

**Hara ngākau kino**

**Hate crime**

**Summary of submissions**

# Contents

<b>Overview .....</b>	<b>3</b>
What we asked submitters .....	4
The submissions .....	7
Other issues raised by submitters .....	9
Other feedback collated by the free speech union .....	11
<b>Hate crime and its impacts .....</b>	<b>12</b>
<b>Reform considerations .....</b>	<b>22</b>
Overview .....	22
The need to treat hate crime more seriously .....	23
Guidance on when it is appropriate to create new offences .....	28
Tikanga .....	30
Te Tiriti o Waitangi   Treaty of Waitangi .....	32
Human Rights .....	36
Selecting protected characteristics .....	40
<b>Sentence aggravation model — problems and options for reform .....</b>	<b>53</b>
Overview .....	53
Denouncing hate crime .....	59
Encouraging reporting of hate crimes .....	66

Ensuring hate motivation is addressed in relevant cases ..	72
Collecting information about hate crime .....	82
Applying the aggravating factor .....	88
Assessing the rehabilitative needs of offenders .....	97
Other concerns raised.....	100
Other suggestions to improve the sentence aggravation model .....	101
<b>Other legal models to address hate crime.....</b>	<b>105</b>
Overview .....	105
Adopting a different model .....	105
Base offences covered by the specific offence model.....	117
Keeping the sentence aggravation model if a different model is adopted.....	123
<b>Appendix 1: List of submitters .....</b>	<b>126</b>
<b>Appendix 2: Other feedback collated by the Free Speech Union .....</b>	<b>129</b>

# Overview

1. The Minister of Justice has asked Te Aka Matua o te Ture | Law Commission to review the law relating to hate crime. This referral follows a recommendation by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain (Muslim places of worship) on 15 March 2019 to create new hate crime offences.
2. Under the current law in Aotearoa New Zealand, an offender's hate motivation must be taken into account at sentencing. We are looking at whether the law should be changed (for example, to create new hate crime offences). The Terms of Reference for the review are available on our website.
3. On 4 February 2025 we published a Consultation Paper seeking submissions about the law on hate crime. We also published a summary of our Consultation Paper in a range of languages and accessible formats and provided an online submission form that submitters could use. Submissions were open for a six-week period, closing on 13 March 2025.
4. This document summarises the submissions we received. We have included the main points from submissions (where these are sufficiently clear). We have excluded information from this summary if a submitter requested we do not publish it.

## WHAT WE ASKED SUBMITTERS

5. Our Consultation Paper discussed a range of issues and asked nine questions, as follows:

### **Hate crime and its impacts**

6. Chapter 2 provided an overview of what hate crime is, its impacts and what we know about hate crime in Aotearoa New Zealand. We asked submitters:

**Question 1:** Is there anything you would like to tell us about what hate crime is occurring in Aotearoa New Zealand and its impacts?

### **Reform considerations**

7. Chapter 3 identified some key considerations that will help us decide whether reform is needed and, if so, evaluate any options for reform. We asked submitters:

**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?

### **Sentence aggravation model — problems and options for reform**

8. Chapter 4 explained that the current law requires judges to take an offender's hate motivation into account as an aggravating factor when they are sentenced (section 9(1)(h) of the Sentencing Act 2002). We referred to this as the 'sentence aggravation model' of hate crime law. We also discussed how the current law is working in practice, from police investigations through to the sentencing and rehabilitation of offenders.
9. Chapters 5 and 7 discussed whether there are problems with how the current law is working and, if so, whether they can be addressed without changing the legal model. We outlined potential advantages of keeping the sentence aggravation model and suggested ways in which the operation of the current law could be improved. We asked submitters:

**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?

### **Other legal models to address hate crime**

10. Chapter 8 discussed whether to adopt a different legal model to the current sentence aggravation model. We outlined the potential advantages and disadvantages two other legal models and sought feedback on whether either one of them should be adopted. The alternative models are:
  - (a) specific hate crime offences, as recommended by the Royal Commission; and
  - (b) the Scottish hybrid model, which combines aspects of the sentence aggravation model and the specific offence model.
11. We also explained that, if we recommended adopting the specific offence model, we would need to decide what offences should be covered by it. In addition, if we recommended adopting either of the alternative models, we would need to decide whether the current sentence aggravation model should be retained as well. We asked submitters:

**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?

**Question 9:** If specific hate crime offences or the Scottish hybrid model are introduced, should the sentence aggravation model be kept as well?

## THE SUBMISSIONS

12. We received 96 submissions in total. These are available on our website.
13. In this document, we refer to submitters by name unless they requested that their name not be published.<sup>1</sup> When referring to submitters who made such a request we use the submission number.

SUBMISSION TYPES	
On behalf of organisations	By individuals
26	70

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<sup>1</sup> There is also one submission (Submission 50) that we decided not to publish at all to protect the privacy of the submitter and third parties, and because publication could expose the Law Commission to legal liability. We refer to it in this document by the submission number.



14. Our summary of the feedback received is organised into four sections:
  - (a) Hate crime and its impacts.
  - (b) Reform considerations.
  - (c) Sentence aggravation model — problems and options for reform.
  - (d) Other legal models to address hate crime.
15. The submissions we received represent a range of views, affected communities and interest groups. Many submitters told us that hate crime causes serious social harm. Submitters also generally agreed that several factors need to be weighed in deciding whether reform is needed, although there were some differences among submitters on what those factors should be or how they should be applied. Submitters were evenly divided on whether there are problems with the current law. Likewise, there was no consensus among submitters on whether to adopt a new legal model for responding to hate crime. In particular, there was no clear consensus among affected communities that creating new hate crime offences would be the best approach.

## OTHER ISSUES RAISED BY SUBMITTERS

16. In addition to responses on the questions we asked, many submitters commented on matters about the review more generally. This included:
- (a) Concerns that the scope of our review is too narrow because it does not include hate speech.<sup>2</sup> Some submitters emphasised that hate speech, including online hate, can lead to hate crimes. They felt that separating out hate speech and hate crime would leave a gap in the legal response.
  - (b) Opposition to hate crime laws in general.<sup>3</sup> In many cases it was unclear whether these submitters opposed new hate crime laws, the existing aggravating factor in the Sentencing Act and/or hate speech laws.
  - (c) Comments on the subjectivity of the concept of ‘hate’ or the difficulty of defining it.<sup>4</sup> Many saw this as a

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2 Disabled Persons Assembly and VisAble (joint submission); Clive Elliot KC; Dr Sanjana Hattotuwa; Russell Hoban; Submission 26; Submission 77; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

3 George Balani; Gary Durey; David F; M Guenole; Rex Landy; Richard Lillywhite; Andrew Marchant; Graeme Minchin; Submission 53; Submission 60; Submission 62; Submission 64; Submission 65; Submission 68; Submission 71; Submission 73; Submission 76; Submission 79; and Fergus Wheeler.

4 George Balani; Dr David Bromell; Destiny Church; Gary Durey; David F; Family First; Free Speech Union; Dr David Harvey; Brian Jones; Karun Lakshman;

reason not to create hate crime offences, as the offences would likely be applied inconsistently and be open to misuse. Others suggested alternative language should be used instead of ‘hate’, such as hostility or prejudice.

- (d) Comments on the need to address broader issues around social cohesion.<sup>5</sup>
- (e) The suggestion that the Royal Commission’s recommendation to create hate crime offences should not be given too much weight, given the narrow focus of the Royal Commission’s inquiry on the March 15 terrorist attacks.<sup>6</sup>

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Maire Leadbeater; David Le Breton; Lesbian Action for Visibility in Aotearoa; Dr John McDonald-Wharry; Tim O’Sullivan; Submission 53; Submission 62; Submission 63; Submission 64; Submission 65; Submission 76; Submission 78; Submission 79; Submission 88; The Law Association of New Zealand Public and Administrative Law Committee; Fergus Wheeler; and Women’s Rights Party.

<sup>5</sup> Grace Carroll; Submission 26; and Submission 90.

<sup>6</sup> Dr David Harvey; Free Speech Union; and Karun Lakshman.

## **OTHER FEEDBACK COLLATED BY THE FREE SPEECH UNION**

17. We also received other feedback in the form of template responses collated by the Free Speech Union. We summarise this feedback separately in Appendix 2.

# Hate crime and its impacts

## OVERVIEW

18. In this section we summarise responses to Question 1, which sought general feedback about hate crime occurring in Aotearoa New Zealand and its impacts. Fifty-three submitters discussed this topic.

### Nature of hate crime

19. Eleven submitters discussed the nature of hate crime.<sup>7</sup> Some submitters commented that hate crimes are unique in their targeting of a particular group or community,<sup>8</sup> and that they are about power and putting vulnerable people in their place.<sup>9</sup> Submitters also said that Nga Pirihimana O Aotearoa

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<sup>7</sup> Dr David Bromell; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Dr Kyle R Matthews; Members of Te Hunga Rōia Māori o Aotearoa; Murray Stirling; Submission 77; Te Kāhui o Ināia Tonu Nei Charitable Trust; Dr Chris Wilson; and Women's Rights Party.

<sup>8</sup> Dr David Bromell; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; and Women's Rights Party.

<sup>9</sup> Inclusive Aotearoa Collective Tāhono; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

| New Zealand Police statistics on hate crime are useful to understand the nature of hate crime occurring in Aotearoa New Zealand.<sup>10</sup>

## Impacts of hate crimes

20. Nineteen submitters discussed the impact of hate crimes, commenting that:<sup>11</sup>

(a) Hate crimes harm individual victims.<sup>12</sup> This might be physical, emotional or economic harm.<sup>13</sup> Victims may

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<sup>10</sup> Dr Kyle R Matthews.

<sup>11</sup> Madeline Ash; Grace Carroll; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Michael Fitzgerald; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Maxim Institute; Parents of Vision Impaired; Pride in Law Otago; Murray Stirling; Submission 43; Submission 63; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Public and Administrative Law Committee; Dr Mark Walters; Dr Chris Wilson; and Women's Rights Party.

<sup>12</sup> Madeline Ash; Grace Carroll; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Michael Fitzgerald; Parents of Vision Impaired; Pride in Law Otago; Submission 43; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>13</sup> Grace Carroll; Donald Beasley Institute and People First New Zealand (joint submission); Michael Fitzgerald; Dr David Harvey; Parents of Vision Impaired; and Submission 43.

feel unsafe in the future<sup>14</sup> or modify their behaviour in response to hate crime.<sup>15</sup>

- (b) Hate crimes affect the community to which an individual victim belongs.<sup>16</sup> Hate crimes cause the targeted community to feel fearful, anxious and angry.<sup>17</sup> This can cause the community to decrease their public presence and their voice.<sup>18</sup> It can erode the community's ability to safely practice their culture and religion.<sup>19</sup> From an ao Māori perspective, hate crimes are a serious transgression of tikanga that has spiritual and wellbeing impacts on the wider whānau, hapū, iwi and hapori.<sup>20</sup>

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<sup>14</sup> Disabled Persons Assembly and VisAble (joint submission); Dr David Harvey; and Submission 43.

<sup>15</sup> Dr Mark Walters.

<sup>16</sup> Madeline Ash; Grace Carroll; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Pride in Law Otago; Murray Stirling; Submission 43; The Law Association of New Zealand Public and Administrative Law Committee; Dr Mark Walters; and Women's Rights Party.

<sup>17</sup> Grace Carroll; Inclusive Aotearoa Collective Tāhono; Submission 43; and Women's Rights Party.

<sup>18</sup> Inclusive Aotearoa Collective Tāhono; Dr Mark Walters; and Women's Rights Party.

<sup>19</sup> Submission 43; and Dr Mark Walters.

<sup>20</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust.

(c) Hate crimes can cause wider social harm.<sup>21</sup> They can undermine liberal democracy and the participation of minority groups in society.<sup>22</sup> They can cause minority groups to disengage in civic participation.<sup>23</sup> They can also undermine people's confidence in Police and legal institutions.<sup>24</sup> Hate crimes attack or call into question our diverse and inclusive society.<sup>25</sup> They can divide communities and exacerbate tensions between groups.<sup>26</sup>

## Hate crime in Aotearoa New Zealand

### *Prevalence of hate crimes*

21. Fourteen submitters discussed the prevalence of hate crimes in Aotearoa New Zealand.<sup>27</sup> Of these:

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<sup>21</sup> Grace Carroll; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Submission 43; Submission 63; Dr Mark Walters; and Dr Chris Wilson.

<sup>22</sup> Grace Carroll; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Dr Mark Walters; and Dr Chris Wilson.

<sup>23</sup> Dr David Harvey; Dr Mark Walters; and Dr Chris Wilson.

<sup>24</sup> Dr David Harvey.

<sup>25</sup> Luke Cunningham Clere; and Murray Stirling.

<sup>26</sup> Dr David Harvey; Submission 43; and Women's Rights Party.

<sup>27</sup> Madeline Ash; George Balani; Kevin Bird; Dr David Bromell; Destiny Church; Te Tari Ture o te Karauna | Crown Law; Free Speech Union; Dr David Harvey; Dr Sanjana Hattotuwa; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Dr



- (a) Two submitters said hate crimes are increasing or more prevalent than expected.<sup>28</sup>
- (b) Six submitters thought hate crimes are not a widespread problem.<sup>29</sup>
- (c) Two submitters noted that prosecutions of hate crimes are not common.<sup>30</sup>
- (d) One submitter observed little is known about hate crimes in Aotearoa New Zealand.<sup>31</sup>

### ***Affected groups***

22. Twenty-eight submitters discussed the targeting of particular groups, although it was not always clear if submitters were referring to instances of hate crime.<sup>32</sup> Some

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Kyle R Matthews; Submission 72; Submission 90; Dr Chris Wilson; and Women's Rights Party.

<sup>28</sup> Dr Sanjana Hattotuwa; and Dr Chris Wilson.

<sup>29</sup> George Balani; Kevin Bird; Destiny Church; Free Speech Union; Submission 72; and Submission 90.

<sup>30</sup> Te Tari Ture o te Karauna | Crown Law; and Dr David Harvey.

<sup>31</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>32</sup> Annette Sykes & Co; Destiny Church; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); David F; Grey Power New Zealand; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Members of Te Hunga Rōia Māori o Aotearoa; Whaikaha | Ministry for Disabled Peoples; New

of these submitters referred to specific incidents, which we list below.

23. Eight submitters discussed misogyny and violence against women.<sup>33</sup> Most of these submitters were concerned that misogyny (including offending motivated by misogyny) is an issue in Aotearoa New Zealand, and that misogynistic hate is rising.
24. Seven submitters told us about hate directed at particular religions. They said:
  - (a) There has been a rise in antisemitism recently.<sup>34</sup> One submitter discussed experiences of specific antisemitic attacks.<sup>35</sup>

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Zealand Federation of Business and Professional Women; New Zealand Jewish Council; Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; Sikh Council of New Zealand; Murray Stirling; Submission 26; Submission 43; Submission 57; Submission 62; Submission 75; Submission 77; Submission 78; Te Kāhui Ināia Tonu Nei; Tamsen Williams; Dr Chris Wilson; and Women's Rights Party.

<sup>33</sup> David F; Luke Cunningham Clere; New Zealand Federation of Business and Professional Women; Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; Submission 77; Tamsen Williams; Dr Chris Wilson; and Women's Rights Party.

<sup>34</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); New Zealand Jewish Council; and Submission 78.

<sup>35</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission).

- (b) The Hindu community experiences hate crime.<sup>36</sup>  
Hindus are frequently characterised and treated as a threat to community safety or national security.
  - (c) The Sikh community is concerned about deliberate interference from Indian State agencies and their proxies in New Zealand, including incitement of violence.<sup>37</sup>
  - (d) Globally, Christian and Jewish communities suffer some of the highest levels of persecution.<sup>38</sup>
  - (e) Christianity is often ridiculed and derided.<sup>39</sup>
25. Three submitters told us there has been an increase in violence against the rainbow community.<sup>40</sup>
26. Seven submitters discussed violence or hostility against particular ethnicities. Submitters said hate crime in Aotearoa New Zealand is part of a wider socio-historical context of white supremacy and racism, which impacts Māori and communities of colour.<sup>41</sup> These submitters also said the majority of reported hate crimes target

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<sup>36</sup> Submission 43.

<sup>37</sup> Sikh Council of New Zealand.

<sup>38</sup> Destiny Church.

<sup>39</sup> Submission 57.

<sup>40</sup> Dr Sanjana Hattotuwa; Submission 26; and Submission 77.

<sup>41</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust.

race/ethnicity<sup>42</sup> and hate crimes against race/ethnicity are rising.<sup>43</sup>

27. Some submitters told us about specific incidents directed against Māori and members of the Muslim and Palestinian communities.<sup>44</sup> Some discussed racist comments and concern about racial division in New Zealand.<sup>45</sup> One submitter said there is no evidence Māori face significant hate crimes that justify radical legal reform.<sup>46</sup> Conversely, another submitter expressed concern that immigrants and Māori experience a lack of safety.<sup>47</sup>
28. Four submitters discussed violence against disabled people. Three submitters told us disabled people are over-represented as victims of crime.<sup>48</sup> One submitter told us that discrimination towards disabled people is common, while

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<sup>42</sup> Annette Sykes & Co.

