

Pūrongo | Report 152

Hara ngākau kino

Review of hate crime law



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

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

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

The Commissioners are:

Hon Judith Collins KC — Tumu Whakarae | President

Claudia Geiringer — Kaikōmihana | Commissioner

Mark Hickford — Kaikōmihana | Commissioner

Geof Shirtcliffe — Kaikōmihana | Commissioner

The Māori language version of this Report's title was developed for Te Aka Matua o te Ture | Law Commission by Kiwa Hammond and Maakere Edwards, of Aatea Solutions Limited. The title was finalised in conjunction with the Commission's Māori Liaison Committee.

Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka.

A catalogue record for this title is available from the National Library of New Zealand.

ISBN 978-1-0670173-8-5 (Print)

ISBN 978-1-0670173-9-2 (Online)

ISSN 0113-2334 (Print)

ISSN 1177-6196 (Online)

This title may be cited as NZLC R152. This title is available on the internet at the website of Te Aka Matua o te Ture | Law Commission: www.lawcom.govt.nz

Copyright © 2026 Te Aka Matua o te Ture | Law Commission.



This work is licensed under the Creative Commons Attribution 4.0 International licence. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to Te Aka Matua o te Ture | Law Commission and abide by other licence terms. To view a copy of this licence, visit <https://creativecommons.org/licenses/by/4.0>



Tumu Whakarae | President

Hon Judith Collins KC

Kaikōmihana | Commissioners

Claudia Geiringer FRSNZ

Mark Hickford

Geof Shirtcliffe

Hon Paul Goldsmith

Minister Responsible for the Law Commission

Parliament Buildings

WELLINGTON

23 June 2026

Tēnā koe Minister

NZLC R152 — Hara ngākau kino | Review of hate crime law

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'Mark Hickford', with a long horizontal stroke extending to the right.

Mark Hickford

Kaikōmihana | Commissioner



Foreword

On 25 March 2019, an offender opened fire on worshippers at two masjidain (Muslim places of worship) in Christchurch. Fifty-one people died and another 40 were injured as a result of gunshot wounds. This horrific attack was both an act of terrorism and a hate crime, targeting members of the Muslim community because of their faith. The offender was sentenced to life imprisonment without parole — the first time such a sentence has been imposed in New Zealand history.

The 2019 attack and the Royal Commission of Inquiry that followed it brought hate crime into the public consciousness and prompted discussion about how the law should respond. Like in many countries, New Zealand law already treats hate crimes differently to other crimes. If an offence is committed because of hostility towards a group of people (such as those with a shared race, religion or sexual orientation), that is treated as an aggravating factor at sentencing and may lead to a harsher sentence for the offender. This review considered whether the existing law effectively responds to hate crime or whether changes are needed.

Hate crimes send a message to members of the targeted group that they are not welcome in our society and that any one of them may be next. They undermine the values of tolerance and human dignity that underpin a cohesive society in which everyone can participate and live a fulfilling life.

This Report recommends reforms to ensure that hate crimes are consistently identified, recorded and denounced in the courts. These changes are needed to hold offenders accountable, recognise the impact of their actions on victims and communities and reduce the risk of further hate crimes occurring.

High-profile incidents around the world such as the Bondi Beach shooting on 14 December 2025 have prompted many countries to re-examine how they respond to hate crime. In some cases, governments have introduced new laws dealing not only with hate crime but also with hate speech. Our review related to hate crime. Recommendations on hate speech law were outside our scope, although we received significant feedback about hate speech.

The law influences how the justice system responds after a hate crime has occurred, but it is only one part of the picture. Other interventions are needed to address the societal conditions that can lead to hate crimes. National security and law enforcement agencies also play a crucial role in identifying and mitigating risks and intervening before hate crimes occur. These matters are beyond the scope of our review but their importance cannot be understated.

As the Commissioner responsible for this review and President of the Law Commission at the time this Report was approved for submission, I am grateful to the many people and groups who shared their perspectives and ideas with us. I am confident our recommendations will improve how hate crime is addressed and contribute towards a safer, more inclusive Aotearoa New Zealand.



Mark Hickford

Kaikōmihana | Commissioner

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges everyone who has contributed to this review.

We thank the many people and groups who gave their time to meet with us, make submissions or provide other feedback. The issues addressed in this review hold great significance for many people and groups, and we are grateful to them for engaging with us. Their feedback has been invaluable in developing our recommendations for reform.

We acknowledge with gratitude the contributions of our Technical Advisory Group and of the legal professional bodies and members of the judiciary that assisted us in testing our proposals for reform. The members of our Technical Advisory Group were:

- Charlotte Brook
- Dr Warren Brookbanks
- Professor John Ip
- Mark Lillico (Te Tari Ture o te Karauna | Crown Law)
- Bill Peoples (Ngā Pirihimana o Aotearoa | New Zealand Police)
- Tania Singh (Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service)
- Annette Sykes
- Dr Susann Wiedlitzka

We are also grateful for the support and guidance of the Commission's Māori Liaison Committee.

Nō reira, ko tēnei mātou e mihi nei ki a koutou, kua whai wā ki te āwhina i a mātou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

We emphasise that the views we express in this Report are those of the Commission and not necessarily those of the people who have assisted our work.

The Commissioner responsible for this project is Mark Hickford. The Legal and Policy Advisers who worked on this project are Ruth Campbell, Rebecca Garden, Samuel Mellor and Dena Valente. The law clerks who worked on this project are Grace Cartman and Sean McElwain-Wilson.

We also acknowledge the significant contribution of Amokura Kawharu to this review. Amokura was both the President of the Commission and the Commissioner responsible for this project until September 2025.

Mark Hickford was the President of the Commission when the Board approved this Report for submission in April 2026. While Hon Judith Collins KC held a warrant as President of the Commission from 1 June 2026, she did not participate in this project, which was largely completed prior to that date.

Contents

Foreword.....	iv
Acknowledgements.....	v
Recommendations	4
Chapter 1: Introduction.....	6
Summary of findings and recommendations.....	6
Background to this review	7
Scope of this review.....	10
Matters that are out of scope.....	10
Terminology	12
Our process.....	13
Structure of this Report.....	15
PART 1: BACKGROUND AND CONCEPTUAL MATTERS.....	17
Chapter 2: Hate crime in Aotearoa New Zealand.....	18
Introduction	18
The current law	18
Nature and prevalence of hate crime in Aotearoa New Zealand.....	20
How hate crime is addressed in the criminal justice system	25
Chapter 3: Reform considerations	34
Introduction	34
The need to treat hate crime more seriously than other crime	34
Objectives of hate crime law.....	38
Legal principles for the creation of new offences.....	41
The Treaty and tikanga	43
Human rights obligations	50

PART 2: LEGAL MODEL FOR ADDRESSING HATE CRIME	55
Chapter 4: Are there problems with the current law?	56
Introduction	56
Overview of consultation responses	57
Potential problems with the current law	58
Chapter 5: Comparing legal models	80
Introduction	80
Three legal models for addressing hate crime	81
Consultation	86
Addressing the problems with the current law	91
Other disadvantages of the alternative models	97
Other potential advantages and disadvantages we considered	100
Changing the legal model is neither necessary nor desirable	102
PART 3: IMPROVING THE SENTENCE AGGRAVATION MODEL	105
Chapter 6: Identifying and recording hate crime in the courts	106
Introduction	106
Introducing a court hate crime flag	107
Sharing court information with Police and Corrections	118
Recording additional information about the targeted group	122
Impact on offenders	124
Impact on defendants' willingness to plead guilty	127
Chapter 7: Denouncing hate crime in sentencing decisions	128
Introduction	128
Requiring sentencing judges to state if offending was motivated by hostility	129
Arrangement of the new provisions we recommend	134
Requiring judges to state the difference hostile motivation made to a sentence	135
Sentencing guidelines	140
Express provision for community impact statements at sentencing	142

Chapter 8: Wording of section 9(1)(h)	147
Introduction	147
The victim requirement	147
Which characteristics should receive protection	153
Partial motivation.....	169
Chapter 9: Operational matters.....	171
Introduction	171
Guidance for Police and prosecutors.....	171
Judicial training.....	174
Publishing data on hate crime cases	175
APPENDIX 1: TERMS OF REFERENCE.....	179
APPENDIX 2: PUBLIC CONSULTATION	181
APPENDIX 3: TECHNICAL ADVISORY GROUP.....	183

Recommendations

R1

The Sentencing Act 2002 and Criminal Procedure Act 2011 should be amended to provide that:

- a. a charging document may specify that section 9(1)(h) of the Sentencing Act 2002 is alleged to apply to an offence;
- b. the court may amend the charging document at any time before sentencing to add or remove the specification; and
- c. if the court determines at sentencing that section 9(1)(h) applies to an offence, it must make an entry on the permanent court record to that effect (whether or not the charging document specifies that section 9(1)(h) is alleged to apply).

R2

The courts should share the following information with Ngā Pirihimana o Aotearoa | New Zealand Police and Ara Poutama Aotearoa | Department of Corrections:

- a. The fact that a charging document specifies that section 9(1)(h) of the Sentencing Act 2002 is alleged to apply to an offence.
- b. Any entry on the permanent court record of a determination by the court that section 9(1)(h) applies to an offence.

R3

The recording and sharing of information by the courts in accordance with recommendations R1(c) and R2 should also include information about the characteristic(s) and group(s) of people targeted by the offending if it is technically feasible to record that information.

R4

The Sentencing Act 2002 should be amended to provide that, if section 9(1)(h) applies, the court must state (using any words that it thinks fit) that the offence was committed because of hostility towards a group of people with an enduring common characteristic.

R5

Section 9(1)(h)(ii) of the Sentencing Act 2002, which requires that “the offender believed that the victim has that characteristic”, should be repealed.

R6

Section 9(1)(h) of the Sentencing Act 2002 should be amended to include ‘sex’ in the illustrative list of characteristics.

R7

Ngā Pirihimana o Aotearoa | New Zealand Police should review and update its guidance on hate crimes and other relevant guidance to ensure police officers and prosecutors are informed about any changes to the law as a result of this review.

R8

Updated Ngā Pirihimana o Aotearoa | New Zealand Police guidance relating to hate crime prosecutions should be shared with Crown solicitors.

R9

Ngā Pirihimana o Aotearoa | New Zealand Police and the Crown Solicitor Network (supported by Te Tari Ture o te Karauna | Crown Law) should provide training on any changes to the law as a result of this review.

R10

Te Kura Kaiwhakawā | Institute of Judicial Studies should consider developing guidance and providing training to judges on any changes to the law as a result of this review.

R11

Ngā Pirihimana o Aotearoa | New Zealand Police should publish data on reported hate crimes annually.

R12

If the amendments in R1 are made, Te Tāhū o te Ture | Ministry of Justice should publish court data on hate crime cases annually.

CHAPTER 1

Introduction

- 1.1 In March 2024, the Minister of Justice asked Te Aka Matua o te Ture | Law Commission to review the law relating to hate crime in Aotearoa New Zealand, with a focus on whether the law should be changed to create standalone hate crime offences.
- 1.2 The term ‘hate crime’ is not used or defined in legislation. In this Report, we use it as a descriptive term (as opposed to a legal one) to refer to conduct that is:
 - (a) an offence under the existing law (for example, assault or wilful damage); and
 - (b) committed because of hostility towards a group of people who share a common characteristic.
- 1.3 Under the current law, there are no offences that deal specifically with hate crime. Instead, section 9(1)(h) of the Sentencing Act 2002 provides that if an offence was committed because of hostility towards a group of people with an ‘enduring common characteristic’ (such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability), the courts must take that into account as an aggravating factor when sentencing the offender. We call this the ‘hostility aggravating factor’. When it applies, the courts may impose a harsher sentence than they would have for an equivalent offence that was not motivated by hostility towards a group of people. We refer to this approach of treating hostility as an aggravating factor at sentencing as the ‘sentence aggravation model’ of hate crime law.
- 1.4 Hate crimes harm not only the direct victim but also the wider group of people who share the same characteristic. Hate crimes send a message to the affected group that they are not accepted or valued by society. More broadly, both hate crimes themselves and society’s response to them can affect social cohesion.
- 1.5 This Report considers whether the current law adequately responds to hate crime and, if not, how any concerns about its operation should be addressed. We conclude that, while there are some problems with current law and practice, these are not fundamental problems with the sentence aggravation model. The sentence aggravation model remains the most appropriate way to address hate crime in Aotearoa New Zealand. We recommend a series of reforms to improve its effectiveness.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

- 1.6 The nature of hate crime and the harm it causes mean it is important for the law to respond to it effectively. The justice system should seek to hold hate crime offenders accountable, send a clear message to the public that hate crimes are unacceptable,

reduce occurrences of hate crimes as far as possible and reassure affected communities that hostility towards them will be treated seriously. These objectives provide the framework for our assessment of the current law.

- 1.7 We find that there are some problems with how the current law is working:
- (a) It does not require the courts to communicate clearly to the public (such as through sentencing decisions) that an offence was a hate crime and that this makes it more serious. This means hate crimes may not be consistently denounced.
 - (b) It does not provide a mechanism for systematically documenting court findings that an offence was motivated by hostility. This limits the ability of Ngā Pirihimana o Aotearoa | New Zealand Police, the courts and Ara Poutama Aotearoa | Department of Corrections to deal with the offender appropriately in future. It also makes it difficult to assess how the justice system is responding to hate crime and to develop appropriate laws and policies to improve that response.
 - (c) It does not provide a mechanism to ensure the courts are aware that the hostility aggravating factor may apply to an offence and consider it at appropriate points in a proceeding.
- 1.8 We conclude that these are not fundamental problems with the current sentence aggravation model. They can be addressed through targeted reforms to the existing model. We do not recommend creating hate crime offences. They would not comprehensively resolve the problems we have identified because it is unlikely that hate crime offenders would be consistently charged with or convicted of hate crime offences. One reason for this is that hate crime offences would be more difficult to prove than the equivalent non-hate offence, which is likely to affect charging decisions. Creating offences would also have significant downsides. For example, it is likely to increase the complexity of criminal proceedings and could lead in some cases to unintended outcomes such as hostile motivation not being addressed at all.
- 1.9 In this Report, we make recommendations that would:
- (a) increase the consistency with which hostility is considered in court proceedings by creating a system for flagging hate crime cases in the courts and providing training and guidance for justice system actors; and
 - (b) require the courts to systematically record the application of the hostility aggravating factor on the permanent court record and to clearly address it in sentencing decisions.
- 1.10 Additionally, we recommend reform to the wording of section 9(1)(h) to clarify that the aggravating factor can apply whether or not the offender believes the victim is a member of the targeted group of people. We also recommend adding 'sex' to the illustrative list of enduring common characteristics.
- 1.11 A more detailed summary of our findings and recommendations is available on our website, including in accessible formats and a range of languages.

BACKGROUND TO THIS REVIEW

- 1.12 This review stems from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain (Muslim places of worship) on 15 March 2019. The Royal Commission was established to investigate whether public sector agencies had done all

they could to prevent the terrorist attack and whether more could be done to prevent such attacks in the future.¹ Its report was delivered in December 2020.

- 1.13 The Royal Commission's primary focus was on the counter-terrorism efforts of public sector agencies. It also addressed improving social cohesion, inclusion and diversity, given the supporting role they play in preventing terrorism.² The Royal Commission made a range of recommendations aimed at (among other things) improving workforce diversity and cultural competency within the public sector and strengthening community engagement. It also considered hate crime and hate speech laws in the context of improving social cohesion.

- 1.14 In relation to hate crime, the Royal Commission said that, under the current law:³

A hate motivation for offences is not recorded in charges and convictions, even if it is taken into account during sentencing. This means that recorded convictions do not capture the full blameworthiness (culpability) of the offenders. This limits the signalling effect of prosecution and conviction and means possible needs for rehabilitative interventions are not highlighted.

- 1.15 To address these issues, the Royal Commission recommended creating new hate-motivated offences in:⁴

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

- 1.16 This recommendation was based on the approach taken in England and Wales, where there are hostility-aggravated versions of certain offences with higher maximum penalties than the underlying (or 'base') offence.⁵ The Royal Commission said the proposed offences were likely to:⁶

- (a) have at least some deterrent effect and effects on societal norms;
- (b) increase reporting of hate crimes to Police by showing hate crime is taken seriously;
- (c) encourage more energetic responses by Police to such reporting, including increased prosecutions; and
- (d) facilitate the creation of tailored rehabilitation programmes for hate crime offenders.

¹ Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 Order 2019, sch, cls 1(2) and 5.

² William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020), pt 9.

³ At 703.

⁴ At 762 (recommendation 39).

⁵ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 704; and William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 16–17 (referring to ss 28–32 of the Crime and Disorder Act 1998 (UK)).

⁶ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703–704; and William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 16–17.

- 1.17 In November 2022, the Minister of Justice Hon Kiri Allan requested that the Law Commission conduct “a first principles review of legal responses to hate-motivated offending, and to speech that expresses hostility towards, or contempt for, people who share a common characteristic”.⁷
- 1.18 In March 2024, before that work had commenced and following a change in Government, the new Minister of Justice Hon Paul Goldsmith requested that the review of hate speech be withdrawn from the Law Commission’s work programme.⁸ The Minister asked that we conduct a narrower review of the law relating to hate crime, focusing on whether the law should be changed to create standalone hate crime offences (as recommended by the Royal Commission).
- 1.19 In December 2025, the United Nations Committee on the Elimination of Racial Discrimination recommended that Aotearoa New Zealand:⁹
- (a) Accelerate the implementation of the recommendations of the Royal Commission of Inquiry, particularly measures aimed at preventing further racist violence, providing effective remedies to victims of hate crimes and hate speech, and strengthening coexistence, tolerance, and dialogue among diverse communities;
 - (b) Continue efforts to strengthen the legislative framework to be able to sufficiently respond to hate crimes, including by engaging with the Law Commission, New Zealand Human Rights Commission, civil society, and affected communities; ...
- 1.20 Internationally, there has been increasing public and political attention on hate crime in recent years. Some jurisdictions have reported increases in recorded hate crime.¹⁰ Several high-profile events such as the Bondi Beach shootings in Australia in December 2025 have also intensified public and political debate about how the law should respond to hate crime.¹¹ However, global trends in the prevalence of hate crime are difficult to assess, because jurisdictions define, record and measure hate crime differently. Increases in reported hate crimes may also be attributable (at least in part) to increased public

⁷ Letter from Hon Kiri Allan (Minister of Justice) to Amokura Kawharu (President of the Law Commission) regarding Te Aka Matua o Te Ture | The Law Commission’s 2022/2023 Work Programme (18 November 2022).

⁸ Letter from Hon Paul Goldsmith (Minister of Justice) to Amokura Kawharu (President of the Law Commission) regarding The Law Commission’s 2023/2024 Work Programme (5 March 2024).

⁹ United Nations Committee on the Elimination of Racial Discrimination *Concluding observations on the twenty-third and twenty-fourth periodic reports of New Zealand* CERD/C/NZL/CO/23-24 (19 December 2025) at [22].

¹⁰ See for example Home Office “Hate crime, England and Wales, year ending March 2025” (9 October 2025) <www.gov.uk>, which reports an increase in racial and religious hate crimes, including a 19 per cent increase in religious hate crimes targeting Muslims. Previous years observed a 25 per cent increase in religious hate crimes, driven by a rise in hate crimes against Jewish people: Home Office “Hate crime, England and Wales, year ending March 2024” (10 October 2024) <www.gov.uk>. In Australia, community organisations and researchers have also reported increases in some forms of hostility-motivated incidents, particularly antisemitic and Islamophobic incidents: Human Rights Watch “Statement on Recent Hate Crimes in Australia” (21 January 2025) <www.hrw.org>.

¹¹ Other examples include the 2022 Buffalo, New York mass shooting incident targeting Black Americans and the 2018 Tree of Life Synagogue shooting in Pittsburgh, Pennsylvania. Additionally, an increase in antisemitic and Islamophobic incidents was reported in several jurisdictions following major international conflicts and political events. For example, the UK Home Office attributed a 25 per cent increase in religious hate crimes in 2024 to the beginning of the Israel-Hamas conflict: Home Office “Hate crime, England and Wales, year ending March 2024” (10 October 2024) <www.gov.uk>. It also observed a 19 per cent increase in religious hate crimes targeting Muslims “spiking” around the time of the Southport murders and subsequent disorder.

awareness and improved recording practices rather than increases in the occurrence of hate crime.¹²

SCOPE OF THIS REVIEW

- 1.21 The terms of reference for this review are set out in Appendix 1 to this Report. They state that we will review the law relating to hate crime, with a focus on whether the law should be changed to create new hate-motivated offences. In doing so, we will consider:
- (a) whether the current law adequately responds to hate crime; and
 - (b) if not, whether any concerns about the operation of the current law should be addressed through legislative (or operational) measures — for example, the creation of hate crime offences.
- 1.22 Our primary focus is whether the existing sentence aggravation model is inadequate and should be replaced with hate crime offences. Our terms of reference also envisage that, if the sentence aggravation model is retained, we might make other recommendations for reform to respond to specific problems with the operation of the current law. As we explain further below, this focus on the law relating to hate crime means our review is significantly narrower than the Royal Commission’s report, which considered the broader role of public sector agencies in preventing terrorism.
- 1.23 Our terms of reference state that, in making our recommendations, we will take into account te ao Māori and give consideration to the multicultural character of New Zealand society. This is required by the Law Commission Act 1985.¹³ The Act also requires us to “have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable”.¹⁴

MATTERS THAT ARE OUT OF SCOPE

Criminalising additional behaviour that is not an existing offence

- 1.24 Our review does not consider whether to make any acts illegal that do not already amount to an offence under New Zealand law. While we do consider whether to create new hate crime offences, they would only apply to acts (such as assault) that are already an offence. It is outside our scope to consider criminalising any entirely new behaviours. Our focus is on how the justice system should respond when offending is found to have been motivated by hostility towards a group of people.

Hate speech

- 1.25 This review does not consider hate speech laws. By ‘hate speech’, we mean speech or expression that shows hate or hostility towards a group of people.

¹² See for example European Union Agency for Fundamental Rights *Encouraging hate crime reporting: The role of law enforcement and other agencies* (2021) at 15.

¹³ Law Commission Act 1985, s 5(2)(a).

¹⁴ Section 5(2)(b). See also Regulatory Standards Act 2025, s 9(a)(i).

- 1.26 Current New Zealand law contains offences that capture some kinds of hate speech. For example, under the Human Rights Act 1993, it is an offence to incite racial disharmony.¹⁵ The Royal Commission recommended moving that offence to the Crimes Act, sharpening its language and extending it to cover religious belief.¹⁶
- 1.27 We heard strong concerns about hate speech from submitters and people we spoke with during public consultation. Some suggested that reviewing hate crime law will be ineffective without also addressing hate speech, as the two are connected. We also heard concerns that regulating hate speech unreasonably limits freedom of expression.
- 1.28 We do not comment on the appropriate approach to hate speech, given the scope of this review. We acknowledge our recommendations do not respond to all hate-related harm experienced by communities. As we discuss in Chapter 3, however, we consider hate crime law can help to influence societal attitudes and behaviours over time.

Wider operational and policy responses to hate crime

- 1.29 Preventing hate crime and responding appropriately when it occurs involves many elements. The law has an impact, but it is not the only — or necessarily the most significant — factor. Many submitters and people we spoke with during consultation felt that hate crime would be more effectively addressed through means other than law reform such as:
- (a) addressing bias or lack of cultural awareness within Police and the wider justice system, the existence of which can discourage people from reporting hate crimes;
 - (b) public education to raise awareness of hate crime and to combat the attitudes that underlie it such as racism and bigotry;
 - (c) funding community organisations to support people who experience hate and to provide education and prevention programmes; and
 - (d) focusing on restorative approaches and rehabilitation when a hate crime occurs.
- 1.30 The United Nations Committee on the Elimination of Racial Discrimination also recommended that Aotearoa New Zealand enhance awareness-raising and education programmes to promote tolerance and diversity, including among law enforcement officials and the general public.¹⁷
- 1.31 In addition to the types of initiatives referred to above, the national security system plays an important role in preventing and disrupting terrorist attacks, which overlap to an extent with hate crimes.¹⁸ The national security system and counter-terrorism efforts were considered in detail by the Royal Commission.¹⁹
- 1.32 We have not made recommendations about these matters, which fall outside our scope. Our focus is on addressing concerns about the operation of the law. We emphasise,

¹⁵ Human Rights Act 1993, s 131. See also s 61, which imposes civil liability.

¹⁶ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 763 (recommendation 40).

¹⁷ United Nations Committee on the Elimination of Racial Discrimination *Concluding observations on the combined twenty-third and twenty-fourth periodic reports of New Zealand* CERD/C/NZL/CO/23-24 (19 December 2025) at [22(f)].

¹⁸ For example, the Christchurch terror attack was also treated as a hate crime at sentencing: *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [156]–[157].

¹⁹ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020, pt 8).

however, that reducing occurrences of hate crime and minimising its impact will require Government policy and practice beyond the recommendations in this Report. In some places, we suggest possible areas for further work.

- 1.33 It is also important to acknowledge that even the most robust efforts to reduce hate crime — both through law reform and other means — will not eliminate it entirely. Tolerance for diversity can be promoted, but some prejudice is always likely to exist. It will not always be possible to identify potential hate crime offenders and prevent or disrupt offending. For example, the Royal Commission found there was no information available to public sector agencies that could or should have alerted them to the planned terrorist attack in time to intervene.²⁰ Where hate crimes do occur, it is important that they are appropriately denounced and offenders are held accountable to limit the wider impact on social cohesion.

TERMINOLOGY

- 1.34 Some submitters preferred not to use the terms ‘hate’ or ‘hate crime’. Many of these submitters were concerned that the word ‘hate’ can be inflammatory and does not provide enough certainty or objectivity in the criminal law. Some felt that alternative terms such as ‘hostility-aggravated offending’ or offending motivated by ‘prejudice’ were preferable.
- 1.35 We do not recommend using the words ‘hate’ or ‘hate crime’ in legislation. They are not used in the current sentencing provision. Instead, the provision refers to offending committed because of “hostility towards” a relevant group of people. We do not recommend changing that wording.
- 1.36 Nonetheless, ‘hate crime’ is a commonly used term in ordinary language both in Aotearoa New Zealand and internationally. It also appears in the reference we received from the Minister of Justice to review this area of law. It is more concise and easier to understand than alternatives suggested to us. We have therefore used it in this Report to convey the kind of offending we are concerned with in a general sense.
- 1.37 We use the term ‘hostility’ when referring to the offender’s motivation, since that is the wording used in the legislation. When we use that term, we mean hostility towards a group of people based on a particular characteristic (as opposed to hostility towards the individual victim for other reasons).
- 1.38 Section 9(1)(h) of the Sentencing Act applies to offending motivated by hostility towards a group of people who have an “enduring common characteristic” and provides an illustrative list of characteristics that would be captured. We refer to these throughout the Report as ‘protected characteristics’.

²⁰ At 377.

OUR PROCESS

Identifying potential issues

- 1.39 This review commenced in May 2024. We began by conducting research and preliminary engagement with key stakeholders (including Police, Te Tāhū o te Ture | Ministry of Justice, Corrections, Te Tari Ture o te Karauna | Crown Law and Crown solicitors) to get a sense of how the current law is working in practice. We were guided in our approach to te ao Māori by our Māori Liaison Committee and obtained specialist advice on applicable mātauranga and tikanga from Whāia Legal.
- 1.40 We also analysed approaches in other jurisdictions. The main overseas jurisdictions we investigated are the Australian states and territories, England and Wales, Scotland, Ireland, Northern Ireland and Canada (where hate crime law is federal). We focused our research on these jurisdictions both for practical reasons (in particular, they all include resources in English) and because they have some legal heritage similar to that of Aotearoa New Zealand.

Consultation

- 1.41 In February 2025 we published a Consultation Paper and called for public submissions.²¹ The Consultation Paper sought feedback on:
- (a) whether there are problems with the current law; and
 - (b) if so, whether those problems:
 - (i) could be addressed by making changes to the current sentence aggravation model; or
 - (ii) required a change in the legal model.
- 1.42 The Consultation Paper discussed some ways the current law could be changed to address the potential problems identified.²² It also set out two alternative legal models that could be considered.²³ The first was specific hate crime offences (as recommended by the Royal Commission). This would involve creating hostility-aggravated versions of certain existing offences, with higher maximum penalties than the existing offence. The second was the Scottish hybrid model. Under this model, hostile motivation could be charged as an additional element alongside any existing offence. It would be recorded as part of the conviction and considered at sentencing, but the maximum penalty for the offence would not change.
- 1.43 We received 96 submissions on our Consultation Paper — 26 on behalf of organisations and 70 from individuals. We also met with various organisations and individuals during the public consultation period. Submitters and organisations we met with are listed in Appendix 2. Additionally, the Free Speech Union invited feedback on hate crime law and received 4,042 responses, which it collated and provided to us. The submissions we received are available on our website, along with a summary of them. The summary also provides an overview of the feedback received through the Free Speech Union. Both on

²¹ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper).

²² Consultation Paper, ch 7.

²³ Consultation Paper, ch 8.

our website and in this Report, some submissions by individuals are referred to by the submission number (rather than submitter name) where the submitter requested anonymity.

- 1.44 In this Report, we briefly summarise the submissions and other feedback we received on each of the issues raised in our Consultation Paper. We also refer in more detail to any feedback that is particularly relevant to our analysis (for example, feedback from those working in the justice system about how the current law operates).
- 1.45 After considering the feedback we received during public consultation, we made a preliminary decision to recommend retaining the sentence aggravation model. We developed proposals for reform to address the problems we had identified with the current law. In November 2025, we tested those proposals with a Technical Advisory Group established for the review, comprising legal and academic experts (listed in Appendix 3). We also invited feedback from members of the judiciary, law societies and relevant public sector agencies. The comments we received informed our final recommendations set out in this Report.

Our approach to reform

- 1.46 In assessing whether reform is required, our approach has been that we will recommend changing the legal model if:
- (a) there are problems with the current law;
 - (b) those problems cannot be addressed by making changes to the sentence aggravation model (in other words, they are fundamental problems with the model); and
 - (c) an alternative legal model (such as hate crime offences) would address those problems without creating additional problems that would outweigh the benefits.
- 1.47 We take that approach because of principles we discuss in Chapter 3 regarding the creation of criminal offences.
- 1.48 This approach also shapes our recommendations for reform. In assessing whether the legal model should be changed, it is necessary for us to consider whether the problems we identify with the current law can instead be addressed through amendments to the existing sentence aggravation model. Our recommendations in Chapters 6 and 7 reflect our conclusion that they can.
- 1.49 Because the focus of this review is whether the legal model for hate crime should be changed, we do not undertake a comprehensive redrafting exercise of section 9(1)(h) of the Sentencing Act. As noted above, however, our terms of reference envisage that we might make recommendations for reform to respond to specific problems with the operation of the current law. In Chapter 8, we recommend reforms to section 9(1)(h) to respond to a clear problem with its current wording and to address an issue that arises as a consequence of other reforms we propose.

STRUCTURE OF THIS REPORT

- 1.50 This Report is divided into three parts.
- 1.51 Part 1 addresses background and conceptual matters that provide context to our analysis and recommendations later in the Report:
- (a) In Chapter 2, we discuss hate crime in Aotearoa New Zealand. We describe the current law, what we know about the nature and prevalence of hate crime and how the justice system responds to hate crime.
 - (b) In Chapter 3, we set out the key reform considerations we have used to guide our review. We discuss the rationale for treating hate crimes more seriously than equivalent crimes that are not motivated by hostility and the objectives hate crime law should seek to fulfil. We explain the criminal law principles that should be taken into account when deciding whether to create new offences and how they have affected our approach to this review. We also discuss the relevance of te Tiriti o Waitangi | Treaty of Waitangi, tikanga and human rights to this review.
- 1.52 Part 2 considers the appropriate legal model for addressing hate crime in Aotearoa New Zealand:
- (a) In Chapter 4, we explore whether there are problems with the current law relating to hate crime. We identify several issues with how the law operates in practice.
 - (b) In Chapter 5, we outline the key features of the current sentence aggravation model and the two alternative legal models we considered in this review — specific hate crime offences and the Scottish hybrid model. We assess whether the problems identified in Chapter 4 can be addressed by making changes to the sentence aggravation model or whether an alternative model would address them more effectively. We conclude that the problems identified are not fundamental problems with the sentence aggravation model and can be addressed by making changes to it. Neither of the alternative models would effectively address the problems with the current law. Both alternative models also have significant disadvantages that would outweigh their limited benefits. We do not recommend changing the legal model.
- 1.53 Part 3 sets out our recommendations for reform to improve the current sentence aggravation model:
- (a) In Chapter 6, we make recommendations to improve how hate crimes are identified and recorded in the courts, by creating a court hate crime flag. We recommend legislative amendment to allow Police to specify if the hostility aggravating factor is alleged to apply to an offence when laying charges and to require judges to formally record its application. We also recommend that the courts share information about the application of the aggravating factor with Police and Corrections.
 - (b) In Chapter 7, we address denunciation of hate crimes in sentencing decisions. We recommend legislative amendment to require sentencing judges to state if an offence was motivated by hostility when giving reasons for imposing a sentence. We discuss other options but do not recommend reform.
 - (c) In Chapter 8, we discuss several potential problems with the current wording of section 9(1)(h) on which we consulted or that were raised with us during consultation. We recommend an amendment to ensure the aggravating factor can apply where the victim is targeted because of their association with, rather than their membership of, the targeted group of people or is an innocent bystander. We also recommend

adding 'sex' to the list of characteristics covered by the aggravating factor. This would clarify that the factor applies to offending motivated by hostility based on sex, particularly hostility towards women.

- (d) In Chapter 9, we make operational recommendations to support our recommended reforms. We recommend guidance and training for Police, prosecutors and judges to ensure they are appropriately informed about any changes to the law as a result of this review. We also recommend that Police and the Ministry of Justice publish data on hate crimes annually.
-

PART 1:

BACKGROUND AND CONCEPTUAL MATTERS



CHAPTER 2

Hate crime in Aotearoa New Zealand

INTRODUCTION

- 2.1 In this chapter, we provide an overview of what we know about hate crime in Aotearoa New Zealand. We discuss the following:
- (a) The current law relating to hate crime.
 - (b) The nature and prevalence of hate crime.
 - (c) How hate crime is currently addressed by the justice system.
- 2.2 The term ‘hate crime’ is used differently by different people and in different contexts.¹ As explained in Chapter 1, in this Report, we use ‘hate crime’ as a descriptive term rather than a legal one. We use it to refer to conduct that is already an offence under the existing law and that, additionally, is committed because of hostility towards a group of people who share a common characteristic.

THE CURRENT LAW

- 2.3 Aotearoa New Zealand does not have specific hate crime offences. Instead, the courts take hostile motivation into account as an aggravating factor at sentencing for any criminal offence. When the aggravating factor applies, the courts may impose a harsher sentence than they would have for an equivalent offence that was not motivated by hostility towards a group of people. As we explain below, however, the maximum penalty for the offence does not increase.

Aggravating factors under section 9(1) of the Sentencing Act 2002

- 2.4 Under section 9(1) of the Sentencing Act 2002, when sentencing an offender, the court must take into account certain aggravating factors to the extent they are applicable. Aggravating factors can increase the sentence imposed on an offender, with the extent of the increase depending on the significance of the aggravating factor in the

¹ See for example Jennifer Schweppe “What is a hate crime?” (2021) 7(1) Cogent Soc Sci at 1 and 5–6.

circumstances of the case.² The courts are not required to increase the sentence nor to increase it by any particular amount.

- 2.5 There are 16 aggravating factors in section 9(1). These include factors such as actual or threatened violence or use of a weapon, particular cruelty in the commission of the offence and the vulnerability of the victim.

The hostility aggravating factor in section 9(1)(h)

- 2.6 One of the aggravating factors, in section 9(1)(h), relates to hostile motivation and requires the court to take into account:

that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

- (i) the hostility is because of the common characteristic; and
- (ii) the offender believed that the victim has that characteristic.

- 2.7 We refer to this in our Report as the ‘hostility aggravating factor’. This approach, of treating hostile motivation as an aggravating factor at sentencing, is often called the ‘sentence aggravation model’ of hate crime law. We discuss the key features of the model and other jurisdictions in which it is used in Chapter 5.

- 2.8 In Aotearoa New Zealand, the wording of the hostility aggravating factor is reasonably broad. Three features are worth highlighting:

- (a) It applies where an offence is committed “partly or wholly because of” hostility towards a group of people who have an enduring common characteristic. The hostility need not be the only reason for the offending, provided there is some link.
- (b) While it lists types of “enduring common characteristics”, it is not exhaustive. Offending based on other characteristics may also engage the aggravating factor. We refer to characteristics covered by the aggravating factor as ‘protected characteristics’.
- (c) The offender must have “believed that the victim has that characteristic”. The aggravating factor can apply if the offender was mistaken in that belief.

- 2.9 The aggravating factor can apply to any offence of which the offender has been convicted. It does not create any new offences or increase the maximum penalty for the relevant offence. For example, if an offender is convicted of injuring with intent to injure and the aggravating factor applies, the sentence imposed cannot exceed the existing maximum penalty for that offence (five years’ imprisonment).³ Maximum penalties for offences should be set high enough to allow for a case in which all potentially relevant aggravating factors (and no mitigating factors) apply.⁴

- 2.10 There is a slightly different approach when sentencing an offender for murder. The courts are required to impose a sentence of life imprisonment for murder unless it would be manifestly unjust.⁵ Offenders sentenced to life imprisonment for murder must serve a

² See *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [37]–[44]; and *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [50] (in relation to the hostility aggravating factor specifically).

³ Crimes Act 1961, s 189(2).

⁴ Te Aka Matua o te Ture | Law Commission *Maximum penalties for criminal offences* (NZLC SP21, 2013) at [4.17].

⁵ Crimes Act, s 172; and Sentencing Act 2002, s 102(1).

‘minimum period of imprisonment’ (MPI),⁶ after which the Parole Board considers whether to release them on parole.⁷ The MPI must be at least 10 years.⁸

- 2.11 The Sentencing Act requires the courts to impose an MPI of at least 17 years in certain circumstances unless it would be manifestly unjust.⁹ These circumstances include where the murder was committed with a high level of brutality or callousness, as part of a terrorist act, against a victim who was particularly vulnerable and any other “exceptional circumstances”. Hostility-motivated offending is not specifically listed as a circumstance requiring an MPI of at least 17 years. Nonetheless, in some cases, the fact that a murder was motivated by hostility has been relied on in concluding that there was a sufficiently high level of callousness to engage the 17-year MPI requirement.¹⁰
- 2.12 Where a court considers that an MPI would be insufficient, it has the option to sentence an offender to life imprisonment without parole.¹¹ This has only occurred once, when sentencing the perpetrator of the 15 March 2019 terrorist attack on Christchurch masjidain.¹² The Court referred to the fact that the offending was a hate crime, alongside other aggravating factors, in reaching the view that life imprisonment without parole was appropriate.¹³

NATURE AND PREVALENCE OF HATE CRIME IN AOTEAROA NEW ZEALAND

- 2.13 Due to shortcomings in data collection, it is difficult to ascertain the true prevalence of hate crime in Aotearoa New Zealand.¹⁴ In 2019, Te Kāhui Tika Tangata | Human Rights Commission identified this as making it “difficult to have an informed discussion” about hate crime in Aotearoa New Zealand.¹⁵ The Human Rights Commission collected media reports of racially and religiously motivated crime and described around 100 incidents in its report *It Happened Here*. It described reported incidents as just “the tip of the iceberg”.¹⁶

⁶ Sentencing Act, s 103.

