosecutors deal with hate crime. However, some hate crime cases are prosecuted by Crown solicitors rather than Police. It may be helpful for Crown solicitors to receive similar advice.
- 7.22 Currently, *The Solicitor-General’s Prosecution Guidelines* (which apply to all prosecutors, including Crown solicitors) state that prosecutors should place all proven or agreed facts before the court for sentencing purposes and make submissions on relevant aggravating factors.¹⁵ There is no specific reference to hate crime. There may be scope for more detailed advice prompting Crown solicitors to consider whether hate motivation is a

¹² See, for example, ‘Hate has no home in Scotland’ *Hate Crime Campaign 2017 Evaluation Report* (Scottish Government, May 2018).

¹³ Dr Michael Roguski ‘It’s not OK’ *campaign community evaluation project* (Ministry of Social Development, March 2015) at 20 and 28.

¹⁴ European Union Agency for Fundamental Rights *Encouraging hate crime reporting: The role of law enforcement and other authorities* (Luxembourg, 2021) at 50–51.

¹⁵ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General’s Prosecution Guidelines: Sentencing* | *Te Aratohu Aru a te Rōia Mātāmua o te Karauna: Te whiu* (1 January 2025) at [8] and [9.4].

factor at an early stage, to ensure there is adequate evidence of it and to raise it with the court at relevant stages in proceedings.

Flagging hate crime cases in the court system

- 7.23 Currently, the courts largely rely on prosecutors to raise hate motivation at sentencing and to ensure there is enough evidence for the courts to apply the aggravating factor. While Police has a flag in its National Intelligence Application system to identify perceived hate crime cases, there is no equivalent in the courts' case management system. There is no automatic prompt for a prosecutor to specify whether an offence was hate-motivated when laying a charge or for the court to consider hate motivation at sentencing.
- 7.24 A hate crime flag could be created in the courts' case management system. Family violence cases provide a possible model for this. Like hate crime, family violence can be prosecuted under various offences. When a person is charged with an offence, the prosecutor indicates on the charging document if it allegedly involved family violence.¹⁶ Court staff then apply a family violence flag in the case management system. At any stage in the proceeding, the judge can confirm, add or remove the family violence flag. If the defendant is convicted, the fact that the offence was a family violence offence is entered on the permanent court record. The flag helps to ensure family violence is considered by the court throughout the proceeding (including in bail and sentencing decisions). Including the information on the permanent court record means it can be taken into account in any later cases involving the same defendant.
- 7.25 A similar approach could be considered for hate crime cases. This would likely require legislative amendment¹⁷ and changes to information and communication technology (ICT) systems. Further work would be required on the process and standard of proof for determining whether an offence was hate-motivated. This may be more difficult than determining whether a case involves family violence (as the relationship between the victim and offender is often obvious or agreed).

Improving information about the outcome of hate crime prosecutions

- 7.26 In Chapter 5, we outlined improvements in Police data collection about perceived hate crimes. We noted, however, that there is still a gap in information about the outcome of hate crime prosecutions (for example, whether the defendant was convicted and what sentence was imposed) and whether hate motivation was taken into account at sentencing.
- 7.27 We discussed above the option of flagging hate crime cases in the court system. If this approach were adopted, it may also be possible for the courts to share information about flagged hate crime cases with Police. This could help Police to monitor how often hate motivation is raised by prosecutors and considered by the courts and to track the outcome of hate crime prosecutions. It could also provide Police with more accurate information about offenders who it may deal with again in future.

¹⁶ Criminal Procedure Act 2011, s 16A.

¹⁷ While it may be possible to implement a flag operationally, a provision similar to s 16A of the Criminal Procedure Act 2011 would help to ensure it is applied consistently and in a manner approved by Parliament.

Amending the hate crime aggravating factor

7.28 In Chapter 5, we sought feedback on three issues about the scope and application of the hate crime aggravating factor. These relate to how the courts decide whether an offence was hate-motivated, which characteristics are protected and whether the victim must be a member of the targeted group. If there are problems in these areas, it may be possible to resolve them by amending the wording of the aggravating factor. Some examples of possible amendments are discussed below, but the precise amendments would depend on the nature of the problems identified.

Hate motivation

- 7.29 One of the potential issues we raised in Chapter 5 is that it may not currently be clear how the courts determine whether an offence was hate-motivated. We noted a concern expressed by commentators that the relatively broad approach taken by the courts may lead to harsher sentences in cases where the hate motivation is only a trivial factor in the offending (although we have not seen evidence of this). If this problem is borne out, the aggravating factor could be amended to clarify the appropriate approach. For example, if the factor is being applied too readily, it could be amended to provide that the offender's hostility must materially contribute to the commission of the offence.
- 7.30 There is, however, a risk that this would be too high a bar for prosecutors to meet. It could mean the aggravating factor would not apply where an offender showed significant hostility towards the victim.
- 7.31 Similar issues will require consideration if a different legal model is adopted. For example, if specific hate crime offences were introduced, we would need to decide how the hate element of the offence should be defined. We discuss this in Chapter 8.