<sup>43</sup> Dr Sanjana Hattotuwa.

<sup>44</sup> Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Murray Stirling; and Te Kāhui o Ināia Tōnu Nei Charitable Trust.

<sup>45</sup> Grey Power New Zealand; Submission 26; Submission 62; Submission 75; and Te Kāhui o Ināia Tōnu Nei Charitable Trust.

<sup>46</sup> Destiny Church.

<sup>47</sup> Submission 77.

<sup>48</sup> Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); and Whaikaha | Ministry of Disabled People.

violence towards someone who is visibly disabled is less common but still happens.<sup>49</sup>

### ***Reference to specific incidents and personal experience***

29. Sixteen submitters told us about particular incidents or personal experience of perceived hate crimes or hostility.<sup>50</sup>

These included:

- (a) The arson of the Rainbow Youth Centre in Tauranga in June 2022.
- (b) The protest at Albert Park involving British activist Posie Parker in March 2023.
- (c) Threats of violence directed at members of the An Nur Mosque that resulted in Police action since the mass shooting event on 15 March 2019.
- (d) Assaults on school children wearing hijabs.
- (e) Protest action by members of Destiny Church that interrupted a drag storytime event at Te Atatū Library in Auckland in 2025.

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<sup>49</sup> Submission 26.

<sup>50</sup> Madeline Ash; David F; Donald Beasley Institute and People First New Zealand (joint submission); Family First; Grey Power New Zealand; Russell Hoban; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Murray Stirling; Submission 26; Submission 50; Submission 55; Submission 57; Submission 81; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women's Rights Party.

- (f) The vandalism of the Gloria of Greymouth church with antisemitic and homophobic messages in June 2022.
- (g) Abuse and intimidation of disabled people who were exempted from the mask mandate during the COVID 19 pandemic.
- (h) The murder of Lena Zhang Harrap, a woman with Down syndrome, in September 2021.
- (i) The arson of several marae.

# Reform considerations

## OVERVIEW

30. In this section, we summarise responses to Questions 2, 3 and 4. These questions sought feedback about the considerations that that will help us decide whether reform is needed and, if so, evaluate any options for reform.
31. In our Consultation Paper, we identified some key reform considerations. Eighty-one submitters commented on one or more of these considerations. Of those submitters, six expressed general agreement with the reform considerations we identified.<sup>51</sup> A further six submitters expressed general disagreement with the considerations presented.<sup>52</sup> Some of these submitters commented about individual considerations as well. We summarise what submitters said about each consideration below.

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<sup>51</sup> Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Te Kāhui o Ināia Tonu Nei Charitable Trust; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Ratonga Wawao ā-Tūmatanui | Public Defence Service; and Dr Mark Walters.

<sup>52</sup> Rex Landy; Submission 64; Submission 65; Submission 73; Submission 78; and Roelie van Rijs.

32. Some submitters suggested additional reform considerations to the ones we discussed in our Consultation Paper. These were:

- (a) online hate or hate speech;<sup>53</sup>
- (b) the existence of overly victimised groups within society;<sup>54</sup>
- (c) the State's interest in social cohesion;<sup>55</sup>
- (d) the importance of accurate data collection;<sup>56</sup>
- (e) intersectionality of hate crimes;<sup>57</sup> and
- (f) clear definitions of a hate crime.<sup>58</sup>

## THE NEED TO TREAT HATE CRIME MORE SERIOUSLY

33. In our Consultation Paper, we explained that hate crime laws treat hate crime more seriously than other types of

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<sup>53</sup> Dr Sanjana Hattuwa; Russell Hoban; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>54</sup> Madeline Ash.

<sup>55</sup> Madeline Ash.

<sup>56</sup> Madeline Ash; and Submission 43.

<sup>57</sup> Submission 43.

<sup>58</sup> Submission 43.



offending. Twenty-three submitters discussed the need to treat hate crimes more seriously.<sup>59</sup>

34. Eighteen submitters discussed the harm hate crimes can cause.<sup>60</sup> They gave the following examples of the additional harm caused by hate crimes:

- (a) Harm to the victim, including physical harm, psychological or emotional harm, and economic harm.<sup>61</sup>

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<sup>59</sup> Annette Sykes & Co; Madeline Ash; Grace Carroll; Disabled Persons Assembly and VisAble (joint submission); Michael Fitzgerald; Free Speech Union; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Lesbian Action for Visibility in Aotearoa; Luke Cunningham Clere; Maxim Institute; Pride in Law Otago; Sikh Council of New Zealand; Murray Stirling; Submission 43; Submission 50; Submission 72; Submission 77; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Criminal Law Committee; The Law Association of New Zealand Public and Administrative Law Committee; Dr Mark Walters; Dr Chris Wilson.

<sup>60</sup> Madeline Ash; Grace Carroll; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Michael Fitzgerald; Dr David Harvey; Inclusive Aotearoa Collective | Tāhono; Luke Cunningham Clere; Maxim Institute; Parents of Vision Impaired; Pride in Law Otago; Murray Stirling; Submission 43; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Public and Administrative Law Committee; Dr Chris Wilson; Dr Mark Walters; and Women's Rights Party.

<sup>61</sup> Madeline Ash; Grace Carroll; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint

- (b) Harm to the targeted community, such as causing the community to feel fear or decrease their public presence.<sup>62</sup>
  - (c) Wider social harm, such as attacking the fabric of our diverse and inclusive society and exacerbating tensions between groups.<sup>63</sup>
35. Four submitters discussed whether hate crime offenders are more morally blameworthy.<sup>64</sup> Two submitters did not think hate crime offenders are more morally blameworthy<sup>65</sup> and one did not think the law should be a vehicle for “enforcing moral orthodoxy”.<sup>66</sup> One submitter said that if moral blameworthiness is to be considered, it is relevant to sentencing.<sup>67</sup>

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submission); Michael Fitzgerald; Dr David Harvey; Luke Cunningham Clere; Parents of Vision Impaired; Submission 43; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>62</sup> Madeline Ash; Grace Carroll; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Pride in Law Otago; Murray Stirling; Submission 43; The Law Association of New Zealand Public and Administrative Law Committee; Dr Mark Walters; and Women’s Rights Party.

<sup>63</sup> Grace Carroll; Dr David Harvey; Inclusive Aotearoa; Luke Cunningham Clere; Submission 43; Submission 63; Dr Mark Walters; and Dr Chris Wilson.

<sup>64</sup> Dr David Harvey; Maxim Institute; Pride in Law Otago; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>65</sup> Maxim institute; and Pride in Law Otago.

<sup>66</sup> The Law Association of New Zealand Public and Administrative Law Committee.

<sup>67</sup> Dr David Harvey.

36. Seven submitters considered whether hate crimes require extra denunciation.<sup>68</sup> They said:
- (a) Denunciation of hate crimes is important<sup>69</sup> and there may be symbolic benefits to labelling certain offending as hate-motivated.<sup>70</sup>
  - (b) Hate crime laws reassure vulnerable groups that hate crimes are wrong.<sup>71</sup>
  - (c) The criminal law should not be used for symbolic purposes.<sup>72</sup>
  - (d) Denunciation is a matter for sentencing.<sup>73</sup>
37. Eight submitters discussed the deterrent effect of hate crime laws.<sup>74</sup> Most were sceptical that more punitive sentences act

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<sup>68</sup> Annette Sykes & Co; Dr David Harvey; Luke Cunningham Clere; Te Kāhui Ture o Aotearoa | New Zealand Law Society; The Law Association of New Zealand Criminal Law Committee; The Law Association of New Zealand Public and Administrative Law Committee; and Dr Chris Wilson.

<sup>69</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>70</sup> Luke Cunningham Clere.

<sup>71</sup> Annette Sykes & Co; and Dr Chris Wilson.

<sup>72</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>73</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>74</sup> Dr David Harvey; Lesbian Action for Visibility in Aotearoa; Pride in Law Otago; Sikh Council of New Zealand; Submission 50; The Law Association of New

as a deterrent or that hate crime laws make Aotearoa New Zealand safer.<sup>75</sup> Two submitters thought treating hate crimes seriously may have a deterrent effect.<sup>76</sup>

38. Submitters also raised other points. One submitter did not think hate crimes are more serious.<sup>77</sup> Some emphasised the positive effects of treating hate crime more seriously, suggesting Police would take victims more seriously<sup>78</sup> or it would help combat racism and promote social cohesion.<sup>79</sup> Others emphasised negative effects, saying it could fuel resentment and exacerbate social tensions<sup>80</sup> or create double standards in the justice system.<sup>81</sup>

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Zealand Criminal Law Committee; The Law Association of New Zealand Public and Administrative Law Committee; and Dr Chris Wilson.

<sup>75</sup> Lesbian Action for Visibility in Aotearoa; Maxim Institute; Pride Law in Otago; Sikh Council of New Zealand; Submission 50; and The Law Association of New Zealand Criminal Law Committee.

<sup>76</sup> Dr David Harvey; and Dr Chris Wilson.

<sup>77</sup> Submission 72.

<sup>78</sup> Submission 77.

<sup>79</sup> Annette Sykes & Co.

<sup>80</sup> Free Speech Union.

<sup>81</sup> Destiny Church.

## GUIDANCE ON WHEN IT IS APPROPRIATE TO CREATE NEW OFFENCES

39. In our Consultation Paper, we explained this review must consider guidance on when it is appropriate to create new offences — in particular, the Legislation Design and Advisory Committee's *Legislation Guidelines*. Seventeen submitters discussed this.<sup>82</sup>
40. Submitters said new offences should only be created if:
- (a) there is a clear rationale or need;<sup>83</sup>
  - (b) they would meet a purpose not achieved by the current law;<sup>84</sup>
  - (c) there are not less restrictive ways to achieve the same policy goal;<sup>85</sup> and

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<sup>82</sup> Madeline Ash; Grace Carroll; Dr David Bromell; Dr David Harvey; Free Speech Union; Luke Cunningham Clere; Maxim Institute; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Murray Stirling; Submission 17; Submission 51; Submission 63; The Law Association of New Zealand Criminal Law Committee; The Law Association of New Zealand Public and Administrative Law Committee; Don Whitfield; and Women's Rights Party.

<sup>83</sup> Dr David Harvey; Luke Cunningham Clere; Maxim Institute; Te Kāhui Ture o Aotearoa | New Zealand Law Society; The Law Association of New Zealand Public and Administrative Law Committee.

<sup>84</sup> Dr David Bromell; Maxim Institute; Submission 51; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Women's Rights Party.

<sup>85</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

- (d) there is clear evidence for how a new offence will reduce hate crime.<sup>86</sup>

41. They also said:

- (a) The principle of fair labelling is important.<sup>87</sup>
- (b) Offenders are entitled to clarity about the offence for which they are charged.<sup>88</sup>
- (c) The law must apply to everyone equally.<sup>89</sup> It must also be objective and clear for all.<sup>90</sup>
- (d) Objective, rather than emotive, terminology should be used.<sup>91</sup>
- (e) We should consider what effect any legislative change will have on policing and judicial practices.<sup>92</sup>
- (f) The law should focus on addressing harm within existing frameworks.<sup>93</sup>

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<sup>86</sup> Pride in Law Otago.

<sup>87</sup> Madeline Ash; and Murray Stirling.

<sup>88</sup> The Law Association of New Zealand Criminal Law Committee.

<sup>89</sup> Free Speech Union; Submission 17; Don Whitfield.

<sup>90</sup> Free Speech Union; and Don Whitfield.

<sup>91</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>92</sup> Grace Carroll.

<sup>93</sup> Submission 63.

## TIKANGA

42. In the Consultation Paper, we explained that tikanga should be analysed as part of good law-making in Aotearoa New Zealand. Eleven submitters discussed this.<sup>94</sup>
43. Eight submitters expressly or impliedly agreed tikanga is relevant.<sup>95</sup> Submitters said considering tikanga is important because:
- (a) it fosters a more culturally responsive legal framework;<sup>96</sup>
  - (b) it reflects Aotearoa New Zealand's commitment to honouring its indigenous people; and<sup>97</sup>
  - (c) it is the first law of Aotearoa New Zealand.<sup>98</sup>
44. Two submitters discussed the intersection between hate crimes and tikanga. Members of Te Hunga Rōia Māori o

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<sup>94</sup> Annette Sykes & Co; Dr David Bromell; Family First; Dr David Harvey; Kyle R Matthews; Members of Te Hunga Rōia Māori o Aotearoa; Pride in Law Otago; Submission 11; Submission 63; Te Kāhui o Ināia Tonu Nei Charitable Trust; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>95</sup> Annette Sykes & Co; Dr David Harvey; Dr Kyle R Matthews; Members of Te Hunga Rōia Māori o Aotearoa; Pride in Law Otago; Submission 63; Te Kāhui o Ināia Tonu Nei Charitable Trust; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>96</sup> Annette Sykes & Co.

<sup>97</sup> Annette Sykes & Co.

<sup>98</sup> Pride in Law Otago.

Aotearoa noted that, from an ao Māori perspective, hate crimes may be considered a category of crime that requires a higher level of denunciation. Te Kāhui o Ināia Tonu Nei Charitable Trust suggested we consider the concepts of tūkino and utua kia ea. They explained tūkino is a transgression that is unjust, unfair, violent, destructive, cruel and abusive. Utua kia ea is a process that is undertaken to account for tūkino.

45. Three submitters expressed concerns about the relevance of tikanga.<sup>99</sup> They said:

- (a) Tikanga must be understandable by all to be a useful basis for law — it is unhelpful to treat it as fundamentally different to a Western worldview.<sup>100</sup>
- (b) Legal reasoning in a secular society should not invoke supernatural concepts like atua, tapu and mauri.<sup>101</sup>
- (c) The law should apply equally to all citizens, regardless of identity or ancestry.<sup>102</sup>
- (d) There is no concept of hate crime in tikanga.<sup>103</sup>

46. Some submitters made other points, including:

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<sup>99</sup> Dr David Bromell; Family First; and Submission 11.

<sup>100</sup> Submission 11.

<sup>101</sup> Submission 11.

<sup>102</sup> Dr David Bromell.

<sup>103</sup> Family First.



- (a) Māori customs and perspectives should inform but not restrict legal fairness and equality.<sup>104</sup>
- (b) Our Consultation Paper did not explore what a tikanga-led model responding to hate crime might look like.<sup>105</sup>
- (c) Tikanga is relevant to sentencing.<sup>106</sup>

## TE TIRITI O WAITANGI | TREATY OF WAITANGI

- 47. In our Consultation Paper, we explained that we aim to give practical effect to te Tiriti o Waitangi | the Treaty of Waitangi in our work and invited views on ways to uphold the Crown's obligations under the Treaty in the context of this review. Fifty-five submissions discussed this.
- 48. Twenty-two submitters considered that the Treaty is relevant to this review or discussed what Treaty-consistent reform might look like.<sup>107</sup> They said:

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<sup>104</sup> Submission 63.

<sup>105</sup> Dr Kyle R Matthews.

<sup>106</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>107</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission) Dr David Harvey; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective | Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Amos Mann; Members of Te Hunga Rōia Māori o Aotearoa; New Zealand Federation of Business and

- (a) Different models of dispute resolution, such as restorative justice approaches or access to education about Te Tiriti, could be applied.<sup>108</sup>
- (b) Māori should be resourced and empowered to address hate crimes in accordance with tikanga.<sup>109</sup> Investment should be made in whānau, hapū or community organisations to lead responses to hate crimes.<sup>110</sup> Such initiatives could assist in restoring aspects of tino rangatiratanga.<sup>111</sup>
- (c) There should be meaningful consultation with or involvement of Māori in any reform.<sup>112</sup>

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Professional Women; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Submission 26; Submission 43; Submission 51; Submission 72; Submission 77; Submission 90; Te Kāhui o Ināia Tonu Nei Charitable Trust; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>108</sup> Dr David Harvey; and Members of Te Hunga Rōia Māori o Aotearoa.

<sup>109</sup> Submission 90.

<sup>110</sup> Inclusive Aotearoa Collective Tāhono; Members of Te Hunga Rōia Māori o Aotearoa; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>111</sup> Annette Sykes & Co; Inclusive Aotearoa Collective Tāhono; Members of Te Hunga Rōia Māori o Aotearoa; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>112</sup> Madeline Ash; Donald Beasley Institute and People First New Zealand (joint submission); Sanjana Hattotuwa; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); New Zealand Federation of Business and Professional Women; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Submission 77.

- (d) Wāhine Māori experience higher rates of violence and discrimination, and their safety should be a priority in legal reforms addressing hate crime.<sup>113</sup>
  - (e) More information or better data keeping about how Māori are affected by hate crimes is needed.<sup>114</sup>
  - (f) We should be cautious about introducing new offences because it risks over-criminalising Māori.<sup>115</sup>
  - (g) Anti-bias training for Police and prosecutors is needed to ensure Māori are not overrepresented in new offences.<sup>116</sup>
49. Twenty-seven submitters disagreed that the Treaty is relevant to this review or disagreed with the Consultation Paper's discussion of what the Treaty means.<sup>117</sup> Comments included:

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<sup>113</sup> New Zealand Federation of Business and Professional Women.