⁷ Parole Act 2002, ss 20–21. Offenders sentenced to life imprisonment who are released on parole remain subject to parole conditions for their whole life (s 29(4)(b)) and may be recalled to prison (on the grounds set out in s 61).

⁸ Sentencing Act, s 103(2).

⁹ Section 104.

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

¹¹ Sentencing Act, s 103(2A).

¹² *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [133].

¹³ At [145], [156] and [179].

¹⁴ Some commentators have suggested that hate crime is not a new phenomenon in Aotearoa New Zealand and that the killing of Ngāti Oneone rangatira Te Maro by an *Endeavour* crew member on 9 October 1769 was the first recorded race-based violent crime in Aotearoa New Zealand: Tina Ngata, Arama Rata and Dilwin Santos “Race-Based Hate Crime in Aotearoa” (2021) 10(2) MAI J 207 at 209.

¹⁵ Te Kāhui Tika Tangata | Human Rights Commission *It Happened Here: Reports of race and religious hate crime in New Zealand 2004-2012* (June 2019) at 1.

¹⁶ At 1.

- 2.14 Ngā Pirihimana o Aotearoa | New Zealand Police collects data on reported hate crimes and Te Tāhū o te Ture | Ministry of Justice includes relevant questions in the New Zealand Crime and Victim Survey. In both cases, the data only dates back a few years. Police and the Ministry of Justice provided us with some of this data, which we summarise below. Data about hate crime is not currently published in any comprehensive way (as we discuss further in Chapter 9, where we recommend annual publication of Police and courts data).

Prevalence of hate crime

- 2.15 Since 2019, Police has been able to flag on its National Intelligence Application that a reported offence is perceived to be a hate crime.¹⁷ The National Intelligence Application is a computer application used to record information about incidents reported to Police and investigations into alleged offences. The hate crime flag is applied if a victim, police officer or anyone else considers that the alleged offending was motivated by hostility or prejudice. Since 2021, a national Hate Crime Quality Assurance Team has carried out a quality assurance process to ensure this flag is being used correctly. We discuss the role of this team further below and in Chapter 4.
- 2.16 Perceived hate crimes flagged by Police make up a small proportion of overall reported offences (around 0.8 per cent). There has been an increase in the number of offences flagged as hate crimes from 3,452 in 2021 to 5,918 in 2025. It is not clear whether this increase is attributable to an increase in hate crimes being committed or to increased awareness and improved reporting and recording practices.
- 2.17 Police data only shows the number of perceived hate crimes that have been reported to Police. It does not capture any unreported offences. As victims of hate crime do not always report the offending, Police data may not provide a complete picture.¹⁸ Conversely, because Police recording is based on perception and reported offences, it captures alleged offending that may not ultimately be proven in court or found to be motivated by hostility.
- 2.18 Further information on the prevalence of hate crime can be found in the Ministry of Justice's New Zealand Crime and Victim Survey.¹⁹ As noted above, the Ministry of Justice also provided us with some additional, unpublished survey data. As a direct survey of New Zealanders' experiences of crime, the New Zealand Crime and Victim Survey collects information about both reported and unreported crimes. However, the survey does not ask specifically about hostility-motivated offending. It asks whether the victim perceived an alleged offence happened at least partly because of the offender's attitudes towards a particular characteristic such as race or sexuality. This means the survey data captures all alleged offences that the victim believes occurred because of a particular characteristic, whether or not it occurred because of *hostility* based on that characteristic. For example, elder abuse can occur because of hostility towards someone based on their

¹⁷ A more detailed summary of the available Police data can be found in our Consultation Paper: Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper) at [2.13]–[2.20].

¹⁸ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 714.

¹⁹ The most recent survey cycle results can be found at Te Tāhū o te Ture | Ministry of Justice "NZCVS Cycle 8 resources and results" <www.justice.govt.nz>.

age. However, it can also occur because of the victim's perceived vulnerability. In both situations, the offence happened because of the offender's attitude towards the victim's age, but only the former would meet the criteria in section 9(1)(h).

- 2.19 Since 2018, the proportion of alleged offences perceived by the victim to have occurred because of the offender's attitudes towards a particular characteristic has ranged between 11 and 20 per cent of the alleged offences reported by survey participants.
- 2.20 Fourteen submitters on our Consultation Paper discussed the prevalence of hate crime in Aotearoa New Zealand. Of these, two considered that hate crime is increasing or is more prevalent than might be expected,²⁰ while six thought hate crime is not a widespread problem.²¹ One submitter said that little is known about hate crime in Aotearoa New Zealand.²²

Features of hate crime offending

- 2.21 The types of offences most frequently flagged by Police as perceived hate crimes are: offences that harm or endanger persons (such as stalking, harassment and threatening behaviour); public order, health and safety offences (such as offensive behaviour or language); assault; and property damage. From 2021 to 2025, these types of offences together accounted for over 90 per cent of perceived hate crimes.²³
- 2.22 In the New Zealand Crime and Victim Survey data, the most common types of offences reported to be motivated by an offender's attitudes towards a particular characteristic were sexual assault, threats and property damage, and harassment and threatening behaviour.²⁴ The survey does not gather data on public order offences, which, as noted above, are among the most common perceived hate crimes reported to Police.

Characteristics of targeted individuals

- 2.23 Police data captures the percentage of perceived hate crimes that related to each protected characteristic. More than one protected characteristic can be targeted in a single reported offence — for example, if a gay South Asian person experiences a hate crime, they may consider they were targeted because of both their race *and* sexual orientation.
- 2.24 The table below shows the percentage of perceived hate crimes that related to each protected characteristic from 2021 to 2025, based on Police data.

²⁰ Dr Sanjana Hattotuwa; and Dr Chris Wilson.

²¹ George Balani; Kevin Bird; Destiny Church New Zealand; Free Speech Union; Submission 72; and Submission 90.

²² Te Kāhui Ture o Aotearoa | New Zealand Law Society.

²³ These offence types are based on the Australian and New Zealand Standard Offence Classification (ANZSOC) divisions, which are used by Police to present offence data. They differ from the offence types referred to in our Consultation Paper because a revised ANZSOC standard was adopted in 2025: Ngā Pirihimana o Aotearoa | New Zealand Police "Changes to ANZSOC standard" (30 July 2025) <www.police.govt.nz>.

²⁴ For example, in 2025, 59 per cent of sexual assaults, 46 per cent of threats and property damage and 49 per cent of harassment and threatening behaviour offences were perceived to be motivated by the offender's attitude towards a protected characteristic: Te Tāhū o te Ture | Ministry of Justice "NZCVS Data Hub" (March 2026) <www.justice.govt.nz> (under "tb07victimexperience").

POLICE DATA: CHARACTERISTICS TARGETED IN ALLEGED OFFENCES FLAGGED AS PERCEIVED HATE CRIMES					
	2021	2022	2023	2024	2025
Age	1%	1%	1%	0%	0%
Disability	1%	2%	2%	2%	1%
Gender identity	3%	4%	4%	4%	5%
Race/ethnicity	82%	79%	78%	79%	79%
Religion/faith	7%	6%	6%	5%	6%
Sexual orientation	7%	9%	9%	10%	9%

- 2.25 Since 2022, Police has recorded further detail on the protected characteristics perceived to be targeted by an alleged offence such as the type of race or religion. From 2022 to 2025, the most recorded ethnicities were South Asian (including Indian) and Asian. In 2025, these accounted for 27 per cent and 15 per cent of perceived hate crimes targeting race/ethnicity, respectively. ‘People of colour’ and Māori were the next most recorded races or ethnicities (at 13 per cent and 8 per cent, respectively). Islam and Judaism were the most recorded religions, accounting for 51 per cent and 16 per cent of perceived hate crimes targeting religion in 2025, respectively.
- 2.26 The New Zealand Crime and Victim Survey also looks at what percentage of alleged offences relate to particular characteristics, as shown in the table below. The percentage is out of the total alleged offences respondents thought were motivated by the offender’s attitude towards a characteristic. As with Police data, more than one characteristic can be recorded for a single alleged offence.
- 2.27 There are two preliminary points to make about this data, which means it should be treated with caution.
- (a) In the table, ‘S’ means suppressed estimates. Estimates were suppressed if they had either a margin of error of 20 percentage points or greater, a relative standard error of 50 per cent or greater or an underlying sample count of fewer than six, making them too unreliable for general use.
 - (b) There are some statistical limits to most of the data presented here. From 2019 to 2025, most of the percentages presented have a margin of error of 10–20 percentage points or a relative standard error of 20–50 per cent.

NEW ZEALAND CRIME AND VICTIM SURVEY DATA: CHARACTERISTICS TARGETED IN ALLEGED OFFENCES PERCEIVED TO BE MOTIVATED BY OFFENDER'S ATTITUDE								
	2018	2019	2020	2021	2022	2023	2024	2025
Race, ethnicity or nationality	29%	36%	31%	35%	15%	37%	S	23%
Sexuality or sexual orientation	30%	37%	36%	40%	17%	25%	19%	27%
Age	38%	41%	40%	35%	S	34%	S	33%
Gender or sex	68%	57%	55%	53%	72%	51%	S	63%
Religion	11%	11%	10%	11%	20%	14%	21%	18%
Disability	6%	13%	12%	21%	7%	10%	7%	10%
Race/religion or political opinion	35%	40%	33%	40%	S	42%	S	36%

- 2.28 The reasons for the differences between the Police and New Zealand Crime and Victim Survey data are unclear. One reason may be that the survey data captures unreported offending and different types of offending to Police data (in particular, it does not capture public order offending). Another reason may be that, as we noted above, the survey data captures more than just hostility-motivated offending.
- 2.29 Twenty-eight submitters discussed the targeting of particular groups, although it was not always clear if submitters were specifically referring to instances of hate crime. Several submitters discussed hate directed at particular religions, including Judaism,²⁵ Islam,²⁶ Hinduism,²⁷ Sikhism²⁸ and Christianity.²⁹
- 2.30 Three submitters expressed concerns about an increase in violence against the rainbow community.³⁰ Some submitters referred to particular instances of this such as the arson of the Rainbow Youth Centre in Tauranga in June 2022, the vandalism of the Gloria of Greymouth Church (which included homophobic messages) in June 2022 and the actions of members of Destiny Church New Zealand that interrupted a drag storytime event at Te Atatū Library in Auckland in 2025.

²⁵ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); New Zealand Jewish Council; and Submission 78.

²⁶ Inclusive Aotearoa Collective Tāhono; and Murray Stirling.

²⁷ Submission 43.

²⁸ Sikh Council of New Zealand.

²⁹ Destiny Church New Zealand; and Submission 57.

³⁰ Dr Sanjana Hattotuwa; Submission 26; and Submission 77.

- 2.31 Seven submitters discussed violence or hostility directed at particular ethnicities. Some submitters told us about specific incidents directed at Māori (for example, acts of arson at several marae) and at members of the Palestinian community.³¹ One submitter emphasised the importance of considering hate crime in the wider socio-historical context of white supremacy and racism in Aotearoa New Zealand, which affects Māori and communities of colour.³² Some of these submitters also expressed their perception that the majority of hate crimes target race or ethnicity³³ and that these hate crimes are increasing.³⁴

HOW HATE CRIME IS ADDRESSED IN THE CRIMINAL JUSTICE SYSTEM

- 2.32 This section explains how the criminal justice system in Aotearoa New Zealand responds to hate crime. It provides context for later chapters where we discuss problems with the current law and options for reform.

Recognising, recording and investigating hate crime

- 2.33 The report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 drew attention to shortcomings in the reporting and recording of hate crime. The Royal Commission repeatedly heard that people were reluctant to report hate crime and that there was a lack of data about hostility-motivated offending and harassment.³⁵ Police only began recording hate crime in its National Intelligence Application system in 2019, with the Royal Commission noting that recording was incomplete and inconsistent.³⁶ The Royal Commission considered this was due in part to limited training for police officers on hate crime.³⁷
- 2.34 The Royal Commission said that accurate recording of reported hate crime was desirable and would enhance community trust and increase reporting rates.³⁸ It recommended that Police improve how it records hate crime and trains frontline staff.³⁹ In response, a four-year interagency programme called Te Raranga was established to improve the Government's response to hate crime, incidents and speech.⁴⁰ Through this programme, Police:
- (a) Updated its definition of a hate crime.

³¹ Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Murray Stirling; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

³² Te Kāhui o Ināia Tonu Nei Charitable Trust.

³³ Annette Sykes & Co.

³⁴ Dr Sanjana Hattotuwa.

³⁵ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 714–715.

³⁶ At 715. Note that at [78] the report says the reporting of hate motivations remains incomplete and somewhat inconsistent, but it appears from the context that the Royal Commission was referring to recording.

³⁷ At 715.

³⁸ At 715.

³⁹ At 716 and 764 (recommendation 42).

⁴⁰ Ngā Pirihimana o Aotearoa | New Zealand Police “Te Raranga (The Weave)” <www.police.govt.nz>.

- (b) Updated the Police Instructions and Standard Operating Procedures to include guidance on how to investigate and record hate crime.
- (c) Established a Hate Crime Quality Assurance Team.
- (d) Introduced hate crime training.
- (e) Developed ‘Standing Together Against Hate’ resources for communities⁴¹ to highlight the harm hate causes and support public conversations.
- (f) Created dedicated district hate crime leads — senior officers in each district who are responsible for keeping hate crime as a live issue in their area and identifying and responding to any emerging trends. These leads work closely with the Quality Assurance Team, receiving direct updates and daily reports on hate crime issues.

Recognising hate crime

- 2.35 Since 2022, the Police Instructions and Standard Operating Procedures have contained guidance on how to recognise hate crime. Police has also developed and introduced training. For example, all new recruits are trained and assessed on hate crime.⁴² Hate crime training is regularly integrated into training days and forms part of promotional exams. Police buildings have posters on how to recognise hate crime, and line-ups (where frontline police officers meet before a shift to discuss issues, trends and handover information) include information on how to recognise, record and respond to hate crime.

Recording hate crime

- 2.36 All alleged offences reported to Police are recorded in the National Intelligence Application. Since 2019, Police has used a ‘perceived hate crime’ flag to record whether an alleged offence was perceived to be motivated by hostility. The information the Police records includes the characteristic or group that is perceived to be the target of the hostile motivation and any further information about the hostile motivation such as any specific words or symbols used.
- 2.37 Police’s Hate Crime Quality Assurance Team completes daily quality assurance checks of the perceived hate crime flag. This includes conducting keyword searches to identify reported offences that should have been flagged as perceived hate crimes. The team fixes any errors and identifies ways to improve Police’s recording of hate crime. The team works closely with hate crime leads in Police districts to improve recording practices and help to ensure potential hate crimes have been appropriately identified and followed up.

Investigating hate crime

- 2.38 Police is responsible for investigating reported hate crime. This includes recording statements, checking CCTV footage and interviewing alleged offenders. Police Instructions explain that the investigation file should state in the subject line or first paragraph if an alleged offence is ‘hate related’ and that any information about the hostile motivation should be recorded in the National Intelligence Application.

⁴¹ Ngā Pirihimana o Aotearoa | New Zealand Police “Standing Together Against Hate” <www.police.govt.nz>.

⁴² Ngā Pirihimana o Aotearoa | New Zealand Police “Hate-Motivated Crime: How to recognise and record hate-motivation, and respond appropriately” <www.police.govt.nz>.

- 2.39 Police Instructions also say that, when a person reports a hate crime, Police should offer them a referral to support agencies such as Manaaki Tāngata | Victim Support. Police also has liaison officers, whose role includes forming relationships with marginalised communities.⁴³ Liaison officers are made aware of any reported hate crime and are involved in the investigation as appropriate.
- 2.40 Once a matter has been investigated, Police decides how to respond. Sometimes there will not be enough evidence to prosecute the offence. Sometimes Police may consider that alternatives such as issuing a formal warning are more appropriate.

Prosecuting hate crime

- 2.41 When Police decides to prosecute an offence, the investigating officer files a charging document with the relevant court. The charges are reviewed by a prosecutor to ensure prosecution is appropriate. The charging document does not refer to hostile motivation.
- 2.42 Like other crimes, not all offences that are motivated by hostility will be prosecuted. An offence should only be prosecuted if:⁴⁴
- (a) there is enough evidence to prove the charge beyond reasonable doubt; and
 - (b) the public interest requires prosecution.
- 2.43 When determining whether the public interest requires prosecution, one of the factors the prosecutor must consider is the seriousness of the offence. In assessing the seriousness of an offence, any applicable aggravating factors, including hostile motivation, will be relevant.⁴⁵
- 2.44 Prosecutors rely on the investigating police officer to provide evidence of the offender's alleged hostile motivation. As we discuss further in Chapter 4, where that does not occur, hostile motivation is unlikely to be raised at sentencing or at other relevant stages in a proceeding.
- 2.45 Most offences are prosecuted by the Police Prosecution Service. Crown solicitors prosecute the most serious offences and those where the defendant elects a jury trial.⁴⁶
- 2.46 From 2022 to 2025, 13–15 per cent of alleged offences perceived to be motivated by hostility were investigated to the point where there was enough evidence to charge a person with an offence. In 2025, 64 per cent of these alleged offences were prosecuted. Other actions included formal or informal warnings (10 per cent and 7 per cent, respectively).⁴⁷

⁴³ These include, for example, iwi liaison officers, ethnic liaison officers and diversity liaison officers (who serve rainbow communities).

⁴⁴ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General's Prosecution Guidelines: Principal Guideline* (2024) at [22].

⁴⁵ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General's Prosecution Guidelines: Decisions to prosecute* (2024) at [29] and [33].

⁴⁶ Crown Prosecution Regulations 2013, reg 4.

⁴⁷ As of 1 December 2025, informal warnings are no longer recorded as a formal outcome.

Sentencing hate crime offenders

Process for establishing hostile motivation

- 2.47 If a defendant is found guilty of an offence, the court determines at a sentencing hearing whether the hostility aggravating factor applies. In *Te Kōti Matua* | High Court and some *Te Kōti ā Rohe* | District Court proceedings, the prosecutor must identify any applicable aggravating factors in a sentencing memorandum filed in advance of the hearing.⁴⁸ Aggravating factors are also addressed in oral submissions. The court must take into account any aggravating factors that are applicable when sentencing the offender (whether or not those factors have been raised by the prosecutor).⁴⁹
- 2.48 When deciding whether offending was motivated by hostility, the court can consider any evidence presented at the trial and any facts agreed on by the prosecution and the defence.⁵⁰ Agreed facts include those in a summary of facts accepted by the defendant when entering a guilty plea.⁵¹ If there is a significant dispute about the facts, the parties may present further evidence.⁵² The prosecution must prove any disputed facts beyond reasonable doubt.⁵³ In practice, we understand such disputes occur relatively infrequently.

How the courts have applied the aggravating factor

- 2.49 As explained above, the hostility aggravating factor applies to offending committed “wholly or partly because of” hostility towards a group of people who have an enduring common characteristic. *Te Kōti Pira* | Court of Appeal has variously described the aggravating factor as targeting “offending that demonstrates hostility towards a particular group or groups in society”⁵⁴ and offending “motivated by” such hostility.⁵⁵
- 2.50 The courts do not tend to undertake a detailed assessment of the offender’s motivation or reasons for the offending. It will generally be sufficient if there is evidence that the offender showed hostility towards the victim based on a common characteristic.⁵⁶ For example, the courts have taken evidence of the following into account when applying the hostility aggravating factor:

⁴⁸ Criminal Procedure Rules 2012, r 5A.5(1)(c). The rule only applies to District Court proceedings if the Crown assumes responsibility for the proceeding prior to sentencing or the judge directs that a sentencing memorandum be filed: r 5A.3.

⁴⁹ Sentencing Act, s 9(1). In practice, however, the court may be unaware an aggravating factor is applicable if no relevant evidence has been presented.

⁵⁰ Sentencing Act, s 24(1)(a).

⁵¹ Criminal Procedure Rules, r 5A.1.

⁵² Sentencing Act, s 24(2). If the defendant disputes a fact relied on by the prosecutor, the court first indicates to the parties what weight it is likely to attach to the disputed fact if it is proved and its significance for the sentence: s 24(2)(a). If the prosecutor still wishes to rely on the fact, the parties may adduce further evidence unless the court is satisfied sufficient evidence was adduced at trial: s 24(2)(b).

⁵³ Sentencing Act, s 24(2)(c).

⁵⁴ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [55] (emphasis added). See also [57].

⁵⁵ *Solicitor-General v Milne* [2020] NZCA 134 at [41].

⁵⁶ We discuss the meaning of ‘enduring common characteristic’ further in Chapter 8.

- (a) Racist or homophobic comments made by the offender to the victim before or during the offending.⁵⁷
- (b) Comments made by the offender to police officers or Ara Poutama Aotearoa | Department of Corrections staff after the offending, showing hostility towards a group of people to which the victim belonged (such as Muslims, Asians or trans people).⁵⁸
- (c) Deliberate targeting of victims based on a protected characteristic such as religion.⁵⁹
- (d) A pattern of offending against victims of a particular ethnicity⁶⁰ or at a religious site.⁶¹
- (e) Evidence of established hostile views towards Muslims.⁶²
- (f) Membership of a white supremacist neo-Nazi group.⁶³

Effect of the aggravating factor on sentences

- 2.51 The courts generally consider all aggravating factors relating to the seriousness of an offence together when deciding on the appropriate starting point for the sentence (see Chapter 7 for further detail). The court does not usually state how much an individual factor (such as hostile motivation) has affected the starting point.⁶⁴ This makes it difficult to draw conclusions about the weight the courts give to hostile motivation.
- 2.52 It is likely that the weight given to the hostility aggravating factor differs depending on the circumstances of the case. For example, clear targeting of victims on ideological grounds may be given greater weight than an expression of hostility that may not reflect the offender's main motivation for the offending.⁶⁵

⁵⁷ *Police v Kelland* [2024] NZDC 17908; *R v Davidoff* [2024] NZDC 19266 (affirmed in *Davidoff v R* [2026] NZCA 126); *Solicitor-General v Milne* [2020] NZCA 134; *R v Angelich* [2018] NZHC 2429; *Landon v R* [2018] NZCA 264; *R v Uili* CA148/06, 26 October 2006; and *Whitwell v Police* HC Nelson CRI-2005-442-5, 15 September 2005.

⁵⁸ *R v Arps* [2019] NZDC 11547; *Galloway v R* [2011] NZCA 309; *R v Sanders* HC Wellington CRI-2009-078-824, 10 December 2010; *Whitwell v Police* HC Nelson CRI-2005-442-5, 15 September 2005; and *R v Johansen* HC Auckland CRI-2004-83-1849, 2 June 2005.

⁵⁹ *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15.

⁶⁰ *R v Kaitapere* [2017] NZDC 23907.

⁶¹ *Bryan v Police* HC Auckland CRI 2009-404-45, 3 April 2009.

⁶² *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15; and *R v Arps* [2019] NZDC 11547.

⁶³ *R v McKenzie* HC Greymouth CRI-2008-018-981, 5 December 2008 (upheld in *R v McKenzie* [2009] NZCA 169).

⁶⁴ An exception is *R v Davidoff* [2024] NZDC 19266 (at [18]), where the sentencing judge adopted a starting point of 10 months' imprisonment for the violence itself and applied an uplift of two months (20 per cent) for the offender's hostile motivation. An appeal against sentence was dismissed: *Davidoff v R* [2026] NZCA 126. The Court of Appeal did not comment on the practice of specifying a discrete uplift.

⁶⁵ Compare *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [121], [125] and [156]–[157]; and *R v McKenzie* HC Greymouth CRI-2008-018-981, 5 December 2008 at [11], [15] and [20]–[21] (clear targeting on ideological grounds) to *Galloway v R* [2011] NZCA 309 at [38] and [44] (expressions of hostility).

How often the aggravating factor is applied

- 2.53 We do not know how many times the courts have applied the hostility aggravating factor. Neither Police nor Ministry of Justice data systems record the factors taken into account at sentencing, including hostile motivation.
- 2.54 We have identified 29 cases in which the hostility aggravating factor appears to have been applied at sentencing, but this is likely to be only a small proportion of the actual number.⁶⁶ A significant proportion of hate crime offenders are likely to be sentenced in the District Court, as many of the offences that tend to be motivated by hostility are relatively low-level (such as public order offences and property damage). As most District Court decisions and sentencing notes are not published online and will only sometimes be referred to in media reporting, it is difficult to accurately assess how often the aggravating factor is being applied.

Types of hate crime recognised in case law

- 2.55 Consistent with the Police data discussed above, hostility based on race, colour or nationality were by far the most common grounds for applying the hostility aggravating factor in sentencing decisions we located. Other cases involved hostility based on sexual orientation, religion, gender identity, sex and gang membership.⁶⁷
- 2.56 None of the cases we found involved hostility based on age or disability, which are also given as examples of enduring common characteristics in the Sentencing Act. The victim's age or disability are, however, sometimes taken into account under a different aggravating factor that focuses on the vulnerability of the victim.⁶⁸
- 2.57 The hate crime cases we identified involved the offences of:
- (a) murder, attempted murder and manslaughter;
 - (b) assault, wounding and injury;
 - (c) intimidation, unlawful assembly and threatening acts;
 - (d) carrying out a terrorist act;
 - (e) kidnapping;
 - (f) robbery and burglary;
 - (g) possession and use of explosives;
 - (h) distributing objectionable publications;
 - (i) sexual violation; and
 - (j) attempt to corrupt a juror.

⁶⁶ Some of these decisions did not expressly refer to the hostility aggravating factor in s 9(1)(h) of the Sentencing Act but it appears from the court's reasons that hostility based on an enduring common characteristic was taken into account. As we discuss in Chapter 4, in some cases, it is not entirely clear whether the aggravating factor was applied or not.

⁶⁷ We discuss concerns about the recognition of gang membership as an enduring common characteristic in Chapter 8.

⁶⁸ Section 9(1)(g) of the Sentencing Act refers to the victim's vulnerability due to their age, health or any other factor known to the offender. It can apply to children, elderly people and people suffering from a medical or mental health condition or disability: see *Sheppard v R* [2013] NZCA 639 at [15].

- 2.58 As explained above, less-serious offending is prosecuted in the District Court, where decisions and sentencing notes are not routinely published online. This includes offences under the Summary Offences Act 1981 such as offensive behaviour or language, wilful damage and graffiti vandalism. This means that these offences were not well represented in our case searches. Accordingly, we do not know whether and how often the courts have applied the hostility aggravating factor to these types of offences.

Restorative justice

- 2.59 As with other types of criminal offending, restorative justice may be available to address hostility-motivated offending.⁶⁹ A restorative justice conference is an informal, facilitated meeting between a victim, offender, support people and any other approved people such as community representatives or interpreters. It provides an opportunity for the offender to take responsibility, apologise to the victim, seek to address the harm caused and find ways to prevent reoffending. Restorative justice will not always be available or appropriate — for example, the offender must accept responsibility and both parties must agree to participate.⁷⁰
- 2.60 Several submitters referred to the potential for restorative justice to provide effective remedies to victims and to address some of the underlying causes of hate crime.⁷¹ Members of our Technical Advisory Group also noted that restorative justice is an option.
- 2.61 Given the lack of data generally on hostility-motivated offending, it is difficult to assess how often restorative justice is being used. We are aware of one hate crime case in which a restorative justice conference occurred and was taken into account at sentencing.⁷²

Rehabilitating hate crime offenders

Rehabilitative support offered by Corrections

- 2.62 Corrections manages all people who are serving sentences for criminal offending, whether they are subject to imprisonment or a community-based sentence. One of its roles is to assist in the rehabilitation of offenders through the provision of programmes and other interventions.⁷³
- 2.63 Corrections told us that the rehabilitative support available to offenders depends on a number of factors, including their overall risk of reoffending and (re)imprisonment, any specific features of their offending (such as violence), the availability of programmes at the offender's location and their willingness or ability to participate in rehabilitation. Rehabilitation is also currently limited by ongoing staff shortages (including shortages of Corrections officers, psychologists and programme facilitators).
- 2.64 Corrections provides offence-focused rehabilitative programmes that aim to change the attitudes and behaviours that contributed to an individual's offending. These include general rehabilitation programmes for offenders with a medium risk of reoffending as well as specific programmes for high-risk violent and sexual offenders, female offenders and

⁶⁹ Sentencing Act, s 24A; and Victims' Rights Act 2002, s 9.

⁷⁰ Te Tāhū o te Ture | Ministry of Justice *Restorative justice: Practice framework* (August 2019) at 10–11.

⁷¹ Dr Sanjana Hattotuwa; Dr Mark Walters; Dr David Harvey; and Members of Te Hunga Rōia Māori o Aotearoa.

⁷² *Bryan v Police* HC Auckland CRI-2009-404-45, 3 April 2009 at [51].

⁷³ Corrections Act 2004, s 5(1)(c).

youth offenders. There is also a general programme grounded in te ao Māori (Mauri Tū Pae). Offenders may receive individual treatment by a psychologist if their rehabilitative needs cannot be adequately addressed through group programmes.

- 2.65 Rehabilitative programmes are usually only available to offenders who are assessed as having a medium or high risk of reoffending and (re)imprisonment. Focusing rehabilitative efforts on offenders assessed to pose a low risk of reoffending is considered to be counter-productive. For example, these offenders may be negatively influenced if they are placed into a group of other offenders with anti-social behaviour.
- 2.66 Low-risk offenders may be referred for a psychological assessment or to a community-based service if there are concerns about pervasive issues driving their behaviour. Examples of community-based services include social cohesion and connectedness groups for youth offenders and He Aranga Ake, a multi-agency disengagement framework aimed at preventing extremist or terrorist harm.⁷⁴

How hostile motivation impacts rehabilitation

- 2.67 Corrections does not have specific rehabilitative programmes for hate crime offenders. It told us there are several reasons for this:
- (a) It is unlikely there would be enough offenders serving a sentence for hostility-motivated offending at any one time who could be grouped together safely (having regard to the nature of their beliefs and their individual needs).
 - (b) Some offenders have specific needs or vulnerabilities (such as learning disabilities) that mean group-based treatment is not suitable for them. Individual treatment (or modified group treatment) may be more appropriate.
 - (c) Rehabilitative programmes do not seek to challenge a person's fundamental beliefs about ideology. They address the patterns of thought that contribute to offending (for example, that it is permissible to use violence to advance one's beliefs) and how to manage emotions (such as anger or contempt).
 - (d) Existing rehabilitative programmes can already accommodate hate crime offenders.
- 2.68 The fact that an offence was motivated by hostility may affect Corrections' assessment of the offender's risk of reoffending and their eligibility for rehabilitative programmes or individual treatment. Even if an offender is assessed as low risk, unusual features of their offending — such as hostile motivation — may prompt a more in-depth assessment of their rehabilitative needs. Depending on the outcome of that assessment, they may receive individual support.

How Corrections identifies hate crime offenders

- 2.69 Currently, Corrections is not automatically notified if offending has been identified by Police or the courts as a hate crime. It might, nevertheless, become aware that offending was motivated by hostility in several ways:
- (a) For offenders assessed as having a medium or high risk of reoffending, Corrections reviews the court's sentencing notes and the summary of facts, which may refer to hostile motivation (for example, if the hostility aggravating factor was applied at

⁷⁴ Ngā Pirihimana o Aotearoa | New Zealand Police "He Aranga Ake" <www.police.govt.nz>.

sentencing). This scrutiny does not usually occur for offenders deemed to pose a low risk of reoffending. For offenders who receive a sentence other than imprisonment or home detention (such as community work), sentencing notes are not usually transcribed so are not available to Corrections at all.

- (b) Case managers or probation officers speak with all offenders and try to understand what led to their offending. Hostile motivation may become apparent through that process. For high-risk offenders, a psychological assessment is also conducted.
- (c) The Corrections intelligence team (which works alongside Police) may identify concerns relating to a particular offender.

2.70 There is no guarantee, however, that an offender's hostile motivation will be identified by Corrections. This is particularly so for low-risk offenders, where there is no established process of reviewing the sentencing notes and other background material that might identify hostile motivation as an issue.

CHAPTER 3

Reform considerations

INTRODUCTION

- 3.1 In this chapter, we set out the key reform considerations that have guided this review:
- (a) The need to treat hate crime more seriously than other crime.
 - (b) The objectives of hate crime law.
 - (c) Legal principles for the creation of new offences.
 - (d) Te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) and tikanga.
 - (e) Aotearoa New Zealand's human rights obligations in domestic and international law.
- 3.2 We discuss each of these considerations below and explain how they have influenced our analysis and recommendations in this Report.

THE NEED TO TREAT HATE CRIME MORE SERIOUSLY THAN OTHER CRIME

- 3.3 The first reform consideration we have identified is the need to treat hate crimes more seriously than equivalent crimes that are not motivated by hostility. This is necessary to reflect the additional harms hate crimes cause and the moral blameworthiness of the offender.
- 3.4 In our Consultation Paper, we explained that the enactment of hate crime law (whether in the form of specific hate crime offences or an aggravating factor at sentencing) reflects the view that hate crime is more serious than other types of offending.¹ We discussed four possible reasons for that view:²
- (a) Hate crimes cause additional types of harm.
 - (b) Hate crime offenders are more morally blameworthy or culpable than other offenders.
 - (c) Hate crime requires additional denunciation.
 - (d) Treating hate crime more seriously will deter future hate crimes.

¹ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper) at [3.4].

² For a summary of the literature and a more detailed explanation of these reasons, see James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 23–39.

Additional harm and moral blameworthiness

- 3.5 We have concluded that (a) and (b) — harm and blameworthiness — are compelling reasons for generally treating hate crimes more seriously than equivalent non-hate crimes. These reasons are reflected in the select committee report on the Sentencing and Parole Reform Bill 2001, which became the Sentencing Act 2002. In recommending the inclusion of the hostility aggravating factor, the committee explained that hate crimes carry “a different moral quality and a different risk to society which we should be reflecting”.³
- 3.6 Harm and blameworthiness are also fundamental concepts in the criminal law. The level of harm caused by conduct and the moral blameworthiness of a person engaging in it underlie both the creation of criminal offences⁴ and the courts’ assessment of the seriousness of an offence for sentencing purposes.⁵
- 3.7 As we explain below, both the additional harm caused by hate crimes and the moral blameworthiness of hate crime offenders are linked to the nature of hate crimes as identity-based crimes. Hate crimes target victims for “who they are” — that is, because of their actual or perceived membership of a particular social group.⁶ The victim is often selected, at least partly, as a “symbolic” or “interchangeable” representative of that group.⁷ Hate crimes are often experienced as attacks on the core of a person’s identity and dignity.⁸ We return to this concept of identity in Chapter 8, where we discuss the characteristics that should be covered by the hostility aggravating factor and the interpretation of the term ‘enduring common characteristic’.
- 3.8 In relation to the additional harm caused by hate crime, most submitters on our Consultation Paper agreed that the presence of a hostile motivation causes additional harm. Submitters referred to impacts on the victim,⁹ the community to which the victim belongs¹⁰ and wider society.¹¹ Views expressed by submitters included the following:

³ Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 12.

⁴ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121 and 123.

⁵ *R v Boskovic* CA33/06, 12 December 2006 at [36].

⁶ Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 20.

⁷ Clare Godfryd “A Denial of Personhood: Why Hate Crime Legislation is Necessary to Assure Proportionality in Punishment” (2023) 114(2) JCLC Online 63 at 64–65.

⁸ Office for Democratic Institutions and Human Rights *Understanding the Needs of Hate Crime Victims* (Organization for Security and Co-operation in Europe, 2020) at 11; and Mark Austin Walters “Conceptualizing ‘Hostility’ for Hate Crime Law: Minding ‘the Minutiae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998” (2014) 34(1) Oxf J Leg Stud 47 at 52.

⁹ 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.

¹⁰ 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.

¹¹ Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Submission 43; Submission 63; Dr Mark Walters; and Dr Chris Wilson.

- (a) Harm to the individual can be physical, emotional or economic.¹² Victims may feel unsafe in the future¹³ or modify their behaviour in response to the offending.¹⁴
 - (b) Because hate crime targets a group of people based on their identity, it can cause members of that group to feel fearful, anxious and angry.¹⁵ This can lead to members of a group decreasing their public presence,¹⁶ restricting their enjoyment of their right to freedom of expression¹⁷ or limiting their ability to safely practise their culture or religion.¹⁸
 - (c) 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 hāpori.¹⁹
 - (d) Hate crimes can undermine liberal democracy and the participation of minority groups in society.²⁰ They divide communities and exacerbate tensions between groups.²¹ They can also undermine public confidence in Ngā Pirihimana o Aotearoa | New Zealand Police and legal institutions.²²
- 3.9 Only one submitter said expressly that hate crimes are not more serious than equivalent non-hate crimes.²³
- 3.10 Some commentators have identified evidence that hate crimes cause additional psychological harm to victims,²⁴ potentially because they are targeted for “who they are”.²⁵ Other commentators point to evidence that hate crime causes additional harm to the community to which the victim belongs.²⁶ This may be because “hate crimes are ‘message crimes’ that emit a distinct warning to all members of the victim’s community”.²⁷

¹² Grace Carroll; Donald Beasley Institute and People First New Zealand (joint submission); Michael Fitzgerald; Dr David Harvey; Parents of Vision Impaired; and Submission 43.

¹³ Disabled Persons Assembly and VisAble (joint submission); Dr David Harvey; and Submission 43.

¹⁴ Dr Mark Walters.

¹⁵ Grace Carroll; Inclusive Aotearoa Collective Tāhono; Submission 43; and Women’s Rights Party.

¹⁶ Inclusive Aotearoa Collective Tāhono; Dr Mark Walters; and Women’s Rights Party.

¹⁷ Inclusive Aotearoa Collective Tāhono.

¹⁸ Submission 43; and Dr Mark Walters.

¹⁹ Te Kāhui o Ināia Tonu Nei Charitable Trust.

²⁰ Grace Carroll; Dr David Harvey; Inclusive Aotearoa Collective Tāhono; Luke Cunningham Clere; Dr Mark Walters; and Dr Chris Wilson.

²¹ Dr David Harvey; Submission 43; and Women’s Rights Party.

²² Dr David Harvey.

²³ Submission 72.

²⁴ See for example James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 25–27.

²⁵ Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 20.

²⁶ See for example Mark A Walters and others “Group identity, empathy and shared suffering: Understanding the ‘community’ impacts of anti-LGBT and Islamophobic hate crimes” (2020) 26 *Intl Rev Vict* 143; and Amanda Haynes and Jennifer Schweppe “LGB and T? The Specificity of Anti-Transgender Hate Crime” in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds) *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave MacMillan, London, 2017) 111 at 130.

²⁷ Barbara Perry and Shahid Alvi “‘We are all vulnerable’: the *in terrorem* effects of hate crimes” (2011) 18 *Intl Rev Vict* 57 at 59.

Members of the victim's community "may also feel threatened and intimidated" or "directly targeted".²⁸

- 3.11 It is harder to find direct evidence of wider social harm. However, we agree with submitters that it is a likely consequence of hate crime. Commentators suggest, for example, that hate crimes divide communities, exacerbate intergroup tensions and increase the risk of social unrest.²⁹
- 3.12 In conclusion, our analysis suggests that, compared to equivalent non-hate crimes, offending that is motivated by hostility causes additional harm to the victim and the affected community. It is also likely to cause additional harm to wider society.
- 3.13 As discussed above, the second reason we identified in the Consultation Paper for treating hate crimes more seriously than equivalent non-hate crimes is that hate crime offenders are more morally blameworthy.³⁰
- 3.14 We did not receive many submissions specifically on this point. Two submitters did not think hate crime offenders are more morally culpable than other offenders.³¹ One did not think the law should be a vehicle for "enforcing moral orthodoxy".³² One did not take a clear position but said that, to the extent moral blameworthiness is to be considered, it should only be relevant at sentencing.³³
- 3.15 Although the additional harm caused by hostile motivation is, in our view, the primary justification for having laws that treat hate crimes more seriously than equivalent non-hate crimes, we agree that moral blameworthiness is an additional reason why hate crime law is justified.³⁴
- 3.16 Offending based on hostility is contrary to shared values held by many New Zealanders such as equality, tolerance and human dignity. These values are reflected in New Zealand law.³⁵ Hate crime offenders undermine these values by targeting victims based on their identity and signalling to the affected group that they are not welcome in New Zealand society. Further, in many cases, hate crime offenders intend to cause, or could reasonably foresee that their actions are likely to cause, the additional types of harm discussed above.