Protected characteristics

- 7.32 There may be some uncertainty about or dissatisfaction with the characteristics that are protected under the current law. If that is the case, legislative amendment could be considered. We discuss three possible changes below that submitters may wish to comment on. The detail of any amendment would depend on views about which characteristics should be covered by hate crime law, which we discussed and invited feedback on in Chapter 3.
- 7.33 First, the aggravating factor could be limited to a closed list of specific characteristics (rather than applying to any enduring common characteristic). This approach is taken in some other jurisdictions.¹⁸ It would reduce the risk of the courts applying the factor inconsistently or in a manner not anticipated or intended by Parliament. On the other hand, it could also limit the courts' ability to adapt if societal attitudes change and different groups of people become the target of hate crime. As noted earlier in this chapter, the flexibility of the sentence aggravation model is one of its potential advantages over other models.
- 7.34 Second, the list of examples of protected characteristics could be amended while keeping the general reference to enduring common characteristics. This would provide a clear

¹⁸ For example, England and Wales (Sentencing Act 2020, s 66); Northern Ireland (Criminal Justice (No 2) (Northern Ireland) Order 2004, s 2); and Tasmania (Sentencing Act 1997, s 11B).

signal to the courts about the characteristics that should be covered by the aggravating factor. It may be appropriate if we decide certain characteristics should be covered that the courts currently do not tend to consider (such as sex). Characteristics could also potentially be removed if the situations they tend to arise in are more directly addressed by other aggravating factors and their inclusion in the list is leading to confusion or double counting. For example, age and disability are often considered under the vulnerability factor.¹⁹ We found no examples of the hate crime aggravating factor applying to them, although there could be situations where offending targeting young, older or disabled people is motivated by hate rather than simply exploiting vulnerability.

- 7.35 Third, the term “enduring common characteristics” could be changed. As the court noted in *R v Pahau*, some of the characteristics listed as examples are potentially changeable and may not be considered “enduring” (such as religion, sexual orientation and gender identity).²⁰ Other jurisdictions with open categories of protected characteristics tend to use broader language. For example, the aggravating factors in some Australian jurisdictions apply to hate against any “group of people”²¹ or any “group of people with common characteristics”.²² In Canada, the aggravating factor applies to hate based on specific characteristics “or any other similar factor”.²³ However, removing the reference to “enduring” could extend the application of the factor to characteristics that some may not consider require the protection of hate crime laws (for example, members of a particular profession or people holding particular political views).

Reference to the victim

- 7.36 The hate crime aggravating factor currently only applies where the offender believed the victim had the relevant protected characteristic. This requirement could be deleted if it is unduly limiting the application of the factor. The aggravating factor would then apply to any offending motivated by hate towards a group of people based on a protected characteristic, regardless of who the victim is. This could include, for example, hate crimes where the victim is targeted due to their association with the relevant group of people. This approach is taken in some other jurisdictions.²⁴

Flagging hate crime offenders to Corrections

- 7.37 The final issue we sought feedback on in Chapter 5 is whether there is a problem identifying the rehabilitative needs of offenders. We discussed above the option of flagging hate crime offences in the courts’ case management system to help ensure the courts consider hate motivation consistently. If this was done, a further option might be

¹⁹ Sentencing Act 2002, s 9(1)(g).

²⁰ *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [39].

²¹ New South Wales (Crimes (Sentencing Procedure) Act 1999, s 21A(2)(h)); and Northern Territory (Sentencing Act 1995, s 6A(1)(e)).

²² Victoria (Sentencing Act 1991, s 5(2)(daaa)).

²³ Criminal Code RSC 1985 c C-46, s 718.2(a)(i). See also South Australia (the Sentencing Act 2017, s 11(1)(ca) lists certain characteristics “without limiting” the operation of the aggravating factor).

²⁴ For example, England and Wales (Sentencing Act 2020, s 66); Canada (Criminal Code RSC 1985 c C-46, s 718.2(a)(i)); Northern Ireland (Criminal Justice (No 2) (Northern Ireland) Order 2004, s 2); and the Northern Territory (Sentencing Act 1995, s 6A(1)(e)).

to automatically share that hate crime flag with Ara Poutama Aotearoa | Department of Corrections.²⁵ Corrections would then be notified if the courts found that offending was hate-motivated. This would involve some additional changes to ICT systems.

Question 6

If there are problems with how Aotearoa New Zealand's hate crime law is working, can they be addressed while keeping the current legal model (sentence aggravation)? If so, how?

²⁵ It appears this information could be shared under the Privacy Act 2020, s 172 and sch 4 (details of hearings).

CHAPTER 8

Other legal models for addressing hate crime

INTRODUCTION

- 8.1 As we discussed in Chapters 4–7, Aotearoa New Zealand currently uses the sentence aggravation model of hate crime law. If there are problems with the current law that stem from key features of the sentence aggravation model, it may be appropriate to adopt a different legal model. This chapter discusses the potential advantages and disadvantages of two other legal models and seeks feedback on whether either one of them should be adopted. They are:
- (a) specific hate crime offences (as recommended by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019); and
 - (b) the Scottish hybrid model, which combines aspects of the sentence aggravation model and the specific offence model.
- 8.2 In relation to specific hate crime offences, we also seek feedback on which offences they should cover, if adopted.
- 8.3 Our discussion of these models assumes they are used on their own. At the end of this chapter, we discuss whether the sentence aggravation model should also be kept if one of these alternative models is adopted.

SPECIFIC HATE CRIME OFFENCES

- 8.4 The Royal Commission recommended creating specific hate crime offences based on the approach in England and Wales. Under this model, hate motivation is an element of the offence a person is charged with. It must be proven at trial beyond reasonable doubt (unless the defendant pleads guilty). If the defendant is convicted, the fact that the offending was a hate crime should be clear in the court's sentencing notes and any media reporting since it forms part of the offence. It is also recorded in criminal records relating to the offender.