<sup>114</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Submission 26.

<sup>115</sup> Annette Sykes & Co; Members of Te Hunga Rōia Māori o Aotearoa; Submission 51; Submission 72; and Submission 90.

<sup>116</sup> Madeline Ash.

<sup>117</sup> Kevin Bird; Dr David Bromell; Trevor Dance; Destiny Church; Gary Durey; David F; Family First; Free Speech Union; Rex Landy; David Le Breton; Dr John McDonald-Wharry; Submission 11; Submission 17; Submission 57; Submission 62; Submission 63; Submission 64; Submission 65; Submission 66; Submission 68; Submission 71; Submission 72; Submission 73; Submission 75; Submission 79; Roelie van Rijs; and Peter Williamson.

- (a) Māori communities should not be tasked with monitoring hate crimes as this would create racial tensions.<sup>118</sup>
- (b) The Treaty is not relevant in today's society.<sup>119</sup>
- (c) The Treaty does not refer to hate or hate law.<sup>120</sup>
- (d) The texts of the Treaty in English and Te Reo are the same.<sup>121</sup>
- (e) Article 3 does not refer to equity.<sup>122</sup>
- (f) Prioritising the Māori language version of the Treaty marginalises viewpoints in the English text and risks discouraging open discussion.<sup>123</sup>
- (g) The argument that we should be cautious about introducing hate crime laws because Māori are overrepresented as offenders is flawed.<sup>124</sup>

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<sup>118</sup> Destiny Church.

<sup>119</sup> Rex Landy, and Submission 73.

<sup>120</sup> Family First; Submission 65; and Submission 66.

<sup>121</sup> Trevor Dance.

<sup>122</sup> Dr John McDonald-Wharry.

<sup>123</sup> Free Speech Union.

<sup>124</sup> Submission 11.

50. Six submitters did not take a clear position about the Treaty's relevance to the review.<sup>125</sup> Some submitters said all New Zealanders should be treated equally.<sup>126</sup>

## HUMAN RIGHTS

51. In our Consultation Paper, we explained that law reform should be consistent with Aotearoa New Zealand's human rights obligations. Thirty-four submitters discussed this.<sup>127</sup>

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<sup>125</sup> Grey Power New Zealand; Russell Hoban; Sikh Council of New Zealand; Submission 55; Submission 76; and Submission 88.

<sup>126</sup> Kevin Bird; Dr David Bromell; Destiny Church; Gary Durey; David Le Breton; Submission 17; Submission 57; Submission 62; Submission 63; Submission 68; Submission 71; Submission 75; Submission 79; Roelie van Rijs; and Peter Williamson.

<sup>127</sup> Annette Sykes & Co; George Balani; Kevin Bird; Destiny Church; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Graeme Edgeler; Clive Elliot KC; David F; Family First; Free Speech Union; Ken Gorbey; Dr David Harvey; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Karun Lakshman; Maire Leadbeater; Luke Cunningham Clere; John McDonald-Wharry; Members of Te Hunga Rōia Māori o Aotearoa; Tim O'Sullivan; Pride in Law Otago; Roelie van Rijs; Greg Rzesniowiecki; Submission 11; Submission 51; Submission 55; Submission 63; Submission 66; Submission 77; Submission 78; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Women's Rights Party.

52. Seven submitters discussed human rights at a general level.<sup>128</sup> Comments included:

- (a) Disagreement that hate crime laws infringe human rights.<sup>129</sup>
- (b) Both agreement and disagreement that there is a growing consensus international human rights obligations require hate crime laws.<sup>130</sup>
- (c) Agreement that international law does not require a particular type of hate crime legislation.<sup>131</sup>
- (d) Concern about whose interests international obligations serve.<sup>132</sup>

53. Twenty-eight submitters discussed free speech and related rights.<sup>133</sup> Comments included:

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<sup>128</sup> Kevin Bird; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Tim O'Sullivan; Submission 51; and Submission 78.

<sup>129</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission).

<sup>130</sup> Kevin Bird; Luke Cunningham Clere; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Submission 78.

<sup>131</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 51.

<sup>132</sup> Tim O'Sullivan.

<sup>133</sup> George Balani; Kevin Bird; Destiny Church; Graeme Edgeler; Clive Elliot KC; David F; Family First; Free Speech Union; Ken Gorbey; Dr David Harvey; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Karun Lakshman; Luke Cunningham Clere; Maire Leadbeater; Dr John McDonald-Wharry;

- (a) Care should be taken to ensure freedom of thought, conscience and religion and freedom of expression are not infringed.<sup>134</sup> This needs to be balanced against the need to protect vulnerable groups.<sup>135</sup>
- (b) Hate crimes restrict the victim's and community's free speech rights.<sup>136</sup>
- (c) Hate crime legislation (including hate crime offences and the Scottish hybrid model) is likely to undermine freedom of speech and thought.<sup>137</sup> The criminal law is designed to punish action not thoughts.<sup>138</sup>

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Members of Te Hunga Rōia Māori o Aotearoa; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Tim O'Sullivan; Greg Rzesniowiecki; Submission 11; Submission 55; Submission 63; Submission 66; Submission 77; Roelie van Rijs; and Women's Rights Party.

<sup>134</sup> Dr David Harvey; Dr Sanjana Hattotuwa; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Members of Te Hunga Rōia Māori o Aotearoa; Submission 63; Submission 66 and Roelie van Rijs.

<sup>135</sup> Dr Sanjana Hattotuwa; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Submission 77.

<sup>136</sup> Inclusive Aotearoa Collective Tāhono.

<sup>137</sup> George Balani; Kevin Bird; Destiny Church; Family First; Free Speech Union; Karun Lakshman; Maire Leadbeater; Tim O'Sullivan; Greg Rzesniowiecki; Submission 11; and Women's Rights Party.

<sup>138</sup> Free Speech Union; and Greg Rzesniowiecki.

- (d) Free speech is important in a democratic country.<sup>139</sup>
  - (e) Courts have found the right to freedom of expression can be limited, including by the objectives of hate crime law.<sup>140</sup>
  - (f) Given the underlying behaviour in a hate crime is already a criminal offence, freedom of expression concerns are not as strong.<sup>141</sup>
  - (g) Free speech advocates give insufficient weight to the continuum between hostile speech and violence.<sup>142</sup>
54. Twelve submitters discussed the right to equality.<sup>143</sup> Some submitters said that hate crimes violate the rights to equality and non-discrimination,<sup>144</sup> hate crime legislation can help ensure people live free from discrimination,<sup>145</sup> and New Zealand's non-discrimination obligations support treating

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<sup>139</sup> George Balani; David F; Ken Gorbey; Maire Leadbeater; Submission 55; and Roelie van Rijs.

<sup>140</sup> Luke Cunningham Clere; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>141</sup> Graeme Edgeler; and Luke Cunningham Clere.

<sup>142</sup> Clive Elliot KC.

<sup>143</sup> Annette Sykes & Co; Kevin Bird; Destiny Church; Free Speech Union; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Dr John McDonald-Wharry; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Tim O'Sullivan; Greg Rzesniowiecki; Submission 78; and Women's Rights Party.

<sup>144</sup> Luke Cunningham Clere.

<sup>145</sup> Annette Sykes & Co.



hate crimes differently to other types of offences.<sup>146</sup> Conversely, other submitters had concerns that hate crime legislation infringes the right to equality,<sup>147</sup> including because it treats some victims as more deserving than others.<sup>148</sup>

55. The Disabled Persons Assembly and VisAble (joint submission) and the Donald Beasley Institute and People First New Zealand (joint submission) said the rights in the Disability Convention are relevant, including rights to awareness raising; access to justice; freedom from torture or cruel, inhuman or degrading punishment; and freedom from exploitation, violence and abuse.<sup>149</sup>

## SELECTING PROTECTED CHARACTERISTICS

56. In our Consultation Paper, we explained that we need to think about which characteristics should be protected by Aotearoa New Zealand's hate crime law. Forty-eight submitters commented on this issue.

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<sup>146</sup> Luke Cunningham Clere.

<sup>147</sup> Destiny Church; Dr John McDonald-Wharry; and Tim O'Sullivan.

<sup>148</sup> Free Speech Union; Dr John McDonald-Wharry; Greg Rzesniowiecki; and Women's Rights Party.

<sup>149</sup> Disabled Persons Assembly and VisAble (joint submission); and Donald Beasley Institute and People First New Zealand (joint submission).

## Criteria to select protected characteristics

57. Eighteen submitters discussed the criteria that should be used to determine which characteristics should be protected.<sup>150</sup> Comments included:

- (a) Groups of people with common features and less social power<sup>151</sup> and vulnerable communities should be protected.<sup>152</sup> We also heard concern about selecting protected characteristics based on marginalisation.<sup>153</sup>
- (b) Hate crime laws should protect characteristics that define a person's fundamental identity.<sup>154</sup>
- (c) Agreement with the criteria identified in the Consultation Paper.<sup>155</sup>
- (d) Criteria are needed because otherwise the list will be overinclusive and the symbolic effect of hate crime legislation will be lost.<sup>156</sup>

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<sup>150</sup> Graeme Edgeler; Free Speech Union; Dr David Harvey; Russell Hoban; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Pride in Law Otago; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Submission 11; Submission 26; Submission 43; Submission 51; Submission 62; Submission 77; Dr Mark Walters; and Dr Chris Wilson.

<sup>151</sup> Submission 26.

<sup>152</sup> Pride in Law Otago; Submission 77; and Dr Chris Wilson.

<sup>153</sup> Free Speech Union; Submission 11; and Submission 51.

<sup>154</sup> Submission 43.

<sup>155</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Dr Mark Walters.

<sup>156</sup> Luke Cunningham Clere.

- (e) The grounds in the Human Rights Act could be used to determine which characteristics should be protected.<sup>157</sup>

## Views on the list of protected characteristics

58. The current law has an open list of characteristics and a residual category. This means the protected characteristics include not just those mentioned in the Sentencing Act but any “enduring common characteristic”. Thirteen submitters commented on this.
59. Nine submitters were in favour of a residual category. They said:<sup>158</sup>
- (a) It is not prescriptive and allows flexibility so other groups can be included in the future.<sup>159</sup> An overly

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<sup>157</sup> Graeme Edgeler; Dr David Harvey; Russell Hoban; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>158</sup> Donald Beasley Institute and People First New Zealand (joint submission); Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Sikh Council of New Zealand; Submission 11; Te Kāhui o Ināia Tonu Nei Charitable Trust; and The Law Association of New Zealand Criminal Law Committee.

<sup>159</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Submission 11; Te Kāhui o Ināia Tonu Nei Charitable Trust; and The Law Association of New Zealand Criminal Law Committee.

restrictive approach would fail to protect certain groups.<sup>160</sup>

- (b) Any uncertainty arising from an open list would be mitigated if hate aggravation became an element of the offence, because it could be dealt with as a pre-trial challenge.<sup>161</sup>
- (c) A list of examples is useful to indicate the likely characteristics.<sup>162</sup> Even with an open list, it needs to be specific enough to ensure groups are legally recognised.<sup>163</sup>

60. Eight submitters raised concerns about an open list and the “enduring common characteristic” definition:

- (a) Some submitters said there is uncertainty about its application in practice and there could be incongruous outcomes regarding which groups are protected.<sup>164</sup> It was viewed as problematic that some groups may

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<sup>160</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>161</sup> The Law Association of New Zealand Criminal Law Committee.

<sup>162</sup> Dr Kyle R Matthews.

<sup>163</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>164</sup> Madeline Ash; Te Tari Ture o te Karauna | Crown Law; Luke Cunningham Clere; Maxim Institute; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Ratonga Wawao ā-Tūmatanui | Public Defence Service; and Submission 11.

meet the test even though society, in general, considers they should not be included.<sup>165</sup>

- (b) Some submitters said it is unclear why a characteristic must be “enduring”<sup>166</sup> or observed it is anomalous that some of the currently listed characteristics — such as religion, sexual orientation and gender identity — are not necessarily enduring.<sup>167</sup>

61. Some submitters made other points about the list of protected characteristics. They said:

- (a) The list of protected characteristics should be broad.<sup>168</sup>
- (b) The idea of defining protected characteristics raises issues of under and over inclusivity.<sup>169</sup> If the list provides for a wide range of identities the law is overly broad, but if some groups are excluded it can look unfairly selective.<sup>170</sup>

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<sup>165</sup> Submitters referred to the examples we discussed in our Consultation Paper of gang members or paedophiles being protected groups.

<sup>166</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service; and Submission 11.

<sup>167</sup> Graeme Edgeler; Rex Landy; and Women’s Rights Party.

<sup>168</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Dr Chris Wilson.

<sup>169</sup> Dr David Bromell.

<sup>170</sup> Free Speech Union.

- (c) If hate crime laws encompass an increasing number of characteristics, they risk criminalising speech and behaviour.<sup>171</sup>
- (d) The approach to protected characteristics depends on the model. A broad approach is appropriate for the sentence aggravation model while a narrower approach is needed for offences.<sup>172</sup>
- (e) It is impossible to list the characteristics because hate is demonstrated in so many ways and against so many characteristics.<sup>173</sup> No group deserves special protection more than any other.<sup>174</sup>
- (f) The division of categories is not always clear. For example, the Israel-Palestine conflict raises both religion and race.<sup>175</sup>
- (g) People can experience hate crimes based on multiple characteristics.<sup>176</sup>

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<sup>171</sup> Free Speech Union.

<sup>172</sup> Madeline Ash.

<sup>173</sup> Submission 66.

<sup>174</sup> Don Whitfield.

<sup>175</sup> Members of Te Hunga Rōia Māori o Aotearoa.

<sup>176</sup> Dr Sanjana Hattotuwa.

## Views on keeping, adding or removing certain characteristics

62. Twelve submitters discussed the existing characteristics mentioned in the Sentencing Act. They said that the law should protect disabled people,<sup>177</sup> race/ethnicity,<sup>178</sup> colour,<sup>179</sup>

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<sup>177</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Inclusive Aotearoa Collective Tāhono; New Zealand Federation of Business and Professional Women; Parents of Vision Impaired; Pride in Law Otago; Submission 26; Submission 43; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Rod Young.

<sup>178</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr David Harvey; New Zealand Federation of Business and Professional Women; Pride in Law Otago; Submission 43; Submission 57; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Rod Young.

<sup>179</sup> Disabled Persons Assembly and VisAble (joint submission); New Zealand Federation of Business and Professional Women; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

nationality,<sup>180</sup> religion,<sup>181</sup> age,<sup>182</sup> sexual orientation<sup>183</sup> and gender identity.<sup>184</sup>

63. Some submitters discussed whether additional characteristics should be protected. They said the following characteristics should be protected:

- (a) **sex**;<sup>185</sup>
- (b) **variations in sex characteristics**;<sup>186</sup>

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<sup>180</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>181</sup> Annette Sykes & Co; Disabled Persons Assembly and VisAble (joint submission); New Zealand Federation of Business and Professional Women; Pride in Law Otago; Submission 26; Submission 43; Submission 57; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Rod Young.

<sup>182</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr David Harvey; New Zealand Federation of Business and Professional Women; Submission 57; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Rod Young.

<sup>183</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr David Harvey; New Zealand Federation of Business and Professional Women; Parents of Vision Impaired; Pride in Law Otago; Submission 43; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Rod Young.

<sup>184</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr David Harvey; New Zealand Federation of Business and Professional Women; Pride in Law Otago; Submission 26; Submission 43; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>185</sup> Madeline Ash; Dr David Harvey; Russell Hoban; Inclusive Aotearoa Collective Tāhono; New Zealand Federation of Business and Professional Women; Submission 57; Tamsen Williams; Dr Chris Wilson; and Women's Rights Party.

<sup>186</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust.



- (c) immigration status, and membership of migrant and refugee communities;<sup>187</sup>
- (d) socioeconomic status;<sup>188</sup>
- (e) financial status;<sup>189</sup>
- (f) ethical belief;<sup>190</sup>
- (g) pro-Palestinian and anti-Zionist views;<sup>191</sup>
- (h) people who lack an enduring characteristic (for example, in Europe most mass terrorism events involve strangers who are not necessarily protected).<sup>192</sup>

64. Submitters also said certain characteristics should not be protected:

- (a) sexuality;<sup>193</sup>
- (b) gender identity;<sup>194</sup>
- (c) certain religions (Islam);<sup>195</sup>

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<sup>187</sup> Annette Sykes & Co; and New Zealand Federation of Business and Professional Women.

<sup>188</sup> Annette Sykes & Co; and Submission 57.

<sup>189</sup> Rod Young.

<sup>190</sup> Dr David Harvey.

<sup>191</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission).

<sup>192</sup> Submission 51.

<sup>193</sup> Destiny Church.

<sup>194</sup> Destiny Church; Rex Landy; Submission 72; and Women's Rights Party.

<sup>195</sup> Destiny Church.