²⁸ Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 21.

²⁹ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 32–33; and Barbara Perry "Exploring the community impacts of hate crime" in Nathan Hall and others (eds) *The Routledge International Handbook on Hate Crime* (Routledge, New York, 2015) 47 at 53.

³⁰ See for example Mark Austin Walters "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) *Oxf J Leg Stud* 47; and John Ip "Debating New Zealand's Hate Crime Legislation: Theory and Practice" (2005) 21 *NZULR* 575 at 592 and 594.

³¹ Maxim Institute; and Pride in Law Otago.

³² The Law Association of New Zealand Public and Administrative Law Committee.

³³ Dr David Harvey.

³⁴ See for example Gail Mason "Penalty Enhancement Laws: A Model for Regulating Hate Crime in Australia?" (2021) 48 *UWAL Rev* 470 at 477.

³⁵ For example, the New Zealand Bill of Rights Act 1990 protects the rights of minorities, freedom of religion, freedom of association and freedom from discrimination (ss 13, 15, 17, 19 and 20).

- 3.17 In summary, the additional harms caused by hate crime and the additional moral blameworthiness of the offender justify hate crimes being treated more seriously than equivalent non-hate crimes.
- 3.18 These justifications for treating hate crime more seriously have influenced our assessment of the objectives that hate crime law should seek to achieve, which we discuss below. They have also influenced our assessment, in Chapter 8, of whether reform is required to the wording of section 9(1)(h).

Denunciation and deterrence

- 3.19 As noted above, in our Consultation Paper, we identified two other possible reasons for treating hate crimes more seriously than equivalent non-hate crimes — denunciation and deterrence. On reflection, we consider that these two considerations are more properly described as objectives of hate crime law rather than reasons to treat hate crimes more seriously. We return to them below.

OBJECTIVES OF HATE CRIME LAW

- 3.20 It follows from our conclusion above that hate crime laws of some kind are desirable. As explained in Chapter 2, Aotearoa New Zealand already has such laws. The Sentencing Act treats hostile motivation as an aggravating factor at sentencing.
- 3.21 A key question for us is whether this approach adequately responds to hate crimes, having regard to the higher levels of harm and moral culpability associated with them. To answer that question, it is helpful to identify the proper objectives of hate crime law. We use these objectives in later chapters to assess whether there are problems with the current law and, if so, how they should be addressed.
- 3.22 We have identified four objectives of hate crime law as being:
- (a) to hold hate crime offenders accountable for the additional harm caused by hate crime;
 - (b) to denounce hate crime;
 - (c) to reduce the occurrence of hate crime; and
 - (d) to provide reassurance to victims and communities.
- 3.23 These objectives are acknowledged in commentary on hate crime law (which we discuss further below) and reflect Parliament's intentions in enacting section 9(1)(h) of the Sentencing Act.³⁶ They also reflect general purposes of the criminal law³⁷ and sentencing.³⁸

Holding the offender accountable

- 3.24 First, hate crime law should hold hate crime offenders accountable for the additional harm caused by hate crimes. As explained above, hate crimes cause more significant harms to and are more morally blameworthy than equivalent non-hate crimes. A key objective of

³⁶ Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 12. See also *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [48].

³⁷ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121 (referring to punishment, denunciation and deterrence as purposes of creating criminal offences).

³⁸ Sentencing Act 2002, s 7(1)(a), (c), (e) and (f).

hate crime law is to ensure that punishment for hate crimes reflects those higher levels of harm and culpability. This is consistent with the principle of proportionality in the criminal law, according to which the punishment imposed on an offender should be proportionate to the seriousness of the offence they have committed.³⁹

Denouncing hate crime

- 3.25 The second objective of hate crime law is denunciation. The law should send a message that hate crime is a serious wrong and will not be tolerated by society.⁴⁰ A number of submitters discussed denunciation in their feedback on our Consultation Paper.⁴¹ Several submitters emphasised that the denunciation of hate crime is important. One submitter considered that, for this reason, there may be important symbolic benefits to labelling certain offending as hate crimes.⁴²
- 3.26 Denouncing hate crimes reaffirms Aotearoa New Zealand's commitment to the values of tolerance and equality that hate crimes undermine. This may help to influence public attitudes and behaviour over time by making it clear that the offender's hostile views are not shared or condoned by society at large.
- 3.27 Denunciation may occur at different levels. The enactment of hate crime law itself may have an expressive or symbolic function, communicating to the public that hate crime is not acceptable.⁴³ Denunciation may also occur through the enforcement of the law, for example, when the courts label an offence as a hate crime or impose a harsher sentence on an offender because of their hostile motivation.⁴⁴ If publicised, this enforcement process serves to remind the public that hate crime laws exist and to demonstrate that they are taken seriously.

Reducing the occurrence of hate crimes

- 3.28 A third objective of hate crime law is to reduce the occurrence of hate crimes. It is well accepted that one purpose of the criminal law is to deter offending.⁴⁵ However, of the

³⁹ Clare Godfryd "A Denial of Personhood: Why Hate Crime Legislation is Necessary to Assure Proportionality in Punishment" (2023) 114(2) JCLC Online 63 at 68–70; Kamban Naidoo "The *raison d'être* of hate-crime laws" (2016) 29(2) SACJ 158 at 164; and Gail Mason "The Penal Politics of Hatred" (2009) 42(3) ANZJ Crim 275 at 280. Proportionality is accepted as an important principle of sentencing in Aotearoa New Zealand: *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [8].

⁴⁰ Jennifer Schweppe "What is a hate crime?" (2021) 7(1) Cogent Social Sciences 1 at 4; Gail Mason "The symbolic purpose of hate crime law: Ideal victims and emotion" (2014) 18 Theoretical Criminology 75 at 78; and Clare Godfryd "A Denial of Personhood: Why Hate Crime Legislation is Necessary to Assure Proportionality in Punishment" (2023) 114 Journal of Criminal Law and Criminology Online 63 at 67.

⁴¹ 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.

⁴² Luke Cunningham Clere.

⁴³ Clare Godfryd "A Denial of Personhood: Why Hate Crime Legislation is Necessary to Assure Proportionality in Punishment" (2023) 114(2) JCLC Online 63 at 67; Ann C McGinley "Misogyny and Murder" (2022) 45(1) Harv JLG 177 at 241; Sara Sun Beale "Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?" (2000) 80(5) BUL Rev 1227 at 1254–1255 and 1259; and Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at [3.66].

⁴⁴ Mark Austin Walters "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34(1) Oxf J Leg Stud 47 at 55; and Kamban Naidoo "The *raison d'être* of hate-crime laws" (2016) 29(2) SACJ 158 at 170.

⁴⁵ Legislation Design and Advisory Committee *Legislation guidelines* (2021) at 121; and Sentencing Act, s 7(1)(f).

eight submitters who discussed the relevance of deterrence to hate crime law,⁴⁶ most were sceptical that more punitive sentences act as a deterrent or that hate crime law makes Aotearoa New Zealand safer.⁴⁷ Two submitters thought that treating hate crimes seriously may have a deterrent effect.⁴⁸ One submitter did not directly discuss deterrence but suggested that treating hate crimes seriously helps to combat systemic racism and promote social cohesion and equality.⁴⁹

3.29 We agree there is little evidence that imposing more serious consequences on hate crime offenders would directly deter people from offending or reoffending.⁵⁰ However, well-designed hate crime law may nevertheless indirectly influence the prevalence of hate crime. We see three ways in which hate crime law may reduce hate crime:

- (a) As we have noted above, hate crime law has an important denunciatory role. Having laws that clearly signal that hate crime (and the prejudice that underlies it) is unacceptable might influence societal attitudes, and consequently behaviour, over time.⁵¹ This may help to reduce the number of hate crimes that occur.
- (b) Hate crime law that facilitates appropriate management and rehabilitation of offenders may help to reduce the risk that they will commit further hate crimes in future.
- (c) Hate crime law that supports appropriate decision-making about bail, sentence conditions and parole may also help to reduce reoffending. For example, there may be conditions that prevent a person from going to certain places (such as mosques if an individual had committed hostility-motivated offending against Muslims).⁵²

Reassuring victims and communities

3.30 The final objective of hate crime law is to provide reassurance to victims and communities. This objective is also related to denunciation but it is sufficiently important to be stated as an objective in its own right.

⁴⁶ 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 Zealand Criminal Law Committee; The Law Association of New Zealand Public and Administrative Law Committee; and Dr Chris Wilson.

⁴⁷ 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.

⁴⁸ Dr David Harvey; and Dr Chris Wilson.

⁴⁹ Annette Sykes & Co.

⁵⁰ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 37; and Mark Austin Walters “Conceptualizing ‘Hostility’ for Hate Crime Law: Minding ‘the Minutiae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998” (2014) 34(1) Oxf J Leg Stud 47 at 53. There is some recent data from Aotearoa New Zealand showing a correlation between longer sentences and lower reimprisonment rates: Ara Poutama Aotearoa | Department of Corrections *Annual Report 2023/24* (2024) at 199 and 201. However, it is unclear what weight we can place on this. It may be explained by other factors such as the type of offending (a high proportion of longer sentences are for sexual offending, which tends to have lower recidivism rates than other offending) or people “ageing out” of offending: Lillian Hanly “Mark Mitchell wants short prison sentences scrapped in hope of reducing reoffending” (5 May 2025) Radio New Zealand <www.rnz.co.nz>.

⁵¹ Mark Austin Walters “Conceptualizing ‘Hostility’ for Hate Crime Law: Minding ‘the Minutiae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998” (2014) 34(1) Oxf J Leg Stud 47 at 54–55; Gail Mason “The Penal Politics of Hatred” (2009) 42(3) ANZJ Crim 275 at 281 and 284; Ann C McGinley “Misogyny and Murder” (2022) 45(1) Harv JLG 177 at 241; and Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, 31 May 2018) at [2.17].

⁵² *Arps v Department of Corrections* [2020] NZCA 547 at [7].

- 3.31 As discussed above, the additional harms caused by hate crime largely stem from the fact that they are ‘message crimes’. By targeting people based on their identity, hate crimes send a message to the targeted community that they are not welcome or valued in society. To counter that message, hate crime law should make it clear to affected communities that they are valued members of society and that the state is committed to protecting them.⁵³ Treating hate crimes seriously “reaffirms the fundamental equality of all members of a democratic community”.⁵⁴ It may help to reduce the additional harms caused by a hate crime by reinforcing that the offender’s hostility is not shared by society at large.

LEGAL PRINCIPLES FOR THE CREATION OF NEW OFFENCES

- 3.32 As explained in Chapter 2, New Zealand law currently treats hostile motivation as an aggravating factor at sentencing. The key question in this review is whether the law should (either as well as, or instead of, a sentence aggravation approach) contain separate hate crime offences.
- 3.33 There are well-established principles for deciding when it is appropriate to create new offences. The starting point is the Legislation Design and Advisory Committee’s *Legislation Guidelines* (LDAC Guidelines).⁵⁵ The LDAC Guidelines explain that the purpose of an offence is to “punish, deter, and publicly denounce conduct that society considers to be blameworthy and harmful”.⁵⁶ The Guidelines suggest it may be appropriate to create an offence for conduct that is harmful (to individuals or to public or private interests) and/or morally blameworthy (for example, because the harm is intended or foreseeable).⁵⁷
- 3.34 As explained above, hate crimes involve additional harm and moral blameworthiness compared to equivalent non-hate crimes. The question, however, is whether the additional harm and blameworthiness associated with hostile motivation demands the creation of separate hate crime offences. That depends, in the first instance, on whether the existing sentence aggravation model is sufficient to reflect the additional harm and blameworthiness. The LDAC Guidelines state that offences should only be introduced if there are “compelling reasons”.⁵⁸ Conduct that is already an offence should not be further

⁵³ Clare Godfryd “A Denial of Personhood: Why Hate Crime Legislation is Necessary to Assure Proportionality in Punishment” (2023) 114(2) JCLC Online 63 at 67; Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at [1.13]; Mark Austin Walters “Conceptualizing ‘Hostility’ for Hate Crime Law: Minding ‘the Minutiae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998” (2014) 34(1) Oxf J Leg Stud 47 at 55; and Sara Sun Beale “Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?” (2000) 80(5) BUL Rev 1227 at 1255.

⁵⁴ Antti Kauppinen “Hate and Punishment” (2015) 30(10) JIV 1719 at 1720, cited in James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 38.

⁵⁵ Legislation Design and Advisory Committee *Legislation Guidelines* (2021). The Legislation Design and Advisory Committee is responsible for providing guidelines that promote good legislative standards, reviewing Bills after they are introduced to Parliament and providing advice to departments on legislative design.

⁵⁶ At 121.

⁵⁷ At 123.

⁵⁸ At 122.

criminalised unless it would serve some additional purpose not achieved by the current law.⁵⁹

3.35 For these reasons, we indicated in our Consultation Paper that we would only recommend adopting hate crime offences if we identified problems with the current law that cannot be addressed by making changes to the sentence aggravation model.⁶⁰ Submitters and others with whom we consulted generally agreed with this approach.

3.36 In our Consultation Paper, we also identified some additional questions that need to be considered when deciding whether to create new offences.⁶¹ They are as follows:⁶²

- (a) **Can the offence achieve its purpose?** This includes considering the practicality of enforcing the offence.⁶³ The purpose of creating hate crime offences would be to address the problems with the existing law (which we discuss in Chapter 4) so as to meet the objectives of hate crime law more effectively than the sentence aggravation model.
- (b) **Are there less-restrictive ways to achieve the same outcome?** For example, could any of the problems identified be addressed by making changes to policy and practice rather than by creating new offences? It is well accepted that the criminal law should be employed sparingly, since it limits the autonomy of the public, involves punishment and stigmatisation of individuals who are convicted and has resource implications for the criminal justice system.⁶⁴
- (c) **Do the costs of creating a new offence outweigh the benefits?** This includes both financial and social costs associated with the creation and enforcement of the offence.
- (d) **Is the offence consistent with the rule of law and constitutional principles?** These include Aotearoa New Zealand's obligations under the Treaty and human rights obligations in domestic and international law, which we discuss below. Other relevant principles include:
 - (i) the need for certainty in the criminal law (defining offences clearly so that people can know in advance what is prohibited and the maximum penalty for non-compliance); and

⁵⁹ At 123.

⁶⁰ Consultation Paper at [3.14]–[3.15], [6.4]–[6.5] and [7.2].

⁶¹ At [3.16].

⁶² Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121–127; AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [2.1] and [21.5]–[21.7]; Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 72–73; and Asaf Harduf “How Crimes Should Be Created: A Practical Theory of Criminalisation” (2013) 49(1) *Criminal Law Bulletin* 31.

⁶³ AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [21.7.2].

⁶⁴ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121 and [24.1]; AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [1.3]; David Ormerod QC and Karl Laird Smith, *Hogan, and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) at [1.3.1]; Grant Lamond “What is a Crime?” (2007) 27(4) *Oxf J Leg Stud* 609 at 627–628; and Asaf Harduf “How Crimes Should Be Created: A Practical Theory of Criminalisation” (2013) 49(1) *Criminal Law Bulletin* 31 at 60–62.

- (ii) the principle of fair labelling (the need to be clear to offenders and the public what wrong has been committed, why the offender is being punished and what conduct the state is denouncing).
- 3.37 No submitters disagreed that these questions are relevant. We remain of the view that they should be taken into account when deciding whether to introduce hate crime offences. In short, before recommending hate crime offences, we would need to be satisfied that they would address the problems with the current law without creating additional problems that would outweigh their benefits. We discuss this in Chapter 5.
- 3.38 This approach is also consistent with the principles of good law-making set out in the Regulatory Standards Act 2025. Those principles include that legislation should be expected to produce benefits that exceed its costs and should be the most effective, efficient and proportionate response to the issue concerned that is available.⁶⁵

THE TREATY AND TIKANGA

- 3.39 In our Consultation Paper, we identified the Treaty and tikanga as relevant reform considerations for our review.⁶⁶ The LDAC Guidelines recognise both as relevant considerations for law-making.⁶⁷ Additionally, our governing statute requires us to take into account te ao Māori in making any recommendations.⁶⁸
- 3.40 In this review, it was important for us to assess whether the Treaty or tikanga affected the appropriate legal model for hate crime or other options for reform. For reasons we explain in this section, however, they did not ultimately have a significant impact on our conclusion that the current model should be retained. Nor have they led us to make any specific recommendations. Accordingly, they do not feature heavily in our analysis in the rest of this Report.

The Treaty and hate crime

- 3.41 The Treaty is an integral part of Aotearoa New Zealand's constitutional framework, and analysis of Treaty implications is a longstanding expectation of good policy design.⁶⁹
- 3.42 There are two preliminary points to make about the way in which Te Aka Matua o te Ture | Law Commission considers the Treaty in its work. First, there are both Māori and English language versions of the Treaty, with significant differences between them. For reasons explained more fully in earlier Law Commission reports, the Commission takes the view that, where there are differences, the Māori version is more authoritative.⁷⁰ This is the version signed by signatories (following debate in te reo Māori) and by Lieutenant-Governor Hobson.

⁶⁵ Regulatory Standards Act 2025, s 9(l) and (m).

⁶⁶ Consultation Paper at [3.17]–[3.40].

⁶⁷ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 19 and 28–32.

⁶⁸ Law Commission Act 1985, s 5(2)(a).

⁶⁹ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 19 and 28–32.

⁷⁰ See for example Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* / *Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at [2.61]–[2.62].

- 3.43 Second, the Law Commission also treats the text of the Treaty rather than Treaty ‘principles’ as its primary point of reference. Treaty principles have emerged in recent decades from the work of various agencies, especially Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal.⁷¹ They can be helpful in “enabling the Treaty to be applied in situations that were not foreseen or discussed at the time”.⁷² Ultimately, however, the Crown’s obligations under the Treaty are contained in its text.
- 3.44 The Treaty is engaged in three main ways in this review:
- (a) Under article 1, Māori rangatira granted the Crown kāwanatanga. Kāwanatanga has been translated as government or governorship,⁷³ which the Waitangi Tribunal has said includes the power to make laws for the “good order and security” and “peace and good order” of Aotearoa New Zealand.⁷⁴ This includes laws relating to hate crime.
 - (b) In article 2, the Crown undertook to protect the exercise by Māori of tino rangatiratanga over their lands, villages and all their treasures. According to the Waitangi Tribunal, tino rangatiratanga requires the Crown “to allow Māori to manage their own affairs in a way that aligns with their customs and values”.⁷⁵ Tino rangatiratanga is engaged in this review because rangatiratanga was traditionally exercised to respond to or manage behaviour that we now characterise as criminal offending.⁷⁶ Hate crime also impacts Māori individuals and communities, both as offenders and victims.
 - (c) In article 3, the Crown agreed to give Māori the Queen’s protection and the same rights and duties as British subjects. According to the Waitangi Tribunal, article 3 obliges the Government to exercise its kāwanatanga (governorship) both to care for Māori and to ensure outcomes for Māori are equivalent to those enjoyed by non-Māori.⁷⁷ Article 3 is relevant because we are reviewing laws that may have a disproportionate impact on Māori. Māori are overrepresented at all levels of the criminal justice system as victims and offenders. Specifically, in relation to hate crime, Māori are disproportionately represented in Police data as alleged hate crime offenders.
- 3.45 Much has been written about the Treaty and the criminal justice system, including the failure of the system to give effect to the Crown’s article 2 obligations to protect the

⁷¹ See Treaty of Waitangi Act 1975, s 6.

⁷² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

⁷³ IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319.

⁷⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 25; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Manukau Report* (Wai 8, 1985) at 66.

⁷⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2757, 2023) at 28.

⁷⁶ See Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 9–17; and Moana Jackson *The Maori and the Criminal Justice System — A New Perspective: He Whaipaanga Hou, Part 2* (Department of Justice, Study Series 18, 1988) at 37–44.

⁷⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2757, 2023) at 33–34; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

exercise of tino rangatiratanga and its article 3 obligations to address disparities between Māori and other New Zealanders. The criminal justice system was built on Pākehā attitudes and values, not Māori notions of justice.⁷⁸ It does not therefore recognise “Māori as having their own system of law and cultural traditions pertaining to justice”.⁷⁹ Some have also argued the system “fosters a clear perception of discrimination and institutional racism” towards Māori.⁸⁰ These factors have contributed to the overrepresentation of Māori within the criminal justice system.⁸¹

- 3.46 One of the challenges for us is how to give effect to the Crown’s Treaty obligations, given the limited scope of this review. Commentators have repeatedly said the Treaty requires radical reform of the criminal justice system.⁸² That is outside the scope of this review, which focuses on whether to introduce hate crime offences into New Zealand law.
- 3.47 In our Consultation Paper, we referred to Police data showing Māori are overrepresented as alleged hate crime offenders.⁸³ Approximately 40 per cent of alleged hate crime offenders are Māori, while Māori make up 19.6 per cent of Aotearoa New Zealand’s population. We said there is a risk that, if hate crime offences are introduced, they would be disproportionately enforced against Māori.⁸⁴ Some commentators have suggested the Crown’s obligations under the Treaty mean that criminal liability should not be expanded.⁸⁵
- 3.48 In consultation, 56 submitters discussed the Treaty and its impact on this review. Of these, 27 submitters disagreed the Treaty is relevant to this review or disagreed with the Consultation Paper’s discussion of what the Treaty means. Comments included the following:
- (a) Māori communities should not be tasked with monitoring hate crimes as this would create racial tensions.⁸⁶
 - (b) The Treaty does not refer to hate or hate crime⁸⁷ or to equity.⁸⁸

⁷⁸ Moana Jackson *The Maori and the Criminal Justice System — A New Perspective: He Whaipaanga Hou, Part 2* (Department of Justice, Study Series 18, 1988).

⁷⁹ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 44.

⁸⁰ Moana Jackson *The Maori and the Criminal Justice System — A New Perspective: He Whaipaanga Hou, Part 2* (Department of Justice, Study Series 18, 1988) at 154. See also Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 3–5.

⁸¹ See Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 4–5, 28–30 and 45–46 for an explanation of how and why Māori are overrepresented in the criminal justice system. We heard similar views during consultation.

⁸² See for example Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 79; Moana Jackson *The Maori and the Criminal Justice System — A New Perspective: He Whaipaanga Hou, Part 2* (Department of Justice, Study Series 18, 1988); *Turuki! Turuki! Move Together! Transforming our criminal justice system: The second report of Te Uepū Hāpai i Te Ora | Safe and Effective Justice Advisory Group* (Ministry of Justice, 2019); and Ināia Tonu Nei *Hui Māori Report* (July 2019).

⁸³ Consultation Paper at [2.20(b)].

⁸⁴ At [8.37].

⁸⁵ Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 76.

⁸⁶ Destiny Church New Zealand.

⁸⁷ Family First; Submission 65; and Submission 66.

⁸⁸ Dr John McDonald-Wharry.

- (c) Prioritising the Māori language version of the Treaty marginalises viewpoints in the English text and risks discouraging open discussion.⁸⁹
- 3.49 Twenty-two submitters considered the Treaty is relevant to this review or discussed what Treaty-consistent reform might look like. Comments included the following:
- (a) Different models of dispute resolution could be used such as restorative justice approaches or access to education about the Treaty.⁹⁰
 - (b) Māori should be resourced and empowered to address hate crimes in accordance with tikanga.⁹¹ Whānau, hapū or community organisations should be resourced to lead responses to hate crime.⁹² Such initiatives could assist in restoring aspects of tino rangatiratanga.⁹³
 - (c) We should be cautious about introducing new offences because it risks over-criminalising Māori.⁹⁴
- 3.50 Seven submitters explicitly addressed the potential for disproportionate enforcement of hate crime offences against Māori. Most said the overrepresentation of Māori means we should be cautious about introducing hate crime offences.⁹⁵ Two submitters said concerns about overrepresentation should not prevent us from introducing hate crime offences, although neither disputed the risk that Māori would be overrepresented in prosecutions. Madeline Ash submitted that anti-bias training should be introduced alongside hate crime offences to ensure Māori are not overrepresented. Inclusive Aotearoa said the overrepresentation of Māori as hate crime offenders may reflect institutional and systemic racism, which, while a problem, does not undermine the need for hate crime offences.

Tikanga and hate crime

- 3.51 Tikanga means the right way of doing things.⁹⁶ Tikanga includes a system of values and principles that guide and direct rights and obligations in a Māori way of living. It governs relationships by providing a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.⁹⁷

⁸⁹ Free Speech Union.

⁹⁰ Dr David Harvey; and Members of Te Hunga Rōia Māori o Aotearoa.

⁹¹ Submission 90.

⁹² Inclusive Aotearoa Collective Tāhono; Members of Te Hunga Rōia Māori o Aotearoa; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

⁹³ 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.

⁹⁴ Annette Sykes & Co; Members of Te Hunga Rōia Māori o Aotearoa; Submission 51; Submission 72; and Submission 90.

⁹⁵ Annette Sykes & Co; Members of Te Hunga Rōia Māori o Aotearoa; Submission 51; Submission 72; and Submission 90.

⁹⁶ Deriving from the word “tika”, meaning right or correct. See Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 29.

⁹⁷ Bishop Manuhua Bennett “Te Pū Wānanga” (presented with Te Mātāhauariki Research Institute, University of Waikato, 23 March 2000) as cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

- 3.52 The kinds of recommendations the Law Commission makes in respect of tikanga can differ substantially depending on the scope and nature of a particular review.⁹⁸ In this review, an important limitation to our consideration of tikanga is the fact that tikanga operates as a complete, interrelated system reflecting a worldview that is fundamentally different to a Western worldview. Tikanga concepts cannot be readily explained in English. This means there are limits to our discussion of tikanga in this Report and that our discussion is limited to the context of hate crime.
- 3.53 In our Consultation Paper, we explained that our preliminary research suggested tikanga does not traditionally have an equivalent concept to hate crime.⁹⁹ As set out below, however, the concepts of hara, kanga and kōhuru suggest the behaviour we call hate crime would be a serious breach of tikanga:
- (a) Hara¹⁰⁰ is an offence “primarily resulting from the violation of tapu” or any action that disrupts relational stability.¹⁰¹ The concept of hara arises from a framework of social relationships based on group rather than individual concerns. This means tikanga recognises that the impacts of offending are experienced by both the victim’s¹⁰² and the offender’s wider whakapapa.¹⁰³ Responses to hara will consider what might be needed to address the relational instability and achieve a state of ea or balance.
 - (b) Kanga and kōhuru are both specific types of hara. Kanga covers verbal abuse and angry denouncements, including placing a curse on someone.¹⁰⁴ Kōhuru has been defined as causing injury or harm to another person without any remorse or justification.¹⁰⁵ In the past, both kanga and kōhuru were considered significant hara.¹⁰⁶

⁹⁸ See for example Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* / *Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at [2.127], in which the Law Commission recommended weaving together tikanga Māori with other values to make new law for all New Zealanders.

⁹⁹ Consultation Paper at [3.23]. For an explanation of the tikanga relevant to offending, see Te Aka Matua o te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu* / *Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at [2.7]–[2.23].

¹⁰⁰ Also denoted by the word hē, a general term for mistakes, faults and being in the wrong: Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 85.

¹⁰¹ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 74. See also Moana Jackson “Statement of Evidence of Moana Jackson in the matter of the Treaty of Waitangi Act 1975 and in the matter of the Department of Corrections and Reoffending Prisoners claim” (Wai 2540, #A28, 4 May 2016) at [54].

¹⁰² Moana Jackson “Criminality and the Exclusion of Māori” (1990) 20 VUWLR Monograph 3 23 at 27.

¹⁰³ Khylee Quince “Maori and the criminal justice system in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 339.

¹⁰⁴ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 115.

¹⁰⁵ He Pātaka Kupu (definition of “kōhuru”) <www.hepatakakupu.nz>; and Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 141.

¹⁰⁶ Both kanga and kōhuru could result in a severe response. See for example Te Rangi Hiroa *The Coming of the Maori* (Whitcombe and Tombs, Wellington, 1949) at 394 and Edward Tregear *The Maori Race* (AD Willis Ltd, Wanganui, 1926) at 367–368, both cited in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 123 and 142–143.

- 3.54 In consultation, 11 submitters discussed tikanga as a reform consideration. Of these, eight submitters expressly or impliedly agreed that tikanga should be considered as part of this review,¹⁰⁷ and three submitters questioned the relevance of tikanga.¹⁰⁸
- 3.55 Some submitters and people we spoke with during consultation discussed the intersection between hate crime and tikanga. Lawyers from Te Hunga Rōia Māori o Aotearoa | the Māori Law Society noted that, from an ao Māori perspective, hate crime may be considered a category of crime that needs greater 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 or abusive. Utua kia ea is a process that is undertaken to account for tūkino.
- 3.56 Further research into the concept of tūkino underscores our view that the behaviour we now understand as a hate crime would be considered serious under tikanga. As a matter of ordinary usage, tūkino could be used to describe a hate crime.¹⁰⁹ Its use historically has included a range of types of wrongdoing, including violation of urupā and ill or unjust treatment of people by the law.¹¹⁰ However, tūkino is not necessarily the best term to describe hate crime, as recent usage has taken on a particular association with specific forms of abuse, physical and sexual violence and neglect.¹¹¹

The relevance of tikanga and the Treaty to this review

- 3.57 In deciding whether the current law in Aotearoa New Zealand adequately responds to hate crime (and, if not, whether and what reform is required) we have considered the implications of the Treaty and tikanga. Ultimately, however, we have not identified any specific implications that can or should be addressed through law reform in the context of this review.

Relevance of tikanga and the Treaty to consideration of appropriate legal models

- 3.58 As we have explained, the key question in this review is, if reform is required, whether a different legal model (such as specific hate crime offences) should be adopted. We discuss alternative legal models in Chapter 5. We have not identified any specific implications of tikanga or the Treaty that strongly favour any one model.
- 3.59 Our tikanga analysis suggests that hate crimes are viewed as serious and as requiring additional denunciation. One possible argument is that this weighs in favour of adopting

¹⁰⁷ 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.

¹⁰⁸ Dr David Bromell; Family First; and Submission 11.

¹⁰⁹ Te Aka Māori Dictionary (definition of “tūkino”) <maoridictionary.co.nz>; and He Pātaka Kupu (definition of “tūkino”) <hepatakakupu.nz>.

¹¹⁰ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: a Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, 2013) at 487; and *Maori Messenger: Te Karere Maori* (Auckland, Vol II, Issue 4, 30 April 1856) at 10 (available at <paperspast.natlib.govt.nz>).

¹¹¹ Royal Commission of Inquiry into Historical Abuse in Care and in the Care of Faith-based Institutions *Whanaketia — Through pain and trauma, from darkness to light: Part 1* (2024) at [268]–[269]; Child, Youth and Family *Recognition of Child Abuse and Neglect: Tirohanga Tukino Tamariki* (1997); Te Puni Kōkiri *Arotake Tūkino Whānau: Literature Review of Family Violence* (2010); Denise Wilson *Violence within whānau and mahi tūkino — A litany of sound revisited* (Te Pūkōtahitanga — Tangata Whenua Advisory Group for the Minister of the Prevention of Family Violence and Sexual Violence, 2023) at 2; and Paora Moyle and others “Connecting Mahi Tūkino and Housing Poverty in Hauraki: Wāhine Give Voice to Compassionate Solutions” <hauraki.refuge.co.nz>.

hate crime offences, as they might have a stronger denunciatory effect.¹¹² However, all the legal models (including the current sentence aggravation model) offer stronger denunciation of hate crimes compared to equivalent non-hate crimes to some degree. Further, as we explain in Chapter 5, hate crime offences would not necessarily provide greater denunciation than the sentence aggravation model (although some changes to the sentence aggravation model are desirable to strengthen its denunciatory effect).

- 3.60 In addition, an argument in favour of the current model is that there is more ability to consider tikanga-related matters at sentencing than at trial. The Sentencing Act already provides that the court must take into account an offender's whānau and cultural background¹¹³ as well as information provided to help recognise the victim's needs and the interests of the victim (including the effects of the offending on the victim).¹¹⁴ In recent decisions, the courts have considered tikanga at sentencing both in relation to the offender and the victim.¹¹⁵
- 3.61 Tikanga could also be considered at sentencing if hate crime offences were adopted. However, there may be less flexibility to do this if those offences carried higher maximum penalties (as was recommended by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019).¹¹⁶ Reform of that kind may be interpreted by the courts as requiring harsher sentences for hostility-motivated offending in general.¹¹⁷ In contrast, under the sentencing model, the courts decide what weight to give the hostility aggravating factor in the circumstances of the case.
- 3.62 Ultimately, we do not consider that there are strong arguments flowing from tikanga for favouring one model over the other. We conclude that tikanga considerations do not weigh strongly in respect of the choice of legal models.
- 3.63 We have reached a similar conclusion in relation to the Treaty. We have not identified implications flowing from the Crown's Treaty obligations that weigh strongly in favour of any one of the legal models. We agree that any new hate crime offences could be disproportionately enforced against Māori. However, the aggravating factor currently applied at sentencing may also be applied disproportionately to Māori offenders. On balance, we do not consider this risk points strongly towards any particular model.

¹¹² Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 42; Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.65]–[4.88]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.23].

¹¹³ Section 8(1)(i) of the Sentencing Act requires the court to “take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose”.

¹¹⁴ Section 8(1)(f).

¹¹⁵ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [155] and [159]; and *R v Ormsby-Turner* [2023] NZCA 601 at [92]–[94].

¹¹⁶ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 704.

¹¹⁷ See *R v Richardson* [2006] EWCA Crim 3186, [2007] 2 All ER 601 at [4], cited with approval in *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881 at [48].

Additionally, overrepresentation is a systemic problem that applies across the criminal justice system and cannot be addressed in the context of hate crime in isolation.¹¹⁸

Tikanga and the Treaty and the need for reform

- 3.64 We have also considered whether the Treaty or tikanga have implications for reform of the existing sentence aggravation model. However, we have not identified any Treaty or tikanga implications specific to hate crime that could be addressed as part of this review.
- 3.65 The options for Treaty- and tikanga-consistent reform suggested by submitters — such as restorative justice or resourcing Māori to address hate crimes — respond to systemic issues within the criminal justice system. As we noted above, our review is limited to consideration of hate crime.
- 3.66 As explained in Chapter 2, restorative justice is already available in some cases.¹¹⁹ We agree that restorative justice may be more aligned with tikanga than a punitive approach to sentencing and should be explored in appropriate cases. Law reform is not required to enable this.

HUMAN RIGHTS OBLIGATIONS

- 3.67 Any law reform must be consistent with Aotearoa New Zealand's human rights obligations in domestic and international law. In our Consultation Paper, we explained that human rights are relevant to hate crime in two respects:¹²⁰
- (a) There is a growing consensus that international human rights obligations require hate crime laws, since hate crimes violate rights to equality and non-discrimination.
 - (b) Some people argue that hate crime laws infringe the rights to freedom of thought, expression and association and the right to equality before the law.
- 3.68 Thirty-four submitters to this review discussed human rights. Many emphasised the importance of free speech and related rights.¹²¹ Some also emphasised the right to equality and non-discrimination.¹²² People and organisations we spoke with during consultation also highlighted these rights. Some submitters thought that, if hate crime offences were created, they would infringe free speech and related rights.¹²³ Some suggested the current legal model is preferable because it allows hostile motivation to be considered in a way that protects individual rights.¹²⁴

¹¹⁸ Māori account for approximately 40 per cent of alleged hate crime offenders. This is similar to the rate for all reported offences, where Māori account for approximately 44 per cent of alleged offenders: Ngā Pirihimana o Aotearoa | New Zealand Police "Proceedings (offender demographics)" (March 2026) <www.police.govt.nz>.

¹¹⁹ Sentencing Act, s 24A; and Victims' Rights Act 2002, s 9.

¹²⁰ Consultation Paper at [3.41]–[3.50].

¹²¹ New Zealand Bill of Rights Act, ss 13–15 (the rights to freedom of thought, conscience, and religion, freedom of expression and manifestation of religion and belief).

¹²² The New Zealand Bill of Rights Act does not include an express right to equality but does include the right to freedom from discrimination (s 19).

¹²³ Destiny Church New Zealand; Free Speech Union; Dr David Harvey; Karun Lakshman; Maire Leadbeater; and Submission 11.

¹²⁴ Te Kāhui Ture o Aotearoa | New Zealand Law Society; Free Speech Union; and Submission 63.

Human rights implications for the choice of models

- 3.69 Creating hate crime offences is not required to comply with Aotearoa New Zealand's human rights obligations. As we noted in our Consultation Paper, international law obligations may require states to have hate crime laws but they do not require those laws to take any particular form.¹²⁵ Based on current law and practice, a sentence aggravation model is sufficient. No submitters suggested otherwise.
- 3.70 As noted above, some submitters argued that creating hate crime offences would infringe free speech and related rights. For reasons we explain in later chapters, there are several strong reasons to retain the current sentence aggravation model. It is therefore unnecessary for us to analyse the human rights implications of other models.

Human rights implications of the sentence aggravation model

- 3.71 Submitters who expressed concern about the human rights implications of hate crime laws mostly referred to hate crime laws generally or focused their concern on the implications of introducing hate crime offences. No submitters explicitly stated that the current law breaches human rights obligations. Nonetheless, to avoid any doubt, we have considered whether Aotearoa New Zealand's current sentence aggravation model infringes human rights. We conclude it does not.

Freedom of expression

- 3.72 The right to freedom of expression is recognised in section 14 of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) as well as at international law. Section 14 states that freedom of expression includes “freedom to seek, receive, and impart information and opinions of any kind in any form”. This right is not absolute. Many rights, including the right to freedom of expression, are capable of some limitation and there can be good reasons to limit rights.¹²⁶ Domestically, this is reflected in section 5 of the NZ Bill of Rights, which states that:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 3.73 Te Kōti Pira | Court of Appeal considered the relationship between the right to freedom of expression and section 9(1)(h) of the Sentencing Act in *Arps v Police*.¹²⁷ Mr Arps pleaded guilty to distributing objectionable material, namely, video footage of the Christchurch terror attack on 15 March 2019. At sentencing, Te Kōti ā Rohe | District Court found the offending was committed because of Mr Arps' hostility towards Muslim people and applied the aggravating factor.¹²⁸ The District Court decision was affirmed on appeal to Te Kōti Matua | High Court¹²⁹ and then to the Court of Appeal. One of the issues

¹²⁵ Consultation Paper at [3.45]. See Office of the United Nations High Commissioner for Human Rights and Equal Rights Trust *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) at 170.

¹²⁶ New Zealand Bill of Rights Act, s 5. See also International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 19(3).

¹²⁷ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94.

¹²⁸ *R v Arps* [2019] NZDC 11547, [2019] DCR 847 at [12] and [14].

¹²⁹ *Arps v Police* [2019] NZHC 2113.

considered by the Court of Appeal was whether the lower courts had erred in failing to take into account Mr Arps' right to freedom of expression.