- 8.5 Specific hate crime offences exist in England and Wales, Western Australia and Queensland.¹ There is also a Bill before Parliament in the Republic of Ireland that would introduce specific hate crime offences.² In all these jurisdictions, hate crime offences correspond to existing criminal offences (such as assault and criminal damage). These existing offences are often called the ‘base offence’. The hate crime offence is the same as the base offence except the prosecution must also show the offender was motivated by hate. Hate crime offences have a higher maximum penalty than the base offence.
- 8.6 Laws that create offences must be reasonably specific so it is clear to the public what conduct is prohibited.³ In addition, a maximum penalty needs to be set out for each individual offence. Because of this, hate crime offences tend to cover a narrower range of conduct than the sentence aggravation model. Hate crime offences only cover:
- (a) a limited number of base offences; and
 - (b) protected characteristics that are specifically listed.
- 8.7 Hate crime offences do not typically cover very serious crimes that are already punishable by life imprisonment (such as murder).⁴ There is no need for a separate offence in this situation since the maximum penalty would be the same as for the base offence.⁵ However, this does mean the other potential benefits of hate crime offences discussed below (such as additional denunciation and improved recording) would not apply to very serious offending.
- 8.8 To help address some of these limitations of hate crime offences, England and Wales use the sentence aggravation model as well. Sentence aggravation can be relied on in cases where the specific offences do not apply. The Irish Bill proposes a similar approach. Although the Royal Commission did not specifically address this issue, since its recommendation was based on the approach in England and Wales, it may well have anticipated that sentence aggravation would be kept alongside specific offences. Later in this chapter, we discuss the option of keeping the sentence aggravation model in addition to any alternative model adopted.

¹ Crime and Disorder Act 1998 (UK), ss 28–32; Criminal Code Act Compilation Act 1913 (WA), ss 80I, 313, 317, 317A, 338B and 444; and Criminal Code Act 1899 (Qld), ss 52B, 69, 75, 207, 335, 339, 359, 359E and 469. The New South Wales Law Reform Commission touched on the possibility of creating hate crime offences in its report *Serious racial and religious vilification* (R151, 2024). It concluded this was outside the scope of its review but also expressed some concerns about creating hate crime offences (at [8.56]–[8.57] and [8.67]–[8.77]).

² Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022, pt 3.

³ As we discussed in Chapter 3, there is a general principle that offences should be clearly defined so that people can know in advance what is and is not prohibited: Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 123–124; Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at [1.3.1.1]; and AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [2.1.3].

⁴ The Law Commission in England and Wales recently considered whether to add specific hate crime offences corresponding to some serious offences punishable by life imprisonment and decided against this (Law Commission *Hate crime laws: Final report* (R402, December 2021) at [8.101]–[8.103]). It noted a submission from the Crown Prosecution Service that the essence of hate crime offences is their higher maximum penalty, and without this, they would create unnecessary complexity.

⁵ In England and Wales, there are specific provisions relating to the minimum period of imprisonment (MPI) for hate-motivated murder (Sentencing Act 2020 (UK), sch 21, cl 3(2)(g)–(h)). As we discussed in Chapter 4, although there is no direct equivalent in Aotearoa New Zealand, the courts have taken hate motivation into account when setting the MPI for murder.

- 8.9 If we recommend introducing specific hate crime offences, we will need to consider how to define the hate element of the offences. Hate motivation can be difficult to prove as there will often be no direct evidence of why a person committed an offence. In some jurisdictions, hate crime offences apply if the defendant “demonstrated hostility” towards the victim based on the victim’s membership of a protected group.⁶ This makes the offences easier to prove. It may, however, raise questions about whether the reasons for treating hate crime more seriously than other offending (which we discussed in Chapter 3) justify creating the offences. For example, a passing comment made by an offender to the victim may be enough to demonstrate hostility even though it may not reflect the offender’s actual motivation for offending (which may affect their level of culpability). In addition, it may not cause harm to the wider community the victim is a part of. We welcome any views on these issues.
- 8.10 Additionally, we will need to consider which base offences and protected characteristics any hate crime offences should cover. We sought views on the characteristics that should be protected by hate crime law in Chapter 3 and seek feedback on offence selection below.
- 8.11 We also discuss below some potential advantages and disadvantages of specific hate crime offences compared to the current sentence aggravation model. We are interested in feedback on whether submitters agree with these advantages and disadvantages and whether there are others we should consider.

What offence types should specific hate crime offences cover?

- 8.12 The Royal Commission recommended creating specific hate crime offences corresponding to the offences of offensive behaviour or language, assaults, wilful damage, intimidation, arson and intentional damage.⁷ It selected these offences after consideration of the hate crime offences in England and Wales.⁸
- 8.13 Offence selection is not straightforward. For example, as we discussed in Chapter 4, in Aotearoa New Zealand the hate crime aggravating factor has been applied at sentencing for other types of offences, such as murder, kidnapping, burglary and offences relating to the use or possession of weapons or explosives. These offences are not covered by the Royal Commission’s recommendation or the approach in England and Wales.
- 8.14 The current approach in England and Wales has also received some critical attention.⁹ In 2017, a Sussex University law reform project recommended several other offences be included.¹⁰ These included violent disorder, all sexual offences, theft and homicide. In

⁶ For example, England and Wales (Crime and Disorder Act 1998, s 28(1)(a)); and Western Australia (Criminal Code Act Compilation Act 1913, s 80I(a)).