(d) family status;<sup>196</sup>

(e) age; and<sup>197</sup>

(f) political views.<sup>198</sup>

65. One submitter did not support any protected characteristics on the basis everyone deserves equal treatment under the law.<sup>199</sup>

### **Views about characteristics of sex, age and disability**

66. Several submitters discussed the characteristics of sex, age and disability in more detail.

67. Seven submitters supported including sex as a protected characteristic.<sup>200</sup> Reasons for that view included:

(a) It sends the wrong message to exclude sex as a protected characteristic and it can be overlooked by courts because it is not listed.<sup>201</sup>

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<sup>196</sup> Inclusive Aotearoa Collective Tāhono.

<sup>197</sup> Inclusive Aotearoa Collective Tāhono.

<sup>198</sup> Destiny Church; and Inclusive Aotearoa Collective Tāhono.

<sup>199</sup> Kevin Bird.

<sup>200</sup> Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; New Zealand Federation of Business and Professional Women; Tamsen Williams; Dr Chris Wilson; and Women's Rights Party.

<sup>201</sup> Women's Rights Party.

- (b) A significant proportion of crimes are committed by men against women and it is common that they are motivated directly or indirectly by misogyny.<sup>202</sup>
  - (c) Misogyny is an issue in Aotearoa New Zealand<sup>203</sup> and should be properly denounced.<sup>204</sup>
  - (d) Research shows protection from “gender-based violence” is required.<sup>205</sup> Sex-based violence is not taken seriously enough.<sup>206</sup>
  - (e) Publicity around the addition of “sex” to the list of aggravating factors will help educate the public about misogyny and crimes against women.<sup>207</sup>
68. Submitters also said that clarification is needed on whether sex includes gender expression,<sup>208</sup> and that sex and gender should be defined and not conflated.<sup>209</sup>

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<sup>202</sup> Luke Cunningham Clere.

<sup>203</sup> New Zealand Federation of Business and Professional Women; Tamsen Williams; Dr Chris Wilson; and Women’s Rights Party.

<sup>204</sup> New Zealand Federation of Business and Professional Women.

<sup>205</sup> Inclusive Aotearoa Collective Tāhono.

<sup>206</sup> Tamsen Williams.

<sup>207</sup> Women’s Rights Party.

<sup>208</sup> Russell Hoban.

<sup>209</sup> Family First; Lesbian Action for Visibility in Aotearoa; Submission 11; and Women’s Rights Party.

69. In relation to age, one submitter observed there is debate about whether it should be a protected characteristic.<sup>210</sup> One submitter thought crimes based on age are due to a person's vulnerability and not hostility.<sup>211</sup> Another submitter suggested one of the reasons hate crimes based on age appear uncommon is that older people are invisible to police and justice processes.<sup>212</sup>
70. On disability, submitters said:
- (a) Aotearoa New Zealand has a shameful history regarding its treatment of disabled people.<sup>213</sup> The recent Royal Commission of Inquiry into Abuse in Care highlighted that disabled people experience abuse underpinned by ableism.<sup>214</sup>
  - (b) Having disability as a protected characteristic offers additional protection.<sup>215</sup>

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<sup>210</sup> Luke Cunningham Clere.

<sup>211</sup> Inclusive Aotearoa Collective Tāhono.

<sup>212</sup> Disabled Persons Assembly and VisAble (joint submission).

<sup>213</sup> Parents of Vision Impaired.

<sup>214</sup> Donald Beasley Institute and People First New Zealand (joint submission).

<sup>215</sup> Parents of Vision Impaired.

- (c) Disabled people are targeted because they are vulnerable<sup>216</sup> and because some people believe they should not exist.<sup>217</sup>
- (d) The apparent absence of hate crimes against disabled people is likely due to them being invisible within the justice system, having their complaints diminished and not being given reasonable accommodations.<sup>218</sup>

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<sup>216</sup> Disabled Persons Assembly and VisAble (joint submission).

<sup>217</sup> Inclusive Aotearoa Collective Tāhono.

<sup>218</sup> Disabled Persons Assembly and VisAble (joint submission); and Donald Beasley Institute and People First New Zealand (joint submission).

# Sentence aggravation model — problems and options for reform

## OVERVIEW

71. In this section, we summarise responses to Questions 5 and 6. These questions asked whether there are problems with how the current law on hate crime is working and, if so, whether these problems can be addressed while keeping the sentencing aggravation model. We first give an overview of submitters' views then summarise the feedback received on each of the potential problems identified in our Consultation Paper and options to address them.

### Identifying problems with the current law

72. Twenty-two submitters thought there are problems with how the current law is working. Of these submitters:

- (a) ten supported keeping the sentence aggravation model (in some cases with changes to practice,

procedure or legislation) or did not see a case for changing the legal model;<sup>219</sup>

(b) seven supported adopting a different legal model;<sup>220</sup>

(c) one supported repealing the aggravating factor and having no hate crime laws;<sup>221</sup> and

(d) four did not express a clear view on whether the legal model should be changed.<sup>222</sup>

73. Twenty-two submitters either did not think there are problems with the current law or said no problems had been identified that justify changing the legal model.<sup>223</sup>

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<sup>219</sup> Destiny Church; Free Speech Union; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Submission 43; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Roelle van Rijs.

<sup>220</sup> Madeline Ash; Inclusive Aotearoa; Russel Hoban; Kyle R Matthews; and Donald Beasley Institute and People First New Zealand.

<sup>221</sup> Dr John McDonald-Wharry.

<sup>222</sup> Te Tari Ture o te Karauna | Crown Law; Members of Te Hunga Rōia Māori o Aotearoa; Sikh Council of New Zealand; and Submission 26.

<sup>223</sup> George Balani; Kevin Bird; Dr David Bromell; David F; Dr David Harvey; Brian Jones; Karun Lakshman; Maxim Institute; Submission 51; Submission 55; Submission 57; Submission 58; Submission 63; Submission 65; Submission 66; Submission 72; Submission 85; Submission 90; The Law Association of New Zealand Public and Administrative Law Committee; Fergus Wheeler; Peter Williamson; and Rod Young.

74. The remaining submitters did not take a clear position on whether there are problems with how the current law is working. Many of these submitters did nonetheless express a view on whether and how the law should be changed (see the discussion below on addressing problems with the current legal model and on other legal models).

## **Addressing problems under the sentence aggravation model**

### ***Support for keeping the sentence aggravation model***

75. Forty-one submitters supported keeping the current sentence aggravation model or did not see a case for changing the legal model. Some of these submitters thought the current model could be improved and commented on how that could be done, as discussed below.
76. The main reasons submitters gave for keeping the sentence aggravation model were:
- (a) The sentence aggravation model is a sufficient or the preferable way to address hate crime in the law.<sup>224</sup>

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<sup>224</sup> George Balani; Kevin Bird; Dr David Bromell; Destiny Church; Family First; Free Speech Union; Ken Gorbey; Dr David Harvey; Brian Jones; David Le Breton; Lesbian Action for Visibility in Aotearoa; Maxim Institute; New Zealand Federation of Business and Professional Women; Greg Rzesniowiecki; Submission 17; Submission 51; Submission 55; Submission 57; Submission 58; Submission 63; Submission 72; Submission 78; Submission 79; Submission 85;



- (b) Any issues with how the law is working should be addressed through changes to practice and procedure or amendments to the existing law.<sup>225</sup>
- (c) No compelling reasons have been identified for changing the legal model.<sup>226</sup>
- (d) The current law is generally working well.<sup>227</sup>
- (e) Changing the legal model would not address the problems with how hate crime is dealt with.<sup>228</sup>
- (f) Harsher penalties will not address the underlying causes of hate crimes. Resources are better spent on prevention, rehabilitation and victim support.<sup>229</sup>

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Submission 90; Roelie van Rijs; Peter Williamson; Women's Rights Party; and Rod Young.

<sup>225</sup> Free Speech Union; Dr David Harvey; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Maxim Institute; New Zealand Jewish Council; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Submission 58; Submission 63; Submission 90; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>226</sup> George Balani; Dr David Bromell; Destiny Church; Family First; and Dr David Harvey.

<sup>227</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service; and Submission 57.

<sup>228</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Lesbian Action for Visibility in Aotearoa.

<sup>229</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

- (g) More information is needed to assess how the current law is working.<sup>230</sup> Changes to allow better data collection should occur first before any changes are made to the legal model.

77. Submitters identified the following advantages of the sentence aggravation model:

- (a) It is more flexible than alternative approaches.<sup>231</sup>
- (b) It allows hate motivation to be considered in a way that protects individual rights (such as the right to freedom of expression).<sup>232</sup>
- (c) It can apply to any offence.<sup>233</sup>
- (d) It satisfies the reasons for treating hate crimes differently from other crimes.<sup>234</sup>
- (e) It allows hate crimes to be recognised and denounced without creating additional legal barriers to prosecution that may be introduced by the creation of specific hate crime offences.<sup>235</sup>

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<sup>230</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>231</sup> Free Speech Union; Maxim Institute; Whaikaha | Ministry for Disabled People; Te Kāhui Ture o Aotearoa; New Zealand Law Society; and Pride in Law Otago.

<sup>232</sup> Free Speech Union; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Free Speech Union; and Submission 63.

<sup>233</sup> Maxim Institute; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>234</sup> Maxim Institute.

<sup>235</sup> New Zealand Federation of Business and Professional Women.

## ***Other responses***

78. As we discuss in the next chapter, nineteen submitters thought a different legal model should be adopted. Many of these submitters did not specifically comment on why any problems with the current law could not be addressed under the sentence aggravation model.
79. Four submitters thought the aggravating factor in the Sentencing Act should be repealed and not replaced with any other hate crime law.<sup>236</sup> Most did not give reasons. One was concerned that any hate crime law, including the sentence aggravation model, is open to abuse and ideological bias.<sup>237</sup>
80. The remaining submitters did not express a clear view on whether any problems with the current law could be addressed under the sentence aggravation model.
81. Some submitters who supported changing the legal model or who did not express a clear view still commented on how the operation of the current legal model could be improved if it is kept. This feedback is included in the discussion of specific issues below.

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<sup>236</sup> Dr John McDonald-Wharry; Submission 64; Submission 71; and Submission 73.

<sup>237</sup> Dr John McDonald-Wharry.

## DENOUNCING HATE CRIME

82. In the Consultation Paper, we explained that some people may think the current law does not do enough to denounce hate crimes or show they are taken seriously. We suggested options to strengthen the denunciatory effect of the sentence aggravation model if that is needed.

### Is there a problem?

83. Fourteen submitters discussed whether the current law adequately denounces hate crime.<sup>238</sup>

84. Two submitters considered the sentence aggravation model does not do enough to denounce hate crime.<sup>239</sup> One of these submitters added that it does not contribute to public education and conversations that can provide the impetus to challenge and reduce hate crime.<sup>240</sup>

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<sup>238</sup> Te Tari Ture o te Karauna | Crown Law; Donald Beasley Institute and People First New Zealand (joint submission); Grey Power New Zealand; Dr David Harvey; Luke Cunningham Clere; Murray Stirling; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Submission 63; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Criminal Law Committee; The Law Association of New Zealand Public and Administrative Law Committee; and Women's Rights Party.

<sup>239</sup> Donald Beasley Institute and People First New Zealand (joint submission); and Murray Stirling.

<sup>240</sup> Donald Beasley Institute and People First New Zealand (joint submission).

85. Some submitters identified features of the current law and how it is applied that may limit its denunciatory effect. They said:

- (a) The law does not require hate motivation to be clearly communicated and recorded (for example, in sentencing notes, statistics and the offender's conviction history).<sup>241</sup>
- (b) It is unclear from sentencing decisions whether and to what extent the offender's hate motivation affected the sentence imposed.<sup>242</sup>
- (c) Inconsistent judicial treatment of hate crimes could suggest that sentences being handed down may not be sufficient to signal public condemnation of hate crime offending.<sup>243</sup>
- (d) There is a lack of media attention on cases where hostility is treated as an aggravating factor.<sup>244</sup>

86. Other submitters responded to concerns about inadequate denunciation:

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<sup>241</sup> Luke Cunningham Clere; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women's Rights Party.

<sup>242</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service; Murray Stirling; and The Law Association of New Zealand Criminal Law Committee.

<sup>243</sup> Luke Cunningham Clere.

<sup>244</sup> Dr David Harvey; and Women's Rights Party.

- (a) Three submitters emphasised that denunciation can be achieved through sentencing, as the current law already provides for<sup>245</sup> (although one suggested some improvements to sentencing practice and procedure<sup>246</sup>).
- (b) Te Tari Ture o te Karauna | Crown Law noted aggravating factors are usually spelled out in sentencing decisions for more serious crimes. Ratonga Wawao ā-Tūmatanui | Public Defence Service thought hate motivation is particularly likely to be mentioned because its circumstances are “quite unique”.
- (c) The Public Defence Service said judges are picking up instances of repeat hate-motivated offending even though it is not recorded in the offender’s criminal record.
- (d) Two submitters did not think there is a problem with the maximum penalties available.<sup>247</sup> In addition, Crown Law suggested there is enough room in the existing maximum penalties for more serious offences and

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<sup>245</sup> Dr David Harvey; Submission 63; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>246</sup> Dr David Harvey.

<sup>247</sup> Pride in Law Otago; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

enough charging options available to prosecutors to address hate-motivated offending.

87. Te Kāhui Ture o Aotearoa | New Zealand Law Society thought there is not enough information about hate crimes and how they are dealt with in the criminal justice system to know if they are being treated seriously enough. We discuss this further below under the heading “Collecting information about hate crime”.

### **Can the problem be addressed under the current legal model?**

#### ***Requiring judges to state an offence was a hate crime***

88. Nine submitters expressly supported requiring sentencing judges to state that an offence was a hate crime during sentencing.<sup>248</sup> Four other submitters made comments implying potential support for this option but did not address it explicitly.<sup>249</sup>

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<sup>248</sup> Russell Hoban; Dr Kyle R Matthews; some members of Ratonga Wawao ā-Tūmatanui | Public Defence Service; New Zealand Federation of Business and Professional Women; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Public and Administrative Law Committee; and Women’s Rights Party.

<sup>249</sup> Dr David Harvey (who said judges should make it clear when and how hostility aggravation forms a part of a sentencing outcome); Luke Cunningham Clere

89. Submitters who supported this option thought it would reinforce the law’s denunciation of hate crimes.<sup>250</sup> They suggested clear communication of an offender’s hate motivation would contribute to wider public awareness<sup>251</sup> and, potentially, increase reporting rates.<sup>252</sup>

***Requiring judges to explain how an offender’s hate motivation affected their sentence***

90. Five submitters supported requiring judges to explain how the offender’s hate motivation affected their sentence.<sup>253</sup> Two additional submitters thought it should be clear how hate

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(which noted this option would meet the international trend of “marking out” hate-motivated offending); and Maxim Institute and Submission 90 (both of whom did not comment on this option but supported requiring judges to state how the aggravating factor affected the sentence, which would also involve making it clear the aggravating factor applied).

<sup>250</sup> New Zealand Federation of Business and Professional Women; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women’s Rights Party.

<sup>251</sup> Dr Kyle R Matthews; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>252</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust. In addition, The Law Association of New Zealand Criminal Law Committee did not specifically comment on this option but suggested greater visibility of hate motivation at sentencing may help increase victim confidence in the criminal justice system and reduce reluctance to report hate crimes.

<sup>253</sup> Russell Hoban; Maxim Institute; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 90; and Te Kāhui o Ināia Tonu Nei Charitable Trust.



motivation affected the sentence but did not explicitly address whether judges should be required to state this.<sup>254</sup>

91. The Maxim Institute suggested such a requirement would show the public how the law deprecates hate crimes and provide guidance to other judges so that like cases are treated alike.
92. Two submitters suggested that, if such a requirement were introduced, it may be appropriate to treat all aggravating factors in the same way.<sup>255</sup>
93. Although it did not expressly oppose this option, Luke Cunningham Clere observed that requiring judges to explain how an aggravating factor increased the offender's sentence would be a significant departure from current practice.

### ***Reviewing maximum penalties for existing offences***

94. Two submitters expressly supported reviewing the maximum penalties for existing offences to ensure they are high enough to take proper account of the offender's hate motivation.<sup>256</sup> In addition, one submitter said there "may be

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<sup>254</sup> Dr David Harvey; and The Law Association of New Zealand Criminal Law Committee.

<sup>255</sup> Maxim Institute; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>256</sup> Russell Hoban; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

room” to review maximum penalties<sup>257</sup> and another said that punishments need to reflect the damage hate crime causes.<sup>258</sup> None of these submitters stated that current maximum penalties are inadequate or gave examples of offences for which the maximum penalty may warrant review.

95. Four submitters said either that there is no need to review maximum penalties, that current maximum penalties are adequate or that harsher penalties are not the best way to address hate crime.<sup>259</sup>
96. Crown Law did not take a position on whether maximum penalties should be reviewed but made some relevant observations. It suggested more serious offences that might be motivated by hate, such as wounding or grievous bodily harm, usually have plenty of “headroom” in the maximum penalty to reflect the culpability of the offending. It noted sentences for these offences are usually well below the maximum. Crown Law observed that some offences in the Summary Offences Act 1981 commonly involved in hate crimes (such as assault and wilful damage) have near-

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<sup>257</sup> Submission 63.

<sup>258</sup> Grey Power New Zealand.