3.74 The Court of Appeal found that, by distributing video footage of the attack, Mr Arps was conveying an opinion — that there is no place for Muslim people in our society.¹³⁰ The Court observed that the words “opinions of any kind” in section 14 of the NZ Bill of Rights capture a wide range of beliefs and views, including those that are totally objectionable.¹³¹ Section 9(1)(h) imposes a punitive consequence where offending is motivated by hostility.¹³² Mr Arps' motivation was established by reference to the information and opinions he had conveyed. Accordingly, the Court found that section 9(1)(h) limited Mr Arps' right to freedom of expression.

3.75 The Court concluded, however, that the limit section 9(1)(h) places on the right to freedom of expression is justified in accordance with section 5 of the NZ Bill of Rights.¹³³ It found the limit serves important purposes:¹³⁴

As we have noted from the Select Committee Report on s 9(1)(h), the purposes of the measure include marking society's condemnation of various types of hate motivated offending, holding those who commit such crimes accountable for their motives, deterring others from similarly motivated offending and protecting the interests of victims of such offending. These are very important objectives in a society that wishes to condemn and deter those who are motivated to undermine the wellbeing of society and the interests of individuals by engaging in hate motivated offending of the kind that is the focus of s 9(1)(h) of the Sentencing Act. These very important purposes necessitate the placing of limits on the right to freedom of expression in order to protect the wider interests of society and the rights of victims of crime that are motivated by hate.

3.76 The Court found that there is a rational link between the limit placed on freedom of expression by section 9(1)(h) and its underlying purpose, that section 9(1)(h) limits freedom of expression no more than is reasonably necessary to achieve its purpose and that the limit is proportionate to the purpose.¹³⁵ The Court placed weight on the fact that the provision allows the courts to decide by how much to increase an offender's sentence, having regard to all of the purposes and principles of sentencing as well as any mitigating factors.

3.77 Assuming the NZ Bill of Rights is even engaged by section 9(1)(h),¹³⁶ we agree with the Court of Appeal in *Arps* that the limit on the right to freedom of expression is justified, given the important purposes of the provision. Those purposes, outlined by the Court in the quote above, are consistent with the general objectives of hate crime law identified earlier in this chapter.

¹³⁰ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [40].

¹³¹ At [41].

¹³² At [42].

¹³³ At [44].

¹³⁴ At [48] (citations omitted).

¹³⁵ At [49]–[51].

¹³⁶ There may be a contrary argument that the right to freedom of expression is not engaged because the provision does not impose punishment for expression on its own — it only applies where there is a criminal act and where the expression provides evidence of hostile motivation.

- 3.78 We also agree that the sentencing process provides safeguards to ensure the right is limited no more than is justified. If a case arose that raised concerns about freedom of expression, the court would be required to ensure consistency with the NZ Bill of Rights in deciding whether and by how much to increase the offender's sentence.

Freedom of thought, conscience and religion

- 3.79 The right to freedom of thought, conscience and religion is recognised in section 13 of the NZ Bill of Rights as well as at international law. Section 13 states that “everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference”.
- 3.80 We do not consider the current law engages the right to freedom of thought. Section 13 only extends to what people are entitled to think or believe, not to whether they are entitled to express those thoughts or beliefs in words or action.¹³⁷ The hostility aggravating factor only applies if a person acts on their thoughts or beliefs in a way that causes harm to others. In other words, some external manifestation of thoughts or beliefs is required. The offender is not punished simply for holding hateful views. Further, it is not unusual in other contexts for the courts to consider an offender's motive when assessing their culpability at sentencing.¹³⁸

Rights to equality and non-discrimination

- 3.81 The right to equality before the law is recognised in the International Covenant of Civil and Political Rights, which Aotearoa New Zealand has ratified.¹³⁹ The NZ Bill of Rights does not recognise a right to equality before the law¹⁴⁰ but it does affirm the right to freedom from discrimination.¹⁴¹ This right is only engaged if there is a difference in treatment on the grounds of one of the prohibited grounds of discrimination listed in section 21 of the Human Rights Act 1993 (such as race or religious belief).
- 3.82 Some submitters suggested that hate crime laws breach the right to equality before the law by treating some groups as more deserving of protection than others.¹⁴² We do not

¹³⁷ See Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at [6.14].

¹³⁸ See for example *Drever v R* [2016] NZSC 92 at [20] (malice); *Hazeldine v Police* [2016] NZHC 1132 at [22] (desire to cause emotional harm); *Robertson v R* [2020] NZCA 218 at [6] (greed); and *R v Parker* [2021] NZHC 439 at [19] (desire to inflict violence and to dominate and humiliate the victim).

¹³⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

¹⁴⁰ This was a deliberate choice, due to concerns about the meaning of “equality” and caution about giving the courts permission to inquire into substantive policy: Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* (Department of Justice, April 1985) at [10.81]–[10.82].

¹⁴¹ New Zealand Bill of Rights Act, s 19.

¹⁴² Free Speech Union (referring specifically to hate crime offences); Dr John McDonald-Wharry; and Women's Rights Party. A similar argument was considered and rejected by the Court of Appeal in *Hoban v Attorney-General* [2025] NZCA 644. There, the Court held that limits on the scope of hate speech provisions were not discriminatory as they were intended to protect disadvantaged groups and therefore fell within s 19(2) of the New Zealand Bill of Rights Act, which provides that “measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination ... does not constitute discrimination”: at [74]–[75].

agree. Equality before the law does not always require identical treatment.¹⁴³ For example, the committee responsible for monitoring the International Covenant of Civil and Political Rights has said that differentiation can occur where there is a legitimate objective and reasonable, objective criteria.¹⁴⁴

- 3.83 A common justification given for hate crime laws is that hate crimes “violate the ideal of equality among and between the members of a society”.¹⁴⁵ As discussed earlier in this chapter, recognising and denouncing hate crime reinforces Aotearoa New Zealand’s commitment to values such as equality and tolerance. We consider the current law supports rather than violates equality.
-

¹⁴³ United Nations Human Rights Committee *General Comment No 18: Non-discrimination* CCPR/C/21/Rev.1/Add.1 (10 November 1989) at [8].

¹⁴⁴ United Nations Human Rights Committee *General Comment No 18: Non-discrimination* CCPR/C/21/Rev.1/Add.1 (10 November 1989) at [13].

¹⁴⁵ See for example Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 19.

PART 2:

LEGAL MODEL FOR ADDRESSING HATE CRIME



CHAPTER 4

Are there problems with the current law?

INTRODUCTION

- 4.1 In this part of our Report, we consider whether the legal model for addressing hate crime in Aotearoa New Zealand should be changed. This chapter considers whether there are problems with how the current law is working. In Chapter 5, we assess whether those problems can be addressed by making changes to the sentence aggravation model or whether an alternative model is needed.
- 4.2 In this chapter, we discuss potential problems with the current law in the following areas:
- (a) Denouncing hate crime.
 - (b) Systematic recording of hate crime.
 - (c) Investigating hate crime.
 - (d) Identifying hostile motivation as an issue in court proceedings.
 - (e) Adequacy of penalties for hate crime.
 - (f) Reporting hate crime to Ngā Pirihimana | New Zealand Police.
 - (g) Rehabilitating hate crime offenders.
 - (h) Supporting victims of hate crime.
- 4.3 These issues were discussed in our Consultation Paper, except for the final one (supporting victims of hate crime), which was raised by submitters. Matters relating to the wording of section 9(1)(h) of the Sentencing Act 2002 are discussed separately in Chapter 8, as they do not affect the choice of legal model.
- 4.4 We conclude that the current law has three main shortcomings:
- (a) It does not require the courts to communicate clearly to the public (such as through their sentencing decisions) that an offence was a hate crime and that this makes it more serious. This means hate crimes may not be consistently denounced.
 - (b) It does not provide a mechanism for systematically documenting court findings that an offence was motivated by hostility. This limits the ability of Police, the courts and Ara Poutama Aotearoa | Department of Corrections to deal with the offender appropriately in future. It also makes it difficult to assess how the justice system is

responding to hate crime and to develop appropriate laws and policies to improve that response.

- (c) It does not provide a mechanism to ensure the courts are aware that the hostility aggravating factor may apply to an offence and consider it at appropriate points in a proceeding.

4.5 Other problems we discuss, including underreporting of hate crime and concerns about how Police respond to reports of hate crime, are best addressed through changes in Police practice or Government policy rather than law reform. There is already significant work underway in these areas. As this review is focused on the operation of the law relating to hate crime, it is outside our scope to make specific recommendations about them. In some cases, we suggest possible areas for further work.¹

OVERVIEW OF CONSULTATION RESPONSES

4.6 In our Consultation Paper, we sought feedback on whether there are problems with how the current law is working and, if so, whether those problems could be addressed while keeping the sentence aggravation model.² Based on our preliminary research and engagement, we identified a number of potential problems with the current law and practice. Some problems such as low rates of reporting hate crimes are not necessarily problems with the law itself. However, we wanted to understand them better to help us assess whether and how changing the law might affect them.

4.7 Of the 96 submissions we received in total, 22 suggested there are problems with how the current law is working. The following problems were most commonly mentioned by submitters:

- (a) Twelve submitters thought hostile motivation is not consistently investigated by Police, raised by prosecutors or considered at sentencing.³
- (b) Eight submitters said there is a lack of accurate data about hate crimes because hostile motivation is not systematically recorded when a person is convicted of an offence.⁴ This makes it difficult to assess whether the justice system is responding to hate crimes appropriately and consistently.

¹ We do make some recommendations about operational matters where they are closely related to how changes to the law are implemented: see Chapter 9.

² Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper), chs 5 and 7.

³ 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; Members of Te Hunga Rōia Māori o Aotearoa; Te Kāhui Ture o Aotearoa | New Zealand Law Society; The Law Association of New Zealand Criminal Law Committee; and Dr Chris Wilson.

⁴ 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-Ture Tūmatanui | Public Defence Service; The Law Association of New Zealand Criminal Law Committee; and Dr Chris Wilson.

- (c) Two submitters said the current law does not do enough to denounce hate crimes.⁵ Five others implied this was the case by supporting a change in the legal model in part because they thought it would provide stronger denunciation.⁶
 - (d) Six submitters were concerned about the lack of specific rehabilitation programmes for hate crime offenders.⁷ Three of these also said it is problematic that Corrections is not notified when a person is convicted of an offence that is found to be motivated by hostility.⁸
 - (e) Submitters generally agreed there are barriers to reporting hate crimes. There were mixed views on whether this is attributable (at least in part) to the current law not treating hate crime seriously enough.
 - (f) Two submitters said there is a lack of support for disabled victims of hate crime to navigate justice processes.⁹
- 4.8 We heard similar concerns to those listed above from other people and organisations we met with as part of our consultation. Some of these organisations also raised concerns about lack of support for victims of hate crime more generally.

POTENTIAL PROBLEMS WITH THE CURRENT LAW

- 4.9 Below we discuss each of the potential problems with the current law raised in our Consultation Paper or in the submissions and other feedback we received. We assess whether there is evidence of a problem and, if so, whether it is a problem with the law itself.
- 4.10 In assessing whether there is a problem, we refer to the objectives of hate crime law set out in Chapter 3. Those objectives are to:
- (a) hold offenders accountable for the additional harm caused by hate crimes;
 - (b) denounce hate crimes;
 - (c) reduce the occurrence of hate crimes; and
 - (d) reassure victims and communities.

Denouncing hate crime

Consultation

- 4.11 In our Consultation Paper, we sought feedback on whether the current law adequately denounces hate crime.¹⁰ Some submitters suggested that, under the current law, hostile

⁵ Donald Beasley Institute and People First New Zealand (joint submission); and Murray Stirling.

⁶ Madeline Ash; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective Tāhono; Murray Stirling; and Dr Chris Wilson.

⁷ Madeline Ash; Russell Hoban; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; Te Kāhui o Ināia Tōnu Nei Charitable Trust; and The Law Association of New Zealand Criminal Law Committee.

⁸ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and Te Kāhui o Ināia Tōnu Nei Charitable Trust.

⁹ Donald Beasley Institute and People First New Zealand (joint submission); and Submission 26.

¹⁰ Consultation Paper at [5.5].

motivation may not be denounced because its presence or seriousness is not adequately communicated to the public. They said:

- (a) the law does not require the presence of a hostile motivation to be clearly communicated and recorded (for example, in sentencing notes);¹¹
- (b) it is unclear from sentencing decisions whether and to what extent the offender's hostile motivation affected the sentence imposed;¹² and
- (c) there is a lack of media attention on cases where hostility is treated as an aggravating factor.¹³

- 4.12 Te Tari Ture o te Karauna | Crown Law said aggravating factors are usually spelled out in sentencing decisions for more serious crimes. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service thought hostile motivation is particularly likely to be mentioned (compared to other aggravating factors) because its circumstances are “quite unique”.
- 4.13 In our Consultation Paper, we also discussed (in the context of denunciation) whether the penalties available for hostility-motivated offending under the current law are adequate. We discuss that issue separately later in this chapter.

Is there a problem with the current law?

- 4.14 Under the current law, the courts are not required to clearly communicate to the public (whether in their sentencing decisions or in any other way) that an offence was a hate crime and that this makes it more serious. This creates a risk that hate crimes may not be denounced consistently.
- 4.15 As discussed in Chapter 3, one of the objectives of hate crime law is to ensure hate crimes are denounced. Denouncing hate crime is important for several reasons. It reaffirms Aotearoa New Zealand's commitment to the values of tolerance and equality that hate crime seeks to undermine. It may influence societal attitudes and expectations over time, helping to reduce occurrences of hate crime. It also provides reassurance to affected communities that they are valued by society and that hate crimes against them will be treated seriously.
- 4.16 When the Sentencing Act was enacted, the select committee that considered the Bill said section 9(1)(h) was intended to denounce hate crimes and encourage awareness of their existence.¹⁴ It said it was important for the courts to send a message about fundamental values.
- 4.17 The view of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 was that this denunciative purpose is not adequately performed by the current law. The Royal Commission said that the signalling effect of prosecutions and convictions for hate crime offending is limited because hostile

¹¹ Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women's Rights Party.

¹² Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; Murray Stirling; and The Law Association of New Zealand Criminal Law Committee.

¹³ Dr David Harvey; and Women's Rights Party.

¹⁴ Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 12.

motivation does not form part of a charge or conviction.¹⁵ In the Royal Commission's view, this means recorded convictions do not capture the full blameworthiness of offenders.

- 4.18 We consider the key question with respect to denunciation is whether the criminal justice process as a whole adequately communicates the nature and seriousness of hate crimes to the public. The way in which a conviction is recorded is unlikely to have a significant denunciatory effect on its own, since most members of the public will not view the court record.¹⁶ The circumstances of a charge and conviction, and the court's denunciation of the offending, is primarily communicated through media reporting of charges laid and of subsequent court proceedings (particularly sentencing decisions).
- 4.19 For that reason, it is important from the perspective of denunciation that either the charges laid or sentencing decisions:
- (a) clearly communicate to the public that an offence was motivated by hostility and that this makes it more serious than an equivalent non-hate crime; and
 - (b) convey to victims and the affected community that crimes targeting them because of their identity are considered unacceptable by society and will be treated seriously by the justice system.
- 4.20 Whether that happens consistently under the current law and practice is unclear. As we discuss further below, there is an absence of readily available information about hate crime cases in the courts. This makes it difficult to identify all relevant sentencing decisions to assess whether they satisfy the denunciatory objective of hate crime law. We had particular difficulty identifying relevant Te Kōti ā Rohe | District Court decisions since they are not routinely published.¹⁷
- 4.21 In our research, we found examples of sentencing decisions where the courts made it clear that offending was motivated by hostility and that this made the offending more serious.¹⁸ On the other hand, a Crown solicitor also informed us of one case in which the judge appeared to accept that the hostility aggravating factor applied but made no reference to it in the sentencing notes.¹⁹ We do not know how common this sort of occurrence is, as such cases are unlikely to be identified through keyword searches (even where they are published).

¹⁵ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703; William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 13.

¹⁶ Any person is entitled to access certain court records relating to a proceeding, including convictions: see the District Court (Access to Court Documents) Rules 2017, r 8; Senior Courts (Access to Court Documents) Rules 2017, r 8; and Criminal Procedure Rules 2012, r 7.2. However, this information is provided in response to a specific request and is not proactively released to the public.

¹⁷ We did have access to a small number of relevant District Court decisions. Some were published online. Others were referenced in media reporting and we obtained copies of the sentencing notes from the relevant court.

¹⁸ See for example *R v Curry* CA272, 273 and 326/00, 28 September 2000 at [12]–[15]; *Bryan v Police* HC Auckland CRI-2009-404-45, 3 April 2009 at [16]–[17] and [45]–[53]; *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [16], [28]–[32] and [64]–[65]; *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [156] and [177]–[179]; *Solicitor-General v Milne* [2020] NZCA 134 at [41]; and *Police v Kelland* [2024] NZDC 17908 at [6]–[8] and [13].

¹⁹ We were provided with a copy of the prosecution's sentencing submissions, which proposed a starting point that took account of the hostility aggravating factor. The judge accepted that starting point, suggesting they agreed the factor applied, but did not mention hostility at all.

- 4.22 We also located through our own research a small number of sentencing decisions in which section 9(1)(h) or hostility towards a group of people is referred to briefly, but it is not entirely clear whether the court considered the aggravating factor applied.²⁰
- 4.23 What is clear — as the Royal Commission and some submitters to our review pointed out — is that the current law does not require the courts to clearly communicate the fact that an offence has been found to be motivated by hostility. This means hate crimes may not be denounced consistently. Given that denunciation is one of the objectives of hate crime law (discussed in Chapter 3), we consider that to be a significant problem. It means the current law does not adequately respond to hate crime and the harm it causes.

Systematic recording of hate crime

Consultation

- 4.24 In our Consultation Paper, we questioned whether information about the outcome of prosecutions for alleged hostility-motivated offences (for example, whether the defendant was convicted, what sentence was imposed and whether hostile motivation was taken into account at sentencing) is readily enough available.²¹ We sought feedback on whether there are barriers to accurate recording and data collection.
- 4.25 Eight submitters said it is difficult to get accurate data about hate crimes because hostile motivation is not recorded (outside of the sentencing notes) when a person is convicted of an offence.²² Two additional submitters did not comment specifically on barriers but supported improved recording.²³ Some submitters said recording data on convictions for hostility-motivated offences would help to build a picture of how the justice system is responding to hate crimes and to improve that response.²⁴ If published, submitters said this data could also:
- (a) raise public awareness of hate crimes and public confidence that such crimes are taken seriously;²⁵ and
 - (b) facilitate understanding of why and where hate crimes occur and the factors that give rise to a heightened risk of hate crimes.²⁶
- 4.26 Two submitters commented on other ways in which information about hostility-motivated offending could be useful. Justice for Palestine, Alternative Jewish Voices and Dayenu said (in their joint submission) that it is important to identify convicted perpetrators of

²⁰ *Police v Purves* [2025] NZDC 7514 at [8]; *Landon v R* [2018] NZCA 264 at [59]; and the sentencing decisions relating to the attempted murder of Harnek Singh (*R v Singh* [2022] NZHC 1188 at [19]; *R v Brar* [2023] NZHC 3405 at [39] and [45]; *R v Sidhu* [2023] NZHC 3406 at [45]; *R v Singh* [2024] NZHC 491 at [45]; and *R v Sandhu* [2025] NZHC 565 at [6]). In *Landon*, the Court of Appeal noted that the District Court sentencing judge had not referred to the hostility aggravating factor “although it may well have been in his mind”. The Court of Appeal did, however, take it into account on appeal.

²¹ Consultation Paper at [5.33]–[5.34].

²² 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-Ture Tūmatanui | Public Defence Service; The Law Association of New Zealand Criminal Law Committee; and Dr Chris Wilson.

²³ Grace Carroll; and Submission 11.

²⁴ Inclusive Aotearoa Collective Tāhono; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

²⁵ Grace Carroll; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

²⁶ Dr Chris Wilson.

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 but these offences may be relevant if they were motivated by hostility. Another submitter said information about hostile motivation should be considered by the Parole Board when making decisions about parole.²⁷

4.27 Several submitters called for collection and publication of additional data, including:

- (a) data breaking down hostility-motivated offending by the group affected;²⁸ and
- (b) data on how often reported hate crimes lead to prosecution and conviction.²⁹

4.28 Submitters said this data could inform policy and law enforcement strategies and preventive action.³⁰

Is there a problem with the current law?

4.29 Outside of sentencing decisions (discussed earlier), the current law does not provide a mechanism for systematically documenting court findings that an offence was motivated by hostility. This creates three distinct problems:

- (a) It limits the ability of Police, the courts and Corrections to deal with the offender appropriately in future.
- (b) It makes it difficult to assess how the justice system is responding to hate crime and to develop appropriate laws and policies to improve that response.
- (c) The lack of publicly available data makes hate crime and the justice system's response to it less visible.

4.30 We discuss each of these problems below, after outlining the Royal Commission's comments on recording in its report and developments in Police recording since then.

The Royal Commission's report and subsequent developments

4.31 The Royal Commission considered reporting in the context of Police investigations. It found there was a lack of accurate recording of reported hate crimes and data about them.³¹ It noted Police had been recording perceived hate crimes since 2019 but that the record was incomplete and inconsistent. The Royal Commission suggested better recording of hostile motivation by Police would help to ensure it is brought to the attention of the sentencing judge and allow links to be made between different events involving the same offender or victim. Alongside data on how complaints are resolved, it would also help in any assessment of the Police response and assure targeted communities that their complaints are being treated seriously.

4.32 The Royal Commission thought creating hate crime offences would facilitate the recording of reported hate crimes, although it noted the absence of such offences did

²⁷ Dr John McDonald-Wharry.

²⁸ 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.

²⁹ Inclusive Aotearoa Collective Tāhono.

³⁰ New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; and Submission 26.

³¹ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 714–715.

not make recording impossible.³² It recommended the Government direct Police to revise how it records complaints of criminal conduct to capture hostile motivation and to provide training for staff.³³

- 4.33 As described in Chapter 2, Police practices for collecting information about perceived hate crimes has improved significantly since the Royal Commission's report. Those improvements have resulted from more structured training, recording and quality assurance processes. However, Police data only provides one part of the picture. There remain gaps in the availability of information about hostility-motivated offending in the courts. Aside from manually reviewing court sentencing notes, there is no way to identify potential hate crime cases in the courts or to determine their outcome (including whether the hostility aggravating factor was applied at sentencing). This has significant practical implications.

Dealing with convicted offenders

- 4.34 The absence of readily available information about hate crime cases in the courts presents challenges for Police and the courts when dealing with repeat offenders and for Corrections when managing hate crime offenders. The fact that an offence was found to be hostility-motivated may be relevant in the following ways:
- (a) If the courts are dealing with the same offender in future, information about previous hostility-motivated offending may affect the sentence imposed and decisions about bail. We discuss this further below when we assess how hostility is identified as an issue in court proceedings.
 - (b) If the same offender is reported to Police for further alleged hostility-motivated offending, it may affect whether Police decides to investigate or charge the person.
 - (c) It may affect Police's assessment of any application by the offender for a firearms licence.
 - (d) It would assist Corrections to ensure the safety of staff and other prisoners, assess the offender's rehabilitative needs and provide information to the Parole Board to support decisions about parole.
- 4.35 In Chapter 6, we discuss in more detail how having access to accurate court records about hostility-motivated offending would support the functions of Police and Corrections.
- 4.36 Currently, there is no systematic way to ensure relevant justice system actors are aware that a person's offending was found to be motivated by hostility. While the sentencing notes for an offence are reviewed by Police, prosecutors and Corrections in some cases, that does not occur consistently. As discussed earlier, there is also a small number of cases in which the application of the hostility aggravating factor is not clear from the sentencing notes.

Assessing the justice system's response to hate crime

- 4.37 The absence of readily available information about hate crime cases in the courts also makes it difficult to assess how the justice system is responding to hate crime and at what

³² At 716.

³³ At 764 (recommendation 42).

points in the process any problems are occurring. We have attempted to assess the justice system's response based on the sentencing decisions we have been able to locate and anecdotal evidence, but the picture provided is incomplete. The difficulties are compounded by the fact that most District Court sentencing decisions are not published so cannot be identified through online keyword searches. This limits our ability to assess the extent to which there are problems with how hostile motivation is addressed in Police investigations and court proceedings.

- 4.38 We do not know, for example, how often the hostility aggravating factor is considered or applied by the courts at sentencing in cases identified by Police as potential hate crimes. Where the aggravating factor is not considered and applied, we do not know if that reflects a problem either in the way offences are being investigated or in the way they are prosecuted. For example, we do not know whether investigating police officers are consistently providing relevant information to the prosecutor, whether prosecutors are consistently raising the aggravating factor with the courts where appropriate or, as discussed above, whether allegations of hostile motivation are being consistently addressed by judges.
- 4.39 These information gaps present challenges when seeking to develop appropriate policies to improve the response to hate crime, both in law reform and operational settings, and to gain support for their implementation. The Government may be less likely to allocate resources to address hate crime and the prejudice underlying it if the nature and scale of the problem is unclear.

Visibility of hate crime and the justice system's response to it

- 4.40 Finally, the lack of publicly available data about hate crime cases makes hate crime less visible, with the following results:
- (a) Affected communities do not know how hostility towards them is being addressed. Publishing data on hate crime cases (when combined with other measures to improve the consistency of the justice system's response to hate crime) may provide a measure of assurance that offenders are being prosecuted and their hostility denounced in appropriate cases. This may also encourage people to report hate crimes to Police.
 - (b) The public does not know how often hate crimes are occurring or what groups are being targeted. More information about confirmed cases may promote public dialogue and support for government action.

Relevance to the objectives of hate crime law

- 4.41 The absence of a systematic and accessible record of information about hate crime cases in the courts impacts the ability of current law and practice to meet the objectives of hate crime law set out in Chapter 3. There is a risk that offenders will not always be held fully accountable — for example, if previous hostility-motivated offending is not identified and taken into account when they are sentenced. Opportunities to reduce occurrences of hate crime may also be missed if information about hostile motivation is not available to Corrections when assessing an offender's rehabilitative needs or to Police when deciding whether to charge them for later offending. Lack of publicly available data about hate crime cases and their outcomes may undermine efforts to raise public awareness and to assure affected communities that hate crime is taken seriously.

- 4.42 For these reasons, change is required to ensure the courts systematically record information about hate crimes cases in a way that is readily available for use in later cases and can be used for data purposes. We consider this is a legal issue within the scope of this review. As we discuss in Chapters 5 and 6, law reform could affect how hate crime cases are recorded.

Investigating hate crime

Consultation

- 4.43 In our Consultation Paper, we sought feedback on whether hostile motivation is being addressed consistently in the investigation of relevant offences by Police.³⁴ We noted it may be too early to assess the impact of recent changes within Police since the Royal Commission's report. However, we sought feedback on whether those changes were likely to improve the consistency with which hostile motivation is investigated by Police.
- 4.44 Six submitters said Police do not always treat reports of hate crimes seriously or investigate them adequately,³⁵ potentially due to a lack of understanding or training.³⁶ Organisations we spoke with during consultation also raised concerns about Police practice that may affect investigations — such as unconscious bias and a lack of understanding of hate crimes and of issues affecting particular communities. Some suggested there is insufficient resourcing to follow up on reports of alleged hate crimes or to dedicate to community liaison roles.

Is there a problem with the current law?

- 4.45 As we explain below, significant work has occurred within Police since the Royal Commission's report to improve how it responds to reports of hate crime. That work is ongoing and it is too early to tell whether it will address submitters' concerns. Further, the matters raised by submitters are primarily operational rather than legal in nature so are not all able to be addressed within the scope of this review.
- 4.46 The Royal Commission did not specifically state that there were problems with how Police was responding to reports of hate crime. However, it did suggest that creating hate crime offences was likely to promote "more energetic responses on the part of New Zealand Police ... including an increase in prosecutions for hate crimes".³⁷ This suggests the Royal Commission may have thought there was room for improvement in the Police response to hate crime, consistent with the comments made by some submitters.
- 4.47 We received data from Police indicating that, compared to equivalent non-hate crimes, investigations into perceived hate crimes are more likely to be closed based on 'police

³⁴ Consultation Paper at [5.24]–[5.28].

³⁵ Madeline Ash; Inclusive Aotearoa Collective Tāhono; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Submission 43; Members of Te Hunga Rōia Māori o Aotearoa; and The Law Association of New Zealand Criminal Law Committee.

³⁶ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Submission 43.

³⁷ William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

discretion'.³⁸ This means further lines of inquiry are available but are not pursued because of other priorities. This data could suggest there is a basis for the concerns we heard from submitters that reports of hate crime are not being followed up sufficiently, although we acknowledge there may be other factors at play.

- 4.48 Police has made significant efforts to improve its response to hate crime since the Royal Commission's report. As discussed in Chapter 2, these changes include the introduction of Police Instructions on hate crime, training for police officers, dedicated district hate crime leads and quality assurance from a central Hate Crime Quality Assurance Team that checks hate crime cases are being accurately identified and followed up.³⁹ Improving consistency in how hate crime is addressed across an organisation as large and diverse as Police will take time. However, it was clear to us from speaking to people within Police, including frontline officers, that there is a growing awareness of hate crime and that work is underway to improve consistency across the organisation.
- 4.49 Police informed us that funding for the Hate Crime Quality Assurance Team has expired and the future of the quality assurance function is uncertain. Quality assurance is important to ensure that potential hostile motivation is consistently identified and recorded. Its impact is not limited to ensuring the accuracy of data. If a reported crime is not identified and flagged as a potential hate crime at the outset, the investigating officer may not inquire into the hostility further, include reference to it in the summary of facts or inform the prosecutor that the aggravating factor may apply. Police may therefore wish to consider whether some form of quality assurance can be continued. As we explain in Chapter 6, that would support the implementation of some of our recommendations in this Report.
- 4.50 It is too early to tell whether work already completed or underway within Police will address the issues raised by submitters. Additionally, we agree with the submitters who said that, if there are problems with how hate crime is investigated, it is primarily an operational issue and should be addressed (at least in the first instance) through Police and prosecutorial practice rather than law reform.⁴⁰ Irrespective of the precise content of the law, police officers would still need to identify that offending may have been motivated by hostility and to gather the evidence needed to prove that. Consistent enforcement of the law is likely to depend primarily on having adequate education, resourcing and quality assurance processes in place to ensure hostile motivation is identified and investigated appropriately.
- 4.51 We do not consider it is appropriate, in this review of hate crime law, to make recommendations about Police resourcing and training generally. We are conscious that there are competing priorities for Police attention and that recorded hate crime is only a small proportion (0.8 per cent) of overall reported offending. We do recommend, in Chapter 9, that Police review its guidance on hate crime to ensure that investigating officers and prosecutors are informed of any changes to the law as a result of this review.

³⁸ For example, in 2025, 42 per cent of offences flagged as perceived hate crimes were closed based on police discretion. For comparable non-hate offences (that is, offences in the same categories as those often flagged as hate crimes such as assaults, threatening behaviour, property damage and public order offences), this figure was 26 per cent.

³⁹ Wider changes to address bias in policing and improve relationships with minority groups are discussed later in this chapter (under "Reporting hate crime to Police").

⁴⁰ 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.

In Chapter 6, we also recommend changes to ensure Police is aware if a suspect under investigation has previously been found by a court to have committed a hostility-motivated offence. That information should assist Police to make informed decisions about whether to investigate further or prosecute the person.

- 4.52 Finally, it is important to acknowledge that Police can only prosecute a person if there is sufficient evidence that an offence has been committed. Many of the examples given by submitters and people we spoke with of hate incidents they felt were not properly investigated or prosecuted did not clearly involve any offence under the current law. There was a high level of concern about hate speech and online hate, much of which is not covered by existing offences. Police is therefore limited in how it can respond to these incidents. As explained in Chapter 1, we have not been asked to review these areas of law.

Identifying hostile motivation as an issue in court proceedings

Consultation

- 4.53 In our Consultation Paper, we sought feedback on whether prosecutors consistently raise hostile motivation in relevant cases.⁴¹ We also asked whether hostile motivation should be considered at other stages of court proceedings such as when the court is considering whether to grant a defendant bail or is sentencing the same defendant again for subsequent offending.⁴² We did not ask specifically about whether judges consistently identify hostile motivation (if the prosecutor fails to do so) but some submitters commented on that as well.
- 4.54 Four submitters (a retired judge and three legal professional organisations) suggested that prosecutors do not always raise hostile motivation with the court where it is relevant.⁴³ A member of Te Hunga Rōia Māori o Aotearoa | the Māori Law Society said there have been examples of hate crimes against Māori — such as desecrations of urupā and vandalism of people's homes — where the prosecution did not raise the aggravating factor and the court did not apply it. Dr David Harvey, a retired District Court judge, told us that the two hate crime cases he dealt with in his career were not identified as such by the prosecutor (although those cases occurred pre-2019 and therefore pre-date efforts by Police to improve its response to hate crime).
- 4.55 Four submitters, including three legal professional organisations, also thought it was likely that judges do not always identify hostile motivation or apply the aggravating factor in appropriate cases.⁴⁴ Additionally, Inclusive Aotearoa Collective Tāhono suggested the current law is inadequate to ensure hostile motivation is consistently addressed since it is discretionary, relying on judges to ensure hate crimes are recognised in sentencing.

⁴¹ Consultation Paper at [5.24]–[5.28].

⁴² At [5.27]–[5.28].

⁴³ Dr David Harvey; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Members of Te Hunga Rōia Māori o Aotearoa; and The Law Association of New Zealand Criminal Law Committee.

⁴⁴ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Te Kāhui Ture o Aotearoa | New Zealand Law Society; Members of Te Hunga Rōia Māori o Aotearoa; and The Law Association of New Zealand Criminal Law Committee.

- 4.56 Two submitters discussed whether hostile motivation is taken into account in bail decisions and subsequent sentencing decisions:
- (a) The Public Defence Service considered hostile motivation may be relevant to bail decisions and later sentencing decisions. It said hostile motivation is already considered under the current law where appropriate, observing that Police sometimes notes hostile motivation in bail opposition forms. It observed that some people accused of hostility-motivated crimes against Muslims have had bail conditions restricting them from going near a mosque. In addition, it said previous convictions for hostility-motivated crime may be admissible as propensity evidence in a subsequent case (although it acknowledged this will only occur if the previous sentencing notes have been obtained, since hostile motivation is not recorded on a person's criminal conviction history).
 - (b) The Law Association Criminal Law Committee said that any previous convictions for hostility-motivated offending are unlikely to be apparent at a bail hearing. This is because 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.
- 4.57 One additional submitter thought hostile motivation should be considered in bail decisions but did not comment on current practice.⁴⁵
- 4.58 When we inquired with police prosecutors and Crown solicitors about their experiences with hate crime cases, their feedback indicated that such cases are rare and most prosecutors had never dealt with the hostility aggravating factor. We also heard from prosecutors that, in some cases, they are unable to pursue the application of the aggravating factor because inadequate evidence is provided by the investigating officer. We heard that documentation provided to the prosecutor by the investigating officer sometimes states that an offence may have been motivated by hostility, but there is no relevant evidence included in the summary of facts. Given the short turnaround time on many cases, that may mean the prosecutor cannot raise hostile motivation with the court.

Is there a problem with the current law?

Identifying hostile motivation as a factor at sentencing for the relevant offence

- 4.59 The absence of readily available information about hate crime cases in the courts, discussed above, makes it difficult to assess whether there are problems with hostile motivation not being identified as an issue in relevant court proceedings. Our research did not disclose clear examples of cases where prosecutors or judges failed to pick up on hostile motivation at sentencing.⁴⁶ However, such cases would be difficult to identify since the hostility would not be referenced in the sentencing notes.
- 4.60 What is clear is that there are no structural mechanisms to ensure hostile motivation is consistently identified as an issue in relevant cases and that evidence is presented to establish it. We consider this is a significant shortcoming in the current operation of the

⁴⁵ Dr John McDonald-Wharry.

⁴⁶ One possible example is the District Court decision in *R v Landon* [2017] NZDC 15598, where the hostility aggravating factor was not referred to. On appeal, the Court of Appeal found s 9(1)(h) applied and noted the sentencing judge had not referred to it "although it may well have been in his mind": *Landon v R* [2018] NZCA 264 at [59]. It is unclear whether the matter was raised by the prosecutor or considered by the judge at sentencing.

law. Based on the submissions we received from those working in the justice sector and given how few hate crime cases there are in the courts, there is a risk that the aggravating factor may not always be front of mind for prosecutors and judges. They are often dealing with high caseloads (particularly in the District Court) and the hostility aggravating factor will only be relevant in a small proportion of cases. Judges and prosecutors are also reliant on the information provided by Police.

- 4.61 The risk of hostile motivation being overlooked may be heightened in relation to prosecutions for lower-level offending (including offences under the Summary Offences Act 1981), which account for many of the perceived hate crimes flagged by Police. These cases are dealt with in the District Court and, in some instances, sentencing may occur in a criminal list court. List courts deal with a high volume of cases and the prosecutor and judge have limited time to become familiar with the case.

Bail decisions and subsequent sentencing decisions

- 4.62 As well as being relevant at sentencing for the offence to which it relates, hostile motivation may affect bail decisions and subsequent sentencing decisions involving the same offender:
- (a) For bail decisions, hostile motivation may be relevant in relation to both the current charge and any previous offending. The court will consider the nature and seriousness of the current charge as well as the defendant's past conduct.⁴⁷
 - (b) At sentencing, the nature and seriousness of the offender's previous convictions is an aggravating factor.⁴⁸
- 4.63 The Public Defence Service indicated in its submission that, in some cases, hostile motivation is already considered in bail decisions and subsequent sentencing decisions. As noted above, it said that some defendants have been granted bail with a condition that they avoid mosques (where the alleged offending targeted Muslims). We also located through our own research one case in which previous hostility-motivated offending was taken into account at sentencing for subsequent offending.⁴⁹
- 4.64 However, hostile motivation will only be considered in bail decisions and subsequent sentencing decisions if the prosecutor has information to suggest the hostility aggravating factor may apply to the current charge or was applied to a previous offence. Currently, there is no process to ensure the prosecutor or the court is aware that hostile motivation may be an issue.
- 4.65 In relation to the current charge, feedback from our Technical Advisory Group suggests that, if bail is opposed, any potential hostile motivation is likely to be raised by the prosecutor based on information provided by the investigating police officer.⁵⁰ However, it is not clear that hostility will necessarily be identified as an issue where bail is not opposed (as is often the case for summary offences). In these cases, the fact that the

⁴⁷ Bail Act 2000, s 8(2)(a), (c) and (d).

⁴⁸ Sentencing Act 2002, s 9(1)(j).

⁴⁹ *Arps v Police* [2019] NZHC 2113 at [37] and [50]. Bail decisions are not ordinarily published so it is unsurprising we found no examples of hostile motivation being taken into account at that stage.

⁵⁰ A member of the Technical Advisory Group said that, if bail is opposed, the investigating police officer is likely to review the National Intelligence Application entry for the alleged offence and see any Police perceived hate crime flag. This would prompt them to inform the prosecutor that the hostility aggravating factor may apply.

hostility aggravating factor may apply to the alleged offence may still be relevant to bail conditions.

- 4.66 In relation to previous hostility-motivated offending by the same defendant, under the current law, prosecutors will not always be able to identify that the court applied the hostility aggravating factor to an offence. The application of the aggravating factor is only evident from a review of the sentencing notes (assuming it is recorded there). Prosecutors will not necessarily review the sentencing notes for all a defendant's previous convictions. According to the submission we received from The Law Association Criminal Law Committee, prosecutors are especially unlikely to review sentencing notes for a previous conviction before a bail hearing. Whether they do so before trial and sentencing will depend on the seriousness of the current offence and how relevant the previous conviction appears to be on its face.⁵¹ This issue is linked to the earlier problem we discussed — that there is an absence of readily available information about hate crime cases in the courts. If the application of the hostility aggravating factor was recorded in a systematic and more easily accessible way, that would help to ensure the courts are aware if an offender has previously been convicted of an offence that was found to be motivated by hostility.