⁷ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 762 (recommendation 39).

⁸ At 704. In England and Wales, there are specific hate-motivated offences for assault, criminal damage, public disorder, harassment and stalking: Crime and Disorder Act 1998 (UK), ss 29–32.

⁹ Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, October 2017); and Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021).

¹⁰ Mark Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, October 2017) at 198.

2020, the Law Commission of England and Wales considered the issue as part of its wider review of hate crime laws. Ultimately, the Commission did not recommend creating further hate crime offences.¹¹ In reaching this conclusion, its analysis was guided by the following criteria:¹²

- (a) The prevalence of particular offences as hate crimes.
- (b) The effect on the coherency and consistency of the criminal law. For example, in England and Wales, wounding with intent to do grievous bodily harm does not have a specific hate crime offence yet malicious wounding does. In practice, this has meant consideration of hate motivation is confusing for juries as often both offences are charged as alternatives.
- (c) Whether the maximum penalty is already high enough to reach the appropriate sentence. For example, when hate offences were introduced in England and Wales, it was decided they were not needed where the existing offence already has a maximum penalty of life imprisonment.
- (d) Whether it would be unnecessarily burdensome to prove the hate motivation as part of the offence. For example, sexual assault is already difficult to prosecute. Adding hate motivation as an element of the offence may make it more difficult and encourage prosecutors to pursue the existing offence as an alternative.

8.15 If specific hate crime offences are adopted, we are interested in feedback on what offences they should cover and why.

Question 7

If specific hate crime offences are adopted, what offences should they cover? Why?

Potential advantages of specific offences

May more strongly denounce hate crime

- 8.16 Specific offences are said to have a strong symbolic function of denouncing hate crime. Convicting a person of a specific hate crime offence may send a clearer message to the offender, targeted communities and wider society that this type of offending will be treated seriously.
- 8.17 The higher maximum penalties for specific offences may be considered necessary to reflect the gravity of hate crime and the harm it causes. However, the sentences imposed for hate crime offences in England and Wales rarely exceed the maximum penalty for the base offence.¹³

¹¹ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at 331 (recommendation 14).

¹² Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.47]–[16.68]; and Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.74] and [8.91]–[8.134].

¹³ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.33]; and Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.122]–[4.129].

- 8.18 In practice, the potential for stronger denunciation would depend on defendants being charged with and convicted of a specific hate crime offence (as opposed to the base offence). As we discuss below under “potential disadvantages of specific offences”, there are several reasons why this may not occur.

May improve recording and monitoring of hate crimes

- 8.19 If a defendant is charged with or convicted of a specific hate crime offence, hate motivation is clear from the offence type. This may make it easier for Ngā Pirihimana o Aotearoa | New Zealand Police, the courts and Ara Poutama Aotearoa | Department of Corrections to identify hate crime cases. In turn, this could help ensure that hate motivation is consistently addressed in criminal prosecutions and when assessing an offender’s rehabilitative needs. It may also make it easier for Police and Te Tāhū o te Ture | Ministry of Justice to track case outcomes, assess progress in responding to hate crimes and provide information to the public.
- 8.20 This improved recording and monitoring would be limited to cases where the defendant is charged with a specific hate crime offence. It would not assist in cases where the defendant commits a type of offence for which there is no hate-motivated equivalent or where the defendant is charged with the base offence instead. Separate recording mechanisms may still be required for these cases.

May lead to more consistent investigation and prosecution of hate crimes

- 8.21 The Royal Commission suggested that introducing specific offences may increase hate crime prosecutions.¹⁴ Making hate motivation an element of offences may prompt investigators and prosecutors to consider it at an early stage and to build cases around it. This could lead to hate motivation being raised more consistently and effectively in the courts. We invite feedback on whether this is a likely outcome of adopting specific offences. As we discuss below, there is also a risk that the opposite may be true — hate motivation may be raised in fewer cases because it could become more difficult to prove.

May increase reporting of hate crimes

- 8.22 The Royal Commission thought creating specific offences would encourage people to report hate crimes to Police by showing they are taken seriously.¹⁵ As we discussed in Chapter 5, there are various reasons why people may not report hate crimes. We are interested in feedback on whether creating specific offences is likely to address barriers to reporting. Low reporting rates for hate crimes are still a challenge in jurisdictions that have specific offences.¹⁶

¹⁴ William Young and Jacqui Caine *Hate speech and hate crime-related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

¹⁵ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703.

¹⁶ See, for example, Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [7.9] and [7.48]–[7.68]; and Sarah Ingles “Legislating against Hate: Why Ohio’s Hate Crime Statute, and the Sentencing Enhancements That Support It, Cannot Remedy Institutional Problems and Continued Bigotry” (2018) 46(4) *Cap U L Rev* 701 at 725–726.

May impact societal attitudes

8.23 The Royal Commission suggested that having specific hate crime offences is likely to have some deterrent effect and an effect on societal norms.¹⁷ We invite feedback on this. The Law Commission of England and Wales has suggested that, because the conduct involved in hate crime is already unlawful, specific offences are unlikely to have any additional direct deterrent effect.¹⁸ As we discussed in Chapter 3, higher penalties have not been shown to deter offenders. There is, however, a further possibility that specific offences may have an indirect deterrent effect on society as a whole by raising awareness of the greater harm and culpability associated with hate crime. Over time, this could help to reduce hate crime.