<sup>259</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; Ratonga Wawao ā-Tūmatanui | Public Defence Service; and Submission 90.

equivalents in the Crimes Act 1961 with higher maximum penalties. Prosecutors may therefore be able to charge hate crime offenders with a more serious offence in appropriate cases. Crown Law acknowledged this is not the case for offensive behaviour or language.

## **ENCOURAGING REPORTING OF HATE CRIMES**

97. In our Consultation Paper, we explained that hate crime is often not reported to Police. We asked for feedback about barriers to reporting hate crime and whether improvements at Police since publication of the Royal Commission's findings has made any difference. We also suggested some options to address these barriers.

### **Is there a problem?**

98. Five submitters said members of marginalised communities often do not report hate crimes because of their own or others' previous experiences with Police.<sup>260</sup> Submitters gave the following examples of negative interactions with Police:

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<sup>260</sup> Donald Beasley Institute and People First New Zealand (joint submission); Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and Submission 26.

- (a) Police failing to protect vulnerable communities at events<sup>261</sup> or trivialising complaints.<sup>262</sup>
  - (b) The Dawn Raids, police violence during the evictions at Ihumātao and the recent crackdown on gangs.<sup>263</sup>
  - (c) Deaf and disabled people being treated disrespectfully and aggressively, with frequent use of force.<sup>264</sup>
99. One of these submitters said they had friends who had reported hate-motivated assaults (such as being pushed down stairs) but Police were not responsive.<sup>265</sup>
100. Four submitters commented on barriers to reporting hate crimes for disabled people specifically.<sup>266</sup> They said:
- (a) Police and justice staff (including judges) make inaccurate assumptions about the competency and credibility of disabled people.<sup>267</sup>

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<sup>261</sup> Inclusive Aotearoa Collective Tāhono.

<sup>262</sup> Donald Beasley Institute and People First New Zealand (joint submission); and Submission 26.

<sup>263</sup> Pride in Law Otago.

<sup>264</sup> Whaikaha | Ministry of Disabled People.

<sup>265</sup> Submission 26.

<sup>266</sup> Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Whaikaha | Ministry of Disabled People; and Submission 26.

<sup>267</sup> Donald Beasley Institute and People First New Zealand (joint submission); and Whaikaha | Ministry of Disabled People.

- (b) Disabled people may not get the support they need to navigate the justice system.<sup>268</sup>
- (c) Police and prosecuting authorities diminish complaints by disabled people.<sup>269</sup> For example, violence and abuse may be downplayed as ‘bullying’.<sup>270</sup>
- (d) Disabled, blind or low vision people may have limited ability to identify an offender.<sup>271</sup>

101. Two submitters suggested the current legal framework does not encourage people to report hate crimes.<sup>272</sup> One also noted the lack of dedicated social service organisations, official hate incident reporting tools, and research or education networks for the Hindu community.<sup>273</sup>

102. The Public Defence Service observed that a low reporting rate is not unique to hate crimes. It said the reasons for low reporting of hate crime identified in our Consultation Paper accord with the reasons people give generally for not

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<sup>268</sup> Donald Beasley Institute and People First New Zealand (joint submission); and Submission 26.

<sup>269</sup> Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission).

<sup>270</sup> Disabled Persons Assembly and VisAble (joint submission).

<sup>271</sup> Submission 26.

<sup>272</sup> Donald Beasley Institute and People First New Zealand (joint submission); and Submission 43.

<sup>273</sup> Submission 43.

reporting crime. Those reasons include the perceived triviality of the offending, as well as perceptions Police could not do anything or would not be interested.

## **Can the problem be addressed under the current legal model?**

### ***Public awareness and education***

103. Eleven submitters supported public awareness and education initiatives.<sup>274</sup> Two other submitters did not specifically address whether there is a problem with underreporting but suggested, if there is, public education would help to address this.<sup>275</sup>

104. Some submitters focused on public awareness around hate crime specifically, including its impacts and how to report

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<sup>274</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Dr Kyle R Matthews; Members of Te Hunga Rōia Māori o Aotearoa; New Zealand Federation of Business and Professional Women; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Submission 26; Submission 43; Submission 90; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>275</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

it.<sup>276</sup> Some said this would help to encourage reporting or show that hate crime is taken seriously.<sup>277</sup>

105. Others saw public education as a way to reduce the occurrence of hate crime by addressing its root causes and counteracting harmful narratives (for example, by targeting racism and misogyny).<sup>278</sup>

106. Luke Cunningham Clere suggested that, in addition to public campaigns, tolerance education in schools and bias training in institutions could be considered.

### ***Third party reporting services***

107. Two submitters supported establishing third party reporting mechanisms through community organisations.<sup>279</sup> One suggested having a separate entity that can receive reports of hate crimes from victims and offer support could lead to

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<sup>276</sup> Luke Cunningham Clere; Dr Kyle R Matthews; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 43; Submission 90; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>277</sup> Dr Kyle R Matthews; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 90; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>278</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; New Zealand Federation of Business and Professional Women; Pride in Law Otago; and Submission 26.

<sup>279</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Pride in Law Otago.

more accurate reporting (and, consequently, more accurate records).<sup>280</sup>

108. In addition, Ināia Tonu Nei supported “alternative ways of reporting” but did not specify what form this should take.
109. Inclusive Aotearoa Collective Tāhono said third party reporting is already provided informally through support at a community level. Although it saw merit in the idea, it was hesitant about formalising these arrangements because it might limit the extent of care that could be given. It emphasised that such services need sufficient resourcing and mental health support to operate well.

### ***Other comments on encouraging reporting of hate crimes***

110. Several submitters made other suggestions about how to increase reporting of hate crimes.
- (a) Whaikaha | Ministry of Disabled People supported making reporting more accessible for disabled people. This could involve upskilling Police and the judiciary in disability responsiveness, and providing accessible ways to report hate crimes and information on how to do so.
  - (b) The Law Association of New Zealand Criminal Law Committee suggested that making hate motivation more visible at sentencing could help to increase victim

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<sup>280</sup> Pride in Law Otago.



confidence in the criminal justice system, potentially reducing reluctance to report hate crimes.

- (c) Two submitters emphasised that new hate crime offences are not needed to encourage reporting of hate crimes. They suggested this could instead be achieved through public education, improved police engagement with affected communities and other trust-building initiatives.<sup>281</sup>

## **ENSURING HATE MOTIVATION IS ADDRESSED IN RELEVANT CASES**

111. In our Consultation Paper, we sought feedback on whether hate motivation is being consistently investigated by Police and raised by prosecutors at sentencing. We also asked whether hate motivation should be considered at other stages of court proceedings, such as in bail decisions or subsequent sentencing decisions relating to the same offender. We suggested options to improve the consistency with which hate motivation is addressed in court proceedings.

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<sup>281</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

## Is there a problem?

112. Twelve submitters suggested hate motivation is not consistently investigated by Police or considered at sentencing.<sup>282</sup>
113. Six submitters thought Police do not always treat reports of hate crimes seriously or investigate them adequately,<sup>283</sup> potentially due to a lack of understanding or training.<sup>284</sup> The Free Speech Union expressed concern that the training already developed by Police is ambiguous and subjective, raising concerns over its legality and impact on fundamental rights.

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<sup>282</sup> Members of Te Hunga Rōia Māori o Aotearoa; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Graeme Edgeler; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Submission 43; Te Kāhui Ture o Aotearoa | New Zealand Law Society; The Law Association of New Zealand Criminal Law Committee; and Dr Chris Wilson.

<sup>283</sup> Members of Te Hunga Rōia Māori o Aotearoa; Madeline Ash; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Submission 43; The Law Association of New Zealand Criminal Law Committee.

<sup>284</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Submission 43.

114. Four submitters suggested prosecutors do not always raise hate motivation when it is relevant.<sup>285</sup> The Public Defence Service and a member of Te Hunga Rōia Māori o Aotearoa expressed concern that prosecutors sometimes seek to rely on the aggravating factor in situations where that is not appropriate (for example, where the offender has mental health issues or said something in the heat of the moment).<sup>286</sup>
115. In addition to issues with investigations and prosecutions, five submitters thought there is inconsistent judicial treatment of hate crime.<sup>287</sup>
116. Three submitters suggested the current law is inadequate to ensure hate motivation is consistently addressed since it:
- (a) is discretionary, relying on judges and police to recognise and record hate motivation;<sup>288</sup>

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<sup>285</sup> Members of Te Hunga Rōia Māori o Aotearoa; Dr David Harvey; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and The Law Association of New Zealand Criminal Law Committee.

<sup>286</sup> Members of Te Hunga Rōia Māori o Aotearoa; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>287</sup> Members of Te Hunga Rōia Māori o Aotearoa; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and The Law Association of New Zealand Criminal Law Committee.

<sup>288</sup> Inclusive Aotearoa Collective Tāhono.

- (b) does not encourage or prompt prosecutors to raise hate motivation at sentencing;<sup>289</sup> and
- (c) does not include hate motivation as an element of offences, so hate motivation is more likely to be “filtered out” of the criminal process.<sup>290</sup>

117. Two submitters noted the lack of hate crime cases involving disabled people as victims. They thought this is because disabled people are often not viewed as credible witnesses,<sup>291</sup> their complaints are not taken seriously or they are not given the support they need (including legal resources) to take their cases forward.<sup>292</sup> Similar issues were raised as barriers to reporting hate crimes for disabled people (see above). One submitter said older people are also invisible in police and justice processes.<sup>293</sup>
118. On the other hand, a member of the Muslim community submitted that the work Police has undertaken since March 2019 to improve recording of hate motivation has resulted

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<sup>289</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>290</sup> Dr Mark Walters.

<sup>291</sup> Disabled Persons Assembly and VisAble (joint submission); and Donald Beasley Institute and People First New Zealand (joint submission).

<sup>292</sup> Donald Beasley Institute and People First New Zealand (joint submission).

<sup>293</sup> Disabled Persons Assembly and VisAble (joint submission).

in more consistency in the presentation of this background to the courts for sentencing purposes.<sup>294</sup>

119. Two submitters discussed whether hate motivation is taken into account in bail decisions or subsequent sentencing decisions.

- (a) The Public Defence Service considered hate motivation may be relevant to bail decisions and later sentencing decisions, and said this is already taken into account under the current law where appropriate. It said Police sometimes notes hate motivation in bail opposition forms. It observed people accused of hate-motivated crimes against Muslims regularly have bail conditions restricting them from going near a mosque. In addition, previous convictions for hate-motivated crime may be admissible as propensity evidence in a subsequent case (although at present this will only occur if the previous sentencing notes have been obtained, since hate motivation is not recorded on a person's criminal conviction history).
- (b) The Law Association of New Zealand Criminal Law Committee said that any previous convictions for hate-motivated offending are unlikely to be apparent at a

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<sup>294</sup> Murray Stirling.

bail hearing. This is because aggravating factors are not recorded on the defendant's criminal conviction history, and the short timeframe between a defendant being charged and applying for bail rarely allows time for the arresting officer to obtain previous sentencing notes or summaries of fact.

## **Can the problem be addressed under the current legal model?**

### ***Guidance and training***

120. Five submitters supported providing advice, guidance or training for prosecutors.<sup>295</sup> The New Zealand Law Society noted that the courts rely on prosecutors to raise hate motivation at sentencing and ensure there is enough evidence to apply the aggravating factor.

121. Crown Law suggested it may not be appropriate to include guidance on hate crime in the Solicitor-General's Prosecution Guidelines, which provide high-level advice and do not give specific commentary on any individual aggravating factors. The Guidelines also apply to all prosecutors, whereas hate crimes will only be a Police or

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<sup>295</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; New Zealand Federation of Business and Professional Women; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

Crown matter. However, Crown Law said it could direct Crown Solicitors to the Police material on hate crime and suggest in-house training. It could also assist the Crown Solicitors Network with the implications of any legislative reform.

122. Seven submitters suggested further Police training or guidance.<sup>296</sup> Most did not identify specific areas for improvement to the training and guidance that has been recently developed. The New Zealand Jewish Council recommended training on how to recognise and address antisemitic incidents and other forms of bias, noting some incidents in recent years have revealed gaps in understanding of antisemitism. The New Zealand Federation of Business and Professional Women supported adopting a similar education program to the one implemented by police in Victoria, Australia, which it said had led to increased recognition of prejudice-motivated crimes.

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<sup>296</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 26; and Submission 43.

123. Five submitters supported training or guidance for the judiciary.<sup>297</sup> The New Zealand Law Society suggested legal education at university or through continuing professional development to raise awareness within the legal profession.

### ***Flagging hate crimes in the court system***

124. Eight submitters supported introducing a hate crime flag or conviction notation in the court system to record where an offence has been identified as a hate crime.<sup>298</sup> Some submitters said the flag or notation should form part of the court record<sup>299</sup> or the offender's criminal conviction history.<sup>300</sup> We heard this could help ensure hate motivation is considered at sentencing for the offence (including in pre-

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<sup>297</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>298</sup> Dr David Harvey; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; Dr Kyle R Matthews; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Public and Administrative Law Committee; and Women's Rights Party.

<sup>299</sup> Dr David Harvey.

<sup>300</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women's Rights Party.



sentence reports) and for any subsequent offences.<sup>301</sup> It could also provide more accurate data on hate crimes.<sup>302</sup>

125. Two other submitters made comments indicating possible support for a hate crime flag or conviction notation but did not take a clear position:

- (a) The Law Association of New Zealand Criminal Law Committee supported Police and prosecutors recording suspected or identified hate motivation but did not specify how this should occur.<sup>303</sup>
- (b) Luke Cunningham Clere said a hate crime flag would serve the symbolic function of “marking out” hate crimes without increasing the complexity of the law and would make them easier to identify.

126. Five submitters said a hate crime flag could be shared with Ara Poutama Aotearoa | Department of Corrections to help assess the offender’s rehabilitative needs.<sup>304</sup>

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<sup>301</sup> Dr David Harvey; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Luke Cunningham Clere; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>302</sup> The Law Association of New Zealand Public and Administrative Law Committee.

<sup>303</sup> The submitter referred to a flag, but it was unclear whether they were referring to a court flag, the existing Police flag, or both.

<sup>304</sup> Dr David Harvey; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; Pride in Law Otago; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

127. No submitters expressly opposed the introduction of a court flag. However, the Public Defence Service cautioned that a hate crime flag could be misapplied. It observed that the existing ‘family violence flag’ is not always accurately applied, with some cases being flagged that are clearly not family violence related.

***Other comments on ensuring hate motivation is addressed consistently***

128. Four submitters emphasised that if there are problems with how hate crime is investigated or prosecuted, this is an operational issue that should be addressed (at least in the first instance) through Police and prosecutorial practice rather than law reform.<sup>305</sup> The New Zealand Law Society recommended Police and Crown prosecutors review their processes for investigating, recording and prosecuting hate crimes, as well as sentencing practices and outcomes, with the purpose of improving consistency.

129. On the other hand, one submitter said that while in theory detailed guidance could be developed for every part of the criminal justice system, if this mimicked a quasi-legislative

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<sup>305</sup> Dr David Harvey; Graeme Edgeler; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and The Law Association of New Zealand Public and Administrative Law Committee.

change it would beg the question of why the legislative framework is not simply changed.<sup>306</sup>

130. Two submitters thought hate motivation should be considered in bail decisions,<sup>307</sup> and one of these also said it should be considered in parole decisions.<sup>308</sup> Neither submitter commented on the best way to ensure this occurs, although as noted above, the Public Defence Service said hate motivation is already being considered in some bail decisions.

## COLLECTING INFORMATION ABOUT HATE CRIME

131. In our Consultation Paper, we discussed the concern that it may be difficult to collect accurate information about reported hate crimes and case outcomes because hate motivation does not form part of the offence a person is charged with or convicted of. We suggested a hate crime flag in the court system could assist with information gathering and that information about flagged cases could be shared with Police.

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<sup>306</sup> Madeline Ash.

<sup>307</sup> Dr John McDonald-Wharry; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>308</sup> Dr John McDonald-Wharry.

## Is there a problem?

132. Eight submitters said it is difficult to get accurate data on hate crimes because hate motivation is not recorded when a person is convicted of an offence.<sup>309</sup> Submitters said having data on convictions for offences that are hate-motivated would:

- (a) help to assess whether the justice system is responding to hate crimes appropriately and consistently;<sup>310</sup> and
- (b) allow researchers to understand why and where hate crimes occur, and to identify moments in time where there might be a heightened risk of hate crimes.<sup>311</sup>

133. In addition, Justice for Palestine, Alternative Jewish Voices and Dayenu said it is important to identify convicted perpetrators of hate crimes for the purposes of vetting individuals for firearms licences. They said minor crimes such as intentional damage are often overlooked in assessing fit and proper status for a firearms licence.

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<sup>309</sup> Madeline Ash; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Te Kāhui ture o Aotearoa | New Zealand Law Society; Pride in Law Otago; Ratonga Wawao ā-Tūmatanui | Public Defence Service; The Law Association of New Zealand Criminal Law Committee; and Dr Chris Wilson.

<sup>310</sup> Inclusive Aotearoa Collective Tāhono; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>311</sup> Dr Chris Wilson.