Propensity evidence

- 4.67 Finally, as the Public Defence Service noted, it is possible that evidence of previous hostility-motivated offending could be admitted as propensity evidence in a later trial of the same defendant for similar offending.⁵² For example, if there was a dispute about the identity of the offender or whether the offence occurred at all, evidence that the defendant had committed similar hostility-motivated offending in the past could be relied on to help establish their guilt. We are not aware of any cases where this has occurred. The prosecutor would first need to identify that the previous offence involved similar hostility.

Relevance to the objectives of hate crime law

- 4.68 The absence of clear processes to ensure hostile motivation is raised with the courts in relevant cases impacts the ability of current law and practice to meet the objectives of hate crime law. If a court does not consider section 9(1)(h) in a relevant case, the offender is not held accountable for the additional harm caused by their offending. Nor does the court's decision denounce the hostility or provide assurance to victims and communities that hate crime is treated seriously. Opportunities to prevent further offending may also be missed. For example:

⁵¹ A prosecutor or the investigating police officer may also be prompted to review the sentencing notes for a previous offence if the investigating officer sees that the offence was flagged by Police as a perceived hate crime. We understand, however, that the Police flag for perceived hate crimes is not visible when a person's criminal record is viewed in the Police National Intelligence Application. It is only visible if the entry relating to the particular offence is opened, which is only likely to occur if there is some other indication that the offence may be relevant.

⁵² Propensity evidence is evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind: Evidence Act 2006, s 40(1)(a). For example, it may be evidence that a defendant previously committed similar offences or engaged in similar conduct to that alleged in the current proceeding. Propensity evidence is admissible against a defendant at trial if it has probative value in relation to an issue in dispute that outweighs the risk that it may have an unfairly prejudicial effect on the defendant: s 43(1).

- (a) An offender with a pattern of hostility could be released on bail without appropriate conditions, increasing the risk they will commit further hostility-motivated offending.
- (b) At sentencing, failure to account for an offender's hostility may mean the sentence imposed does not provide adequate opportunity for rehabilitation. For offenders who receive a short-term sentence of imprisonment, special release conditions may also be appropriate to protect the affected community.⁵³

Adequacy of penalties for hate crime

Consultation

- 4.69 In our Consultation Paper, we discussed the adequacy of penalties for hostility-motivated offending alongside denunciation. We explained that, under the current law, the fact that an offence was motivated by hostility does not change the maximum penalty that can be imposed on the offender.⁵⁴ Additionally, the courts are not required to increase an offender's sentence at all or by any particular amount.⁵⁵ We sought feedback on whether these features of the current law limit the denunciatory effect of sentencing decisions.⁵⁶
- 4.70 No submitters suggested the maximum penalties for existing offences in the Crimes Act 1961 and Summary Offences Act are inadequate to take proper account of hostile motivation (although a few suggested the penalties could be reviewed to assess their adequacy).⁵⁷ Crown Law said more serious offences that might be motivated by hostility such as wounding or grievous bodily harm usually have plenty of "headroom" in the maximum penalty to reflect the culpability of the offending. It also noted that some offences in the Summary Offences Act commonly involved in hate crimes such as assault and wilful damage have near-equivalents in the Crimes Act with higher maximum penalties. Therefore, prosecutors can charge hate crime offenders with a more serious offence in appropriate cases. Crown Law acknowledged this is not the case for some summary offences such as offensive behaviour or language.
- 4.71 We also heard few concerns about the sentences imposed in cases where the hostility aggravating factor was applied. Most submitters and people we spoke with were more concerned about offending either not being prosecuted or not treated as a hate crime (as discussed above) than with the sentence imposed when the aggravating factor was applied.
- 4.72 One submitter, Luke Cunningham Clere, suggested there is some evidence of inconsistent judicial treatment of hate crime and said this could indicate that sentences being handed down are inadequate. It referred to two cases in which it said Te Kōti Pira | Court of Appeal took a different view to Te Kōti Matua | High Court on the significance of the hostility aggravating factor.⁵⁸ We discuss these cases below.

⁵³ See *Arps v Dept of Corrections* [2020] NZCA 547, [2020] 2 NZLR 94 at [7].

⁵⁴ Consultation Paper at [5.12].

⁵⁵ At [5.11].

⁵⁶ At [5.14].

⁵⁷ Russell Hoban; and Te Kāhui o Ināia Tonu Nei Charitable Trust. Additionally, Submission 63 said there "may be room" for such a review.

⁵⁸ *Solicitor-General v Milne* [2020] NZCA 134; and *Galloway v R* [2011] NZCA 309.

Is there a problem with the current law?

- 4.73 Based on the information available to us, we have not identified a problem with the sentences available or imposed in cases where the hostility aggravating factor is applied.
- 4.74 To ensure that hate crime offenders are held accountable and their offending is appropriately denounced, maximum penalties need to be high enough to allow the courts to reflect the offender's hostile motivation in the sentence imposed. The courts also need to give adequate weight to an offender's hostile motivation when determining their sentence.
- 4.75 In relation to the adequacy of maximum penalties, the Royal Commission noted that the maximum penalties for summary offences are low and suggested that may mean that taking hostile motivation into account at sentencing would have little practical effect.⁵⁹ As noted above, however, no submitters suggested the existing maximum penalties are causing problems in practice. We did not identify a problem with existing maximum penalties from our own research either. In the cases we identified where the hostility aggravating factor was applied, the sentences imposed were not generally near the maximum. This suggests there is scope within the existing maximum penalties to adequately reflect hostile motivation.
- 4.76 In England and Wales, where there are hate crime offences with higher maximum penalties, feedback from criminal law practitioners on a review by the Law Commission of England and Wales indicated that judges are reluctant to sentence anywhere near the increased maximum.⁶⁰ Indeed, it is uncommon for sentences for hate crime offences to exceed the maximum available for the equivalent non-hate offence, although it does happen on occasion.⁶¹ This tends to suggest that higher maximum penalties for hate crime offences are more symbolic than practical in nature. We return to the symbolic value of higher maximum penalties in Chapter 5 when discussing denunciation.
- 4.77 We were unable to conduct a full review of the sentences imposed in all hate crime cases, given the difficulties already discussed with identifying those cases. In particular, since District Court sentencing decisions are not routinely published, we were mostly limited to examining cases of more serious hostility-motivated offending. This reinforces the need for improved recording of hate crime cases in the courts to inform any future review of hate crime law.
- 4.78 We also did not identify a problem with the weight given to hostile motivation in sentencing decisions. The cases referred to by Luke Cunningham Clere do not appear to raise general concerns about the adequacy of sentences imposed where hostility is a factor. In *Solicitor-General v Milne* the concern was that the sentencing judge did not apply the aggravating factor at all (as opposed to giving it inadequate weight) and the

⁵⁹ For example, the Royal Commission observed that the maximum penalty for offensive behaviour or language (Summary Offences Act 1981, s 4(1)) is a fine of \$1,000: William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703; and William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 13.

⁶⁰ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.24].

⁶¹ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.39]. See also Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.198].

sentence was increased on appeal.⁶² In the 2011 case *Galloway v R*, the Court of Appeal reduced the offender's sentence in part because of the need for parity with a co-offender and the fact that the sentencing judge may have double-counted hostility as a factor.⁶³ These features of the case make it difficult to draw any wider conclusions from the decision. We found nothing in later cases to suggest this precedent has led to sentencing judges giving inadequate weight to the aggravating factor.

Reporting hate crime to Police

Consultation

- 4.79 In our Consultation Paper, we referred to observations by the Royal Commission and to overseas data indicating that hate crime is underreported to Police.⁶⁴ We described work that has occurred within Police since the Royal Commission's report to improve how Police responds to reports of hate crime. We sought feedback on whether there are still barriers to reporting hate crime and, if so, whether the current law is part of the reason for this.⁶⁵
- 4.80 It is clear from the submissions we received and feedback from people we spoke with during consultation that many people who experience hate crimes choose not to report them to Police. We heard in consultation that this is due to low levels of trust in Police and the justice system among certain communities affected by hate crimes, a perception that Police cannot do anything or a reluctance to engage with the justice process. That reluctance can be because of the time and potential trauma involved in reporting, lack of support for victims or a belief that punishment is not the right way to address hate.
- 4.81 Some submitters and people we spoke with said members of marginalised communities may not report hate crimes because of their own or others' previous interactions with Police.⁶⁶ This was particularly emphasised by rainbow and disabled people, respectively, who highlighted past experiences of state persecution, lack of protection and disrespectful treatment (including victim-blaming and trivialising of complaints).⁶⁷
- 4.82 Three submitters made comments suggesting that underreporting of hate crime is a problem with the current law. Two said the sentence aggravation model does not encourage people to report hate crimes⁶⁸ and a third suggested creating hate crime offences could encourage reporting.⁶⁹
- 4.83 On the other hand, most submitters and people we spoke with attributed low reporting rates to systemic issues within the justice system — including bias, a lack of cultural and

⁶² *Solicitor-General v Milne* [2020] NZCA 134 at [22] and [34]–[36].

⁶³ *Galloway v R* [2011] NZCA 309 at [44]–[48].

⁶⁴ Consultation Paper at [5.18]–[5.19].

⁶⁵ At [5.21] and [5.23].

⁶⁶ 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.

⁶⁷ We heard this from organisations we met with during consultation and from the following submitters: Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Inclusive Aotearoa Collective Tāhono; Submission 26; and Whaikaha | Ministry of Disabled People.

⁶⁸ Donald Beasley Institute and People First New Zealand (joint submission); and Submission 43.

⁶⁹ Dr Sanjana Hattotuwa.

diversity awareness, inadequate support for victims and a focus on punishment rather than prevention and rehabilitation. Two submitters said explicitly that hate crime offences are not needed to encourage reporting.⁷⁰ They suggested this could instead be achieved through public education, improved Police engagement with affected communities and trust-building initiatives. A further six submitters agreed that public education and awareness initiatives could help to improve reporting or show hate crimes are taken seriously.⁷¹

- 4.84 The Law Association Criminal Law Committee suggested that making hostile motivation more visible at sentencing could help to increase victim confidence in the criminal justice system, potentially reducing reluctance to report hate crimes.

Is there a problem with the current law?

- 4.85 We find that there is likely to be a problem with underreporting of hate crime but that changing the law would not be the most effective way to address it. For that reason, we do not make any specific recommendations about it in this Report (although, as we discuss later, some of our recommendations may indirectly contribute to increased reporting).
- 4.86 There is no general data on reporting rates for hate crimes in Aotearoa New Zealand. However, data provided to us by the New Zealand Youth Safety Survey suggests that hate crimes in Aotearoa New Zealand are underreported.⁷² Ninety-one per cent of respondents who said they had experienced ‘hate violence’ did not report it to Police.⁷³ The main reasons respondents gave for not reporting were that they felt the incident was not worth reporting, they did not believe Police could have done anything or they dealt with the matter themselves. This is consistent with what we heard from submitters and with the Royal Commission’s observations.⁷⁴
- 4.87 We do not know the full scope of any underreporting of hate crimes or whether it is improving. Police data shows the number of perceived hate crimes recorded each year is increasing, but it is unclear to what extent this is due to an increase in reporting, more consistent recording practices or an increase in the number of hate crimes occurring.
- 4.88 Underreporting of hate crime is of concern because if a hate crime is not reported, the criminal justice system cannot respond. The offender will not be held accountable and there will be no formal means of denouncing their offending. Underreporting also affects the quality of Police data and may mean the prevalence of hate crime (both in general

⁷⁰ Dr David Harvey; and The Law Association of New Zealand Public and Administrative Law Committee.

⁷¹ Dr Kyle R Matthews; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 26; Submission 43; Submission 90; and The Law Association of New Zealand Public and Administrative Law Committee.

⁷² Susann Wiedlitzka, Angela Higginson and Kathryn Benier *The New Zealand Youth Safety Survey: Research Briefing Note* (University of Auckland, March 2025) (unpublished). The survey included 820 young people aged 14 to 25. At the time this Report was finalised, the survey results had not yet been published. The authors provided us with an advance briefing note so that we could refer to the survey data. We are grateful for their assistance.

⁷³ ‘Hate violence’ was described in the survey as follows: “Someone committed physical violence against you, because of your religion, the language you speak, the colour of your skin, your social background, your gender or sexuality, your disability, or for similar reasons.” Ten per cent of respondents said they had experienced hate violence at some point in their lives.

⁷⁴ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 715.

and against certain communities) is underestimated. This may affect the resources that are invested in addressing hate crime and contribute to a lack of understanding about the hostility experienced by different communities.

- 4.89 The Royal Commission (and some submitters) suggested that creating hate crime offences would be likely to increase reporting of hostility-motivated crimes to Police by providing a signal that they are taken seriously.⁷⁵ However, reporting rates for hate crimes are low in other jurisdictions as well, even where hate crime offences exist.⁷⁶ International research also shows low levels of trust in Police among certain groups affected by hate crimes.⁷⁷ Moreover, non-hate crimes in Aotearoa New Zealand are often not reported for similar reasons to those given by hate crime victims.⁷⁸ The 2025 New Zealand Crime and Victim Survey found that only 24 per cent of crime is reported to Police.⁷⁹ Accordingly, it is not clear to us that low reporting rates for hate crimes are a result of problems with the law.
- 4.90 We agree with The Law Association Criminal Law Committee that, to the extent that denunciation of hate crimes may contribute to increased reporting, that would be achieved by making hostile motivation more visible at sentencing. For those victims who do not report a perceived hate crime because they think Police will not do anything or will not treat them with respect, the most obvious way to address that is by improving the way police officers respond to reports of hate crimes and interact with affected communities.
- 4.91 As discussed above, Police is already working to improve its response to hate crime. More broadly, it is also dedicating resources to improving cultural and diversity awareness and building better relationships with communities that have historically had lower levels of trust in Police, with the following examples:
- (a) There is ongoing work to strengthen and train the network of diversity liaison officers, who act as a bridge between Police and rainbow communities.
 - (b) Diversity awareness and bias training is provided to all new recruits and to existing staff as the opportunity arises (for example, it is part of training undertaken for promotion).

⁷⁵ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703; and William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

⁷⁶ Consultation Paper at [5.19].

⁷⁷ See for example Rune Ellefsen, Kristina Os and Mona Hovland Jakobsen “Reporting Anti-LGBTQI Hate Crime to the Police: First-Hand Experiences and Reasons for not Reporting (2024) 11(1) *Nordic Journal of Studies in Policing* 1; and Neil Chakraborti, Jon Garland and Stevie-Jade Hardy *The Leicester Hate Crime Project: Findings and Conclusions* (University of Leicester, September 2014) at 72–73.

⁷⁸ Te Tāhū o te Ture | Ministry of Justice *NZCVS Key results: 2024 (Cycle 7)* (25 February 2025) at 30.

⁷⁹ Te Tāhū o te Ture | Ministry of Justice *NZCVS Key results: 2025 (Cycle 8)* (March 2026) at 24.

- (c) Information about a person's disability can now be flagged in Police's IT system to improve police services when interacting with them.⁸⁰ Training on neurodiversity is also in development for frontline staff.⁸¹
 - (d) Police has updated its strategies for working with ethnic⁸² and Pasifika⁸³ communities. The strategies emphasise increasing representation of these communities within Police and improving cultural responsiveness to victims of crime. A refreshed strategy for working with Māori is forthcoming.
- 4.92 We also agree with submitters that improving public awareness of hate crime, its impacts and how to report it could help to encourage reporting of hate crimes. Police launched a public education initiative called 'Standing Together Against Hate' after the Royal Commission's report.⁸⁴ This includes a documentary series, educational resources and information about how to report hate crime. However, these resources are difficult to find on the Police website and do not appear to have been widely publicised. Greater visibility and promotion of this initiative could increase its impact.
- 4.93 Finally, we heard that some people are reluctant to report hate crime because they do not think that punishing offenders is the best way to address hate. Some submitters and people we spoke with thought that greater use of restorative processes, rehabilitation and public education addressing the attitudes underlying hate crimes (such as racism) would be more effective. As explained in Chapter 2, restorative justice may be available in hate crime cases where it is appropriate. We agree it should be explored where the victim and offender are both willing to engage. Public education initiatives could also assist in changing public attitudes, helping to reduce occurrences of hate crime. Those are questions of funding and Government prioritisation rather than law reform.

Rehabilitating hate crime offenders

Consultation

- 4.94 In our Consultation Paper, we asked submitters whether there are practical difficulties in assessing hate crime offenders' rehabilitative needs.⁸⁵ We received no specific feedback on that point, although three submitters did think it was problematic that Corrections is not notified of an offender's hostile motivation.⁸⁶
- 4.95 More broadly, six submitters were concerned about the lack of specific rehabilitation programmes for hate crime offenders.⁸⁷ Two additional submitters supported better

⁸⁰ The 'Disability and Special Considerations' flag has been live since November 2024. Police advised us that a public promotion, allowing people to share their disability information with Police, will launch in mid-2026.

⁸¹ See further the Police Disability Roadmap: Ngā Pirihimana o Aotearoa | New Zealand Police "Disability Roadmap 2026" (April 2026) <www.police.govt.nz>.

⁸² Ngā Pirihimana o Aotearoa | New Zealand Police *Ethnic Strategy — Working Together with Ethnic Communities* (2024).

⁸³ Ngā Pirihimana o Aotearoa | New Zealand Police *Pasifika Strategy — O Le Taeao Fou: Dawn of a New Day* (2024).

⁸⁴ Ngā Pirihimana o Aotearoa | New Zealand Police "Standing Together Against Hate" <www.police.govt.nz>.

⁸⁵ Consultation Paper at [5.57].

⁸⁶ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

⁸⁷ 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.

resourcing for rehabilitation of hate crime offenders but did not say what form that rehabilitation should take.⁸⁸

Is there a problem with the current law?

- 4.96 The Royal Commission was concerned that, because hostile motivation is not recorded as part of a conviction, the need for rehabilitative support may not be identified.⁸⁹ It recommended creating hate crime offences in part because it thought this could encourage the creation of specific rehabilitative programmes.⁹⁰
- 4.97 As explained in Chapter 2, there are currently no specific rehabilitative programmes for hate crime offenders and Corrections considers it is unlikely to be viable to create one. It suggested other support that is already available — such as general offence-based programmes, individual psychological treatment or community-based services — may help to address the factors underlying hate crime and reduce the risk of reoffending.
- 4.98 Corrections is responsible for assisting in the rehabilitation of offenders and makes decisions about the best way to do that.⁹¹ Specific programmes or interventions are not mandated by law. There is also limited research on whether and how hate crime offenders can be effectively rehabilitated.⁹² We are therefore not in a position to recommend any particular approach to rehabilitation. Nor do we consider encouraging the creation of specific programmes to be an objective for law reform.
- 4.99 We do, however, consider that the information available to Corrections about offenders' hostile motivation is inadequate. As explained in Chapter 2, Corrections is not automatically notified when offences have been identified as hostility-motivated. For offenders assessed as having a medium or high risk of reoffending, Corrections may identify hostile motivation by reviewing the court's sentencing notes. This is not done as a matter of course for low-risk offenders, and for those who receive a sentence other than imprisonment or home detention, sentencing notes are not usually available at all.
- 4.100 As noted earlier in relation to recording hate crime, it is problematic that Corrections may not be aware that an offender under its management was motivated by hostility. This makes it difficult for Corrections to tailor its response to these offenders and to ensure

⁸⁸ Annette Sykes & Co; and Submission 90.

⁸⁹ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 703; and William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 13.

⁹⁰ William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 17.

⁹¹ The Corrections Act 2004 provides that one of the purposes of the corrections system is to improve public safety and contribute to the maintenance of a just society by “assisting in the rehabilitation of offenders and the reintegration of persons under control or supervision into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions”: s 5(1)(c).

⁹² Provision of hate crime rehabilitation programmes is limited in other jurisdictions and there are few comprehensive evaluations. See for example Mark Walters, Rupert Brown and Susann Wiedlitzka *Preventing hate crime: emerging practices and recommendations for the effective management of criminal justice interventions* (University of Sussex, 2016) at 26, 34 and 37; and Rania Hamad *Hate Crime: Causes, Motivations and Effective Interventions for Criminal Justice Social Work* (City of Edinburgh Council, June 2017) at 67.

the safety of its staff and other prisoners. It also means hostile motivation may not be addressed in reports prepared by Corrections for the courts (to inform bail and sentencing decisions) and the Parole Board (when making decisions about whether to grant parole).

- 4.101 This impacts negatively on the objectives of hate crime law we have identified, as Corrections has a role in seeking to reduce the occurrence of hate crimes. It does this by addressing offenders' risks of reoffending through rehabilitation, taking precautions to prevent hate crimes against its own staff and other prisoners and supporting informed decisions about bail and parole. Additionally, by providing pre-sentence reports to the courts, Corrections helps to ensure the courts hold hate crime offenders accountable and denounce hostile motivation. The fact that Corrections may be unaware of an offender's hostile motivation limits its ability to perform those functions effectively.

Supporting victims of hate crime

Consultation

- 4.102 This issue was not discussed in our Consultation Paper. However, some submitters and people we spoke with during consultation said there is a lack of appropriate support for victims throughout the justice process. Some organisations we spoke with said victims may not report hate crimes because they feel that they will not receive support that is appropriate to their background and needs and that they may be re-victimised by the justice process. Two submitters suggested disabled people may not receive the support they need to navigate justice processes.⁹³
- 4.103 In addition, the Chief Victims Advisor, Ruth Money, told us there is a lack of cultural competency in the justice system and victims are not adequately supported through the whole process. She thought there would be value in cultural competency training for the judiciary and court staff as well as better funding for community organisations to support victims.⁹⁴ However, she saw these as issues that affect all victims and did not think hate crime victims needed to be treated differently.

Is there a problem with the current law?

- 4.104 We agree there are gaps in the support available for victims. For example, while victims can contact Manaaki Tāngata | Victim Support, there is no guarantee they will be allocated a support worker who understands their background and needs. There is limited support for disabled victims to ensure they can fully understand and participate in the justice process.⁹⁵ There is also limited access to funded counselling (depending on the type of crime experienced).

⁹³ Donald Beasley Institute and People First New Zealand (joint submission); and Submission 26.

⁹⁴ Similar points were made by the previous Chief Victims Advisor. See Dr Kim McGregor *Strengthening the Criminal Justice System for Victims — Te Tangi o te Manawanui: Recommendations for Reform* (September 2019) at 37–38.

⁹⁵ A communication assistant may be appointed by the court to enable a witness to give evidence but there is no broader entitlement to communication assistance to understand the proceeding: Evidence Act, s 80(3). Courts may be able to assist in other ways, such as providing sign language interpreters or information in alternative formats: Te Tāhū o te Ture | Ministry of Justice "Interpreters, language & disability access" <www.justice.govt.nz>.

- 4.105 These are important issues, and we agree they are likely to have an impact on victims' willingness to report crimes. However, we do not consider they are specific to hate crime victims or indicate problems with hate crime law. Victims from marginalised communities (as hate crime victims usually are) face the same barriers when they experience other types of crimes. It would be problematic to recommend changes in relation to hate crime victims only without considering the needs of all victims of crime and how resources are best allocated to support them through the justice process. That work is beyond the scope of this review. We suggest it be considered by Te Tāhū o te Ture | Ministry of Justice separately.
-

CHAPTER 5

Comparing legal models

INTRODUCTION

- 5.1 As explained in Chapter 3, our approach in this review has been that we will only recommend changing the legal model for addressing hate crime if:
- (a) there are problems with the current law;
 - (b) those problems cannot be addressed by making changes to the sentence aggravation model (in other words, they are fundamental problems with the model); and
 - (c) adopting a different legal model would address the problems with the current law without creating additional problems that would outweigh the benefits.
- 5.2 In Chapter 4, we identified some problems with the operation of the current law relating to hate crime in Aotearoa New Zealand. Those problems impact the ability of current law and practice to meet the objectives of hate crime law set out in Chapter 3.
- 5.3 In this chapter, we consider whether the legal model should be changed to address those problems. We discuss:
- (a)
 - (b) the key features of the current sentence aggravation model and the two alternative legal models considered in this review — the specific hate crime offence model and the Scottish hybrid model;
 - (c) the feedback we received during consultation on whether the legal model should be changed;
 - (d) whether each of the problems identified in Chapter 4 can be addressed by making changes to the sentence aggravation model or whether an alternative model would address the problem more effectively; and
 - (e) other potential advantages and disadvantages of the alternative models.
- 5.4 We conclude that the sentence aggravation model is the most appropriate way to address hate crime in Aotearoa New Zealand. The problems identified in Chapter 4 are not fundamental problems with the sentence aggravation model and can be addressed by making changes to it. Crucially, neither of the alternative models we examine would effectively address those problems. Both alternative models also have significant disadvantages that would outweigh their limited benefits.
- 5.5 We make recommendations to improve the sentence aggravation model in Part 3 of this Report.

THREE LEGAL MODELS FOR ADDRESSING HATE CRIME

- 5.6 There are three main legal models used to address hate crime in the overseas jurisdictions we examined:
- (a) The sentence aggravation model (currently used in Aotearoa New Zealand).
 - (b) The specific hate crime offence model (recommended by the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019).
 - (c) The Scottish hybrid model, which combines aspects of the sentence aggravation model and the specific offence model.
- 5.7 The specific hate crime offence model is sometimes used alongside the sentence aggravation model.¹ As we discuss below, in England and Wales and the Republic of Ireland, there is a limited number of specific hate crime offences and sentence aggravation is available for other hate crimes not covered by those offences.

Sentence aggravation model

- 5.8 In Chapter 2, we set out the current law relating to hate crime in Aotearoa New Zealand. We explained that the approach taken in section 9(1)(h) of the Sentencing Act 2002 (the hostility aggravating factor) is an example of the sentence aggravation model of hate crime law.
- 5.9 Under this model, an offender's hostile motivation is taken into account as an aggravating factor when they are sentenced. This may increase the sentence imposed on the offender. However, the maximum penalty for an offence is the same whether it is motivated by hostility or not.
- 5.10 Because hostile motivation is not an element of the offence, it does not need to be proven at trial or accepted by the defendant to secure a conviction. Nor is it automatically recorded as part of the conviction. Instead, the court decides at sentencing whether the hostility aggravating factor applies. We explained in Chapter 2 how that process works under the current law in Aotearoa New Zealand. At sentencing, the court can consider any evidence presented at the trial and any facts agreed on by the prosecution and the defence² (for example, those set out in a summary of facts accepted by the defendant when entering a guilty plea).³ If the defendant disputes a fact relied on by the prosecution to establish hostile motivation, further evidence may be presented and the prosecution must prove the fact beyond reasonable doubt.⁴ In practice, however, we understand such disputes occur relatively infrequently.
- 5.11 Sentence aggravation provisions can apply to any type of offence and, depending on how the law is worded in the respective jurisdiction, may protect a broad category of characteristics or groups of people. The current law in Aotearoa New Zealand applies to any group of people with an "enduring common characteristic". In some Australian jurisdictions, sentence aggravation provisions apply even more broadly to hatred towards

¹ It is not used alongside the Scottish hybrid model. There would be less reason to do so since, as we explain below, that model can apply to any type of offence.

² Sentencing Act 2002, s 24(1)(a).

³ Criminal Procedure Rules 2012, r 5A.1.

⁴ Sentencing Act, s 24(2).

any “group of people”⁵ or any “group of people with common characteristics”.⁶ By contrast, sentence aggravation provisions in some jurisdictions (such as England and Wales) only apply to a closed list of protected characteristics.⁷

- 5.12 Sentence aggravation is used in most Australian jurisdictions and in Canada, England and Wales, Northern Ireland and the Republic of Ireland.⁸ As we explain below, some of these jurisdictions have specific hate crime offences as well as a sentence aggravation provision. The aggravating factor can be relied on to cover some hostility-motivated offending that falls outside the more limited scope of the specific hate crime offences.

Specific hate crime offence model

- 5.13 Under the specific hate crime offence model, hostile motivation is an element of the offence a person is charged with. It must be proven at trial beyond reasonable doubt, or the defendant must accept it when pleading guilty. Since hostile motivation forms part of the offence, if the defendant is convicted, the fact that the offending was a hate crime should be clear from the verdict, the court’s decision on conviction (if there was a judge-alone trial), the sentencing notes and any media reporting. It is also documented in criminal records relating to the offender.
- 5.14 Specific hate crime offences exist in England and Wales, Queensland, Western Australia and the Republic of Ireland.⁹ In these jurisdictions, hate crime offences correspond to certain existing criminal offences such as assault, threats or criminal damage. These existing offences are often called the ‘base offence’. The hate crime offence is the same as the base offence except the prosecution must also show the offender was motivated by hate or hostility. Each hate crime offence specifies a maximum penalty, which is higher than the penalty for the base offence.
- 5.15 An alternative approach is taken in a Bill currently before the Parliament of Canada, which would create hate crime offences corresponding to all existing offences.¹⁰ In that Bill, maximum penalties for hate crime offences are specified through a band system, based on the maximum penalty for the base offence. For example, a hate crime offence is punishable by up to five years’ imprisonment if the penalty for the base offence is more than two years and less than five years. While this approach has the benefit that it can apply to any type of offence, it creates other difficulties. The maximum penalty increases

⁵ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h); and Sentencing Act 1995 (NT), s 6A(1)(e).

⁶ Sentencing Act 1991 (Vic), s 5(2)(daaa).

⁷ Sentencing Act 2020 (UK), s 66(1).

⁸ Crimes Act 1914 (Cth), s 16A(2)(mb); Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h); Sentencing Act 1995 (NT), s 6A(1)(e); Sentencing Act 2017 (SA), s 11(1)(ca); Sentencing Act 1997 (Tas), s 11B; Sentencing Act 1991 (Vic), s 5(2)(daaa); Criminal Code RSC, 1985 c C-46, s 718.2(a)(i); Sentencing Act 2020 (UK), s 66; The Criminal Justice (No 2) (Northern Ireland) Order 2004 (UK), art 2; and Criminal Justice (Hate Offences) Act 2024 (Ireland), s 8. We do not refer to Canadian provincial laws as hate crime law is federal.

⁹ Crime and Disorder Act 1998 (UK), ss 28–32 (as amended by the Crime and Policing Act 2026 (UK), s 145); Criminal Code Act 1899 (Qld), ss 52B, 69, 75, 207, 335, 339, 359, 359E and 469; Criminal Code Act Compilation Act 1913 (WA), ss 80I, 313, 317, 317A, 338B and 444; and Criminal Justice (Hate Offences) Act 2024 (Ireland), ss 5–7. The New South Wales Law Reform Commission touched on the possibility of creating hate crime offences in its report *Serious racial and religious vilification* (R151, 2024). It concluded this was outside the scope of its review but also expressed some concerns about creating hate crime offences: at [8.56]–[8.57] and [8.67]–[8.77].

¹⁰ Bill C-9 (45-1) An Act to amend the Criminal Code (hate propaganda, hate crime and access to religious or cultural places), cl 5. As at 15 June 2026 the Bill was awaiting final approval in the House of Commons.

significantly more for offences at the lower end of each band. This means that, for some offences, the penalty may be higher or lower than is appropriate to reflect the seriousness of the offence.¹¹

- 5.16 In all the jurisdictions we examined that use the specific hate crime offence model, the offences only protect a closed list of specified characteristics.¹² A closed list of protected characteristics is necessary for specific hate crime offences to comply with the principle of certainty in the criminal law.¹³ That principle, discussed in Chapter 3, holds that offences must be clearly defined so that people can know in advance what is and is not prohibited and the maximum penalty for non-compliance.¹⁴ If a person can be charged with a hate crime offence, the law must make it clear what kind of conduct that offence prohibits so that people can avoid committing it or, where necessary, defend the charge. A judge or jury must also be able to determine whether the elements of the offence are met.
- 5.17 Hate crime offences do not typically cover very serious crimes that are already punishable by life imprisonment (such as murder).¹⁵ That is because, in these cases, the maximum penalty would be the same as for the base offence.¹⁶ However, this does mean the other potential benefits of hate crime offences discussed below (such as additional denunciation and improved recording) do not apply to very serious offending because they are not charged as hate crime offences.
- 5.18 Because specific hate crime offences do not apply to all types of offending, England and Wales and the Republic of Ireland use the sentence aggravation model as well. Sentence aggravation can be relied on in cases where the type of offence committed does not have a corresponding hate crime offence.¹⁷ The aggravating factor cannot generally be

¹¹ See similarly the discussion in Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.40] and [8.44] (commenting on a similar proposal by the Bar Council, albeit with only two bands).

¹² This is the case even under the Canadian Bill, although the existing sentence aggravation provision in Canada includes an open list of protected characteristics (applying to specified characteristics and “any other similar factor”): Bill C-9 (45-1) An Act to amend the Criminal Code (hate propaganda, hate crime and access to religious or cultural places), cl 5; and Criminal Code RSC 1985 c C-46, s 718.2(a)(i).

¹³ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.85].

¹⁴ Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 123–124; Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at [1.3.1.1]; and AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [2.1.3].

¹⁵ The Law Commission in England and Wales recently considered whether to add specific hate crime offences corresponding to some serious offences punishable by life imprisonment and decided against this: *Hate crime laws: Final report* (R402, 2021) at [8.101]–[8.103]. It noted a submission from the Crown Prosecution Service that the essence of hate crime offences is their higher maximum penalty and that, without this, they would create unnecessary complexity.

¹⁶ In England and Wales, there are specific provisions relating to the minimum period of imprisonment (MPI) for hostility-motivated murder: Sentencing Act 2020 (UK), sch 21, cl 3(2)(g)–(h). As discussed in Chapter 2, although there is no direct equivalent in Aotearoa New Zealand, in some cases, the courts have taken hostile motivation into account when setting the MPI for murder.

¹⁷ In England and Wales, until recently, the sentence aggravation provision also applied to some additional protected characteristics that were not covered by specific hate crime offences. However, recent amendments aligned the lists of protected characteristics: compare the Sentencing Act 2020 (UK), s 66(1); and the Crime and Disorder Act 1998 (UK), s 28(1) (as amended by the Crime and Policing Act 2026 (UK), s 145). In the Republic of Ireland, both specific hate crime offences and the sentence aggravation provision apply to the same closed list of protected characteristics: Criminal Justice (Hate Offences) Act 2024 (Ireland), ss 3(1) and 5–8.

relied on if a hate crime offence was available for the type of offending in question but the defendant was only charged with or convicted of the base offence.¹⁸

- 5.19 Although the Royal Commission did not specifically comment on whether the New Zealand sentence aggravation provision should be retained alongside specific offences, it may well have envisaged that since its recommendation was based on the approach in England and Wales.

Scottish hybrid model and related developments in Northern Ireland

- 5.20 Scotland's hate crime law combines aspects of the sentence aggravation model and the specific hate crime offence model. It creates a system of aggravated offences corresponding to any base offence. Prosecutors can specify that any offence was aggravated by prejudice when charging a defendant ('prejudice' being the term used in Scottish legislation rather than 'hostility'). The aggravation is an element of the offence that must be proven at trial or accepted by the defendant if they plead guilty.
- 5.21 If the defendant is convicted of the aggravated offence, the court must:¹⁹
- (a) state that the offence was motivated by prejudice and the type of prejudice (by specifying the protected characteristic targeted);
 - (b) record the conviction in a way that shows the offence was motivated by prejudice and the type of prejudice;
 - (c) take the aggravation into account when sentencing the offender; and
 - (d) state the difference between the sentence imposed and that which would have been imposed without the aggravation (where there is a difference) and the reasons for that difference or lack of difference.
- 5.22 The Scottish hybrid model does not involve setting out standalone hate crime offences in legislation with higher maximum penalties. Nor does it take the approach in the Bill currently before the Canadian Parliament, which specifies higher maximum penalties for hate crime offences through sentencing bands. Under the Scottish legislation, the maximum penalty for an offence remains the same whether it is aggravated by prejudice or not. Sentencing judges are also not required to impose a higher penalty than would otherwise have been imposed.²⁰
- 5.23 An independent review in Northern Ireland (which currently uses the sentence aggravation model) recommended adopting the Scottish hybrid model.²¹ The Government accepted this recommendation and a Bill has been introduced to implement

¹⁸ Crown Prosecution Service "Racist and Religious Hate Crime — Prosecution Guidance" (3 March 2022) <www.cps.gov.uk>. The guidance states that, in the case of offences that could be charged as specific hate crime offences, it would not usually be appropriate following conviction for the base offence to then seek to introduce evidence that the hostility aggravating factor applies at sentencing. This would amount to introducing evidence of a more serious offence than that for which the defendant has been convicted: *R v Druce* (1993) 14 Cr App R (S) 691; and *R v Davies* (1998) 1 Cr App R (S) 380. Similar case law applies in New Zealand: see *R v Daley* [2025] NZHC 3150 at [40]–[43]; *Paraha v New Zealand Police* [2017] NZHC 1887 at [15]–[19]; and *Rodgers v R* [2018] NZHC 1800 at [28]–[31].

¹⁹ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 2.

²⁰ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [10.38].

²¹ Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, November 2020) at 10 (recommendation 2).

it.²² The Law Commission of England and Wales also considered the hybrid model in a recent review and said it had “significant merit”.²³ However, it favoured keeping specific offences since they were already well established and removing them could “send the wrong message to victims and the broader community”.²⁴ It also concluded that, in the absence of an increased maximum penalty, requiring the prosecution to prove the aggravation at trial (and the additional time and resources this would entail) was not justified.²⁵

- 5.24 The Scottish legislation specifies a closed list of protected characteristics (as opposed to an open category as in the New Zealand legislation). As with specific offences, this was likely considered to be necessary to ensure adequate certainty in the criminal law since the hostility is an element of the offence.

Comparison of the legal models

LEGAL MODELS FOR ADDRESSING HATE CRIME			
	Sentence aggravation model	Specific offence model	Scottish hybrid model
Which offences are covered?	All offences	Usually only specified offences (with the exception of the Canadian Bill)	All offences
Which characteristics are protected?	No particular approach required (the New Zealand provision applies to any enduring common characteristic)	A closed list of specified characteristics	A closed list of specified characteristics
Is hostile motivation recorded as part of the conviction?	Not automatically	Yes	Yes
Is there a higher maximum penalty for hate crimes?	No	Yes	No

²² Department of Justice *Review of hate crime legislation in Northern Ireland — departmental response* (July 2021) at [9]; and Criminal Justice (Sentencing etc) Bill 2026 (26/22-27) (UK), cls 33–35.

²³ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.158].

²⁴ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.32] and [16.34]; and Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.50].

²⁵ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.51]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.172] and [17.49].

Where is this model currently used?	Aotearoa New Zealand Australia (New South Wales, Victoria, South Australia, Tasmania and Northern Territory) England and Wales (alongside specific offences) Republic of Ireland (alongside specific offences) Canada Northern Ireland	Australia (Western Australia and Queensland) England and Wales (alongside sentence aggravation) Republic of Ireland (alongside sentence aggravation) <i>A Bill to adopt this model (alongside sentence aggravation) is before the Parliament of Canada</i>	Scotland <i>A Bill to adopt a hybrid model is before the Northern Ireland Assembly</i>
-------------------------------------	--	--	--

CONSULTATION

5.25 In our Consultation Paper, we sought feedback on whether the legal model used to address hate crime in Aotearoa New Zealand should be changed.²⁶ We outline the responses we received below. We address the specific hate crime offence model and the Scottish hybrid model together, except where otherwise stated. Many submitters did not distinguish between the two models or made similar points in respect of both.