May be fairer to the defendant

8.24 Under specific hate crime offences, a defendant's hate motivation needs to be proven at trial beyond reasonable doubt (unless the defendant pleads guilty). This may be considered fairer to the defendant than having the judge determine the issue at sentencing. It is also arguable, however, that fairness can be achieved under the sentence aggravation model provided defendants know they are able to challenge allegations of hate motivation for sentencing purposes.¹⁹

Potential disadvantages of specific offences

Do not address all hate crimes

8.25 As explained above, specific offences only address certain types of offending based on certain protected characteristics. They cannot address all hate crime. If hate crime offences were introduced in place of sentence aggravation, it would reduce the protections provided by the current law in some ways. Hate motivation would not be recognised at all in cases falling outside the scope of the hate crime offences.

8.26 If the sentence aggravation model were kept as well as specific offences, different kinds of hate crime would be treated differently. The stronger denunciation provided by specific hate crime offences would be limited to certain types of offences and protected characteristics. As discussed above, specific offences would not necessarily cover the most serious hate crimes. The response to hate crimes not covered by specific offences could be seen as inadequate and unfair to the targeted communities.

¹⁷ William Young and Jacqui Caine *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 704.

¹⁸ See Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.98]–[4.100].

¹⁹ Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.148]–[4.154]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.23].

Likely to increase complexity and cost

- 8.27 Introducing specific offences would add complexity to the law and criminal trials.²⁰ This is likely to increase costs in the justice system and the time taken to resolve cases. For example:
- (a) Prosecutors would need to assess the quality of the evidence on hate motivation and decide whether to charge a defendant with a hate crime offence or with the base offence. They may charge a defendant with both offences as alternatives in case the hate motivation cannot be proven.²¹ This may complicate charging practices and trials.
 - (b) If hate crime offences have a higher maximum penalty, that may mean the case is tried by a jury rather than by a judge.²²
 - (c) Defendants may be less likely to plead guilty to a hate crime offence given the higher maximum penalty and increased public stigma associated with conviction.²³ This may lead to more cases going to trial.
 - (d) Where the defendant pleads not guilty, the prosecution would need to prove the hate motivation at trial beyond reasonable doubt. It is likely that evidence of hate motivation would be challenged by the defendant since it would be critical to their conviction for a hate crime offence. This may require more extensive witness evidence and cross-examination than usually occurs under the current law (including, potentially, more detailed cross-examination of victims).
- 8.28 Additionally, if hate crime offences led to longer sentences for offenders, this would come with increased costs to the Corrections system. It would also have socio-economic costs (including the offender's loss of productivity while imprisoned, loss of future employment opportunities and the consequential effects on the offender's whānau or family).

May lead to hate motivation going unrecognised in some cases

- 8.29 In some situations, prosecutors could charge a person with the base offence instead of the corresponding hate crime offence to secure a guilty plea.²⁴ This decision may be based on resource considerations, the interests of the victim or potential difficulty in proving the hate element of the offence. *The Solicitor-General's Prosecution Guidelines*

²⁰ See Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.159]–[4.164]; Department of Justice (Ireland) *Learnings from Approaches to Hate Crime in Five Jurisdictions* (December 2020) at 62–63; and *Select committee on religious offences in England and Wales: Volume I — Report* (HL Paper 95-1, 10 April 2003) at [118](i) and [120].

²¹ This appears to be common practice in England and Wales: see Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.62]; and Abenaa Owusu-Bempah, Mark Austin Walters and Susann Wiedlitzka “Racially and Religiously Aggravated Offences: “God’s gift to defence”?” (Sussex Research Online, 2019) at 6–7.

²² Criminal Procedure Act 2011, ss 6 and 71–74.

²³ Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.175]–[4.177].

²⁴ Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.178]–[4.180]; Abenaa Owusu-Bempah, Mark Austin Walters and Susann Wiedlitzka “Racially and Religiously Aggravated Offences: “God’s gift to defence”?” (Sussex Research Online, 2019) at 10–11; Organization for Security and Cooperation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, 2022) at 42–43; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.24].

acknowledge that plea arrangements can be beneficial in relieving victims of the burden of the trial process and avoiding the costs of a trial.²⁵

- 8.30 More generally, when prosecutors have multiple charging options, they select the charge that best reflects the seriousness of the offending.²⁶ In some less serious hate crime cases, it is possible prosecutors would only charge the defendant with the base offence for this reason (particularly since it would be easier to prove).
- 8.31 Even where a person is charged with a specific hate crime offence, they may not be convicted of it. There is some indication in England and Wales that juries are more reluctant than judges to find that offending was hate-motivated because they do not wish to “label” the defendant (for example, as a racist).²⁷

May mean hate motivation is given too much weight

- 8.32 Creating specific hate crime offences would treat hate motivation more seriously than other aggravating factors that are only considered at sentencing. However, the relative significance of aggravating factors differs from case to case.²⁸ Depending on the facts, other aggravating factors can have a greater impact on the seriousness of the offending than hate motivation (for example, serious cruelty, the use of a weapon or exploitation of a vulnerable victim).