134. Some submitters discussed the limitations of the existing Police data or raised concerns about it. Comments included:

- (a) Police may not flag cases correctly and, even where a reported offence is flagged as hate-motivated, it may not be sentenced that way.<sup>312</sup>
- (b) Police officers may lack the skills or training to recognise hate crimes or categorise them appropriately.<sup>313</sup>
- (c) It is inappropriate to record hate crimes based on perception or a subjective test.<sup>314</sup>
- (d) There may be a reporting bias in the data — increases in reporting may not reflect an increase in hate crime.<sup>315</sup>
- (e) Many marginalised communities do not trust Police and are unlikely to make a Police report.<sup>316</sup>
- (f) Because Police has only been collecting data about perceived hate crimes since 2019, with ongoing work to improve it since 2021, the incidence of hate crime

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<sup>312</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>313</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission).

<sup>314</sup> Family First; and Dr David Harvey.

<sup>315</sup> Dr Chris Wilson.

<sup>316</sup> Pride in Law Otago.

and trends in New Zealand over time is difficult to judge.<sup>317</sup>

135. Two submitters thought Police data collection had improved and serves useful purposes. Dr Chris Wilson said when Police started collecting data, there were concerns that the categories of targeted groups were very broad. However, the categories are now more nuanced. He thought the data was becoming reasonably strong and would be able to provide a longitudinal perspective. Another submitter commended Police for their work since March 2019 to improve the recording of hate as a factor in crimes and make statistics available.<sup>318</sup> He thought this had led to greater consistency in hate motivation being raised at sentencing.

136. Several submitters noted other gaps in the information currently available, including information about:

- (a) why many reported hate crimes are not prosecuted;<sup>319</sup>
- (b) the extent to which Māori are experiencing hate crime as victims;<sup>320</sup>

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<sup>317</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>318</sup> Murray Stirling.

<sup>319</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>320</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

(c) the nature of the crime and the motive of the perpetrator (for example, whether an offence is linked to violent extremism).<sup>321</sup>

137. The New Zealand Jewish Council said that while Police do collect data on reported antisemitic crimes, the level of hate that is directed at the Jewish community and Jewish individuals is not well understood by the wider community.

### **Can the problem be addressed under the current legal model?**

138. A number of submitters called for better data collection and public reporting of data, including:

- (a) Data on when hate motivation is a factor in sentencing.<sup>322</sup>
  - (b) Data collection and public reporting showing the scope of hate-motivated offending against different groups (or increased support for such data collection).<sup>323</sup>
- Submitters said this data should recognise

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<sup>321</sup> Dr Chris Wilson.

<sup>322</sup> Grace Carroll; Inclusive Aotearoa Collective Tāhono; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Submission 11.

<sup>323</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; and Submission 26.

intersectionality<sup>324</sup> and gender-based hate crimes.<sup>325</sup> It could inform policy and law enforcement strategies and preventative action.<sup>326</sup> Some suggested requiring Police to collect and report this data<sup>327</sup> or creating clear guidelines.<sup>328</sup>

- (c) Data on whether reported hate crimes led to prosecution and conviction.<sup>329</sup>
- (d) Information on policing responses, resourcing and sentencing.<sup>330</sup> This could support positive public perceptions of procedural justice, in turn supporting positive perceptions of policing and judicial practice.

139. Most submitters who commented on improvements to data collection did not specifically state whether these could be achieved under the current legal framework. As noted earlier, one submitter suggested that introducing a hate crime flag in the court system would help to improve the

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<sup>324</sup> New Zealand Federation of Business and Professional Women; and Submission 26.

<sup>325</sup> New Zealand Federation of Business and Professional Women.

<sup>326</sup> New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; and Submission 26.

<sup>327</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission).

<sup>328</sup> New Zealand Federation of Business and Professional Women.

<sup>329</sup> Inclusive Aotearoa Collective Tāhono.

<sup>330</sup> Grace Carroll.



accuracy of data on hate crimes.<sup>331</sup> Dr Chris Wilson suggested recording the application of the aggravating factor may not be enough to get accurate data because the factor does not appear to be used consistently.

## **APPLYING THE AGGRAVATING FACTOR**

140. In our Consultation Paper, we sought feedback on possible concerns about the wording of the hate crime aggravating factor and its application by the courts. We suggested options to amend the aggravating factor if that is needed.

### **Partial motivation**

141. The hate crime aggravating factor applies to offending committed “partly or wholly” because of hostility toward a group of people with an enduring common characteristic. One submitter said there is variation and incoherence in how the courts have considered what satisfies the requirement for ‘partial’ motivation’ (although they did not suggest the aggravating factor should not apply to partial motivation).<sup>332</sup>

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<sup>331</sup> The Law Association of New Zealand Public and Administrative Law Committee. In addition, Luke Cunningham Clere noted that because there is no hate crime flag, hate motivation is not actively recorded in statistics (suggesting a hate crime flag may remedy this problem).

<sup>332</sup> Madeline Ash.

142. Three other submitters gave reasons why it is reasonable to permit the court to consider partial motivation:

- (a) Section 9 of the Sentencing Act 2002 requires the court to take aggravating factors into account to the extent they are applicable. If hostility was a relatively small part of the offender's motivation then the aggravating factor should not weigh heavily in the court's determination.<sup>333</sup>
- (b) If an aggravating fact relevant to sentencing is disputed by the offender (such as hate motivation), it must be proven beyond reasonable doubt at a disputed facts hearing.<sup>334</sup>
- (c) Offenders may have more than one motivation, and there may not be direct evidence that hate was the main or primary motivation.<sup>335</sup>

143. No submitters suggested amending the law to require hate motivation to be a main reason for the offending. Two submitters explicitly opposed this.<sup>336</sup> They said it would make hate motivation more difficult to prove, so prosecutors would

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<sup>333</sup> Maxim Institute. Similarly, Ratonga Wawao ā-Tūmatanui | Public Defence Service suggested the level of weight given to the aggravating factor would no doubt reflect the level of motivation.

<sup>334</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>335</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>336</sup> Luke Cunningham Clere; and Maxim Institute.

be less likely to pursue it.<sup>337</sup> This would diminish the impact of the aggravating factor. It could also require more police and judicial time and resources where hate motivation is raised.<sup>338</sup>

## Protected characteristics

### *Is there a problem?*

144. We discussed views about the residual category, the term “enduring common characteristic” and the list of protected characteristics in the “Reform considerations” section above. To summarise, submitters raised concerns about:

- (a) the aggravating factor applying to any “enduring common characteristic” and inconsistency in how the test is applied;<sup>339</sup>
- (b) the anomaly that some of the currently listed characteristics are not “enduring”;<sup>340</sup> and

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<sup>337</sup> Luke Cunningham Clere; and Maxim Institute.

<sup>338</sup> Maxim Institute.

<sup>339</sup> Madeline Ash; Te Tari Ture o te Karauna | Crown Law; Luke Cunningham Clere; Maxim Institute; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Ratonga Wawao ā-Tūmatanui | Public Defence Service; and Submission 11.

<sup>340</sup> Graeme Edgeler; Rex Landy; and Women’s Rights Party.

- (c) the fact that sex or gender is not currently listed as a protected characteristic.<sup>341</sup>

***Can the problem be addressed under the current legal model?***

145. Two submitters thought the aggravating factor should be amended so that it only applies to a closed list of protected characteristics.<sup>342</sup> Both considered this is appropriate to ensure clarity in the criminal law. The Maxim Institute said it would ensure the aggravating factor does not apply in situations where Parliament did not intend it to (for example, in relation to groups such as gangs or child sex offenders).
146. The New Zealand Law Society did not take a position on whether the list should be open or closed. It said an open-ended list arguably better provides for changing circumstances and allows the legislation to be utilised flexibly. However, it also acknowledged the difficulty of formulating a provision that provides sufficient protection for groups that are the victims of hate crime while remaining grounded in the rights-based justification for the legislation.

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<sup>341</sup> New Zealand Federation of Business and Professional Women; Tamsen Williams; and Women's Rights Party.

<sup>342</sup> Graeme Edgeler; and Maxim Institute. Although Graeme Edgeler noted this would not necessarily be worth doing if it was the only change we recommended to the aggravating factor.

147. Crown Law suggested concerns about the application of the aggravating factor could potentially be addressed by:

- (a) removing the word “enduring” and instead referring to any “group of people with common characteristics”;
- (b) updating the list of examples of protected characteristics to reflect community expectations, while retaining a broader description to allow expansion over time; and
- (c) specifying that the intention of the aggravating factor is to protect vulnerable or minority groups.

148. One other submitter also supported removing the requirement for the common characteristic to be “enduring”.<sup>343</sup>

149. Public Defence Service lawyers had mixed views but did not think the “enduring common characteristic” requirement was causing any difficulty. The New Zealand Law Society did not support changing the “enduring common characteristics” test if an open list of characteristics is retained, given the risks of an overly-broad formulation. One submitter supported using power imbalance as the key identifier to remove any subjectivity.<sup>344</sup>

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<sup>343</sup> Submission 11.

<sup>344</sup> Submission 77.

150. Three submitters raised the possibility of aligning the list of characteristics in the aggravating factor (at least in part) with those in section 21 of the Human Rights Act 1993.<sup>345</sup> Another three submitters supported adding ‘sex’ to the list of characteristics to recognise the impact of sexism, misogyny and violence against women.<sup>346</sup> The New Zealand Federation of Business and Professional Women thought this approach would avoid a potential hierarchy of sexual offences that could be created under the specific hate crime offence model (based on whether the perpetrator’s hostility toward women could be proven).

## **Requirement that the offender believed the victim had the characteristic**

### ***Is there a problem?***

151. For the aggravating factor to apply, the offender must have believed the victim had the relevant characteristic. Four submitters raised concerns that this requirement limits the application of the aggravating factor.<sup>347</sup> Three submitters observed that hate crimes have broader impacts on

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<sup>345</sup> Te Tari Ture o te Karauna | Crown Law; Graeme Edgeler; and Dr David Harvey.

<sup>346</sup> New Zealand Federation of Business and Professional Women; Tamsen Williams; and Women’s Rights Party.

<sup>347</sup> Grace Carroll; Luke Cunningham Clere; Dr Kyle R Matthews; and The Law Association of New Zealand Criminal Law Committee.

members of the targeted group and wider society regardless of whether the victim is a member of the group.<sup>348</sup>

152. Three submitters did not think there is a problem with the current law in this regard.<sup>349</sup> Public Defence Service lawyers thought it should be possible for an offence to be treated as a hate crime even if the victim was not a member of the targeted group (referring to the example of vandalism of rainbow crossings). However, given the breadth of judges' sentencing discretion, they did not think the current law would prevent this. Graeme Edgeler considered public vandalism is less likely to cause the victim and others in their group to fear being targeted in future, since it does not target individuals.

***Can the problem be addressed under the current legal model?***

153. Two submitters supported removing the requirement that the offender must have believed the victim had the relevant characteristic.<sup>350</sup> The other submitters who raised possible

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<sup>348</sup> Grace Carroll; Luke Cunningham Clere and The Law Association of New Zealand Criminal Law Committee.

<sup>349</sup> Graeme Edgeler; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>350</sup> Dr Kyle R Matthews; and The Law Association of New Zealand Criminal Law Committee.

concerns with the requirement did not specifically address this point.

### **Other concerns about the aggravating factor**

154. One submitter considered section 9(1)(h) is interpreted and applied inconsistently.<sup>351</sup> In addition to the issues around partial motivation and the “enduring common characteristic” test discussed above, she said there is variation and incoherence in how the courts have considered:

- (a) What type of evidence is required to be satisfied that s 9(1)(h) applies.
- (b) Whether the 9(1)(h) motive can arise partway through an offence.
- (c) The relationship between s 9(1)(h) and other aggravating factors (in particular, the risk of double-counting or under-accounting for certain factors). She referred to sections 9(1)(g) (vulnerability), 9(1)(hb) (organised criminal group affiliation) and 9(1)(ha) (part of or involves a terrorist act).
- (d) The impact of a defendant’s intoxication on whether s 9(1)(h) applies.
- (e) Whether motive can or should be ‘divided’ between co-defendants.

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<sup>351</sup> Madeline Ash.



155. The same submitter suggested this lack of consistency arises because hate motivation is generally only examined at sentencing. It is less likely to be subject to rigorous evidence collection, testing, argument and consideration by the court.
156. Two submitters raised concerns about the use of the term ‘hostility’. Ināia Tonu Nei suggested the term ‘prejudice’ is more relevant to hate crime because it more clearly captures bias and preconceived negative opinions. The Free Speech Union noted there is no clear legal definition of hostility. It thought the term was vague and overly broad — potentially capturing behaviour that does not constitute hate crime and facilitating subjective interpretations by police, prosecutors and judges.

## ASSESSING THE REHABILITATIVE NEEDS OF OFFENDERS

157. In our Consultation Paper, we discussed the concern that a person's need for rehabilitative support may not be apparent because hate motivation is not recorded as part of their conviction. We noted that the Department of Corrections has no specific rehabilitative programme for hate crime offenders, although general programmes and individualised support may be provided. We suggested that, if a hate crime flag or conviction notation were introduced, that information could be shared with Corrections so it could more easily identify and assess the offender's rehabilitative needs.

### Is there a problem?

158. Six submitters expressed concern about the lack of specific rehabilitation programmes for hate crime offenders.<sup>352</sup> Three of these submitters also thought it was problematic that there is no mechanism to notify Corrections that a person has been convicted of hate-motivated offending.<sup>353</sup>

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<sup>352</sup> Madeline Ash; Russell Hoban; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; Te Kāhui o Ināia Tonu Nei Charitable Trust; and The Law Association of New Zealand Criminal Law Committee.

<sup>353</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

159. Two submitters said they disagreed with Corrections' view that specific rehabilitation programmes are not required for hate crime offenders.<sup>354</sup> The Law Association of New Zealand Criminal Law Committee doubted it was accurate that there are not enough eligible offenders to warrant such programmes. It also disagreed that existing rehabilitative measures are sufficient, suggesting that rehabilitation for hate crime offenders should explore and confront underlying attitudes and biases about others.
160. One submitter who runs voluntary programmes in prisons observed that if the systems in prison rehabilitation are not specific, measurable and required, rehabilitation will not happen in practice.<sup>355</sup>
161. Justice for Palestine, Alternative Jewish Voices and Dayenu considered there is too much focus on punishment and there needs to be a greater emphasis on rehabilitating hate crime offenders. They were concerned that more minor offending, in particular, may not be identified as a hate crime or addressed through rehabilitative measures.

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<sup>354</sup> Madeline Ash; and The Law Association of New Zealand Criminal Law Committee.

<sup>355</sup> Russell Hoban.

## Can the problem be addressed under the current legal model?

162. Ināia Tonu Nei recommended rehabilitation programmes be established that focus on the specific harms caused by hate crimes, to reduce the risk of reoffending. It said participating in such a programme should be mandatory for those convicted of hate-motivated offending.
163. Five other submitters expressly or impliedly supported specific rehabilitation programmes for hate crime offenders but did not suggest they should be mandatory.<sup>356</sup> Two additional submitters supported better resourcing for rehabilitation of hate crime offenders but did not say what form that rehabilitation should take.<sup>357</sup>
164. Two submitters did not express a clear view on whether specific rehabilitative programmes are desirable, but noted such programmes could be created under the existing legal model.<sup>358</sup> They emphasised rehabilitative needs are not a justification for creating specific hate crime offences.

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<sup>356</sup> Madeline Ash; Russell Hoban; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and The Law Association of New Zealand Criminal Law Committee.

<sup>357</sup> Annette Sykes & Co; and Submission 90.

<sup>358</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

165. As noted above, five submitters said that if a hate crime flag is created in the court system this could be shared with Corrections to help assess the offender's rehabilitative needs.<sup>359</sup>

## OTHER CONCERNS RAISED

166. Some submitters raised other concerns about how the current law is working, including that:

- (a) Judges may be biased or influenced by certain ideologies, leading to the protection of certain groups over others.<sup>360</sup>
- (b) Hate motivation does not need to be proven beyond reasonable doubt at trial.<sup>361</sup> Instead it is inferred by the judge at sentencing. Addressing hate motivation at sentencing means evidential standards and jury assessments are applied differently.<sup>362</sup>
- (c) Offenders are entitled to clarity about the offending with which they are being charged, but this may not

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<sup>359</sup> Dr David Harvey; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Dr Kyle R Matthews; Pride in Law Otago; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>360</sup> Destiny Church; Roelle van Rijs; and Dr John McDonald-Wharry.

<sup>361</sup> Free Speech Union.

<sup>362</sup> Dr Kyle R Matthews.

occur under the current law.<sup>363</sup> It is not difficult to imagine an offender pleading guilty to a summary of facts and not appreciating they would later be sentenced on the basis that their offending was a hate crime.