Overview of responses on the appropriate legal model

- 5.26 Of the 96 submissions we received in this review, 41 supported keeping the sentence aggravation model and 19 said a different legal model should be adopted. The remainder did not express a clear view.
- 5.27 As discussed in Chapter 4, 22 submitters identified problems with how the current law is working. There was no consensus among them on whether the legal model needs to change to address those problems. Ten of these submitters did not see a case for changing the legal model,²⁷ seven supported adopting a different legal model,²⁸ four did

²⁶ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper), ch 8.

²⁷ Destiny Church New Zealand; 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-Ture Tūmatanui | Public Defence Service; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Roelie van Rijs.

²⁸ Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Russell Hoban; Inclusive Aotearoa Collective Tāhono; Dr Kyle R Matthews; and Submission 43.

not express a clear view on whether the model should be changed²⁹ and one supported having no hate crime law of any kind.³⁰

- 5.28 Notably, there was no consensus among submitters from communities affected by hate crime on whether the legal model should be changed. Some of these submitters supported changing the legal model³¹ while others did not.³² Some were sceptical that creating hate crime offences is the best way to deal with hate crime and preferred to focus on addressing its causes and reducing its impacts through education, rehabilitation and community support.
- 5.29 Of the legal professional organisations, prosecutors and defence lawyers who submitted, only The Law Association of New Zealand Criminal Law Committee supported changing the legal model (to the Scottish hybrid model). However, when we later consulted that Committee on our proposed recommendations, it agreed with them and said they would address many of its concerns about the operation of the current law. Te Kāhui Ture o Aotearoa | New Zealand Law Society, The Law Association of New Zealand Public and Administrative Law Committee, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service and Luke Cunningham Clere (the Wellington Crown Solicitor) did not think there was sufficient reason to change the legal model. Te Tari Ture o te Karauna | Crown Law and members of Te Hunga Rōia Māori o Aotearoa | the Māori Law Society did not take a position, although Crown Law did question the need for, and practicalities of, hate crime offences. Among the members of our Technical Advisory Group for this review, none disagreed with our approach of retaining the sentence aggravation model.
- 5.30 The organisations and people we spoke with during consultation also had mixed views on whether the legal model should be changed. As with submitters, there was no consensus among organisations representing affected communities on whether changing the legal model would have a positive impact. Some thought creating offences would encourage Ngā Pirihimana o Aotearoa | New Zealand Police and the courts to treat hate crime more seriously and would act as a deterrent. Others were not convinced that changing the legal model was necessary, would address the underlying causes of hate crime or would lead to significant changes in how hate crime is dealt with in practice.

Advantages of changing the legal model

- 5.31 Submitters who supported changing the legal model thought this would have the following advantages:
- (a) Improved recording and monitoring of hate crime.³³ Submitters thought hate crime offences would have practical benefits by allowing identification of hate crime offenders and more systematic collection of data. Identifying offenders could assist

²⁹ Te Tari Ture o te Karauna | Crown Law; Sikh Council of New Zealand; Submission 26; and Members of Te Hunga Rōia Māori o Aotearoa.

³⁰ Dr John McDonald-Wharry.

³¹ Disabled Persons Assembly and VisAble (joint submission); Donald Beasley Institute and People First New Zealand (joint submission); Grey Power New Zealand; Inclusive Aotearoa Collective Tāhono; and Parents of Vision Impaired.

³² Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Lesbian Action for Visibility in Aotearoa; Pride in Law Otago; New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women's Rights Party.

³³ Madeline Ash; Disabled Persons Assembly and VisAble (joint submission); Dr Sanjana Hattotuwa; Submission 43; The Law Association of New Zealand Criminal Law Committee; Dr Mark Walters; and Dr Chris Wilson.

agencies in addressing their behaviour after conviction and monitoring radicalisation risk.

- (b) More consistent investigation and prosecution of hate crimes.³⁴ Submitters suggested that, if hostile motivation was an element of offences, Police and prosecutors would be more aware of it and incentivised to address it in investigations and prosecutions.
 - (c) Denunciation and recognition of harm.³⁵ Submitters thought changing the legal model would reassure communities, provide accountability for harm suffered and send a message that hate crime is not tolerated by the public. Some thought this would also help to encourage reporting of hate crimes.
 - (d) Fairness to the defendant.³⁶ One submitter suggested changing the legal model would provide clarity to a defendant about the nature of the offending of which they are accused, since the prosecution would be required to prove hostile motivation at trial.
- 5.32 Submitters who favoured the specific hate crime offence model (five submitters),³⁷ those who favoured the Scottish hybrid model (five submitters)³⁸ and those who did not express a clear preference between the two (nine submitters)³⁹ all gave similar reasons.
- 5.33 Some submitters and people we spoke with were not convinced about these advantages. For example, the Public Defence Service and Luke Cunningham Clere were sceptical that a different model would make much difference to a person's choice to report hate crime or Police's inclination to investigate and prosecute it. They pointed out that low reporting rates are not limited to hate crimes and that low reporting is related to a perception that the behaviour being complained about is trivial and Police will not be interested. They questioned if those attitudes would change with a different model in place.
- 5.34 The Public Defence Service also questioned whether an alternative model would be any fairer to defendants than the sentence aggravation model. It noted that section 24 of the Sentencing Act already requires the prosecution to prove any disputed fact it relies on at sentencing beyond reasonable doubt.

Disadvantages of changing the legal model

- 5.35 Some submitters highlighted potential disadvantages of the alternative legal models. They said changing the legal model would have several effects:

³⁴ Madeline Ash; 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.

³⁵ Madeline Ash; Dr Sanjana Hattotuwa; Inclusive Aotearoa Collective Tāhono; Murray Stirling; and Dr Chris Wilson.

³⁶ The Law Association of New Zealand Criminal Law Committee.

³⁷ Dr Sanjana Hattotuwa; Russell Hoban; Inclusive Aotearoa Collective Tāhono; Parents of Vision Impaired; and Murray Stirling.

³⁸ 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.

³⁹ Madeline Ash; 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.

- (a) Increase the complexity and cost of court proceedings.⁴⁰ Some submitters, including Crown Law and Luke Cunningham Clere, were concerned that making hostility an element of offences would place a significant additional burden on the prosecution at trial and increase trial time spent resolving evidential issues.
- (b) Lead to inconsistent enforcement of the law.⁴¹ Both Crown Law and Luke Cunningham Clere thought the prosecution might prefer to charge defendants with the base offence (that is, the equivalent offence without the hostility element) in some cases to avoid the increased complexity and cost referred to above.
- (c) Erode rights to freedom of expression and thought.⁴² Submitters expressed concern that making hostile motivation an element of an offence could have a chilling effect on the free expression of opinions and punish people for their thoughts and beliefs. Submitters were also concerned that enforcement based on a subjective assessment of a person's motives could be (or at least be perceived to be) selective and unfair as it could be influenced by the ideological biases of decision-makers. They said this would worsen, rather than improve, social cohesion.
- (d) Exacerbate justice system inequities.⁴³ Submitters said it is likely offences would be disproportionately enforced against minorities, lower socio-economic groups and Māori. This would be particularly problematic if higher maximum penalties were attached to the offences.
- (e) Have a detrimental impact on victims. One submitter suggested the evidential requirements to prove hostile motivation at trial would increase the burden on victims, which could lead to fewer offences being reported or successfully prosecuted.⁴⁴ This concern was shared by one of the organisations we spoke with during consultation (which did not make a submission).

Reasons to keep the sentence aggravation model

5.36 These were the main reasons submitters gave for keeping the sentence aggravation model:

- (a) The sentence aggravation model is either a sufficient or the preferable way to address hate crime in the law.⁴⁵

⁴⁰ Dr David Bromell; Te Tari Ture o te Karauna | Crown Law; Dr David Harvey; Luke Cunningham Clere; Maxim Institute; New Zealand Federation of Business and Professional Women; New Zealand Jewish Council; Tim O'Sullivan; Pride in Law Otago; Submission 72; and The Law Association of New Zealand Criminal Law Committee.

⁴¹ Te Tari Ture o te Karauna | Crown Law; Luke Cunningham Clere; and New Zealand Jewish Council.

⁴² Kevin Bird; Dr David Bromell; Trevor Dance; Destiny Church New Zealand; 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-Ture 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.

⁴³ Annette Sykes & Co; Te Kāhui Ture o Aotearoa | New Zealand Law Society; a member of Te Hunga Rōia Māori o Aotearoa; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

⁴⁴ New Zealand Federation of Business and Professional Women.

⁴⁵ George Balani; Kevin Bird; Dr David Bromell; Destiny Church New Zealand; 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; Submission 90; Roelie van Rijs; Peter Williamson; Women's Rights Party; and Rod Young.

- (b) Any issues with how the law is working can be addressed through changes to practice and procedure or amendments to the existing law.⁴⁶
 - (c) No compelling reasons have been identified for changing the legal model.⁴⁷
 - (d) The current law is generally working well.⁴⁸
 - (e) Changing the legal model would not solve the problems with how hate crime is dealt with.⁴⁹
 - (f) Harsher penalties will not address the underlying causes of hate crime.⁵⁰ Resources are better spent on prevention, rehabilitation and victim support.
 - (g) More information is needed about how hate crime is being dealt with throughout the justice process to assess how the current law is working.⁵¹ Changes to allow better data collection should occur first before any changes are made to the legal model.
- 5.37 Some submitters identified specific advantages of the sentence aggravation model compared to the other models considered. They said the sentence aggravation model:
- (a) is more flexible than alternative approaches;⁵²
 - (b) allows hostile motivation to be considered in a way that protects individual rights (such as the right to freedom of expression);⁵³
 - (c) can apply to any offence;⁵⁴
 - (d) satisfies the reasons to treat hate crimes differently from other crimes;⁵⁵ and
 - (e) 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 crimes.⁵⁶

⁴⁶ 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.

⁴⁷ George Balani; Dr David Bromell; Destiny Church New Zealand; Family First; and Dr David Harvey.

⁴⁸ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; and Submission 57.

⁴⁹ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Lesbian Action for Visibility in Aotearoa.

⁵⁰ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); Pride in Law Otago; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

⁵¹ Te Kāhui Ture o Aotearoa | New Zealand Law Society.

⁵² Free Speech Union; Maxim Institute; Whaikaha | Ministry of Disabled People; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Pride in Law Otago.

⁵³ Free Speech Union; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Free Speech Union; and Submission 63.

⁵⁴ Maxim Institute; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

⁵⁵ Maxim Institute.

⁵⁶ New Zealand Federation of Business and Professional Women.

ADDRESSING THE PROBLEMS WITH THE CURRENT LAW

- 5.38 In Chapter 4, we identified the following problems with the current law relating to hate crime in Aotearoa New Zealand:
- (a) It does not require the courts to communicate clearly to the public that an offence was a hate crime and that this makes it more serious. This means hate crimes may not be consistently denounced.
 - (b) It does not provide a mechanism for systematically documenting court findings that an offence was motivated by hostility.
 - (c) It does not provide a mechanism to ensure the courts are aware that the hostility aggravating factor may apply to an offence and consider it at appropriate points in a proceeding.
- 5.39 In this section, we discuss whether these problems can be addressed by making changes to the sentence aggravation model or whether a change in the legal model is required.
- 5.40 As noted above, some submitters thought that adopting one of the alternative legal models would support systematic recording of information about hate crime cases and strengthen denunciation. The Law Commission of England and Wales and the Organization for Security and Co-operation in Europe also suggest that hate crime offences:
- (a) facilitate recording and monitoring of hate crimes;⁵⁷
 - (b) have a strong symbolic function in denouncing hate crime;⁵⁸
 - (c) fairly label offending as a hate crime at charge and conviction and on the offender's criminal record;⁵⁹ and
 - (d) may have a general deterrent effect by helping to change public attitudes over time.⁶⁰
- 5.41 As we explain below, we agree that, compared to current law and practice, either of the alternative legal models would provide more effective mechanisms to support the recording and denunciation of hate crime in cases where a person is charged with and convicted of a hate crime offence. They would also reduce the risk of hostile motivation being overlooked at bail or sentencing hearings in those cases. However, we do not consider changing the legal model is necessary to achieve those outcomes.
- 5.42 More fundamentally, our analysis suggests that any benefits of the alternative legal models would be limited in practice. This is because it is unlikely that hate crime offenders would be consistently charged with or convicted of hate crime offences under either

⁵⁷ Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 42.

⁵⁸ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.65]–[4.88]; Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.23]; and Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 42.

⁵⁹ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.139]–[4.147]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.23].

⁶⁰ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.99]–[4.100].

alternative model. We discuss this issue first, since it affects our analysis of how the different legal models would address the problems with the current law.

Inconsistent use of hate crime offences would limit their benefits

- 5.43 As we explain below, feedback received in this review and overseas experience indicate that, under either alternative legal model:
- (a) prosecutors are unlikely to consistently charge hostility-motivated offending as a hate crime offence; and
 - (b) where a person is charged with a hate crime offence, juries may be reluctant to convict them even if the evidence supports it.
- 5.44 These factors limit the extent to which the alternative models would address the problems with the current law.

Charging decisions

- 5.45 The feedback we received from prosecutors and experts suggests prosecutors would be unlikely to consistently charge hostility-motivated offending as a hate crime offence under either alternative model.
- 5.46 Crown Law and Luke Cunningham Clere indicated in their submissions that, in some cases, prosecutors would be likely to charge a person with the base offence rather than the hate crime offence because it would be more straightforward to prove. If a defendant was charged with a hate crime offence, an additional hostility element would need to be proved at trial (if the defendant pleaded not guilty). Further evidence may need to be called and pre-trial hearings may be required to resolve evidential issues — for example, whether a defendant's previous consistent statements or evidence of previous offending can be admitted showing they have a history of hostility towards the relevant group of people.
- 5.47 Although hostile motivation also needs to be proved under the sentence aggravation model, in practice, evidential issues only arise if the defence challenges a fact asserted by the prosecutor at sentencing. We understand this occurs relatively infrequently.
- 5.48 Relatedly, experience in other jurisdictions suggests defendants are less likely to plead guilty if hostile motivation is an element of the offence.⁶¹ This may also impact charging decisions or lead to plea arrangements, where the prosecutor agrees to file a lesser charge (in this context, the base offence) if the defendant will plead guilty.⁶² This risk is more pronounced under the specific hate crime offence model, since the offences carry a higher maximum penalty. However, to a lesser extent, defendants could also be less likely to plead guilty under the Scottish hybrid model if conviction for a hate crime offence

⁶¹ See for example Mark Walters and others *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, October 2017) at 73, referring to a 2002 Home Office study that found racially aggravated offences were frequently contested, with offenders fearing the racist label and enhanced penalty: Elizabeth Burney and Gerry Rose *Racist Offences: How is the Law Working?* (Home Office Research Study 244, 2002) at 91.

⁶² Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.178]–[4.180]; Abenaa Owusu-Bempah, Mark Austin Walters and Susann Wiedlitzka “Racially and Religiously Aggravated Offences: “God’s gift to defence”?” (Sussex Research Online, 2019) at 10–11; Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 42–43; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.24].

is seen as carrying increased public stigma compared to the application of a hostility aggravating factor at sentencing.

- 5.49 While prosecutorial guidance could encourage prosecutors to charge people with hate crime offences where they are available, that may not always be the best outcome for victims. Victims may prefer not to give evidence (and be cross-examined on it) at a trial if that can be avoided by securing a guilty plea. They may also not wish to have court proceedings drawn out. Additionally, from a wider justice system perspective, the increased cost and delay associated with a trial may be difficult to justify in less-serious cases. The *Solicitor-General's Prosecution Guidelines* recognise that plea arrangements can be beneficial for these reasons.⁶³ There may, therefore, be good reasons for a prosecutor to enter a plea arrangement, with the result that the defendant is only charged with the base offence.
- 5.50 There was general agreement among the members of our Technical Advisory Group that hate crime offences would be more difficult to prove and more strongly defended and that this would be likely to affect charging decisions. Some members suggested prosecutors would be likely to charge defendants with hate crime offences, as opposed to the base offence, only if those offences carried a higher maximum penalty and the higher penalty was considered necessary in the circumstances of the case to reflect the seriousness of the offending. Higher maximum penalties would only apply under the specific hate crime offence model. As the Law Commission of England and Wales observed, if a hate crime offence has the same maximum penalty as the base offence (as under the Scottish hybrid model), it is even more difficult to justify the increased time and resources required to prove hostile motivation at trial.⁶⁴
- 5.51 Under the current sentence aggravation model, it is possible that the defendant might agree to plead guilty only if evidence of hostile motivation is removed from the summary of facts (with the result that the aggravating factor is not applied at sentencing). We found no evidence of that occurring, although it would not necessarily be clear from the information we have access to. There is less incentive for the defendant to challenge evidence of hostility under the sentence aggravation model compared to the other models, since it does not change the maximum penalty for the offence and is not recorded on the offender's conviction history report produced by Te Tāhū o te Ture | Ministry of Justice (which may, for example, affect employment opportunities).⁶⁵ Additionally, the *Solicitor-General's Prosecution Guidelines* state that, in entering plea arrangements, prosecutors should not agree to withhold from the summary of facts any admissible facts that would be relevant and material to sentencing.⁶⁶

⁶³ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General's Prosecution Guidelines: Decisions to prosecute* (2024) at [58].

⁶⁴ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.51]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.172] and [17.49].

⁶⁵ In Chapter 6, we recommend that the application of s 9(1)(h) to an offence be recorded on the permanent court record and flagged for the courts in later cases. As we explain in that chapter, that is unlikely to have a significant impact on the defendant's willingness to plead guilty compared to the current law. We also explain in Chapter 6 what a conviction history report is and how it differs from the criminal records used by the courts.

⁶⁶ Te Tari Ture o te Karauna | Crown Law *The Solicitor-General's Prosecution Guidelines: Decisions to prosecute* (2024) at [70.1].

Juror reluctance to convict

- 5.52 In England and Wales, research suggests that juries are reluctant to convict defendants of specific hate crime offences because they do not wish to ‘label’ the defendant (as, for example, a racist).⁶⁷ Hostile motivation would go unrecognised if a defendant was charged with a hate crime offence but acquitted of it for that reason. While the defendant could still be convicted of the base offence in the alternative, as noted above, the hostility aggravating factor could not then be relied on at sentencing. A similar risk is likely to arise under the Scottish hybrid model, since it also requires proof of hostile motivation at trial and formal conviction of the defendant for a hate crime.
- 5.53 This risk does not arise under the sentence aggravation model because the application of the aggravating factor is only considered by the sentencing judge after conviction. We found no evidence that judges are reluctant to apply the aggravating factor for fear of labelling the offender.

Denouncing hate crime

- 5.54 In Chapter 4, we explained that, under the current law, the courts are not required to communicate clearly to the public that an offence was a hate crime. This may mean hostile motivation is not consistently denounced.
- 5.55 Changing the legal model, and the publicity around that reform process, could perform a symbolic function and signal to the public that the Government takes hate crime seriously. As the Royal Commission suggested, this could also have a general deterrent effect by influencing societal attitudes over time.⁶⁸ These benefits may be stronger in relation to the specific hate crime offence model, since it sets higher maximum penalties for hostility-motivated offending.
- 5.56 However, as explained in Chapter 3, the denunciatory effect of enacting hate crime law is a one-off occurrence. Most members of the public do not read legislation and so the existence of hate crime laws alone is unlikely to have a significant continuing effect on the public consciousness. For hate crime laws to have an ongoing denunciatory effect, the application of the law in particular cases (and associated publicity) is therefore required.
- 5.57 If hate crime offences were enacted, where they are used, they would more strongly denounce hate crimes compared to the current law. Under either alternative model, hate crimes would be clearly and consistently labelled as such at both charge and conviction. This is also likely to encourage sentencing judges to squarely address the defendant’s hostile motivation in sentencing decisions.
- 5.58 In practice, however, the denunciatory effect of hate crime offences would be limited. As explained above, defendants are unlikely to be consistently charged with and convicted

⁶⁷ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.175] and [5.19]; and Abenaa Owusu-Bempah, Mark Austin Walters and Susann Wiedlitzka “Racially and Religiously Aggravated Offences: “God’s gift to defence”?” (Sussex Research Online, 2019) at 21–23.

⁶⁸ William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 704; and William Young and Jacqui Caine *Hate speech and hate crime related legislation* (Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, 26 November 2020) at 16.

- of hate crime offences. In cases where the defendant was charged with or convicted of the base offence instead, their hostility would not be denounced at all.⁶⁹
- 5.59 Sentencing already provides an appropriate mechanism for denouncing hate crime. Denouncing offending is one of the purposes of sentencing set out in the Sentencing Act.⁷⁰ However, denunciation depends on judges making it clear at sentencing that the offence was motivated by hostility and that this makes the offence more serious. While this already occurs in some cases,⁷¹ as explained in Chapter 4, the current law does not contain any structural mechanisms to ensure it happens consistently.
- 5.60 This is not a fundamental problem with the sentence aggravation model. In Chapter 7, we recommend an amendment to the Sentencing Act to require the courts to state if an offence was motivated by hostility when delivering a sentencing decision. This would be supported by other recommendations (which we discuss in Chapter 6) to flag potential hate crime cases in the courts and to require the courts to make an entry on the permanent court record when section 9(1)(h) of the Sentencing Act applies. Alongside judicial training, these recommendations will draw judicial attention to the aggravating factor, the need to make a clear finding on its application and the need to strongly denounce hostile motivation in sentencing decisions. The law reform process to implement these changes would also have a symbolic effect, signalling to the public that the Government views hate crime as a serious issue.
- 5.61 Some organisations we spoke with during consultation thought that sentencing occurs too late in the justice process and that a prosecution for a hate crime offence would show the justice system treats hate crime seriously. Charging a person with a hate crime offence could send a stronger message of support to the victim and the affected community earlier in the process. However, this benefit is offset by the likelihood that, in practice, hate crime offences (where used) would result in more contested trials and longer case resolution times. There is also a real risk that defendants would only be charged with or convicted of the base offence and hostile motivation would not be taken into account at all. We do not consider that would improve the experience of victims or send the right message to affected communities.
- 5.62 Accordingly, changing the legal model is not required to improve denunciation of hate crime. Nor would it do so in a comprehensive way. The better approach is to reform the current law to encourage consistent denunciation of hate crimes at sentencing.

⁶⁹ Even if the hostility aggravating factor was retained alongside hate crime offences, it could not be relied on in cases where the defendant could have been charged with a hate crime offence but was not or where the jury acquitted the defendant of a hate crime offence. A sentencing judge cannot sentence an offender as if they committed a different offence with a different mental element (in this context, hostile motivation) of which they were not convicted: *R v Daley* [2025] NZHC 3150 at [40]–[43]; and *Paraha v New Zealand Police* [2017] NZHC 1887 at [15]–[19]. Where an offender has been acquitted of an offence by a jury, the sentencing judge cannot reach a view of the facts that is inconsistent with that verdict: *Rodgers v R* [2018] NZHC 1800 at [28]–[31].

⁷⁰ Sentencing Act, s 7(1)(e).

⁷¹ See for example *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [156]; and *Police v Kelland* [2024] NZDC 17908 at [6]–[13]. The public is often made aware of the courts' denunciation of hostility through media reporting: see for example Rob Kidd "Violent bus hub attack a 'hate crime'" *Otago Daily Times* (online ed, Dunedin, 31 July 2024); Leighton Keith "Angry man who used racist slur during hate crime had previously bashed old man at swimming pool" *The New Zealand Herald* (online ed, Auckland, 19 May 2022); and Chelsea Boyle "Hate crime: More jail time for Fraser Milne who caused horrific crash in racist road rage attack" *The New Zealand Herald* (online ed, Auckland, 1 May 2020).

Systematic recording of hate crime

- 5.63 In Chapter 4, we explained that, outside of sentencing decisions, the current law does not provide a mechanism for systematically documenting court findings that an offence was motivated by hostility. This limits the ability of Police, the courts and Ara Poutama Aotearoa | Department of Corrections to deal with the offender appropriately in future. It also makes it difficult to assess how the justice system is responding to hate crime and to develop appropriate laws and policies to improve that response if required.
- 5.64 Under either alternative legal model, the use of hate crime offences would address this issue up to a point. The fact that the defendant was charged with or convicted of a hostility-motivated offence would automatically form part of the official record. If, however, the defendant was charged with or convicted of the base offence instead, the offending would not be recorded as a hate crime even if there was evidence of hostile motivation.
- 5.65 Under the approach to specific hate crime offences in England and Wales, which the Royal Commission recommended adopting in Aotearoa New Zealand, recording advantages would be further limited by the comparatively confined scope of the offences. Under that approach, only listed offence types are covered (for example, assaults or property damage). A maximum penalty is specified for each offence separately. In cases where the offence charged does not have a corresponding hate crime offence, hostile motivation is instead addressed at sentencing through the application of an aggravating factor. This means the offences do not ensure consistent recording of all offending that the courts find to be motivated by hostility. A separate mechanism is needed to record cases that are dealt with through sentence aggravation. In England and Wales, hate crime prosecutions and case outcomes are recorded through manual application of a hate crime flag to ensure all relevant offending (including that addressed through sentence aggravation) is captured.⁷² The Law Commission of England and Wales observed that recording sentence aggravations has “further narrowed the distinction” between the sentence aggravation and specific hate crime offence models “as far as recognition and labelling is concerned”.⁷³
- 5.66 As the England and Wales approach demonstrates, there is no reason in principle that better recording practices cannot be built into the sentence aggravation model. This would be more effective than changing the legal model, since it would capture more cases of hostility-motivated offending. In later chapters, we recommend changes to the current law and associated processes to achieve this. In Chapter 6, we recommend requiring the courts to record the application of the hostility aggravating factor on the permanent court record and to share that information with Police and Corrections. In Chapter 9, we recommend that Police and the Ministry of Justice publish data on hate crime annually.
- 5.67 Reforms of this kind would ensure the courts systematically record information about the application of the hostility aggravating factor in an accessible way. Therefore, we do not consider inadequate recording of information about hate crime cases to be a fundamental problem with the sentence aggravation model. It can be resolved without changing the legal model.

⁷² Crown Prosecution Service *Hate Crime Report 2018–19* (October 2019) at 23.

⁷³ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.53].

Identifying hostile motivation as an issue in court proceedings

- 5.68 In Chapter 4, we explained that there are no structural mechanisms to ensure hostile motivation is consistently identified as an issue in relevant cases. This creates a risk that the hostility aggravating factor may not be considered by the courts in appropriate cases or at all relevant points in a proceeding.
- 5.69 Adopting either of the alternative legal models would help to ensure hostile motivation is considered by the court in cases where the defendant has been charged with a hate crime offence. That is because hostility is an element of the offence and would be clearly labelled as part of the charge. As we have explained, however, our analysis suggests prosecutors are unlikely to consistently charge defendants with hate crime offences in relevant cases under either legal model. Where such a charge was available but not used, hostility would not be considered by the court at all.
- 5.70 Additionally, as also discussed above, under the approach to specific hate crime offences in England and Wales, the scope of the offences is limited. In cases where a specific offence does not apply and the aggravating factor is relied on instead, other mechanisms would be needed to ensure hostility is taken into account at sentencing.
- 5.71 Some inconsistencies will always occur in practice regardless of the legal model, since individual police officers, prosecutors and judges will not always treat every case identically. Under the sentence aggravation model, these individuals are relied on to identify that hostile motivation is an issue and to ensure it is addressed at relevant points in the proceeding. Under the alternative models, police officers and prosecutors would still need to identify that hostility is an issue and decide to charge the defendant with a hate crime offence (having regard to the additional considerations around charging decisions discussed earlier).
- 5.72 Accordingly, we do not consider that the risk of inconsistencies in prosecutorial and judicial practice is a problem that can be attributed to the sentence aggravation model in particular. Changing the legal model would assist in some ways but would not address the problem entirely. Some offending that is motivated by hostility, and may currently be considered under the aggravating factor, would not be treated as a hate crime at all. It is therefore preferable to make changes within the current model to alert the courts when hostile motivation may be an issue.
- 5.73 In Part 3 of this Report, we recommend reforms to the current legal model to prompt prosecutors and judges to consider the application of the aggravating factor where it is relevant. The court hate crime flag we recommend in Chapter 6 would prompt the courts to consider whether the hostility aggravating factor may apply at appropriate points in a proceeding, based on information provided by the investigating police officer when charges are laid. In Chapter 9, we make recommendations to ensure that Police, prosecutors and judges are informed of the new court flag process. Taken together, these recommendations would encourage consideration of section 9(1)(h) in appropriate cases.

OTHER DISADVANTAGES OF THE ALTERNATIVE MODELS

- 5.74 We conclude that it is neither necessary nor desirable to change the legal model to address the problems with the current law. Those problems can be addressed by making changes to the law within the current sentence aggravation model. Moreover, the

alternative legal models considered would not address the problems with the current law in a comprehensive way.

5.75 We have also identified some disadvantages of changing the model. Some of these have already been referred to above. To summarise those, making hostile motivation an element of offences (under either alternative model) is likely to:

- (a) increase the cost and complexity of hate crime proceedings and the time taken to resolve them;⁷⁴
- (b) lead to hostile motivation not being addressed at all in some cases, given the disincentives for prosecutors to charge a person with a hate crime offence and the potential reluctance of juries to convict;⁷⁵ and
- (c) increase the burden on victims, in cases where the defendant is charged with a hate crime offence, as there is more likely to be a defended trial at which the victim must give evidence of the alleged hostile motivation.⁷⁶

5.76 In this section, we discuss two other disadvantages we have identified. They are that changing the legal model would:

- (a) provide less flexibility and scope for future-proofing the law; and
- (b) reduce the overall coherence of the criminal law.

Reduced flexibility and future-proofing

5.77 The scope of the alternative legal models is more confined than the current law in two respects. This means that, under either model, some hostility-motivated offending may not be captured.

5.78 First, if the approach to specific offences in England and Wales were adopted, legislation would need to single out certain types of offences. The offences identified are generally those that are most frequently motivated by hostility such as certain public order offences and crimes against the person. While this would likely capture the bulk of hate crimes, hostile motivation can accompany a wide range of offending and some would inevitably be missed.⁷⁷ In cases that did not fall within the scope of a specific hate crime offence, prosecutors would have to rely on the aggravating factor at sentencing

⁷⁴ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.159]–[4.164]; Department of Justice (Ireland) *Learnings from Approaches to Hate Crime in Five Jurisdictions* (December 2020) at 62–63; and *Select Committee on Religious Offences in England and Wales: Volume I — Report* (HL Paper 95–1, 10 April 2003) at [118(i)] and [120].

⁷⁵ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.178]–[4.180]; Abenaa Owusu-Bempah, Mark Austin Walters and Susann Wiedlitzka “Racially and Religiously Aggravated Offences: “God’s gift to defence”?” (Sussex Research Online, 2019) at 10–11; Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 42–43; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.24].

⁷⁶ The New Zealand Federation of Business and Professional Women submitted that the evidential requirements to prove hostile motivation at trial would increase the burden on victims and could lead to fewer offences being reported or successfully prosecuted. An organisation we met with during consultation raised a similar concern.

⁷⁷ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [9.32]. By way of example, in one English case, the defendant rang the police and racially abused the call handler. He pleaded guilty to the offence of sending by public communication network an offensive message (Communications Act 2003 (UK), s 127(1)), which does not have a corresponding hate crime offence. A sentence uplift was applied at sentencing to take account of the racial hostility. See CPS Yorkshire and Humberside “Hate crime sentence uplift examples: Cases finalised between April to June 2021” <www.chcpcic.org.uk> at [3].

(assuming it was retained).⁷⁸ These cases would therefore be treated differently — there would be no increased maximum penalty and the hostility would not form part of the offence. This could send the wrong message to the public and affected communities. It may suggest that hate crimes involving certain types of offences are not taken as seriously as other hate crimes.

- 5.79 While the sentence aggravation model could be retained alongside specific offences to address the issue, there would still be disparity in the treatment of different hate crimes. Another alternative would be to adopt the approach in the Canadian Bill but, as explained earlier, that has its own disadvantages.
- 5.80 Second, both alternative models require specification of a closed list of protected characteristics, for reasons already discussed. If new groups of people outside the scope of that list became the target of hate crimes in future, legislative amendment would be needed to bring them within it. Until that occurred, offending against them would either be dealt with under the aggravating factor (if retained) or not treated as a hate crime at all. The chance of this occurring could be reduced by making the list of characteristics relatively extensive but it would not be eliminated entirely. By contrast, as some submitters noted, the open list of characteristics in section 9(1)(h) provides flexibility to recognise additional groups.⁷⁹

Reduced coherence of the criminal law

- 5.81 Making hostile motivation an element of offences (under either alternative model) would also reduce the overall coherence of the criminal law. There are two reasons for this.
- 5.82 First, it would elevate hostility above other aggravating factors that are only considered at sentencing. That may lead to hostile motivation being given disproportionate weight in some cases.⁸⁰ Although hate crime is, in general, more serious than equivalent non-hate crime and requires additional denunciation, other aggravating factors also increase the seriousness of the offence. Which of these factors is most significant will depend on the circumstances of the case. The sentence aggravation model allows the sentencing judge to consider all relevant factors together when assessing the seriousness of the offence and to reach a sentence starting point that appropriately holds the offender to account.
- 5.83 Second, there are good reasons to limit the number of offences on the statute book that are overly specific or overlap with more generic offences. Difficulties with inconsistent charging decisions have been observed in Aotearoa New Zealand in relation to offences that cover specific circumstances or types of victims and overlap with generic offences.⁸¹

⁷⁸ In its 2021 report, the Law Commission of England and Wales said approximately half of hate crime prosecutions there are charged as aggravated offences, while the remainder are dealt with through the application of the aggravating factor: *Hate crime laws: Final report* (R402, 2021) at [8.17]. This is, however, in part due to the narrow list of protected characteristics that were covered by the aggravated offence provisions until amendments in 2026 (see Crime and Policing Act 2026 (UK), s 145), as well as the limited offences to which they apply.

⁷⁹ 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. We discuss the advantages of an open list more fully in Chapter 8.

⁸⁰ See similarly the discussion in Te Aka Matua o te Ture | Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009) at [2.10] and [3.4].

⁸¹ Te Aka Matua o te Ture | Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009) at [3.4] (referring to victim-specific assault offences in the Crimes Act 1961 such as male assaults female).

As Te Aka Matua o te Ture | Law Commission explained in its review of *Maximum Penalties*:⁸²

Offences in New Zealand tend to be broadly defined, with widely varying degrees of seriousness encapsulated within one offence category. That is desirable as a means of ensuring that there are not unnecessary pleas of not guilty and defended trials because of denials or disputes about secondary matters that do not bear on core culpability and ought to be addressed at sentencing.

- 5.84 In our view, hostile motivation properly falls into the category of a secondary matter that ought to be addressed at sentencing. It affects the seriousness of an offence but does not alter whether an offence has been committed and will not necessarily warrant a substantially higher penalty (depending on the significance of the factor in the particular case). Other kinds of motivation are treated as aggravating factors at sentencing.⁸³
- 5.85 There is a risk that introducing hate crime offences would encourage the creation of further narrowly defined offences in response to every issue of public concern. This could lead to a patchwork of overlapping offences without any logical or coherent structure, which would be detrimental to the clarity of the criminal law as a whole.⁸⁴

OTHER POTENTIAL ADVANTAGES AND DISADVANTAGES WE CONSIDERED

- 5.86 Some submitters to our review suggested the alternative legal models would have other advantages or disadvantages. Similar points are raised in overseas commentary and law reform reports. For completeness, we discuss these below.

Potential advantages

- 5.87 Some submitters to this review (as outlined earlier), as well as overseas commentary and law reform reports, suggest that making hostile motivation an element of offences may:
- (a) increase reporting of hate crimes to Police (by showing hate crime is taken seriously)⁸⁵ and increase prosecutions for hostility-motivated offending;⁸⁶
 - (b) prompt investigators and prosecutors to consider hostile motivation at an early stage and ensure relevant evidence is secured;⁸⁷ and
 - (c) be fairer to the defendant, since hostility must be proven at trial.⁸⁸

⁸² Te Aka Matua o te Ture | Law Commission *Maximum Penalties for Criminal Offences* (NZLC SP21, 2013) at [2.4].

⁸³ *Drever v R* [2016] NZSC 92 at [20] (malice); *Hazeldine v Police* [2016] NZHC 1132 at [22] (desire to cause emotional harm); *Robertson v R* [2020] NZCA 218 at [6] (greed); and *R v Parker* [2021] NZHC 439 at [19] (desire to inflict violence, and to dominate and humiliate the victim).

⁸⁴ See Te Aka Matua o te Ture | Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009) at [2.10] and [3.7].

⁸⁵ Law Commission (England and Wales) *Hate Crime: The Case for Extending the Existing Offences: A Consultation Paper* (CP213, 2013) at [3.65]; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [8.17]–[8.20].

⁸⁶ Department of Justice (Ireland) *Learnings from Approaches to Hate Crime in Five Jurisdictions* (December 2020) at 62.

⁸⁷ Isabelle Becconsall-Ryan “Combatting Hate in New Zealand: The Problems with Hate Crime Legislation and the Importance of Non-Criminal Alternatives” (2022) 53 VUWLR 129 at 141–142; and Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [16.23].

⁸⁸ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.65].

- 5.88 The first two of these potential advantages have already been addressed in Chapter 4. As we explained there, issues relating to reporting, investigation and prosecution of hate crimes are primarily operational and would not be strongly influenced by law reform.
- 5.89 In relation to the final potential advantage, fairness to defendants, the Law Association Criminal Law Committee suggested in its submission that the alternative models would provide more clarity to defendants about the nature of the alleged offending. It said that, while in many cases hostile motivation may be obvious from the summary of facts, that is not a guarantee (for example, in a case where the court applies the residual category in section 9(1)(h) at sentencing). Under either of the alternative models, the prosecution would be required to specify at the outset if the offending was said to be motivated by hostility.
- 5.90 We found no basis to conclude that the current sentence aggravation model is unfair to defendants. Nor did the Public Defence Service consider that to be the case. As explained in Chapter 2, in *Te Kōti Matua | High Court* and some *Te Kōti ā Rohe | District Court* proceedings, the prosecutor must identify any applicable aggravating factors in a sentencing memorandum filed in advance of the sentencing hearing.⁸⁹ Aggravating factors are also addressed in oral submissions. There must be some evidence before the court to establish hostile motivation. If a defendant disagrees with the facts asserted by the prosecution, they are entitled to dispute them. The prosecution must then prove the disputed facts beyond reasonable doubt (the same standard of proof that applies to elements of an offence at trial).⁹⁰ This is the same approach taken to all aggravating factors — it is not unique to hostile motivation.⁹¹ It is, therefore, not unusual for sentencing judges to make findings of fact that affect the penalty imposed.⁹² We do not see this as a reason to change the legal model.
- 5.91 Further, the court hate crime flag process we recommend in Chapter 6 would enable Police to specify that hostile motivation is in issue when laying a charge. If adopted, that process would help to ensure defendants are aware that the hostility aggravating factor will be raised at sentencing.

Potential disadvantages

- 5.92 Some additional disadvantages of changing the legal model suggested by submitters and commentators are that it would:
- (a) be inconsistent with the rights to freedom of expression and thought; and

⁸⁹ Criminal Procedure Rules, r 5A.5(1)(c). This rule applies in High Court proceedings and in District Court proceedings if the Crown assumes responsibility for the proceeding prior to sentencing or the judge directs that sentencing memoranda be filed: r 5A.3.

⁹⁰ Sentencing Act, s 24(2).