May focus trials on the defendant’s beliefs or character in a way that is unhelpful

- 8.33 Hate crime trials could provide a platform for defendants to promote hateful ideologies.²⁹ Conversely, evidence of hate motivation could also be prejudicial to defendants. It could lead a jury to form a poor view of the defendant’s character, which could unfairly influence its overall finding of guilt or innocence. This may create difficult questions for the court about what evidence the prosecution can present to prove hate motivation. For example, evidence of a defendant’s previous offending or conduct may be necessary to prove they have prejudicial beliefs that motivated the offending they are now charged with. Such evidence is likely to be classed as “propensity evidence”. The admission of propensity evidence is limited by the Evidence Act 2006 to guard against judges and juries making prejudicial assumptions about defendants.³⁰

²⁵ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General’s Prosecution Guidelines: Decisions to prosecute* | Te Aratohu Aru a te Rōia Mātāmua o te Karauna: Te whakatau ki te aru (1 January 2025) at [58].

²⁶ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General’s Prosecution Guidelines: Decisions to prosecute* | Te Aratohu Aru a te Rōia Mātāmua o te Karauna: Te whakatau ki te aru (1 January 2025) at [52].

²⁷ Law Commission (England and Wales) *Hate Crime: Should the Current Offences Be Extended?* (R348, 2014) at [4.175] and [5.19]; and Abenaa Owusu-Bempah, Mark Austin Walters and Susann Wiedlitzka “Racially and Religiously Aggravated Offences: “God’s gift to defence”?” (Sussex Research Online, 2019) at 21–23.

²⁸ See Te Aka Matua o te Ture | Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes against the person* (NZLC R111, 2009) at [3.4].

²⁹ For discussion of a similar argument in relation to terrorism offences, see Roger Douglas “Must terrorists act for a cause? The motivational requirement in definitions of terrorism in the United Kingdom, Canada, New Zealand and Australia” (2010) 36(2) *Comm Law Bull* 295 at 303, citing Kent Roach “The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive” in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror* (Federation Press, Sydney 2007).

³⁰ Evidence Act 2006, s 43.

May raise human rights concerns

- 8.34 Most criminal offences do not turn on a person's motives for acting. They are only concerned with a person's actions and whether they are culpable for those actions (for example, because they acted with intent). Some people consider it is inappropriate to punish one offender more harshly than another based on their motivations rather than their actions, suggesting it infringes rights such as freedom of thought and expression.³¹
- 8.35 A related objection has been raised in the context of terrorism offences, which also include a motive element.³² Some commentators have argued that including motive as an element of terrorism offences has a chilling effect on the free expression of opinions and beliefs — particularly those that are outside the mainstream — since it prompts more extensive investigation into suspects' opinions and beliefs.³³
- 8.36 To some extent, these arguments could already apply to the use of hate motivation as an aggravating factor at sentencing under the current law. We are interested in feedback on whether creating specific hate crime offences would heighten these concerns by placing greater emphasis on the offender's motivation and increasing the maximum available penalties.

May exacerbate justice system inequities

- 8.37 There is a risk that hate crime offences (and therefore longer sentences) would be disproportionately enforced against minorities and lower socio-economic groups.³⁴ In particular, hate crime offences may have a disproportionate impact on Māori. As we discussed in Chapters 2 and 3, Māori are overrepresented at all levels of the criminal justice system, including as perceived hate crime offenders. This engages the Crown's obligations under Te Tiriti o Waitangi | Treaty of Waitangi. Some have suggested the Crown's obligations under the Treaty mean that criminal liability should not be expanded.³⁵

THE SCOTTISH HYBRID MODEL

- 8.38 Scotland's hate crime law combines aspects of the sentence aggravation model and specific hate crime offences. Under the Scottish model, any offence can be "aggravated

³¹ See, for example, Free Speech Union "["Hate' is subjective: whether speech or crime"](http://www.fsu.nz) <www.fsu.nz>.

³² The offence of carrying out a terrorist act requires an act be done with the purpose of "advancing an ideological, political, or religious cause" (Terrorism Suppression Act 2002, ss 5(2) and 6A(1)).

³³ See David Small "The Uneasy Relationship between National Security and Personal Freedom: New Zealand and the War on Terror" (2011) 7(4) Int J Law Context 467 at 477; Edwina MacDonald and George Williams "Combating terrorism: Australia's Criminal Code Since September 11, 2000" (2007) 16(1) Griffith Law Rev 27 at 30, citing Kent Roach "The World Wide Expansion of Anti-Terrorism Laws after 11 September 2001" (2004) 116 Studi Senesi 487 at 491; and Roger Douglas "Must terrorists act for a cause? The motivational requirement in definitions of terrorism in the United Kingdom, Canada, New Zealand and Australia" (2010) 36(2) Comm Law Bull 295 at 305.

³⁴ Sarah Ingles "Legislating against Hate: Why Ohio's Hate Crime Statute, and the Sentencing Enhancements That Support It, Cannot Remedy Institutional Problems and Continued Bigotry" (2018) 46(4) Cap U L Rev 701 at 720 and 729–736.

³⁵ Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince (eds) *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 76.

by prejudice” (Scotland uses the word “prejudice” instead of “hate” or “hostility”).³⁶ The prosecutor must specify that an offence was aggravated by prejudice when the defendant is charged, and the aggravation must be proven at trial (unless the defendant pleads guilty). If the defendant is convicted of the offence with the aggravation, the court must:³⁷

- (a) state that the offence was motivated by prejudice and the type of prejudice (by specifying the protected characteristic targeted);
- (b) record the conviction in a way that shows the offence was motivated by prejudice and the type of prejudice;
- (c) take the aggravation into account when sentencing the offender; and
- (d) state the difference between the sentence imposed and that which would have been imposed without the aggravation (where there is a difference) and the reasons for that difference (or lack of difference).