- (d) The aggravating factor does not adequately address issues of social cohesion, community harm, the increased breach of human rights that hate crimes entail and practical challenges in prosecuting hate crimes.<sup>364</sup>
- (e) There may be situations where offending appears to be hate-motivated but mental health or disability is a factor.<sup>365</sup> Lack of disability awareness and responsiveness among police and the judiciary mean these cases may not be handled appropriately.<sup>366</sup>

## OTHER SUGGESTIONS TO IMPROVE THE SENTENCE AGGRAVATION MODEL

167. Some submitters made other suggestions for how the current system could be improved. Many of these

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<sup>363</sup> The Law Association of New Zealand Criminal Law Committee.

<sup>364</sup> Madeline Ash.

<sup>365</sup> Whaikaha | Ministry of Disabled People; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>366</sup> Whaikaha | Ministry of Disabled People.

suggestions related to supporting victims and affected communities, such as by:

- (a) Resourcing community organisations to monitor hate-related incidents, undertake victimisation surveys to capture under-reporting and design community interventions to prevent hate crimes.<sup>367</sup>
- (b) Providing support services for victims of hate crimes, including counselling, legal assistance and community support.<sup>368</sup>
- (c) Reviewing information and resources provided to victims and victims' groups, considering changes to the victims' code and providing training to victims' advisors.<sup>369</sup>
- (d) Allowing affected groups (not just individual victims) to make victim impact statements at sentencing to ensure the court understands the harm caused by the offending.<sup>370</sup>

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<sup>367</sup> Te Kāhui o Ināia Tonu Nei Charitable Trust. See also Luke Cunningham Clere, which suggested victimisation surveys could provide better trend modelling.

<sup>368</sup> Annette Sykes & Co; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>369</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>370</sup> New Zealand Jewish Council.

(e) Providing Government assistance with the security needs of vulnerable communities.<sup>371</sup>

168. Two submitters suggested considering alternative ways of dealing with hate crime, such as restorative justice.<sup>372</sup>

169. Five submitters suggested sentencing guidelines for the judiciary may be beneficial.<sup>373</sup> Two submitters said this would help to ensure consistency and transparency in sentencing outcomes.<sup>374</sup>

170. Justice for Palestine, Alternative Jewish Voices and Dayenu proposed a National Hate Crime Strategy to ensure a preventative, community-led approach to addressing hate crime.

171. The Free Speech Union said there should be a clear evidential foundation for a judge to find hate aggravation, to improve transparency and ensure consistency. This could be established through an admission by the defendant, or through a finding of hate motivation in the course of a

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<sup>371</sup> New Zealand Jewish Council.

<sup>372</sup> Dr Sanjana Hattotuwa; and Dr Mark Walters.

<sup>373</sup> Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; The Law Association of New Zealand Criminal Law Committee; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>374</sup> The Law Association of New Zealand Criminal Law Committee; and The Law Association of New Zealand Public and Administrative Law Committee.



defended hearing or a disputed facts hearing before sentencing.

172. The Free Speech Union also suggested limiting the application of the aggravating factor to serious crimes, such as violent offences (for example, assault and murder), threats and targeted harassment. It considered focusing on crimes that cause significant harm would make the law more focused and proportionate.

# Other legal models to address hate crime

## OVERVIEW

173. In this section, we summarise responses to Questions 7, 8 and 9. These questions sought feedback about whether we should adopt a different legal model to address hate crime and how a different model could be implemented. We first address submitters' views about whether to adopt a different model. We then summarise feedback about the offences submitters thought should be included if the specific offence model were adopted.

## ADOPTING A DIFFERENT MODEL

174. In our Consultation Paper, we discussed the potential advantages and disadvantages of two alternative legal models: the specific offence model and the Scottish hybrid model. We sought feedback on whether either of these models should be adopted.

## Support

175. Twenty submitters said a different model should be adopted. Of these:

- (a) ten submitters said the legal model should be changed but did not express a clear view about which model they preferred;<sup>375</sup>
- (b) five submitters favoured the specific offence model;<sup>376</sup> and
- (c) five submitters favoured the Scottish hybrid model.<sup>377</sup>

176. For many submitters, their view that a new model should be adopted resulted from their assessment that problems with the sentence aggravation model are best addressed by adopting an alternative. Views about problems with the current sentence aggravation model are summarised in the previous section.

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<sup>375</sup> Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Grey Power New Zealand; Ruth Jones; Amos Mann; Submission 26; Submission 43; Submission 77; and Dr Chris Wilson.

<sup>376</sup> Dr Sanjana Hattotuwa; Russell Hoban; Inclusive Aotearoa Collective Tāhono; Parents of Vision Impaired; and Murray Stirling.

<sup>377</sup> Disabled Persons Assembly and VisAble (joint submission); Dr Kyle R Matthews; The Law Association of New Zealand Criminal Law Committee; Dr Mark Walters; and Tamsen Williams.

177. There was significant crossover in submitters' reasoning between those who favoured a specific model and those who did not express a preference.

- (a) Five submitters said a different model would improve denunciation of hate crime.<sup>378</sup> They thought that a different model would reassure communities, provide accountability for harm suffered and send a message that hate-motivated offending is not tolerated by the community.
- (b) Six submitters thought a different model would improve recording and monitoring of hate crime.<sup>379</sup> They said there would be practical benefits through more systematic collection of data and a clear mechanism to identify and track hate crime offenders.
- (c) Two submitters said a different model would lead to more consistent investigation and prosecution of hate crimes.<sup>380</sup> These submitters commented that there

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<sup>378</sup> Madeline Ash; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective Tāhono; Murray Stirling; and Dr Chris Wilson.

<sup>379</sup> Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr Sanjana Hattotuwa; Submission 43; The Law Association of New Zealand Criminal Law Committee; and Dr Chris Wilson.

<sup>380</sup> The Law Association of New Zealand Criminal Law Committee; and Dr Mark Walters. See also the submission of Members of Te Hunga Rōia Māori o Aotearoa, which made a similar point but did not take a clear position on whether the legal model should be changed.

would be greater incentive to obtain evidence to support a case if hate motivation was an element of the offence.

- (d) Three submitters said that a different model would be fairer to defendants.<sup>381</sup> They considered requiring hate motivation to be proven as an element of the offence would be more transparent and provide clarity to a defendant about the nature of the offending of which they are accused. The Law Association of New Zealand Criminal Law Committee said this would avoid scenarios where an offender pleads guilty based on the summary of facts without appreciating that they could be sentenced later on the basis their behaviour amounted to a hate crime.

## Opposition

178. Thirty-eight submitters opposed adopting a different legal model.<sup>382</sup> Among these submitters, fifteen specifically

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<sup>381</sup> Madeline Ash; The Law Association of New Zealand Criminal Law Committee; and Dr Mark Walters.

<sup>382</sup> Kevin Bird; Dr David Bromell; Destiny Church; Family First; Free Speech Union; Ken Gorbey; Dr David Harvey; Brian Jones; David Le Breton; Luke Cunningham Clere; Lesbian Action for Visibility in Aotearoa; Maxim Institute; New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Tim O'Sullivan; Pride in

referred to the Scottish hybrid model<sup>383</sup> Some of these submitters commented on either the specific offence model or the Scottish hybrid model, but many of the reasons they gave could apply to either model. For this reason we discuss their general feedback together. Specific feedback on the Scottish hybrid model is discussed later in this section.

179. Fourteen submitters thought the current law (with or without reform) is adequate so change to a different model is unnecessary<sup>384</sup> or there is a lack of evidence that change to a different model offers sufficient benefit over the status quo.<sup>385</sup>

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Law Otago; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Greg Rzesniowiecki; Submission 11; Submission 51; Submission 55; Submission 56; Submission 57; Submission 58; Submission 63; Submission 66; Submission 72; Submission 85; Submission 88; Submission 90; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Public and Administrative Law Committee; Roelie van Rijs; Peter Williamson; Women's Rights Party; and Rod Young.

<sup>383</sup> Dr David Bromell; Destiny Church; Free Speech Union; Dr David Harvey; Luke Cunningham Clere; Pride in Law Otago; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Greg Rzesniowiecki; Submission 58; Submission 63; Submission 72; Submission 85; Submission 88; Submission 90; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>384</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service; Greg Rzesniowiecki; Submission 51; Submission 57; Submission 72; Submission 90; Peter Williamson; and Rod Young.

<sup>385</sup> Dr David Harvey; Karun Lakshman; Luke Cunningham Clere; Maxim Institute; Submission 56; and The Law Association of New Zealand Public and Administrative Law Committee.

180. Eleven submitters were concerned that a different model would increase the complexity and cost of investigating and prosecuting hate crime. Some made general comments that complexity and cost should be avoided.<sup>386</sup> Other submitters elaborated with specific concerns:

- (a) Three submitters said that proving hate motivation at trial is a significant additional burden for the prosecution.<sup>387</sup> Crown Law explained that prosecutors in Aotearoa New Zealand have little experience proving motivation beyond a reasonable doubt as an element of an offence. At present, motive is usually addressed in relation to circumstantial evidence. Having to prove hate motivation beyond reasonable doubt would, depending on the test adopted, require prosecutors to prove additional actus reus or mens rea elements.
- (b) Luke Cunningham Clere suggested there may be difficulties collecting the necessary evidence to prove

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<sup>386</sup> Dr David Bromell; Dr David Harvey; Tim O'Sullivan; Pride in Law Otago; Submission 72; and The Law Association of New Zealand Criminal Law Committee.

<sup>387</sup> Te Tari Ture o te Karauna | Crown Law; Maxim Institute; and New Zealand Jewish Council.

hate motivation and there would be additional trial time spent resolving evidential matters.

- (c) The New Zealand Federation of Business and Professional Women said more offences might go unreported or not result in conviction due to the burden that collecting necessary evidence places on victims. This would apply particularly to victims of sex-based crime who already find engaging with the legal process difficult.

181. Three submitters observed that prosecutorial decision-making under an alternative model could lead to hate motivation going unrecognised. Crown Law and Luke Cunningham Clere suggested that prosecutors could take a “risk-averse” approach and pursue a base offence rather than a hate-motivated one. Luke Cunningham Clere observed that the “result may be that only cases fitting the stereotypical depiction of hate crimes (such as Nazi symbols painted on synagogues) would be pursued under the hate crime offences”. The New Zealand Jewish Council expressed concern that a gap may emerge due to underlying bias about Jewish people and the complicated relationship between anti-Jewish hostility and views about Zionism influencing decision-making.

182. Twenty-one submitters made comments expressing concern about hate motivation as an element of an



offence.<sup>388</sup> Submitters said that adopting a different model would suppress unpopular viewpoints or result in self-censorship and avoidance of expressing unacceptable views. Most of these submitters described adoption of a different model as “overreach”, a “slippery slope” or criticised including motivation as part of an offence as “too subjective” due to concern that it would erode or infringe rights to freedom of expression and thought.

183. Submitters who objected to including hate motivation as an element of an offence also voiced concern that relying on assessments of a person’s motivation would lead to selective, unfair enforcement.

(a) Some pointed to the possibility that prosecution for an offence could be instigated in support of political orthodoxy. For example, Family First referred to the arson of the Rainbow Youth Centre in Tauranga in 2022. It said despite public claims this offending was motivated by hostility towards the LGBTQ+

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<sup>388</sup> Kevin Bird; Dr David Bromell; Trevor Dance; Destiny Church; Family First; Free Speech Union; Ken Gorbey; Brian Jones; Karun Lakshman; Maire Leadbeater; Lesbian Action for Visibility in Aotearoa; Tim O’Sullivan; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Submission 58; Submission 63; Submission 72; Submission 76; Submission 79; Submission 88; The Law Association of New Zealand Public and Administrative Law Committee; Peter Williamson; and Women’s Rights Party.

community, the judge sentencing the arsonists under the current law rejected that assertion.<sup>389</sup> Family First said these events show that enforcement of hate crime offences is unlikely to be “objective” but rather would be driven by a “political set of decisions by individual officers and others”.

- (b) The Public Defence Service was concerned that enforcement of the law could be perceived as biased even if well-intentioned. They said that if the law focused on motivation, the state may be perceived to be acting in a biased manner if it enforces the law against a person from one group but not another.

184. The Free Speech Union analysed both alternative models in terms of whether they were a justified limit on the right to freedom of expression according to the New Zealand Bill of Rights Act 1990. It applied a proportionality test and concluded that the alternative models are not demonstrably justified in terms of that test.

185. Three submitters expressed concern that hate crime offences and harsher sentences would have a disproportionate, negative impact on Māori and other

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<sup>389</sup> See *R v Burgess* [2022] DCR 384.

minorities due to their overrepresentation in the justice system.<sup>390</sup>

186. Some submitters gave other reasons not to adopt a different legal model or questioned the potential advantages of changing the legal model discussed in our Consultation Paper. Submitters comments included:

- (a) Criminal law should not be used for the purpose of “symbolic” denunciation.<sup>391</sup>
- (b) Although the specific offence model would have a “clear symbolic benefit” of denouncing of hate crime, that denunciatory effect would be muted if hate crime offences simply mirrored basic offences and had broad protected categories.<sup>392</sup>
- (c) A different model would not affect a person’s choice to report hate crime or authorities’ inclination to investigate and prosecute it.<sup>393</sup> Low reporting rates are not limited to hate crimes and are driven by

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<sup>390</sup> Annette Sykes & Co; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Te Kāhui o Inaia Tōnu Nei.

<sup>391</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

<sup>392</sup> Luke Cunningham Clere.

<sup>393</sup> Luke Cunningham Clere; and Ratonga Wawao ā-Tūmatanui | Public Defence Service.

perceptions of the triviality of the offending and that Police will not be interested.

- (d) Requiring hate motivation be proven beyond reasonable doubt at trial would not be any fairer to a defendant because the law already requires a disputed aggravating factor to be proven beyond reasonable doubt by the prosecution.<sup>394</sup>
- (e) If sex were recognised as a protected characteristic under a different legal model, it would introduce a hierarchy or different thresholds that must be met for sexual offences based on whether a perpetrator's hostility towards women could be proven.<sup>395</sup>
- (f) Prosecutors could intimidate an accused person to plead guilty to a base offence, which is a violation of their right not to testify against themselves or to confess guilt.<sup>396</sup>
- (g) Harsher penalties do not deter people from offending so that is not a reasonable justification for adopting the specific offence model.<sup>397</sup>

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<sup>394</sup> Ratonga Wawao ā-Tūmatanui | Public Defence Service.

<sup>395</sup> New Zealand Federation of Business and Professional Women; and Women's Rights Party.

<sup>396</sup> John McDonald-Wharry.

<sup>397</sup> Te Kāhui o Inaia Tonu Nei.

- (h) Treating a person more harshly in the context of hate crime may be counterproductive because it could strengthen their hostility.<sup>398</sup>

## **Feedback on the Scottish hybrid model**

187. As outlined above, five submitters explicitly preferred the Scottish hybrid model over the specific offence model. Their general views about the advantages of adopting a different model are captured above.
188. These submitters preferred the Scottish hybrid model over the specific offence model because they regarded it as simpler and more flexible — it applies to a wide range of offences without the need to create new ones.<sup>399</sup> For example, The Law Association of New Zealand Criminal Law Committee said that separate hate crime offences might “struggle to accommodate the varied nature of hate-motivated offending” but the hybrid model “ensures that all crimes can be treated as hate crimes when appropriate.”
189. Other submitters gave specific reasons for not adopting the Scottish hybrid model.

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<sup>398</sup> A member of Te Hunga Rōia Māori o Aotearoa.

<sup>399</sup> Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr Kyle R Matthews; The Law Association of New Zealand Criminal Law Committee; and Dr Mark Walters.

- (a) Some thought it is problematic that the model applies to any offence regardless of severity. Dr David Harvey criticised this as a “backdoor” method to introduce a wide range of hate crime offences rather than defining only certain offending as a hate crime. The Free Speech Union said that including less serious crimes may undermine public confidence because it “dilutes focus on more serious hate crime”.
- (b) Two submitters cautioned against adopting the Scottish hybrid model because it originates in a different constitutional and cultural context.<sup>400</sup> They implied that there could be unforeseen, unintended consequences if adopted outside that particular setting.

## **BASE OFFENCES COVERED BY THE SPECIFIC OFFENCE MODEL**

190. In our Consultation Paper, we explained that if we were to recommend adopting the specific offence model we would need to decide which base offences any hate crime offence should cover. Nineteen submitters provided feedback on this issue. They made comments about the criteria that should be used to determine which offences should be

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<sup>400</sup> Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

included as well as suggesting categories of offences or specific offences that should be either included or excluded.

## Views about criteria

191. Luke Cunningham Clere said the criteria developed by the Law Commission of England and Wales provide helpful guidance in selecting which offences should be included. Mark Walters, a co-author of the Sussex University law reform project on hate crime, noted that review recommended expanding the current offence categories in England and Wales based on an examination of statistics and the views of interviewees. The decision about which offences are included in New Zealand law should be determined on a similar basis.
192. On the other hand, the New Zealand Law Society expressed “concerns regarding the challenge of finding a principled basis on which to decide what ‘base’ offences to include (and those to exclude).”<sup>401</sup>

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<sup>401</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society did not express an opinion on the offences that should be included because it favoured retaining the current model.