⁹¹ The existence of some aggravating factors will often be obvious from evidence presented at trial or agreed in the summary of facts because they are closely connected to the elements of the offence — for example, that the offence involved actual or threatened violence: Sentencing Act, s 9(1)(a). Other aggravating factors are more likely to require proof of additional facts not necessary to support a conviction — for example, that the victim was particularly vulnerable because of a factor known to the offender or that the offender was involved in an organised criminal association: s 9(1)(g) and (hb)(ii).

⁹² This approach is not unique to Aotearoa New Zealand: see Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [4.153]–[4.154].

(b) exacerbate justice system inequities.⁹³

5.93 We discuss each of these below.

Inconsistent with rights to freedom of expression and thought

5.94 Some submitters said the alternative models would be inconsistent with the rights to freedom of expression and thought. They suggested the current sentence aggravation model is preferable because it allows hostile motivation to be considered in a way that protects individual rights.⁹⁴

5.95 Given our conclusion that the current model should be retained, it is unnecessary for us to analyse the human rights implications of the alternative models. It would be difficult to do so in the abstract, as the impact of a particular model on human rights would depend on the precise framing of the relevant legislation. We therefore reach no conclusion on this issue.

Increased justice system inequities

5.96 Some submitters suggested that, if specific hate crime offences were adopted, it is likely they would be enforced disproportionately against minorities, lower socio-economic groups and Māori. Māori, in particular, are overrepresented in the justice system generally and as alleged hate crime offenders in Police data. Under the specific hate crime offence model, to the extent that those offences were used, higher prosecution and conviction rates for Māori and other groups that are overrepresented in the justice system could lead to longer sentences and associated socio-economic impacts. The stigma of conviction for a hate crime offence (under either alternative model) may also be greater.

5.97 As discussed in Chapter 3, we do not consider this points strongly against changing the legal model. This issue is not specific to hate crime, and the existing sentence aggravation provision may already be disproportionately applied to Māori and other overrepresented groups. Additionally, as explained above, it is likely that hate crime offences would not be charged in all relevant cases, which could mean some hostility-motivated offending is not treated as a hate crime at all. Nonetheless, we acknowledge that, in cases where the offending was charged as a hate crime offence, the consequences of conviction and therefore the impact on Māori and other overrepresented groups could be more significant.

CHANGING THE LEGAL MODEL IS NEITHER NECESSARY NOR DESIRABLE

5.98 We conclude that there are no compelling reasons to change the legal model for hate crime in Aotearoa New Zealand and that there would be significant disadvantages to doing so.

5.99 First, the problems we have identified with the current law can be addressed by improving the sentence aggravation model. Second, neither of the alternative legal models has significant advantages over the sentence aggravation model. They would not effectively resolve the problems with the current law. The practical enforcement of any hate crime

⁹³ Sarah Ingles “Legislating against Hate: Why Ohio’s Hate Crime Statute, and the Sentencing Enhancements That Support It, Cannot Remedy Institutional Problems and Continued Bigotry” (2018) 46 Cap U L Rev 701 at 720 and 729–736.

⁹⁴ Free Speech Union; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Free Speech Union; and Submission 63.

offences is likely to be inconsistent, limiting their potential advantages. Changing the legal model is also likely to create new problems that would outweigh any advantages. It would:

- (a) increase the cost and complexity of hate crime proceedings and the time taken to resolve them;
- (b) lead to hostile motivation not being addressed at all in some cases;
- (c) have a detrimental impact on victims in some cases;
- (d) reduce the flexibility of the law and the extent to which it is future-proofed; and
- (e) reduce the overall coherence of the criminal law.

5.100 This means the alternative models would fail to meet the objectives of hate crime law identified in Chapter 3 — to hold hate crime offenders accountable, denounce hate crime, reduce the occurrence of hate crime and provide reassurance to victims and communities. In cases where hostile motivation is not addressed at all, none of those objectives would be met. Where hate crime offences were relied on, the increased time taken to resolve proceedings and the need for more victims to give evidence at trial could damage affected communities' trust in the justice system (and, consequently, their willingness to report hate crimes). Disparity in how different offences and victims are treated, resulting from the more limited scope of the alternative models compared to the current hostility aggravating factor, could also send the wrong message to the public, victims and affected communities.

5.101 We conclude that the sentence aggravation model is the most appropriate way to address hate crime in Aotearoa New Zealand. We do not recommend changing the model. The sentence aggravation model can fulfil the objectives of hate crime law, with some changes to address the problems discussed in Chapter 4. In considering hostile motivation as an aggravating factor, sentencing decisions are capable of:

- (a) holding the offender accountable for their hostile motivation and the harm caused by the offending by imposing a sentence that reflects the seriousness of the offence;
- (b) denouncing hate crime by communicating its seriousness to the public;
- (c) influencing societal views about what behaviour is acceptable, potentially helping to reduce occurrences of hate crime over time; and
- (d) providing reassurance to victims and affected communities by acknowledging the harm caused by the offending and showing that hate crime is not tolerated by society.

5.102 It is well accepted that sentencing can and should fulfil these kinds of functions, which are similar to the purposes of sentencing set out in the Sentencing Act.⁹⁵

5.103 In Part 3 of this Report, we make recommendations to improve how the sentence aggravation model operates. Some of the changes we recommend — such as flagging alleged hostility-motivated offences in the courts and requiring sentencing judges to record the application of the aggravating factor — will treat hostile motivation differently to other aggravating factors in some respects. That is necessary to respond to the problems we have identified with the current law and is preferable to changing the legal model. There is precedent for treating some sentencing factors differently from others

⁹⁵ Sentencing Act, s 7(1).

for recording purposes.⁹⁶ Our recommendations would not require the courts to give greater weight to the hostility aggravating factor compared to other aggravating factors. As occurs now, the significance of the factor would be assessed in the context of the case alongside all other relevant factors.

⁹⁶ Provisions in the Sentencing Act require the court to make an entry on the permanent court record if an offender has had a sentence reduction under the remorse or youth mitigating factors: Sentencing Act, ss 9D and 9N (inserted June 2025). That is because the courts are prohibited from giving an offender a sentencing reduction for these factors again in relation to later offending unless failure to do so would be manifestly unjust: ss 9B, 9C, 9L and 9M. Sentence reductions for these factors therefore need to be recorded so the courts know, when sentencing the same offender again in future, not to apply a reduction.

PART 3:

IMPROVING THE SENTENCE AGGRAVATION MODEL



CHAPTER 6

Identifying and recording hate crime in the courts

INTRODUCTION

- 6.1 In Chapter 4, we identified the following problems with the current law relating to hate crime in Aotearoa New Zealand:
- (a) It does not require the courts to communicate clearly to the public that an offence was a hate crime and that this makes it more serious. This means hate crimes may not be consistently denounced.
 - (b) It does not provide a mechanism for systematically documenting court findings that an offence was motivated by hostility.
 - (c) It does not provide a mechanism to ensure the courts are aware that the hostility aggravating factor may apply to an offence and consider it at appropriate points in a proceeding.
- 6.2 In this chapter, we recommend introducing a court hate crime flag to help address those problems. This flag would have the following effects:
- (a) Enable Ngā Pirihimana o Aotearoa | New Zealand Police to indicate that section 9(1)(h) of the Sentencing Act 2002 may apply to an alleged offence when filing charges against a defendant. This would be flagged on the court file for the judge to consider at relevant points in the proceeding (such as at bail and sentencing hearings).
 - (b) Require sentencing judges to formally record if section 9(1)(h) is found to apply to an offence at sentencing. These records would assist the courts in later cases and enable monitoring of how hate crimes are being addressed in the court system. The requirement would also encourage judges to make a clear finding on whether the aggravating factor applies, which would support clearer denunciation of hate crime.
- 6.3 We also recommend that the courts share information about alleged or proven hostility with Police and Ara Poutama Aotearoa | Department of Corrections. This would have the following effects:
- (a) Help to ensure Police and prosecutors are aware if a defendant or suspect has previously committed hostility-motivated offending. This could inform investigations, charging decisions, submissions to the court at bail and sentencing hearings and consideration of firearm licence applications.

- (b) Alert Corrections if a person under Corrections management is alleged or confirmed to have committed hostility-motivated offending. This would assist Corrections to ensure the safety of its staff and other prisoners, provide accurate reports to the courts and Parole Board to support informed decision-making and assess the rehabilitative needs of offenders to address their risks of reoffending.
- 6.4 Finally, we recommend that the court record should also include information about the protected characteristic and group targeted by the offending, if it is feasible to record that information.
- 6.5 At the end of this chapter, we address a concern raised with us about how recording hostility in the courts would affect offenders in the future, including their employment prospects. We conclude that our recommendations in this chapter would not unfairly prejudice offenders. We also discuss whether the court flag is likely to have a significant impact on defendants' willingness to plead guilty and conclude it would not.

INTRODUCING A COURT HATE CRIME FLAG

- 6.6 In our Consultation Paper, we sought feedback on the option of introducing a hate crime flag in the court system.¹ By this, we envisaged a process under which Police would be prompted to specify whether section 9(1)(h) of the Sentencing Act is alleged to apply to an offence on the charging document filed with the court when laying a charge. The court would then be notified of any alleged hostile motivation at relevant points in a proceeding (such as at bail and sentencing hearings). If the hostile motivation was proven, the courts would be required to record it on the permanent court record. The permanent court record is a record of formal steps in proceedings,² including charges and convictions.³
- 6.7 The court flag we discuss in this chapter differs from the existing Police perceived hate crime flag referred to in Chapter 2. The Police flag records if an alleged offence reported to Police is perceived (by the victim, police officer or someone else) to be motivated by hostility. These alleged offences will not necessarily be prosecuted and, if they are, may not be treated as a hate crime in the courts. The Police hate crime flag does not indicate that Police believes there is sufficient evidence that a crime has been committed or intends to raise hostility as an issue in any prosecution. The flag is recorded in the Police National Intelligence Application and is not shared with the courts. By contrast, the proposed court hate crime flag we discuss in this chapter would identify if criminal charges before a court are alleged by Police, and ultimately found by the court, to be motivated by hostility.

Background

Explanation of key documents and systems

- 6.8 In this chapter, we refer to several IT systems and key documents used by Police and the courts.

¹ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper) at [7.23]–[7.25].

² Criminal Procedure Act 2011, s 184.

³ Criminal Procedure Rules 2012, r 7.2(7) and 7.2(20).

- 6.9 The courts' **Case Management System** is a computer application used by the courts to record information about proceedings. It can be accessed by court staff and Te Tāhū o te Ture | Ministry of Justice. As we discuss later, information about criminal proceedings entered in the courts' Case Management System can also be viewed by Police staff in the Police National Intelligence Application.
- 6.10 The Police **National Intelligence Application** is a computer application used to record information about incidents reported to Police and investigations into alleged offences. It is accessible to Police staff.
- 6.11 A **charging document** is filed with a court (usually by Police) to commence a criminal proceeding against a defendant.⁴ It specifies the offence the defendant is alleged to have committed.⁵ A separate charging document must be filed for each offence.⁶
- 6.12 There are two types of criminal conviction history reports discussed in this chapter:⁷
- (a) A **court criminal and traffic history report** is a record of a defendant's previous convictions used in court by prosecutors and judges. It can be produced by Police and court staff based on information from the Case Management System.
 - (b) A **Ministry of Justice conviction history report** is a record of a person's convictions provided on request to the person concerned or to a third party (such as a prospective employer) with the person's consent. It is produced by the Ministry of Justice Criminal Records Unit based on information from the Case Management System. It does not list convictions to which the clean slate scheme applies (except in certain situations where a full record is required).⁸

While both reports list the offences a person has been convicted of, the court criminal and traffic history report includes some additional information that does not appear in the Ministry of Justice conviction history report. For example, only the court report shows if an offence is flagged as a family violence offence (discussed below).

The family violence flag

- 6.13 Our court hate crime flag proposal is modelled in part on an existing court flag for family violence cases, although with some differences (which we discuss later in this chapter). The family violence flag was introduced to ensure consistent identification of family violence offending throughout the court process, including for the purposes of bail and sentencing decisions.⁹

⁴ Criminal Procedure Act, s 14(1). Any person can commence a proceeding: s 15.

⁵ Criminal Procedure Act, s 16(2).

⁶ Criminal Procedure Act, ss 16(1) and 17(1).

⁷ For an explanation of these two types of reports, see *Yorston v Attorney-General* [2025] NZHC 38 at [5] and [8].

⁸ See Criminal Records (Clean Slate) Act 2004, ss 14–16, which allow people to withhold information about their criminal convictions (and requires public agencies holding that information such as the Ministry of Justice to do so) if they meet certain criteria. The eligibility criteria include having no convictions in the past seven years and having never been subject to a custodial sentence: ss 4 (definition of “rehabilitation period”) and 7. There are exceptions to the clean slate scheme. It does not apply if a person is seeking certain types of employment, including in national security and law enforcement roles and roles involving care and protection of children or young people: s 19. The scheme also does not apply outside of New Zealand, so a full criminal record may need to be provided when travelling to certain countries.

⁹ Hon Amy Adams, Minister of Justice *Reform of Family Violence Law — Paper Three: Prosecuting family violence* (Cabinet paper, August 2016) at [10]–[11]; and Cabinet Minute “Reform of Family Violence Law — Paper Three: Prosecuting family violence” (22 August 2016) CAB-16-MIN-0422 at [1].

- 6.14 Section 16A of the Criminal Procedure Act 2011 provides as follows:¹⁰
- (a) A charging document may specify an offence is a family violence offence.¹¹
 - (b) The court may amend the charging document at any time after it is filed and before a verdict or decision of the court to add, confirm or remove such a specification.¹² This power is exercisable on the court's own motion or on the application of the defendant or the prosecutor.¹³ It may also be exercised by the registrar if the parties agree.¹⁴
 - (c) If the defendant is convicted, the court "may enter in the permanent court record of the proceeding a specification that the conviction is for a family violence offence" (whether or not this is specified on the charging document).¹⁵
- 6.15 Before section 16A was enacted, a court family violence flag already existed but it did not have a statutory basis. We understand from discussion with the Ministry of Justice that there used to be some inaccuracies in the use of the flag and that it has operated more effectively since legislative amendment.
- 6.16 The Ministry of Justice informed us that, in practice, the specification on the charging document is reflected in the courts' Case Management System as a family violence flag and becomes part of the permanent court record. If the charging document is amended, it remains possible for the Ministry to view earlier versions in the Case Management System. For example, if the family violence specification is removed, the Ministry can still determine that it was originally included on the charging document.
- 6.17 Under section 16A, the court is not required to make a finding as to whether an offence was a family violence offence. The initial proposal was for "a requirement for the court to direct an offence be recorded on a person's criminal record as a family violence offence, if satisfied this was the case at the point of conviction".¹⁶ However, as enacted, section 16A only provides that the court "may" make an entry on the permanent court record. In practice, the Ministry of Justice told us that the judge usually does not confirm or remove the flag, although it is sometimes removed by the registrar with the agreement of the parties. Unless the family violence specification on the charging document is challenged, it usually becomes part of the permanent court record without any positive action from a judge.

Overseas approaches to recording hostile motivation in the courts

- 6.18 We have also considered how hate crime cases are recorded in the courts in other jurisdictions. In Canada, as well as those jurisdictions in Australia and the United States of America that have hate crime sentence aggravation provisions, there does not appear to

¹⁰ Section 16A was inserted in July 2019 by s 43 of the Family Violence (Amendments) Act 2018.

¹¹ Criminal Procedure Act, s 16A(1). A family violence offence is defined as an offence against any enactment that involves family violence: s 16A(5).

¹² Section 16A(2).

¹³ Section 16A(3)(a).

¹⁴ Section 16A(3)(b).

¹⁵ Section 16A(4).

¹⁶ Hon Amy Adams, Minister of Justice *Reform of Family Violence Law — Paper Three: Prosecuting family violence* (Cabinet paper, August 2016) at [45].

be a process for recording information about hate crime prosecutions and case outcomes. The only official data on hate crimes we found in these jurisdictions relates to alleged hate crimes reported to Police.

- 6.19 In Scotland, under the Scottish hybrid model of hate crime law, prosecutors can specify that an offence was “aggravated by prejudice” when laying a charge.¹⁷ If the aggravation is proved, the judge must record the conviction in a way that shows the offence was aggravated by prejudice and the type of prejudice involved (by reference to one or more protected characteristics).¹⁸ An independent review of hate crime law in Scotland found this recording requirement was “essential” to ensure the aggravation could be taken into account in future cases.¹⁹ The review also noted that “good recording allows for the maintenance of statistics and monitoring the impact of legislation”.
- 6.20 In England and Wales, which have both specific hate crime offences and a sentence aggravation provision, sentence aggravations are now recorded on the Police National Computer. The Law Commission of England and Wales noted in 2021 that the introduction of this measure had “narrowed the distinction between the two models as far as recognition and labelling is concerned”.²⁰ The recording of sentence aggravations appears to have resulted from a recommendation by the Law Commission in 2014.²¹ In explaining that recommendation, the Law Commission reasoned:

3.91 Sentencing courts need a full picture of the punishment merited, the danger posed by the offender to the public or sections of it, and the likely response to rehabilitation. Courts and prosecutors also need accurate information on the antecedents for the purpose of bail applications and to assess the defendant’s character.

3.92 Giving the prison and probation services access to accurate information about offenders’ records where hostility aggravation findings have been made should enable them to tailor rehabilitation and education programmes. This could have the further benefit of reducing hostility-based offending.

Consultation

- 6.21 Eight submitters on our Consultation Paper supported introducing a court hate crime flag (or ‘conviction notation’, as some referred to it).²² Some said this could help to ensure hostile motivation is considered at sentencing for the relevant offence (including in pre-sentence reports) and for any subsequent offences.²³ Submitters said it could also provide more accurate data on hate crimes.²⁴

¹⁷ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 2(1)(a).

¹⁸ Section 2(2)(a).

¹⁹ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [3.60].

²⁰ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [8.53].

²¹ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [3.104].

²² Dr David Harvey; 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; Te Kāhui o Ināia Tonu Nei Charitable Trust; The Law Association of New Zealand Public and Administrative Law Committee; and Women’s Rights Party.

²³ Dr David Harvey; Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); and Te Kāhui o Ināia Tonu Nei Charitable Trust.

²⁴ The Law Association of New Zealand Public and Administrative Law Committee.

- 6.22 Additionally, the Law Association Criminal Law Committee supported ensuring that prosecutors record suspected or identified hostile motivation but did not specify in its submission how this should occur.²⁵ When we later consulted the Committee on our proposed recommendations, it supported the court flag recommendation, saying:

We consider that this approach will greatly improve the current difficulties in collecting data on hate crime, monitoring trends, allocating resources and ensuring consistency in sentencing. Additionally, the flag mechanism can support more informed decision-making at the bail stage, which was one of the areas upon which we initially expressed concern.

- 6.23 Although Luke Cunningham Clere did not clearly state that a court hate crime flag should be adopted, it said a flag would serve the symbolic function of “marking out” hate crimes without increasing the complexity of the law. It noted a flag would make it easier to identify hate crimes post-conviction and at sentencing.
- 6.24 No submitters expressly opposed the introduction of a court flag. However, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service cautioned that a hate crime flag could be misapplied. It said the existing court flag for family violence cases is not always accurately applied, with some cases being flagged that are clearly not family violence related.
- 6.25 We raised the issue of the accuracy of the family violence flag with the Ministry of Justice. The Ministry said this was an issue when the flag was implemented operationally before amendments to the Criminal Procedure Act provided a legislative basis for it. However, the Ministry considered the flag is now much more accurate. The Ministry also said, if the flag is incorrectly applied, counsel can raise that with the court and have it removed. It said this does sometimes occur.
- 6.26 We also discussed the option of creating a court hate crime flag with staff at the Ministry of Justice. They noted there would be costs involved to make the necessary IT changes and train staff to implement the flag, which could not be met within existing baselines and would require additional funding. Provided that funding is allocated, they did not identify practical difficulties with the proposal.

The need for reform

- 6.27 In Chapter 4, we discussed that hostile motivation may be relevant at various stages of a proceeding, including at bail and sentencing hearings, and in subsequent proceedings involving the same offender. We explained the current law does not ensure the courts are aware that the hostility aggravating factor may apply to an offence or that previous offending by the same offender was found to be motivated by hostility. This means there is a risk that hostility may be overlooked. We also discussed the need for consistent denunciation of hate crimes at sentencing and for better information about hate crime cases in the courts to support policy, practice and public accountability.
- 6.28 A court hate crime flag would help to address all these issues in these ways:
- (a) Help to ensure hostile motivation is consistently identified and addressed in cases where it is relevant and at all relevant stages of a proceeding. The hate crime field on the charging document would prompt Police to consider whether hostile motivation is an issue and, if it is, to ensure it is raised with the prosecutor and

²⁵ The submitter referred to a flag, but it was unclear whether they were referring to a court flag, the existing Police flag or both.

included in the summary of facts. The flag on the court file would alert the judge to consider whether the offending was motivated by hostility and to raise this with the prosecutor if it is not covered in submissions.

- (b) Encourage sentencing judges to make a clear finding on whether the aggravating factor applies at sentencing, since they would be required to record this on the permanent court record. This would help to ensure the aggravating factor is properly applied and to strengthen denunciation of hate crimes (alongside our recommendation in Chapter 7 to require judges to state if the aggravating factor applies when imposing a sentence).
- (c) Ensure the courts are properly informed in future cases involving the same offender. This would support decisions about bail and sentencing for any subsequent hostility-motivated offending by showing if there is a concerning pattern of behaviour that needs to be addressed.
- (d) Allow data to be gathered on how hate crime is dealt with in the courts. This would support future policy and operational decisions by Police and the Ministry of Justice. For example, the cases flagged as potential hate crimes on the charging document could be compared to those where the court applies section 9(1)(h) at sentencing. This would show if Police is overlooking the potential application of section 9(1)(h) at the charging stage and it is being picked up later in proceedings and indicate how often the courts disagree with the Police view that the aggravating factor applies. This could indicate whether further training or guidance on the application of the factor is required or whether further legislative clarification is needed. We also recommend in Chapter 9 that court data on section 9(1)(h) be published to support research and public confidence in the justice system. We discuss further what information should be recorded later in this chapter.

6.29 There would also be wider benefits for the effectiveness of the justice system response to hate crime if court information is shared with Police and Corrections. We discuss that later in this chapter.

Recommendation

R1

The Sentencing Act 2002 and Criminal Procedure Act 2011 should be amended to provide that:

- a. a charging document may specify that section 9(1)(h) of the Sentencing Act 2002 is alleged to apply to an offence;
- b. the court may amend the charging document at any time before sentencing to add or remove the specification; and
- c. if the court determines at sentencing that section 9(1)(h) applies to an offence, it must make an entry on the permanent court record to that effect (whether or not the charging document specifies that section 9(1)(h) is alleged to apply).

6.30 For the reasons discussed above, we recommend introducing a hate crime flag in court proceedings. In practical terms, the court flag process would involve the following:

- (a) The charging document filed by Police would include a field to specify if the prosecution alleges that section 9(1)(h) of the Sentencing Act applies to the offence.

- (b) If section 9(1)(h) is alleged to apply, the offence would be flagged as a potential hate crime in the courts' Case Management System and in the file provided to the judge dealing with the case.
 - (c) As with the family violence flag, the court could amend the charging document to add or remove the specification. This could occur, for example, if the specification was added or omitted by mistake when charges were filed. If the charging document was amended, the Case Management System flag and the file provided to the judge would also need to be updated accordingly.
 - (d) At sentencing, if the judge determined that the aggravating factor applied, the court would be required to make an entry on the permanent court record to that effect (whether or not the charging document alleged that section 9(1)(h) applied). The entry could be made by the judge directly or by a registrar at the judge's direction. The record of the judge's finding would need to be clearly communicated to any later court dealing with the offender.
- 6.31 There are several matters we wish to highlight in relation to the operation of the court flag. First, for the flag to have the desired effect, the record of the sentencing judge's finding would need to be readily available to any court dealing with the same offender in the future. We have not been prescriptive in our recommendation about how that should occur as the appropriate mechanism may vary over time (including as case management is digitised, which we discuss below) or between courts. One possible way at the current time to ensure courts are notified that an offence was found to be motivated by hostility would be to include a notation on the offender's court criminal and traffic history report.
- 6.32 Second, it is important that anyone viewing the court record after sentencing could tell both whether hostility was alleged on the charging document and whether it was confirmed by the court at sentencing. In cases where hostility was alleged but the court ultimately did not confirm the application of section 9(1)(h), there may need to be a mechanism to remove the flag or indicate for the avoidance of doubt that the provision was not applied (while ensuring the original allegation on the charging document could still be accessed). This should be investigated further prior to implementation if our recommendation is accepted.
- 6.33 Third, there would need to be a process to ensure that, if a decision on the application of section 9(1)(h) is reversed on appeal, the permanent court record and any associated records that may be relied on in future (such as the offender's criminal and traffic history report) are updated to reflect that decision.
- 6.34 Fourth, it is important that the legislation *requires* the court to record if the aggravating factor is applied at sentencing. That approach was not taken for the family violence flag, and we understand the specification on the charging document becomes part of the permanent court record by default unless the defence challenges it. However, the family violence flag simply indicates that the offender and victim were in a family relationship, which will often be clear from the facts before the court and not disputed. The application of the hostility aggravating factor involves a more complex factual determination about the offender's motivation. It would be inappropriate for an offence to be permanently flagged as hostility-motivated without the sentencing judge making an explicit finding on the matter. Mandatory recording will help to ensure there are accurate records for use in future cases and for statistical purposes.

- 6.35 Fifth, Police should be enabled (and encouraged) to identify hostile motivation on the charging document where appropriate. However, if that does not occur, the court should not be prevented from considering or applying the aggravating factor at sentencing if it is relevant, as required by section 9(1)(h). We anticipate that, if a sentencing judge considered the hostility aggravating factor may be relevant, they would want to ensure the defendant has adequate opportunity to challenge the facts that would be relied on to establish hostile motivation²⁶ and to make submissions on the matter.
- 6.36 Finally, the requirement for the court to flag the application of the aggravating factor on the court record would assist appellate courts by making the sentencing judge's finding clear.²⁷ In this way, it could support appeals on the substantive question of whether the aggravating factor should have been applied in the circumstances. We do not, however, anticipate a significant increase in the number of appeals as a result of the flag. A failure by the court to comply with the duty to record hostile motivation would not in itself be a ground for appeal. Appeals against sentence are only allowed if there is an error in the sentence imposed.²⁸ The appellate courts are concerned primarily with the appropriateness of the end sentence rather than the means by which it was reached²⁹ or compliance with requirements of the Sentencing Act that do not affect the sentence.³⁰ The correct course of action if the application of the aggravating factor is not recorded would be for the prosecution to seek a correction of the permanent court record.³¹

Legislative amendments required

- 6.37 It would be possible to introduce a court hate crime flag without any change to legislation. As noted earlier, there was a non-statutory process for identifying family violence cases before section 16A of the Criminal Procedure Act was enacted. There is also no statutory basis for recording hate crime sentence aggravations in England and Wales.
- 6.38 Nonetheless, we propose the court hate crime flag be provided for in legislation for two reasons:
- (a) As explained above, we propose that judges should be *required* to record the aggravation on the permanent court record. A statutory provision is needed to make this mandatory.
 - (b) The Ministry of Justice considers the family violence flag has operated more effectively since legislative amendment. Statutory provisions would make it clearer what Police, court staff and judges need to do to implement the flag effectively.

²⁶ Sentencing Act 2002, s 24(2).

²⁷ In Chapter 7, we also recommend requiring sentencing judges to state if the hostility aggravating factor applies to an offence when giving their reasons. If that recommendation is accepted, the application of the aggravating factor would usually be clear to an appellate court from the sentencing notes. However, we understand that sentencing notes are usually only transcribed where the offender is sentenced to imprisonment or home detention. If there is an appeal against another type of sentence, the appellate court may not have any record of the sentencing judge's remarks.

²⁸ Criminal Procedure Act, s 250(2)–(3).

²⁹ *Birch v Police* [2020] NZHC 878 at [19].

³⁰ See for example the Sentencing Act, s 9P, which provides that failure to comply with the requirements in ss 9N and 9O to record any reduction in sentence for remorse and to inform the defendant of certain matters is not in itself grounds for appeal against sentence.

³¹ Criminal Procedure Rules, r 7.1(6)–(7).

- 6.39 Our recommendation is to amend the Sentencing Act and the Criminal Procedure Act. The reason we propose amendments to two different enactments is that they deal with different stages of proceedings:
- (a) The Criminal Procedure Act addresses the filing of charging documents by prosecutors and the powers of the court in relation to charging documents.³²
 - (b) The Sentencing Act sets out the powers and duties of sentencing judges, including requirements to make entries on the permanent court record in relation to other sentencing factors.³³
- 6.40 Because of this, we consider it is appropriate to include our proposed provisions relating to charging documents in the Criminal Procedure Act and the provisions relating to recording hostile motivation at sentencing in the Sentencing Act. This differs from the approach taken for the family violence flag because that flag does not depend on a determination made at sentencing.³⁴
- 6.41 There are existing legislative provisions dealing with the permanent court record that would facilitate recording of hostile motivation. The Criminal Procedure Act requires courts conducting criminal proceedings to maintain a permanent court record of the formal steps in those proceedings.³⁵ The permanent court record is conclusive evidence of the matters recorded in it (subject to the court's power to amend it).³⁶ The Criminal Procedure Rules 2012 state that the permanent court record may be kept in electronic or hardcopy form and that entries may be made by a judicial officer or a court registrar.³⁷ The judicial officer or registrar who made an entry can also correct any errors.³⁸
- 6.42 The Criminal Procedure Rules also contain a list of information that must be recorded on the permanent court record.³⁹ This includes matters such as the offence charged, the outcome of any bail applications, pleas entered, verdicts and any judgments or orders of the court. We considered whether that list should be amended to also refer to the application of section 9(1)(h) of the Sentencing Act. However, the list does not refer to other matters the Sentencing Act requires courts to enter on the permanent court record.⁴⁰ We have been unable to determine whether that omission was intentional. In any event, a consistent approach is desirable. We therefore do not make any recommendation to amend the list in the Criminal Procedure Rules but suggest the Ministry of Justice consider it further if R1 is accepted, having regard to all the recording requirements in the Sentencing Act.

³² Criminal Procedure Act, pt 2, subpt 1.

³³ Sentencing Act, ss 9D and 9N.

³⁴ While there is now a family violence aggravating factor, it only applies where there was a protection order in place at the time of the offending: Sentencing Act, s 9(1)(ca). Other offending may still be classified as a family violence offence for the purposes of the family violence flag: Criminal Procedure Act, s 16A(5); and Family Violence Act 2018, s 9.

³⁵ Criminal Procedure Act, s 184(1).

³⁶ Section 184(3).

³⁷ Criminal Procedure Rules, r 7.1(2)–(3).

³⁸ Rule 7.1(6). If the judicial officer or registrar who made the entry is unavailable, a judge may correct the entry: r 7.1(7).

³⁹ Rule 7.2.

⁴⁰ Rule 7.2 does not refer to the requirements to record the application of the youth and remorse mitigating factors in ss 9D and 9N of the Sentencing Act.

Implementation

- 6.43 The Ministry of Justice indicated the biggest challenge to implementing the flag would be ensuring that sentencing judges record their finding as to whether the aggravating factor applies. If the flag was implemented with the current paper-based court systems still in place, the judge would need to do this manually on the physical charging document. A court registrar would then need to update the Case Management System to reflect the judge's finding. If the judge failed to record the finding, the registrar would need to go back to the judge to check the outcome. There is a risk the application of the aggravating factor would not be recorded in some cases due to human error.
- 6.44 The Ministry suggested that the digitisation of court case management could make this process easier. After digitisation, judges will be able to record decisions on a screen in real time and could be prompted or required to enter certain information (such as whether section 9(1)(h) applies to an offence) at the same time as recording the sentence. This could automatically update the Case Management System. A programme to digitise case management, Te Au Reka, is in progress, with roll-out currently scheduled to begin in Te Kōti ā Rohe | District Court and Te Kōti Matua | High Court in the second half of 2027.⁴¹ There is a moratorium on policy proposals affecting the Case Management System until that time.⁴² If our recommendation to introduce a court flag is accepted, we anticipate it would be implemented as part of or following digitisation, which should help to mitigate the risk of errors associated with a paper-based system.
- 6.45 Judges are already required to enter certain matters on the permanent court record at sentencing. The Sentencing Act requires the court to make an entry on the permanent court record if an offender has had a sentence reduction under the remorse or youth mitigating factors.⁴³ The Ministry of Justice will need to ensure the digital case management system has a process in place to capture these decisions and communicate them to any court dealing with the same offender in future. That process could also apply to the hostility aggravating factor.
- 6.46 As with any process requiring human input, there would still be some risk of inaccuracies — for example, if Police made an error on the charging document or a judge's decision was not accurately recorded. However, this risk and its associated impacts can be minimised:
- (a) As with the family violence flag, if the hate crime flag was applied in error, it could be removed with the agreement of the parties before the sentencing hearing.
 - (b) The flag would not be treated as determinative at the pre-sentence stage. It would simply be a signal to the judge to consider whether hostile motivation may be an issue. If the flag was applied erroneously, that would likely be obvious to the judge from the facts and the parties' submissions or could be resolved at the sentencing hearing.

⁴¹ Hon Paul Goldsmith and Hon Nicole McKee "Courts' caseload management going digital" (16 April 2025) <beehive.govt.nz>.

⁴² Cabinet Minute "Digital Case Management (Te Au Reka): Change Approach" (12 November 2025) SOU-25-MIN-0161 at [4]–[5].

⁴³ Sentencing Act, ss 9D and 9N.

- (c) Unlike the family violence flag, judges would be *required* to make an entry on the permanent court record if they were satisfied the hostility aggravating factor applied. If no such finding was made, the permanent court record would reflect that (as discussed earlier). After sentencing, the record would only indicate that an offence was motivated by hostility if the court had made an explicit finding to that effect.
 - (d) If any error was made on the permanent court record, it could be corrected by the judge or registrar as already provided for in the Criminal Procedure Rules.⁴⁴
- 6.47 It will be important for Police to identify offences to which the aggravating factor is alleged to apply on the charging document. We understand that would be done by the investigating officer, who would also need to ensure evidence of the hostile motivation is gathered and provided to the prosecutor. As discussed in Chapter 4, the Police Hate Crime Quality Assurance Team currently plays an important role in ensuring potential hate crime cases have been identified and recorded in the Police National Intelligence Application using the existing Police perceived hate crime flag.⁴⁵ The Police flag would feed into the investigating officer's decision to note the potential application of section 9(1)(h) on the charging document and inform the prosecutor.
- 6.48 There has been discussion within Police about implementing a section 9(1)(h) flag in the Police National Intelligence Application. This would be applied by the investigating officer if, at the point of deciding to prosecute, they consider the aggravating factor applies. We consider such a flag would be valuable and we support its implementation if technically feasible. Ideally, applying the Police section 9(1)(h) flag would automatically populate the charging document that goes to the court. This would help to ensure the court flag is applied to all relevant offences.
- 6.49 Training and guidance for Police, prosecutors and judges will be crucial to ensure the court flag is implemented effectively. We make recommendations about that in Chapter 9. Training will also be required for court staff on how to apply the flag, and defence counsel may benefit from training through legal professional bodies.
- 6.50 As noted earlier, the Ministry of Justice indicated there would be some costs associated with implementing the flag (both in terms of system changes and court staff time) and that additional funding would be required to meet those costs. There would also be some impact on judicial time, since judges would be required to record the application of the aggravating factor. However, we expect that section 9(1)(h) would only be relevant in a small proportion of cases and the additional time involved in entering the flag on the court record would not be substantial. We do not therefore anticipate a significant ongoing impact on judicial resourcing.

Decisions of public interest

- 6.51 As discussed in Chapter 4, most District Court decisions (including sentencing notes) are not published online. This makes it difficult to assess how the courts are dealing with hate crime cases. Many potential hate crime cases involve lower-level offences and are heard in the District Court.

⁴⁴ Criminal Procedure Rules, r 7.1(6)–(7).

⁴⁵ As noted in Chapter 4, funding for this team has expired and the future of the quality assurance role is uncertain. We suggested there that Police may wish to consider whether some form of quality assurance can be continued.

- 6.52 The District Court publishes a representative sample of cases each year, with an emphasis on significant cases of particular interest.⁴⁶ Given the need for strong denunciation of hate crimes discussed in Chapter 3 and the need for better information to ensure they are being responded to appropriately, the fact that section 9(1)(h) has been applied may be relevant when deciding whether a case is sufficiently significant to be published. The court hate crime flag would allow the courts to identify such cases.

SHARING COURT INFORMATION WITH POLICE AND CORRECTIONS

- 6.53 As explained in Chapter 4, there is currently no straightforward way for Corrections to know if hostility is at issue in relation to alleged offending currently before the court or for Police or Corrections to know if the court applied the aggravating factor at sentencing for an offence.
- 6.54 In our Consultation Paper, we suggested that, if a court hate crime flag was adopted, it could also be shared with Police and Corrections.⁴⁷ We suggested this might allow Police to monitor how hate crime cases are dealt with once in court. It could also provide Police with more accurate information to inform future investigations — for example, if the same offender comes to Police's attention again. For Corrections, we suggested information about hostile motivation could assist in assessing offenders' rehabilitative needs.

Consultation

- 6.55 Five submitters on our Consultation Paper said a court hate crime flag could be shared with Corrections to help assess the offender's rehabilitative needs.⁴⁸ In addition, although Luke Cunningham Clere did not clearly state this should happen, it noted a flag would make it easier to identify hate crimes when pre-sentence reports are completed. Pre-sentence reports are prepared by Corrections to assist the courts when determining the appropriate sentence.
- 6.56 No submitters specifically commented on whether a court hate crime flag should also be shared with Police. However, Justice for Palestine, Alternative Jewish Voices and Dayenu (in their joint submission) 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.

The need for reform

Police

- 6.57 Having access to court information about hostile motivation would assist Police in several ways. First, it would allow Police to check that the court hate crime flag has been applied to an alleged offence in the Case Management System (and therefore should also be included in the file provided to the judge) and to remedy the situation if it has not been.

⁴⁶ Ngā Kōti o Aotearoa | Courts of New Zealand "Judgments" <www.courtsofnz.govt.nz>.

⁴⁷ Consultation Paper at [7.27] and [7.37].

⁴⁸ 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.

This may be particularly helpful in cases that go to trial, where there may be an extended period between when the charge is laid by Police and when the offender is sentenced.

- 6.58 Second, the record of the court’s finding would assist Police when dealing with the same offender again in future. When a potential hate crime is reported to Police, the National Intelligence Application would show if a suspect has previously been convicted of an offence that was found to be motivated by hostility. This would inform the triage process, which determines whether a report is investigated further. It would also inform any ensuing investigation and may be relevant when deciding whether to prosecute a suspect.⁴⁹ If a suspect is charged, evidence of previous hostility-motivated offending could be provided to the prosecutor to inform submissions on bail or sentencing. At all of these stages, information about previous hostility-motivated offending would allow Police and prosecutors to establish any concerning patterns of behaviour on the part of the offender and to address them appropriately.
- 6.59 Previous hostility-motivated offending may also be relevant when determining applications for firearms licences. Currently, Police is responsible for these decisions, although at the time of publication, there is an Arms Bill before Parliament that would establish a new arms regulator.⁵⁰ The regulator would be an autonomous agency within Police with access to Police information.⁵¹ Under both the current legislation and the Bill, one of the matters considered when assessing whether someone is a fit and proper person to possess a firearm is whether they have “shown patterns of behaviour demonstrating a tendency to exhibit, encourage, or promote violence, hatred, or extremism”.⁵² The existing Police flag for perceived hate crimes is already used as part of that assessment.⁵³ If the regulator also had information about any court finding (as would be the case under our recommendation), that would provide a more complete picture. While conviction for an imprisonable offence is automatically disqualifying in any event,⁵⁴ some summary offences are not punishable by imprisonment yet may nonetheless cause concern if they were motivated by hostility.⁵⁵
- 6.60 Having access to court information about hostile motivation will therefore support Police (or a new arms regulator) to take steps to prevent further hate crimes — for example, by declining applications for firearms licences in appropriate cases or prosecuting a person who might otherwise have been given a warning because they have shown a concerning pattern of hostility.