8.39 This model does not create separate offences.³⁸ The maximum penalty for an offence remains the same whether or not it is aggravated by prejudice. Sentencing judges are also not required to impose a higher penalty than would otherwise have been imposed.³⁹

8.40 The Scottish model is therefore a hybrid of the sentence aggravation and specific offence models:

- (a) Like the sentence aggravation model, hate motivation (or “prejudice” in the Scottish legislation) is treated as an aggravating factor at sentencing and does not alter the maximum penalty. It can apply to any offence.
- (b) Like the specific offence model, the aggravation must be specified when the defendant is charged and proven at trial. The aggravated nature of the offending and the type of prejudice involved is also recorded on the conviction.

8.41 A review in Northern Ireland (which currently uses the sentence aggravation model) recommended adopting the Scottish hybrid model.⁴⁰ The Government has accepted this recommendation and is in the process of drafting legislation.⁴¹ The Law Commission of England and Wales also considered the hybrid model in a recent review and said it had “significant merit”.⁴² Ultimately, however, it favoured keeping specific offences since they were already well established and removing them could send the wrong message.⁴³ It

³⁶ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 1.

³⁷ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 2.

³⁸ Alistair P Campbell *Independent Review of Hate crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [3.2].

³⁹ Alistair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [10.38].

⁴⁰ Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, November 2020) at 10 (recommendation 2).

⁴¹ Department of Justice *Review of hate crime legislation in Northern Ireland – departmental response* (July 2021) at [9]; and (4 June 2024) 160 Northern Ireland Assembly Hansard 41–42 (Hate Crime Legislation in Northern Ireland, Naomi Long MLA).

⁴² Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.158].

⁴³ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.32] and [16.34]; and Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.50].

was also concerned that requiring the prosecution to prove the aggravation at trial would be disproportionate in the absence of an increased maximum penalty.⁴⁴

- 8.42 A limitation of the Scottish hybrid model is that, like the specific offence model, it only applies to specified protected characteristics (as opposed to an open category such as any “enduring common characteristic”). This is arguably necessary to provide adequate certainty since the type of prejudice forms part of the charge against the defendant and is recorded on any conviction. Although the Scottish hybrid model does not create new offences, it shares many of the characteristics of a separate offence. A similar level of certainty may be needed to ensure members of the public are forewarned that they may be convicted of an aggravated offence. We are interested in feedback on whether it would be necessary to limit the hybrid model to specified protected characteristics or whether it could be appropriate to use an open category of characteristics (as is often done under the sentence aggravation model).
- 8.43 If we recommend introducing the Scottish hybrid model, we will need to consider which protected characteristics it should cover. We sought views on the characteristics that should be protected by hate crime law Chapter 3. We will also need to decide how hate motivation would be proven. This would involve similar considerations to those discussed above in relation to defining the hate element of specific hate crime offences.
- 8.44 We discuss below some potential advantages and disadvantages of the Scottish hybrid model compared to the current sentence aggravation model and the specific offence model. We are interested in feedback on whether submitters agree with these advantages and disadvantages and whether there are others we should consider.

Potential advantages and disadvantages of the Scottish hybrid model

- 8.45 The Scottish hybrid model is similar to the specific offence model in that the hate motivation would form part of the charge against the defendant, would need to be proven at trial (unless the defendant pleads guilty) and would be recorded as part of the conviction. Because of this, it would share many of the potential advantages and disadvantages of the specific offence model. These are the main differences between the two models:
- (a) The hybrid model may provide slightly less denunciation than the specific offence model since it would not increase the maximum penalties for hate crimes.
 - (b) The hybrid model would apply in a wider range of hate crime cases than the specific offence model since it can apply to any offence. For example, it could provide increased denunciation and improved recording of very serious hate crimes such as murder, which do not usually have corresponding hate crime offences.
 - (c) The hybrid model would be simpler to implement than the specific offence model. It would not involve creating numerous separate offence provisions with different maximum penalties.
 - (d) The hybrid model would create less disparity in how different hate crimes are treated since it could apply to any offence. It could still lead to unequal treatment of different hate crime victims if (as in Scotland) it only applied to specified protected

⁴⁴ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.51]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.172] and [17.49].

characteristics. However, this risk could be mitigated by making the list of protected characteristics quite wide.

- (e) The hybrid model may be slightly less complex and costly than the specific offence model. Because maximum penalties would not change, an aggravated charge would be heard by the same decision maker (judge or jury) as the equivalent non-aggravated charge. However, cases may still take longer to resolve than under the sentence aggravation model. Defendants may be less likely to plead guilty since the aggravation would go on their criminal record, and the aggravation would then need to be proven at trial.
 - (f) The hybrid model may be less likely to exacerbate justice system inequities compared to the specific offence model since it would not increase the maximum penalty that can be imposed on an offender. However, other impacts (such as those that may flow from having hate motivation recorded on a person's criminal record) may still disproportionately affect minorities and lower-socio-economic groups.
- 8.46 A key argument against the Scottish hybrid model is that requiring prosecutors to prove hate motivation at trial would be disproportionate to the benefits of doing so since the maximum penalty for an aggravated offence would remain the same as for the non-aggravated one.⁴⁵ This may mean prosecutors are less inclined to pursue the aggravation than they would be under the sentence aggravation model (where hate motivation is often not disputed) or the specific offence model (where a higher maximum penalty applies).