## Views on offences or types of offences to include

193. Fifteen submitters commented on the base offences that should be covered by specific hate crime offences.<sup>402</sup>
194. The Royal Commission recommended that if hate crime offences were created they should include offences corresponding to the offences of offensive behaviour or language, assaults, wilful damage, intimidation, arson and intentional damage. Two submitters agreed explicitly with that recommendation.<sup>403</sup>
195. Three submitters explicitly disagreed with the Royal Commission's recommendation that offensive behaviour or language should be included.<sup>404</sup> They objected on the basis that offensiveness is not serious enough for inclusion and it is open to interpretation what is "offensive". They thought hate crime law would, as a result, be applied subjectively.
196. Seven submitters thought that offences should be limited to those with a high degree of seriousness in the sense that

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<sup>402</sup> Madeline Ash; Destiny Church; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Graeme Edgeler; Dr David Harvey; Russell Hoban; Inclusive Aotearoa Collective Tāhono; Karun Lakshman; Luke Cunningham Clere; Dr Kyle R Matthews; Submission 11; Submission 43; The Law Association of New Zealand Public and Administrative Law Committee; and Dr Mark Walters.

<sup>403</sup> Russell Hoban; and Luke Cunningham Clere.

<sup>404</sup> Dr David Harvey; Karun Lakshman; and Submission 11.



they inflict physical harm or involve violence.<sup>405</sup> The harm or violence could impact a person or property.

197. Regarding violent offences against a person, submitters commonly gave “assault” as an example of this type of offending, with the next most common example being rape or sexual assault. One submitter specified that other violent offences they thought are serious enough to be included are domestic violence and genital mutilation.<sup>406</sup>
198. Regarding offences involving damage to property, submitters commonly gave examples of arson, intentional/wilful damage or vandalism. One submitter said that vandalism of religious sites specifically should be included.<sup>407</sup>
199. Six submitters said some conduct that does not involve physical harm to people or property should be considered a hate crime under the specific offence model.<sup>408</sup> Most of the

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<sup>405</sup> Destiny Church; Graeme Edgeler; Dr David Harvey; Russell Hoban; Submission 43; The Law Association of New Zealand Public and Administrative Law Committee; and Dr Mark Walters.

<sup>406</sup> Disabled Persons Assembly and VisAble (joint submission).

<sup>407</sup> Submission 43.

<sup>408</sup> Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Inclusive Aotearoa Collective Tāhono; Dr Kyle R Matthews; and Dr Mark Walters.

conduct mentioned reflects an existing offence but some does not. Conduct these submitters thought should be a hate crime offence included:

- (a) burglary;<sup>409</sup>
- (b) offences of dishonesty such as fraud, forgery and theft;<sup>410</sup>
- (c) offences that disturb public order;<sup>411</sup>
- (d) verbal abuse or threats;<sup>412</sup>
- (e) harassment and stalking;<sup>413</sup>
- (f) doxxing;<sup>414</sup> and
- (g) coercive faith conversion or acts that undermine a person's faith.<sup>415</sup>

200. Two submitters thought that lower-level offending should be included because disabled people are victims of a wide range of offending and the impact on them would not be

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<sup>409</sup> Dr Kyle R Matthews; and Dr Mark Walters.

<sup>410</sup> Dr Mark Walters.

<sup>411</sup> Madeline Ash; and Dr Mark Walters.

<sup>412</sup> Disabled Persons Assembly and VisAble (joint submission); Inclusive Aotearoa Collective Tāhono; and Dr Mark Walters.

<sup>413</sup> Inclusive Aotearoa Collective Tāhono; and Dr Mark Walters.

<sup>414</sup> Inclusive Aotearoa Collective Tāhono. Doxxing is the act of publicly revealing private, identifying information about an individual without their consent, usually with the intent to harass, intimidate or cause the person harm.

<sup>415</sup> Submission 43.

recognised sufficiently by limiting the scope of hate crime to serious offending.<sup>416</sup>

201. Inclusive Aotearoa said that communities they engage with experience behaviour such as threats, stalking and doxxing. They said this should be addressed by hate crime law because this offending furthers a primary goal of those who commit hate crime to “put the community in its place, to make people fearful so they decrease their public presence”.

### **Views about inclusion of murder as a hate crime offence**

202. In our Consultation Paper, we noted that hate crime offences do not typically cover serious crimes already punishable by life imprisonment (such as murder). The reason for this is that the maximum penalty would be the same as for the base offence. However, this does mean other potential benefits of hate crime offences would not apply to these very serious offences.
203. In their joint submission, the Disabled Persons Assembly and VisAble said murder or attempted murder should be included. Dr Mark Walters said “homicide offences” should be included. Neither gave specific reasons why.

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<sup>416</sup> Disabled Persons Assembly and /VisAble (joint submission); and the Donald Beasley Institute and People First New Zealand (joint submission).

204. Two submitters commented about the exclusion of murder as a hate crime offence. Luke Cunningham Clere said it was “sensible” to limit hate crime offences to those proposed by the Royal Commission, which did not include murder. Graeme Edgeler suggested that, rather than a separate, hate-motivated offence of murder, the 17-year minimum period of imprisonment should apply automatically if a person was found guilty and hate motivation was an aggravating factor.

### **Other feedback**

205. Two submitters expressed concern that offences involving property damage or trespass often apply when people engage in legitimate protest action.<sup>417</sup> They thought actions in this context should not be hate crimes.

## **KEEPING THE SENTENCE AGGRAVATION MODEL IF A DIFFERENT MODEL IS ADOPTED**

206. In our Consultation Paper, we said that if either of the alternative models were adopted, we would need to decide whether to keep the existing sentence aggravation model (or an amended form of it) or to replace it completely. Twenty submitters gave feedback on this issue.

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<sup>417</sup> Members of Te Hunga Rōia Māori o Aotearoa; and Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission).

207. Fourteen submitters said the sentence aggravation model should be kept.<sup>418</sup> Some of these submitters did not express which of the different models sentence aggravation should be retained alongside but generally favoured a flexible, comprehensive approach.<sup>419</sup> Other submitters said that sentence aggravation should be kept only if the specific offences model is adopted because it would address circumstances where there is no specific hate offence.<sup>420</sup> One submitter said sentence aggravation should be retained alongside specific offences because it would allow direct comparison of the two models to see whether reform was successful..<sup>421</sup>
208. Two submitters who favoured adopting the Scottish hybrid model said sentence aggravation should be kept alongside

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<sup>418</sup> Annette Sykes & Co; Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Graeme Edgeler; Free Speech Union; Dr David Harvey; Dr Kyle R Matthews; Pride in Law Otago; Submission 26; Submission 43; Submission 63; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Dr Mark Walters.

<sup>419</sup> Pride in Law Otago; Submission 26; Submission 63; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

<sup>420</sup> Graeme Edgeler; Free Speech Union; Dr David Harvey; Submission 43; and Te Kāhui Ture o Aotearoa | New Zealand Law Society

<sup>421</sup> Madeline Ash.

it.<sup>422</sup> Other submitters however remarked on the disadvantages of this approach. The New Zealand Law Society said operating these models in tandem “risks excessive complexity”. The Law Association of New Zealand Criminal Law Committee said it would undermine the Scottish hybrid model because it would disincentivise prosecutors from considering hate motivation at the outset of proceedings.

209. Four submitters said that sentence aggravation should not be kept regardless of the model adopted.<sup>423</sup> They said it was either unnecessary or too complex. Luke Cunningham Clere did not express a clear position but said there may be procedural fairness concerns raised if the Crown could choose to prove hate motivation at trial or sentencing.

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<sup>422</sup> Disabled Persons Assembly and VisAble (joint submission); and Dr Kyle R Matthews.

<sup>423</sup> Destiny Church; Ratonga Wawao ā-Tūmatanui | Public Defence Service; Submission 57; and Submission 62.

# Appendix 1: List of submitters

## INDIVIDUALS

Madeline Ash

George Balani

Kevin Bird

Dr David Bromell

Grace Carroll

Trevor Dance

Gary Durey

Graeme Edgeler

Clive Elliot KC

David F

Michael Fitzgerald

Ken Gorbey

M Guenole

Dr David Harvey

Dr Sanjana Hattotuwa

Russell Hoban

Brian Jones

Ruth Jones

Karun Lakshman

Rex Landy

Maire Leadbeater

David Le Breton

Richard Lillywhite

Amos Mann

Andrew Marchant

Dr Kyle R Matthews

Dr John McDonald-Wharry

Murray Merriman

Graeme Minchin

Tim O'Sullivan

Roelie van Rijs

Greg Rzesniowiecki

Murray Stirling

Dr Mark Walters

Fergus Wheeler

Don Whitfield

Tamsen Williams

Peter Williamson

Dr Chris Wilson

Rod Young

We have withheld the names of 30 additional individual submitters and refer to them by submission number.

## ORGANISATIONS

Annette Sykes & Co

Destiny New Zealand

Disabled Persons Assembly  
and VisAble (joint  
submission)

Donald Beasley Institute and  
People First New Zealand  
(joint submission)

Family First

Grey Power New Zealand

Inclusive Aotearoa Collective  
Tāhono

Justice for Palestine,  
Alternative Jewish Voices  
and Dayenu (joint  
submission)

Free Speech Union

Lesbian Action for Visibility in  
Aotearoa

Luke Cunningham Clere

Maxim Institute

Members of Te Hunga Rōia  
Māori o Aotearoa

New Zealand Federation of  
Business and Professional  
Women

New Zealand Jewish Council

Parents of Vision Impaired

Pride in Law Otago



Ratonga Wawao ā-Ture  
Tumatanui | Public Defence  
Service

Sikh Council of New Zealand

Te Kāhui o Ināia Tonu Nei  
Charitable Trust

Te Kāhui Ture o Aotearoa |  
New Zealand Law Society

Te Tari Ture o te Karauna |  
Crown Law

The Law Association of New  
Zealand Criminal Law  
Committee

The Law Association of New  
Zealand Public and  
Administrative Law  
Committee

Whaikaha | Ministry of  
Disabled People

Women's Rights Party

# Appendix 2: Other feedback collated by the Free Speech Union

1. In this appendix we summarise views on hate crime collated by the Free Speech Union via a webform template.<sup>424</sup>
2. We have considered this feedback separately from submissions. This is because our Consultation Paper sought views on specific matters related to the nine questions we posed. Users of the Free Speech Union webform did not respond to these questions and were not directed to the paper or online submission form to engage with them.<sup>425</sup>
3. We note that the Free Speech Union also provided a separate submission on our Consultation Paper on behalf of its membership. We have included this in our summary of submissions.

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<sup>424</sup> Free Speech Union "Say no to ambiguous hate crime laws" (21 February 2025) <[www.freespeechsubmission.nz](http://www.freespeechsubmission.nz)>.

<sup>425</sup> Some pre-written text from the webform refers to specific paragraphs of the consultation paper (paras [3.16(d)(i)], [3.44] and [3.48]).

## COLLECTION

4. The Free Speech Union online template provided six prompt sentences corresponding to opinions about hate crime law. The six prompt sentences were:
  - (a) Hate crime laws lack clarity, objectivity and consistency.
  - (b) The Treaty of Waitangi promised equal rights for all. ‘Hate crime’ laws negate this.
  - (c) ‘Hate crime’ laws undermine freedom of speech.
  - (d) New Zealand already addresses hate motivations in sentencing.
  - (e) There is no objective definition of ‘hate’: this is an example of poor law making.
  - (f) We cannot legislate away ‘hate’.
5. Selecting a prompt generated pre-written text for inclusion in an individual user’s feedback. They could select any combination of the prompts. They could also add their own original comments in a separate, free-form text box or enter no text at all.
6. Each prompt had multiple variations of pre-written text associated with it so very few responses were identical. These variations mean that a compilation of all the pre-written text is too lengthy to reproduce. Instead, we have

included select samples in the key themes summary table below.

## ANALYSIS

7. The Free Speech Union provided us with the collated feedback in spreadsheet format. It comprised 4,042 responses with unique email addresses.
8. Sixty-one of these responses were blank — they did not include pre-written or original text. We assume that individuals who did not enter any text intended to express agreement with at least one of the six prompts. The balance of responses included either pre-written text, original statements or a combination of both.
9. Our thematic breakdown derives from the pre-written text and a sampling of individual entries. Individuals who supplemented the pre-written material with original comments tended to echo the themes of the pre-written material. Their original contributions were predominantly personal reflections or political comment. The table below captures the dominant themes.

## Screenshots of the FSU webform prompts and instructions

### SUBMIT YOUR FEEDBACK



#### Complete Your Submission In Three Easy Steps

##### 1. Pick the issues that you want to cover

We've highlighted our feedback. Select one or more of them, and our submission builder will generate the text for you.

##### 2. Personalise your submission

Add a personal touch to ensure your submission is valid, if there is anything else the Law Commission should investigate, you can add that too.

##### 3. Add your details and hit send!

Add your name and email address, then press submit.

### Let's get started

(Choose **at least one** of the following)

**I want the Law  
Commission to consider  
that:**

Hate crime laws lack clarity, objectivity, and consistency

The Treaty of Waitangi promised equal rights for all. 'Hate crime' laws negate this.

'Hate crime' laws undermine freedom of speech

New Zealand already addresses hate motivations in sentencing.

There is no objective Definition of 'hate': this is an example of poor law making

We cannot legislate away 'hate'

Key themes summary		
Theme	Explanation	Samples of applicable pre-written text
<b>Retention of existing law / opposition to creating new offences</b>	Statements in this category viewed the current sentence aggravation approach as sufficient to address hate-motivated offending.	<p>New Zealand's existing legal framework effectively tackles crimes driven by hate. The Sentencing Act 2002 ensures that judges take motivation into account during sentencing, along with other relevant considerations, enabling them to make well-rounded decisions for each case.</p> <p>The primary concern is whether a legal model of 'hate' can be objectively applied, and it cannot, because 'hate' is a subjective emotion. New Zealand should keep its existing system, where hate is viewed as an aggravating factor during sentencing, rather than creating new offences.</p>

<b>Legal clarity</b>	<p>Statements in this category focused on objectivity, predictability and equal application of the law.</p>	<p>'Hate crime' is inherently subjective, meaning my interpretation of it, though valid, reflects a personal viewpoint, like anyone else's. Without a legal definition of 'hate,' we rely on everyday understandings of terms such as ill-will, spite, contempt, and dislike.</p> <p>Some criminal activity is motivated by hate, but New Zealand already addresses hate motivations under the 'aggravated and mitigating factors' in Section 9 of the Sentencing Act. This allows judges to use discretion within an objective framework to assess motivations. The law must remain objective, with judges trusted to apply their discerning legal judgment.</p> <p>It should not be subjective, as this contradicts a fundamental principle of the Rule of Law: the law must be clear and predictable. The Consultation Paper recognises</p>
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		<p>this, highlighting “the need for certainty in the criminal law” and stressing that “offences must be clearly defined so that people can know in advance what is prohibited and the maximum penalty for non-compliance.” (3.16d(i), p.18).</p>
<b>Democratic values and rights</b>	<p>Statements in this category asserted that specific hate crime offences:</p> <ul style="list-style-type: none"> <li>• conflict with equality before the law; and</li> <li>• impact freedom of expression and thought.</li> </ul>	<p>I am strongly against the establishment of specific 'hate crimes.' While crime is defined by objective legal principles, 'hate' is a personal emotion. The legal system is effective in regulating actions, but it cannot accurately address emotions. Furthermore, the subjective nature of 'hate' means that definitions of hate crimes would differ from person to person and evolve over time, making it an unreliable and unfair basis for law. This could also open the door to misuse and manipulation.</p> <p>I am deeply concerned that hate crime laws could erode fundamental human rights, including freedom of thought,</p>



		<p>speech, association, and legal equality. As highlighted in section 3.48, these laws could lead individuals to self-censor for fear that their statements may later be used against them in legal proceedings. This would suppress open discourse and damage social relationships. Such an outcome is highly concerning. The state should not impose a constant shadow over conversations in New Zealand.</p> <p>We firmly oppose the claim of a “growing consensus” that human rights obligations require hate crime legislation. The idea that 'hate crime' laws could act as a “mechanism for elimination of discrimination” (3.44, p.24) is especially alarming, as it embodies an authoritarian impulse. True discrimination cannot be eliminated without violating core human freedoms.</p>
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		<p>I reject the notion of protected characteristics. Every individual is a unique minority. Elevating certain traits above others undermines the principle of equality before the law.</p>
<p><b>Role of tikanga Māori / Treaty of Waitangi</b></p>	<p>Statements in this category expressed concern that considering these matters as part of reform would undermine legal equality. Other statements dismissed the relevance of tikanga to law reform.</p>	<p>The Treaty's role in the justice system raises critical issues, particularly regarding the potential introduction of a dual framework rooted in tikanga principles, which may grant Māori communities judicial authority in enforcing 'hate crime' laws.</p> <p>Upholding commitments under the Treaty of Waitangi is best achieved by refraining from promoting 'hate crime' legislation. Te Tiriti o Waitangi obliges the Crown to provide equal treatment to all New Zealand citizens. This means prioritising fairness and consistency over policies that introduce different rights based on identity characteristics.</p>

		<p>International experiences show that laws attempting to regulate 'hate'—a highly subjective term—have often led to unintended consequences, including the prosecution of the very minority groups they were meant to protect.</p>
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