Question 8

Should a different legal model, such as specific hate crime offences or the Scottish hybrid model, be introduced in Aotearoa New Zealand? Why or why not?

SHOULD SENTENCE AGGRAVATION BE KEPT IF A NEW LEGAL MODEL IS ADOPTED?

- 8.47 If either of the alternative models discussed above is adopted, we seek feedback on whether to keep the existing sentence aggravation model (or an amended version of it) as well. If specific hate crime offences were adopted, sentence aggravation could apply to offences for which there is no hate-motivated equivalent (except those carrying a mandatory life sentence). If either the specific offence or Scottish hybrid model were adopted, sentence aggravation could apply to protected characteristics they do not cover. As noted above, this is likely what the Royal Commission anticipated when recommending specific hate crime offences.
- 8.48 This approach would achieve the benefits of an alternative model while reducing concerns about its scope. It would keep the flexibility of the sentence aggravation model in cases not covered by the alternative model. There may be a stronger case for keeping

⁴⁵ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.51]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.172] and [17.49].

the sentence aggravation model if the specific offence model were adopted, since it is more limited in scope than the Scottish hybrid model.

- 8.49 A disadvantage of keeping the sentence aggravation model alongside another model is that it would increase the complexity of the law. There may be confusion over which hate crime law applies in which cases. There would need to be rules about when sentence aggravation could apply. For example, could the prosecution rely on sentence aggravation where they could have charged a defendant with a specific hate crime offence but chose not to?
- 8.50 England and Wales use the sentence aggravation model as well as having specific hate crime offences. The Law Commission of England and Wales recently recommended keeping this approach, saying the flexibility of sentence aggravation is a proportionate way to deal with other types of offending not covered by a specific offence.⁴⁶ Western Australia and Queensland, which also have specific hate crime offences, do not use the sentence aggravation model, and nor does Scotland, where the hybrid model is used. A single-model approach is simpler but means some groups of people and/or offences are not covered by hate crime laws at all.

Question 9

If specific hate crime offences or the Scottish hybrid model are introduced, should the sentence aggravation model be kept as well?

⁴⁶ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.26] and [8.48]–[8.49] (note the Commission refers to sentence aggravation as “enhanced sentencing”).

APPENDIX

Terms of reference

PROJECT OVERVIEW

Te Aka Matua o te Ture | Law Commission will review the law in Aotearoa New Zealand relating to hate crime, with a focus on whether the law should be changed to create new hate-motivated offences. For the purpose of this review, “hate crime” means conduct that is already a criminal offence under New Zealand law and, additionally, is carried out because of hatred or hostility toward a group of people who share a common characteristic (such as race, colour, nationality, religion, gender or sex, gender identity, sexual orientation, age or disability).

Currently, the law in Aotearoa New Zealand responds to hate crimes at sentencing. If a person commits a crime because of hostility toward a group of people who share an “enduring common characteristic”, the court must consider this as an aggravating factor at sentencing (see section 9(1)(h) of the Sentencing Act 2002).

The Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 recommended the creation of new hate-motivated offences. In particular, recommendation 39 proposed that new hate-motivated offences be created in:

- the Summary Offences Act 1981 (corresponding with the existing offences of offensive behaviour or language, assault, wilful damage and intimidation); and
- the Crimes Act 1961 (corresponding with the existing offences of assaults, arson and intentional damage).

SCOPE OF THE REVIEW

The Law Commission’s review will include, but not be limited to, consideration of:

- Whether the current law in Aotearoa New Zealand adequately responds to hate crime (in particular section 9(1)(h) of the Sentencing Act 2002, which requires hostile motivation to be taken into account when sentencing an offender).
- Whether any concerns about the operation of the current law should be addressed through legislative (or operational) measures, for example, the creation of hate-motivated offences.
- If hate-motivated offences should be created:
 - which existing offences they should correspond to;
 - which common characteristics they should cover;
 - how the hatred or hostility element of the offences should be established;
 - what maximum penalties are appropriate; and

- whether any amendments to the Sentencing Act are desirable to take account of the new offences and to ensure hate crime offenders are sentenced appropriately.

In making recommendations for reform the Law Commission will take into account te ao Māori and give consideration to the multicultural character of New Zealand society.

The review will not consider criminalising conduct that does not currently amount to an offence under New Zealand law. For the avoidance of doubt, the review will not consider recommendations 40 and 41 of the Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, which concern:

- the law relating to hate speech, including sections 61 and 131 of the Human Rights Act 1993; and
- the definition of when a publication is “objectionable” in section 3 of the Films, Videos, and Publications Classification Act 1993.

TIMING AND PROCESS

The Law Commission intends to publicly consult in early 2025.

The Law Commission intends to report to the Minister responsible for the Law Commission with its recommendations by mid-2026.

ABOUT THE LAW COMMISSION

The Law Commission is an independent Crown agency that provides law reform advice to the Government. The Government does not direct how we carry out our work or the recommendations we make.

We undertake research and engagement, and then make recommendations to Government to improve the law. These recommendations are published in a report to the Minister of Justice. The Minister must present our report to Parliament.

The Government decides whether and how it will change the law. You can find out more about what we do on the Law Commission website.



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