⁴⁹ A suspect’s previous convictions are taken into account when assessing whether the public interest requires prosecution: *Te Tari Ture o te Karauna | Crown Law The Solicitor-General’s Prosecution Guidelines: Decisions to prosecute* (2024) at [36.3].

⁵⁰ Arms Bill 2025 (233-1).

⁵¹ Clauses 300(2) and 344(2). Clause 344(2) provides that Police must provide to the regulator any information Police holds about an applicant for a firearms licence that may assist the regulator in the exercise of its functions, duties and powers.

⁵² Arms Act 1983, s 24A(1)(l); and Arms Bill 2025 (233-1), cls 69(1)(n).

⁵³ Ngā Pirihi Mana o Aotearoa | New Zealand Police “Hate motivated crime training scenario — Race 07” <www.police.govt.nz> at 3.

⁵⁴ Arms Act, s 24A(1)(a). Under the current test, Police “may” find that someone is not a fit and proper person to possess a firearm on the grounds set out in s 24A(1). However, under the Arms Bill 2025 (233-1), the regulator would only be able to issue a firearms licence if satisfied the listed grounds do not apply: cl 69(1).

⁵⁵ For example, offensive behaviour or language and graffiti vandalism: Summary Offences Act 1981, ss 4 and 11A.

- 6.61 Third, data about case outcomes in the courts could be compared to Police's own data. For example, comparing the Police perceived hate crime flag to the courts' data would allow Police to monitor what proportion of the alleged offences that have been flagged as potential hate crimes are identified as such on the charging document and how they are treated by the courts at sentencing. This would assist Police in evaluating and improving its response to hate crime.

Corrections

- 6.62 In Chapter 4, we explained that Corrections has an important role in helping to reduce the occurrence of hate crimes by addressing offenders' risks of reoffending through rehabilitation, taking precautions to prevent hate crimes against its own staff and other prisoners and supporting informed decisions about bail and parole. Corrections also provides information to the courts to support sentencing decisions, helping to ensure that offenders are held accountable for their hostility.
- 6.63 To fulfil these functions, Corrections needs to know if a prisoner on remand may have been motivated by hostility or if a convicted offender has been found by the court to be so motivated. Corrections told us that having information about a person's alleged or proven hostile motivation would be helpful in the following ways:
- (a) It would allow managers to avoid exposing staff who are members of the targeted group to the prisoner or offender. Corrections noted it would be particularly helpful for this purpose to also have information about the group of people alleged or found to have been targeted by the offending, which we discuss further below.
 - (b) It would be helpful to know if an offence is alleged to be hostility-motivated when preparing a report for the court on the suitability of bail with a condition for electronic monitoring.⁵⁶ For example, the report may recommend other bail conditions and refer to Police's view on the application, including any reasons for opposing it.
 - (c) It would assist prisons when deciding where to house a defendant who is remanded in custody or a convicted offender (including who they can safely be housed around).
 - (d) It may be relevant for probation officers when preparing pre-sentence reports. These reports support sentencing decisions by the courts. They can include information about factors contributing to the offence and the rehabilitative needs of the offender and recommendations on the appropriate sentence.⁵⁷ We are aware of one case in which the pre-sentence report addressed hostile motivation.⁵⁸
 - (e) If an offender receives a Corrections-managed sentence (which includes imprisonment and community-based sentences), hostile motivation may be relevant to risk management and rehabilitation.
 - (f) Corrections provides the Parole Board with information about an offender's convictions and a parole assessment report.⁵⁹ The report includes information about the offender's assessed risk of reoffending, progress made during their sentence of

⁵⁶ Bail Act 2002, s 30F.

⁵⁷ Sentencing Act, s 26(2)(b), (d), (e) and (i).

⁵⁸ *R v Arps* [2019] NZDC 11547 at [20].

⁵⁹ Parole Act 2002, s 43(1)(a) and (c).

imprisonment and proposed special release conditions.⁶⁰ The offender's hostile motivation, and any progress made in addressing it, may be relevant to the Parole Board's decision whether to release an offender and, if so, what conditions to impose.

- (g) An offender's hostile motivation may be relevant to a health assessor's report considered by a court when deciding whether to impose a sentence of preventive detention, an extended supervision order or a public protection order.⁶¹ The preparation of these reports is overseen by Corrections.⁶²

6.64 We agree that, for these reasons, it is important for Corrections to have access to court information showing that an offence is alleged or has been found by the court to have been motivated by hostility.

Recommendation

R2

The courts should share the following information with Ngā Pirihimana o Aotearoa | New Zealand Police and Ara Poutama Aotearoa | Department of Corrections:

- a. The fact that a charging document specifies that section 9(1)(h) of the Sentencing Act 2002 is alleged to apply to an offence.
- b. Any entry on the permanent court record of a determination by the court that section 9(1)(h) applies to an offence.

6.65 For the reasons discussed above, we recommend that court information about hostile motivation should be shared with Police and Corrections. This should include the fact that hostile motivation is alleged on the charging document and any record made by the court at sentencing confirming that section 9(1)(h) was found to apply.

Legal basis for sharing court information

6.66 Our understanding, based on our own analysis and preliminary feedback from the Office of the Privacy Commissioner, is that records of the alleged or proven application of section 9(1)(h) are likely to fall within section 172 and Schedule 4 of the Privacy Act 2020. Those provisions authorise Police and Corrections to access court records relating to "court document processing" (including "particulars of proceedings in respect of which informations are to be laid or charging documents filed") and "details of hearings" (including "convictions, sentences, and all other matters ancillary and subsequent to a determination").

⁶⁰ Tumuaiki o te Mana Arotake | Controller and Auditor-General *Department of Corrections: Managing offenders on parole – Performance audit report* (February 2009) at [2.6].

⁶¹ Sentencing Act, s 88(1)(b); Parole Act, s 107F(2); and Public Safety (Public Protection Orders) Act 2014, ss 9 and 13. Te Aka Matua o te Ture | Law Commission has recommended that the legislation governing preventive detention, extended supervision orders and public protection orders should be repealed and replaced with a single statutory regime for preventing serious reoffending: *Here ora | Preventive measures in a reformed law* (NZLC R149, 2025). The new regime would provide a range of similar measures targeted at the reoffending risks a person poses. If these recommendations are accepted, health assessor reports would still be required to accompany applications for preventive measures: at 195 (recommendation 32).

⁶² Te Aka Matua o te Ture | Law Commission *Here ora | Preventive measures in a reformed law* (NZLC R149, 2025) at [11.42].

- 6.67 Accordingly, legislative amendment is unlikely to be required to enable the courts to share information about hostile motivation with Police and Corrections. However, the Office of the Privacy Commissioner indicated that it would need to consider further how the proposal would fit with Schedule 4 of the Privacy Act if our recommendation is accepted.

Implementation

- 6.68 In relation to Police, we understand that information about criminal proceedings entered in the courts' Case Management System can also be viewed in the Police National Intelligence Application and is automatically updated. However, some changes to both the Case Management System and the National Intelligence Application may be required to ensure this new information is included. Funding would need to be allocated to implement any necessary changes.
- 6.69 Unlike Police, Corrections does not automatically receive information from the courts' Case Management System. Instead, the courts provide specific information about a defendant or offender to Corrections when that information is required. For example, this occurs when the courts request an electronically monitored bail report or pre-sentence report, issue a warrant to detain a defendant on remand or to commit a person sentenced to imprisonment or impose another type of Corrections-managed sentence (such as a community-based sentence). We recommend that, when the courts provide information to Corrections about a charge or conviction, any record that the offence is alleged or has been found to be motivated by hostility should be provided as well. There should also be a mechanism for updating Corrections if the court hate crime flag is removed (for example, if it was applied in error) or added. Again, some changes to both the courts' and Corrections' IT systems would be required to achieve this and funding would need to be allocated for that purpose.

RECORDING ADDITIONAL INFORMATION ABOUT THE TARGETED GROUP

R3

The recording and sharing of information by the courts in accordance with recommendations R1(c) and R2 should also include information about the characteristic(s) and group(s) of people targeted by the offending if it is technically feasible to record that information.

- 6.70 We recommend that, when the court is recording the application of the aggravating factor on the permanent court record, they should also be required to include information about the characteristics and groups of people targeted (for example, "Religion — Muslim") if it is technically feasible to do so. Also, if that additional information is able to be recorded, it should be shared with Police and Corrections.
- 6.71 Similar information is included in Police records of perceived hate crimes. Including it in court data would provide more accurate information about hate crime trends to support policy and operational decisions. It could also be helpful for the courts, Police and Corrections when dealing with the offender in future, by showing if there is a consistent pattern of hostility towards a particular group. If shared with Corrections, this information would help to ensure the safety of staff and other prisoners by identifying groups of people who should not be placed in contact with the offender.

- 6.72 Information about the relevant characteristics and groups targeted should already be included in evidence provided to the court and in the court's sentencing notes, since it is relevant to whether the aggravating factor applies. Including it on the permanent court record would make it more accessible and allow it to be used for data purposes. Additionally, requiring the court to record characteristics and groups would support clearer analysis of the basis of the offender's hostility and the application of the aggravating factor.

Implementation

- 6.73 As with the application of the aggravating factor, Police could be prompted to enter information about the characteristics and groups of people allegedly targeted on the charging document when filing charges. The court would then confirm or amend that information as appropriate if the aggravating factor is applied at sentencing. It should be possible to record more than one characteristic and group, as some victims may be targeted based on more than one aspect of their identity (for example, because they are a Muslim woman).
- 6.74 We acknowledge that it could be difficult to record this level of detail under the current paper-based system. For the information to be recorded in a consistent and helpful way, the charging document would need to include various categories that could be selected, preferably in line with the categories used by Police to allow comparisons of the data. For example, when police officers record perceived hate crimes, they select from 17 different groups under the "race/ethnicity" characteristic (such as South Asian, Māori and Pasifika). Including all these categories could make the physical charging document unwieldy. The Ministry of Justice suggested that recording the characteristics and groups targeted could become easier after case management is digitised. We agree and suggest that the feasibility of recording this additional information be assessed in that context. For example, it may be that categories could be selected from drop-down lists on the digital platforms used by Police to file charges and by judges to record their decisions at sentencing.

Protecting victims

- 6.75 If information about the characteristics and groups targeted is recorded, access to that information or the identity of the victim may need to be restricted in certain cases. By default, any person can access information on the permanent court record on request.⁶³ There may be cases where disclosure of the characteristics or groups targeted, along with the victim's identity, would cause harm to the victim — for example, if they are gay and have not made that fact public. Similar issues could arise if that information is referred to in the court's oral reasons for imposing a sentence (which must be given in a court room open to the public)⁶⁴ and in the recorded sentencing notes (which are generally available to the public on request).⁶⁵

⁶³ District Court (Access to Court Documents) Rules 2017, r 8(2)(a); and Senior Courts (Access to Court Documents) Rules 2017, r 8(3)(a).

⁶⁴ Sentencing Act, s 31(1).

⁶⁵ District Court (Access to Court Documents) Rules, r 8(2)(d); and Senior Courts (Access to Court Documents) Rules, r 8(3)(d).

- 6.76 There are exceptions to the general rules concerning access to court information. Certain documents can only be accessed with the permission of a judge such as documents identifying a person with name suppression.⁶⁶ Where there is concern about associating the victim with the relevant characteristic or group, one option may be for the court to grant the victim name suppression.⁶⁷ That would allow the court to discuss the characteristic and group targeted by the offending at sentencing, enhancing denunciation and recognising the harm caused to the affected group, without implicating the victim. It would also help to address concerns about access to the permanent court record, as access would only be available with a judge's permission. Alternatively, a specific exception to the general access rules could be added for documents recording the application of section 9(1)(h) so that a judge would consider access requests and could decline them if appropriate.⁶⁸

IMPACT ON OFFENDERS

- 6.77 During consultation on our proposed recommendations, some of the feedback we received queried how a court flag would affect offenders in the future, particularly young offenders. There was some concern that marking out young people as hate crime offenders could affect how they are treated for the rest of their lives — including their employment prospects — even if the offending was relatively minor. This could have a particular impact on Māori, given their overrepresentation in the criminal justice system. Other feedback acknowledged that the criminal law in general does stigmatise people and suggested the additional “marking out” of a person as a hate crime offender may be justified if it is necessary to reflect the seriousness of the crime.
- 6.78 Below, we address how our recommendations in this chapter would affect offenders if they are later investigated by Police or sentenced by the courts. We then discuss potential impacts on future employment. For the reasons we explain, we do not consider our recommendations would unfairly prejudice offenders in either context.
- 6.79 We begin with a point of clarification about how our recommendations would affect young people. The court flag and recording requirement would not apply to sentencing in the Youth Court. Different sentencing factors apply in the Youth Court,⁶⁹ and those in the Sentencing Act are not directly relevant.⁷⁰ Any offending dealt with in the Youth Court would not be marked as hostility-motivated on the permanent court record. The Youth Court deals with offending by young people under 18 years of age, except certain serious offences such as murder and manslaughter or where the young person elects trial by jury.⁷¹ A young person may also be transferred to the District or High Court for sentencing in certain circumstances such as where the offending is too serious to be sentenced in

⁶⁶ District Court (Access to Court Documents) Rules, r 8(3)(d); and Senior Courts (Access to Court Documents) Rules, r 8(4)(d).

⁶⁷ Criminal Procedure Act, s 202(1)(b). The grounds for making suppression orders include if publication of the victim's name would cause them undue hardship or endanger their safety: s 202(2)(a) and (c).

⁶⁸ This would require amendment to r 8(3) of the District Court (Access to Court Documents) Rules and r 8(4) of the Senior Courts (Access to Court Documents) Rules.

⁶⁹ Oranga Tamariki Act 1989, s 284.

⁷⁰ *Pouwhare v R* [2010] NZCA 268 at [75]–[77]; and *Police v SY* [2018] NZYC 463 at [81].

⁷¹ Oranga Tamariki Act, s 273 and sch 1A.

the Youth Court.⁷² Where a young person is sentenced in the District or High Court, the Sentencing Act applies⁷³ and the proposed recording requirement would be engaged.

- 6.80 In effect, this means that hostility would only be recorded in relation to offending by a person under 18 years of age if that offending was quite serious. Young offenders aged 18 years and over are dealt with in the adult courts so any finding of hostility would be recorded. Our discussion below of how recording may affect offenders in the future is relevant to all offenders dealt with in the adult courts.

Police and the courts

- 6.81 If our recommendations in this chapter are accepted, the fact that section 9(1)(h) was found to apply to an offence would be communicated to judges in future proceedings involving the same defendant (for example, through a notation on the court criminal and traffic history report). It would also be communicated to Police and could be taken into account in any future investigations. This could lead to a defendant being prosecuted when they otherwise may not have been, or an offender receiving a harsher sentence, because they have committed similar hostility-motivated offending in the past.
- 6.82 These outcomes would not occur by default. The fact that a person previously committed a hostility-motivated offence would not require Police or the courts to take any particular action, although it would be a relevant consideration. For example, a sentencing judge could take into account any relevant circumstances such as the offender's youth when the previous offending occurred, the nature and seriousness of the hostility in that case and any steps taken towards rehabilitation in the intervening period. In our view, this approach strikes an appropriate balance. It is important that Police and the courts are aware of previous hostility-motivated offending so they can establish whether there is a pattern of hostile behaviour that needs to be addressed.
- 6.83 Police and the courts can (and sometimes do) already take previous hostility-motivated offending into account when they are aware of it.⁷⁴ This may occur, for example, if a police officer views the entry for the previous offence in the National Intelligence Application and it has been flagged by Police as a perceived hate crime. That may prompt a review of the sentencing notes to determine whether the aggravating factor applied. Our recommendations in this chapter would simply improve the information available to Police and the courts so that previous hostility can be taken into account more consistently.

Employment

- 6.84 There are several ways in which potential employers may find out about an applicant's previous convictions and the circumstances relating to them. The most common is by requesting a Ministry of Justice conviction history report. This requires the consent of the person seeking employment. These reports only list the offence a person was convicted for — they do not refer to aggravating factors such as hostile motivation. Court flags such as the existing flag for family violence offending and the hate crime flag we recommend are not shown. As noted earlier, convictions also will not be listed if the Criminal Records (Clean Slate) Act 2004 applies.

⁷² Oranga Tamariki Act, ss 283(o) and 284(1A); and *Pouwhare v R* [2010] NZCA 268 at [73].

⁷³ Oranga Tamariki Act, s 283(o).

⁷⁴ See for example *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [16(b)].

- 6.85 In our Consultation Paper, we asked whether the fact that hostility is not recorded on Ministry of Justice conviction history reports is likely to cause problems in practice.⁷⁵ For example, we asked whether some potential employers may need to know if an offence was motivated by hostility to ensure the safety of staff or customers. No submitters suggested it was necessary to record hostility on conviction history reports.
- 6.86 We do not consider it is necessary for Ministry of Justice conviction history reports to identify hostility. Depending on the offence committed and the nature of the employment, the fact of a conviction may be enough for a potential employer to decide against hiring a person. In those situations, more detailed information about the circumstances of the offence (such as whether it involved hostility) is unnecessary. Where an employer does wish to know more about the circumstances of a previous conviction to inform a hiring decision, there are already other ways in which that information can be obtained.
- 6.87 First, any person can access the permanent court record and sentencing notes relating to a case by making a request to the court (with certain exceptions such as where the information would identify a person with name suppression).⁷⁶ If an employer were to obtain the sentencing notes relating to an offence, that would usually alert them to any hostility involved. Similarly, an Internet search may bring up media reporting of the case that refers to the hostility. If our recommendations in this chapter are accepted, the permanent court record would also record the application of the hostility aggravating factor. This would improve the consistency and accessibility of court information relating to hostility, but in most cases it would not substantively change the information potential employers can access.
- 6.88 Second, certain types of authorised employers can request Police vetting of a person who is applying for a position. Employers can be authorised if they employ people in law enforcement or national security or in roles working with children, young people or vulnerable adults.⁷⁷ Police vetting can provide any relevant information Police holds about a person, provided it is sufficiently substantiated. This information can relate to previous convictions, charges and investigations (whether or not they resulted in prosecution or conviction).⁷⁸ It could include the fact that an offence was flagged by Police as a perceived hate crime and any other information about the alleged hostility recorded during the investigation. Accordingly, Police vetting can currently alert a potential employer if a person applying for a position has been investigated for hostility-motivated offending.
- 6.89 If a court hate crime flag was introduced and shared with Police, vetting could also include confirmation of whether any offence the person was convicted of was found by the court to be motivated by hostility. In most cases, this would not mean hostility is raised as an issue with a potential employer when it otherwise would not have been, but it would improve the completeness of the information available. In some instances, the additional information about the court's finding may be beneficial to the person being vetted. For

⁷⁵ Consultation Paper at [5.16].

⁷⁶ District Court (Access to Court Documents) Rules, r 8; and Senior Courts (Access to Court Documents) Rules, r 8.

⁷⁷ Policing (Police Vetting) Amendment Bill 2025 (89-2), cl 5 (new ss 54C–54E). This Bill would insert a new part in the Policing Act 2008 dealing with Police vetting and formalising existing practice: see Policing (Police Vetting) Amendment Bill (89-2) (select committee report) at 1.

⁷⁸ Policing (Police Vetting) Amendment Bill (89-2), cl 5 (new s 54J).

example, if Police had flagged an offence as a perceived hate crime but the court did not apply the aggravating factor, the employer could take that into account rather than making a decision based on the Police flag alone.

- 6.90 We consider these processes are sufficient to allow employers to access information about hostility if they require it to assess a person's suitability for a role — particularly for sensitive roles such as those in law enforcement or working with children. We also do not consider recording hostility on the permanent court record will have a significant additional impact on an offender's future employment prospects. Most potential employers are likely to make decisions based on a Ministry of Justice conviction history report (and potentially any media reporting of the case) without seeking additional information from the court. Those who do take the step of requesting court information should already be able to identify potential hostility from the court's sentencing notes in most cases.
- 6.91 Accordingly, our recommendations would improve the completeness and accessibility of court and Police records but are unlikely to lead to hostility being disclosed to employers in many additional cases. To the extent they do, we consider it appropriate.

IMPACT ON DEFENDANTS' WILLINGNESS TO PLEAD GUILTY

- 6.92 In Chapter 5, we explained that the alternative legal models considered in this review are likely to discourage defendants from pleading guilty and lead to plea bargaining. A court hate crime flag carries significantly less risk in that regard. The flag would not increase the maximum penalty for the offending. Nor would it significantly increase the public stigma associated with conviction compared to the current law. The hostility would not form part of the offence itself and, as discussed above, the flag would not appear on the offender's Ministry of Justice conviction history report provided for employment purposes.
- 6.93 While a court hate crime flag would help to ensure the sentencing judge considers hostile motivation and addresses it in their sentencing decision, in many cases, that already occurs. Similarly, while the flag would increase the consistency with which Police and the courts take account of any previous hostility-motivated offending, they can and do already consider it in some cases. Accordingly, it is unlikely that introducing a court flag would significantly affect a defendant's decision whether to plead guilty.
-

CHAPTER 7

Denouncing hate crime in sentencing decisions

INTRODUCTION

- 7.1 In Chapter 4, one problem we discussed with the current law is that it does not require the courts to communicate clearly to the public that an offence was a hate crime and that this makes it more serious. This means hate crimes may not be consistently denounced.
- 7.2 In this chapter, we recommend introducing a legislative requirement for judges to state if section 9(1)(h) of the Sentencing Act 2002 applies at sentencing. Alongside our recommendations in Chapter 6 to introduce a court hate crime flag, this would help to ensure that sentencing decisions (and media reporting of them) communicate the seriousness of hate crimes to the public.
- 7.3 Te Tari Tohutohu Pāremata | Parliamentary Counsel Office will be able to advise on how the amendments to the Sentencing Act we recommend in this chapter and in Chapter 6 can best be achieved. One approach would be to insert a new section or sections into the Act on offending aggravated by hostility. We discuss some potential benefits of this approach but make no formal recommendation on the point.
- 7.4 We also discuss in this chapter the following options on which we sought feedback in our Consultation Paper or that were raised by submitters:
- (a) Requiring judges to state the difference hostile motivation made to a sentence.
 - (b) Creating sentencing guidelines for hostility-motivated offending.
 - (c) Providing for affected communities to give impact statements at sentencing.

We do not recommend reform to implement these options, although, in relation to option (c), we suggest community impact statements can already be given under the current law.

REQUIRING SENTENCING JUDGES TO STATE IF OFFENDING WAS MOTIVATED BY HOSTILITY

- 7.5 Under the Sentencing Act, a judge must give reasons in open court for imposing a sentence or otherwise dealing with an offender.¹ Reasons may be given “with whatever level of particularity is appropriate to the particular case”.² In practice, sentencing judges usually identify the aggravating factors that apply when giving reasons for their decision in open court. However, this is not specifically required by legislation.
- 7.6 In our Consultation Paper, we sought feedback on the option of requiring judges to state in their sentencing decisions if the hostility aggravating factor applies to an offence.³ We suggested this could help to ensure sentencing decisions consistently convey the seriousness of hate crime to the public.

Consultation

- 7.7 Nine submitters expressly supported requiring sentencing judges to state if an offence was a hate crime.⁴ Some reasons submitters gave for supporting this option were that it would reinforce the law’s denunciation of hate crimes,⁵ contribute to wider public awareness⁶ and, potentially, increase reporting rates for hate crime.⁷ The Law Association Public and Administrative Law Committee emphasised that “[t]he judiciary can and should use sentencing remarks to publicly denounce conduct motivated by hostility”.
- 7.8 Four additional submitters did not express clear support for this option but made related comments:
- (a) Luke Cunningham Clere noted this option would meet the international trend of “marking out” hostility-motivated offending.
 - (b) Dr David Harvey said judges should make it clear when and how a hostility aggravation forms a part of a sentencing outcome.
 - (c) The Maxim Institute and an individual submitter⁸ supported requiring judges to explain the impact of hostile motivation on the sentence imposed (discussed below).

¹ Sentencing Act 2002, s 31(1). In exceptional circumstances, the court must still pass the sentence in public but may decline to state in public all or any of the facts, reasons or other considerations it has taken into account: Criminal Procedure Act 2011, ss 197(3) and 199AA(4).

² Sentencing Act, s 31(2).

³ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper) at [7.11].

⁴ Russell Hoban; Dr Kyle R Matthews; New Zealand Federation of Business and Professional Women; Members of Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; 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.

⁵ New Zealand Federation of Business and Professional Women; Te Kāhui o Ināia Tonu Nei Charitable Trust; and Women’s Rights Party.

⁶ Dr Kyle R Matthews; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

⁷ Te Kāhui o Ināia Tonu Nei Charitable Trust. In addition, The Law Association of New Zealand Criminal Law Committee did not state clear support for this reform option but did suggest greater visibility of hostile motivation at sentencing may help increase victim confidence in the criminal justice system and reduce reluctance to report hate crimes.

⁸ Submission 90.

In practice, that would also require judges to make it clear that the aggravating factor applied.

7.9 No submitters disagreed with requiring judges to state if the aggravating factor applies.

Overseas approaches

7.10 As discussed in Chapter 5, England and Wales have both specific hate crime offences and a hostility aggravating factor at sentencing (to address cases not covered by a specific hate crime offence). Where the aggravating factor applies, the courts are required by legislation to state in open court that the offending was aggravated by hostility.⁹ Similar requirements apply in Northern Ireland¹⁰ and (since 2024) the Republic of Ireland.¹¹ In the Republic of Ireland, the court must also state which protected characteristics are at issue.

7.11 The Law Commission of England and Wales considered the requirement to state the aggravation in open court as part of its review of hate crime in 2020. The Commission said:¹²

We consider this to be an appropriate and important component of recognising the additional harm suffered by the victim, and also wider members of their community. We therefore consider that this requirement should be retained.

7.12 The Commission noted that, historically, the requirement was not routinely complied with, but the situation had improved more recently.¹³ Data and case summaries published by the Crown Prosecution Service indicate that it is now common for sentencing judges to specify if an offence was motivated by hostility and to increase the sentence to reflect that.¹⁴

7.13 In Scotland, under the Scottish hybrid model of hate crime law, the court is required to state on conviction if an offence was aggravated by prejudice and the type of prejudice involved (by reference to one or more protected characteristics).¹⁵ This requirement

⁹ Sentencing Act 2020 (UK), s 66(2)(b).

¹⁰ The Criminal Justice (No 2) (Northern Ireland) Order 2004 (UK), art 2(2)(b). A review of hate crime law in Northern Ireland, which recommended adopting the Scottish hybrid model of hate crime law, also recommended retaining the requirement to state the aggravation in open court: Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at 168 (recommendation 8) and [6.125]. This recommendation has been adopted in the Bill currently before the Northern Ireland Assembly: Criminal Justice (Sentencing etc) Bill 2026 (26/22-27) (UK), cl 34(2)(a).

¹¹ Criminal Justice (Hate Offences) Act 2024 (Ireland), s 8(4).

¹² Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.76]. This issue was not discussed in the Commission's final report, suggesting that submissions received on the point did not alter the Commission's view.

¹³ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.75].

¹⁴ Crown Prosecution Service *Hate Crime Report 2018–19* (October 2019) at 8; CPS Yorkshire and Humberside "Hate crime sentence uplift examples: Cases finalised between April to June 2021" <www.chcpcic.org.uk>; and CPS Yorkshire and Humberside "Hate crime sentence uplift examples, cases finalised October 2024" (19 December 2024) <www.cps.gov.uk>. The hate crime cases referred to in these documents include both cases involving the hostility aggravating factor and offending charged under specific racially or religiously aggravated offences. The CPS uses a generic hate crime flag for all these cases. As most sentencing remarks in England and Wales are not published, we have not been able to systematically review the relevant decisions ourselves. We did, however, find some quotes from sentencing remarks in appellate decisions that addressed hostile motivation in strong terms and made it clear this had an impact on the sentence imposed: see for example *R v White* [2021] EWCA Crim 1511, [2022] 4 WLR 10 at [35].

¹⁵ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 2(2)(a).

would also apply in Northern Ireland under a Bill that has been introduced to adopt the hybrid model.¹⁶ An independent review in Scotland in 2018 found that this requirement — along with the requirements to take the aggravation into account at sentencing and to record the aggravation — were “vital ... to promote understanding of the law, transparency of the judicial process and consistency in sentencing”.¹⁷

- 7.14 In Australia and Canada, there is no requirement to state in open court if the hostility aggravating factor applies. The Canadian courts have nonetheless adopted a practice of considering the evidence of hostile motivation in some detail¹⁸ and emphasising the need for strong denunciation of hate crimes when sentencing an offender.¹⁹ This has occurred through judicial precedent rather than legislative prescription. As far back as 1977, the Ontario Court of Appeal said in *R v Ingram* (in the context of a racially motivated assault):²⁰

It is a fundamental principle of our society that every member must respect the dignity, privacy and person of the other. Crimes of violence increase when respect for the rights of others decreases, and, in that manner, assaults such as occurred in this case attack the very fabric of our society. ... An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multicultural, pluralistic urban society. The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance it.

- 7.15 Similar remarks continue to be made in modern hate crime sentencing decisions. It is common for sentencing judges in Canada to refer to the values of Canadian society that are transgressed by hate crimes (such as human dignity and tolerance) and the harm hate crimes cause to the wider community.²¹

Other requirements for sentencing judges to state certain matters

- 7.16 In Aotearoa New Zealand, there is precedent in the Sentencing Act for requiring judges to state certain matters at sentencing. Current examples relate to sentence reductions for guilty pleas and personal mitigating factors, respectively, both of which are capped at certain percentages in the Act.²² At sentencing, the court must state how it has applied the limits on guilty plea reductions and give reasons for that.²³ It must also state the total sentence reduction that would have been made for personal mitigating factors but for

¹⁶ Criminal Justice (Sentencing etc) Bill 2026 (26/22-27) (UK), cl 34(2)(a)(ii).

¹⁷ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [3.63]. As in England and Wales, Scottish sentencing remarks are not routinely published so we have not been able to assess how this requirement affects sentencing in practice. We did find one appellate decision noting it was unclear whether the requirement to state the aggravation had been complied with by the sheriff who imposed the sentence: *R v Murphy* [2015] HCJAC 34, 2015 SCL 577 at [17].

¹⁸ See for example *R v Kandola* 2010 BCSC 841, [2010] BCWLD 7849 at [11]–[15]; *R v Woodward* 2011 BCCA 251 at [17] and [26]; and *R v Shier* 2019 BCPC 399 at [20]–[23].

¹⁹ See for example *R v Bissonnette* 2019 QCCS 354 at [625]–[627]; *R v Gray* 2013 ABCA 237, [2013] AWLD 3411 at [18]; and *R v Vrdoljak* [2002] OJ No 1332 at [9] and [21].

²⁰ *R v Ingram* [1977] OJ No 531 at [8].

²¹ See for example *R v Grant* 2025 ONCJ 231 at [38]–[40]; *R v Kandola* 2010 BCSC 841, [2010] BCWLD 7849 at [39]; *R v Woodward* 2011 BCCA 251 at [27]; and *R v Gray* 2013 ABCA 237, [2013] AWLD 3411 at [17]–[18].

²² Sentencing Act, ss 9H–9I (guilty pleas) and 9Q–9R (personal mitigating factors).

²³ Section 9J.

the statutory limit.²⁴ Although the purpose of these requirements is unclear from the legislative history, it appears they may have been intended to ensure the court's reasons are adequately recorded to facilitate consideration on appeal.²⁵

7.17 No similar requirements exist currently in relation to aggravating factors.

The need for reform

7.18 In Chapter 4, we explained that, to ensure hate crime is appropriately denounced, sentencing decisions must clearly communicate to the public that an offence was a hate crime and that this makes it more serious. We found it difficult to assess whether that is occurring consistently, given the absence of readily available information about hate crime cases in the courts and because our case law searches were unlikely to locate decisions that did not refer to hostility. Even so, we referred to a small handful of sentencing decisions that did not clearly state whether section 9(1)(h) applied. We concluded that, given the denunciation of hate crime is an objective of hate crime law (discussed in Chapter 3), it is problematic that the current law does not contain any structural mechanism to ensure that hostile motivation is consistently denounced at sentencing.

7.19 We consider reform is required to ensure that sentencing judges articulate if section 9(1)(h) applies and denounce the offender's hostility. This is consistent with the approach in several other jurisdictions, as discussed above. Sentencing decisions are a powerful tool for demonstrating to the public that the societal values recognised by Parliament when creating hate crime laws are being upheld. We agree with the observations of the Law Commission of England and Wales that requiring judges to state if an offence was motivated by hostility is important to recognise the harm caused to victims and affected communities.²⁶

7.20 A legislative requirement may encourage judges not only to refer to the hostility aggravating factor but also to explain why hate crime is a problem, as in the Canadian decisions discussed above. This would help to reinforce the seriousness of hate crime to the public, explain why hate crimes are punished more severely than equivalent non-hate crimes and demonstrate public support for the targeted group.

7.21 In terms of the objectives of hate crime law discussed in Chapter 3, in addition to encouraging consistent denunciation of hate crimes, requiring judges to clearly address hostile motivation in their sentencing decisions would help to reassure affected communities and potentially reduce occurrences of hate crime (by helping to influence public attitudes over time).

7.22 As well as showing that the courts take hate crime seriously in individual cases, there would be wider benefits to requiring courts to explicitly identify hostile motivation in

²⁴ Section 9S.

²⁵ In relation to reductions for personal mitigating factors, see Mathew Downs (ed) *Adams on Criminal Law — Sentencing* (looseleaf ed, Westlaw) at [SA9S.01].

²⁶ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.76]. See also Organization for Security and Co-operation in Europe *Hate crime victims in the criminal justice system: a practical guide* (Office for Democratic Institutions and Human Rights, 2020) at 145: "The most compelling validation of a victim's experience often comes in the form of a sentencing judgment or other type of judicial or out-of-court outcome that specifically describes the crime as bias-motivated."

sentencing decisions. It would encourage rigour in the application of section 9(1)(h), promote transparency and assist appellate courts considering the appropriateness of a sentence.²⁷ It would also enable the courts to compare starting points in similar cases, facilitating the development of precedent and encouraging consistency in sentencing hate crime offenders.²⁸

Recommendation

R4

The Sentencing Act 2002 should be amended to provide that, if section 9(1)(h) applies, the court must state (using any words that it thinks fit) that the offence was committed because of hostility towards a group of people with an enduring common characteristic.

- 7.23 We recommend that, when a judge is giving their reasons for imposing a sentence in open court,²⁹ they should be required to state if the hostility aggravating factor applies to an offence. This statement would be heard by anyone present in court — including the offender and, potentially, the victim(s), members of the affected community and media representatives. It would also be recorded in any published sentencing notes.³⁰ A statement of this kind would increase the likelihood of the media reporting on the hostility aspect of the offending and the court's condemnation of it, further enhancing the denunciatory effect of the sentencing decision.
- 7.24 A statutory requirement of this kind may also encourage judges to address the aggravating factor in more detail where appropriate. We do not recommend specifically requiring this in legislation, as it is important to preserve discretion for sentencing judges to give their decision in a manner appropriate to the circumstances. Matters such as the identity of the targeted group or characteristic and the reasons why hostile motivation is an aggravating factor will often be relevant. However, the level of detail required is likely to differ depending on the significance of the hostility to the offending, the harm caused to the affected community and the other aggravating and mitigating factors that are relevant. As discussed in Chapter 6, there may also be cases where the victim would not wish to be publicly associated with the relevant group or characteristic, which may influence how a judge chooses to express their reasons (although there may also be other ways to address such concerns — for example, by granting the victim name suppression).
- 7.25 A requirement to state if the hostility aggravating factor applies would not impose a significant additional burden on sentencing judges. It would work together with our recommendation in Chapter 6 to create a court hate crime flag, which would help to draw

²⁷ See generally *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [76]–[82] (cited with approval in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345 at [46]–[51]), discussing the reasons for the general requirement for the courts to give reasons for their decisions.

²⁸ See *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [43], noting it is necessary from a consistency perspective for sentencing judges to articulate the factors that have guided their assessment of the sentence starting point.

²⁹ As required by s 31 of the Sentencing Act.

³⁰ In practice, most sentencing decisions in the District Court are delivered orally and the judge's remarks are then transcribed to provide a written record. If the offender's sentence does not include imprisonment or home detention, sentencing remarks may not be transcribed at all. In the High Court, it is more common to issue separate, written sentencing notes that expand on the judge's oral reasons.

judicial attention to whether the aggravating factor applies. Stating its application at sentencing would simply explain the judge's conclusion, which would need to be recorded in any event. It is unlikely to significantly increase the time taken for judges to pronounce a sentence, particularly since the aggravating factor is only engaged in a small proportion of cases. We also emphasise that our recommendation would not require judges to use any particular form of words. As noted above, the level of detail with which a sentencing judge addresses the hostility is likely to differ based on the circumstances of the case.

- 7.26 There is no guarantee that judges will always comply with a requirement to state if the aggravating factor applies, as the experience in England and Wales demonstrates. Training and process changes will be necessary to ensure judges are aware of the requirement and supported to comply with it. Overall, however, when combined with the court hate crime flag (recommended in Chapter 6) and appropriate training (discussed in Chapter 9), this requirement will encourage sentencing judges to make clear findings about whether offending is motivated by hostility and, if it is, to communicate society's condemnation of such offending in their sentencing remarks.
- 7.27 As with our recommendation in Chapter 6 to require sentencing judges to record the application of the aggravating factor, failure to comply with the requirement to state if the aggravating factor applies would not in itself be a ground for appeal against sentence. That is because compliance with the requirement (or lack thereof) would not directly affect the sentence imposed. If the sentence is appealed, however, the requirement should assist appellate courts by making it clear whether and why the aggravating factor was applied by the sentencing judge.

ARRANGEMENT OF THE NEW PROVISIONS WE RECOMMEND

- 7.28 If our recommendations for reform above and in Chapter 6 are accepted, the Parliamentary Counsel Office will be able to advise on the appropriate arrangement of the new provisions. We do not make a formal recommendation on that point but we suggest a possible approach for further consideration.
- 7.29 In our view, there would be some benefits to having a standalone section or sections in the Sentencing Act on offending aggravated by hostility. The new section or sections could encompass the following:
- (a) Define when offending is aggravated by hostility, using the language currently in section 9(1)(h) (with some amendments we propose in Chapter 8). Section 9(1)(h) could then be amended to simply state that it applies where the offence was aggravated by hostility, as defined in the relevant new provision. A similar approach is taken for some other aggravating factors currently.³¹
 - (b) Contain the new Sentencing Act provisions recommended in Chapter 6 (R1) and above (R4), requiring the courts to take certain actions if the hostility aggravating factor applies.
- 7.30 This approach could highlight hostility as an aggravating factor that must be considered and make the law more accessible. Currently, the list of factors in section 9 is long and

³¹ See Sentencing Act, s 9(1)(ca) (in relation to family violence offences) and (ha) (in relation to an offence committed as part, or involving, a terrorist act).

the hostility aggravating factor may be overlooked, particularly as it is not regularly engaged. A separate section or sections, cross-referenced in section 9(1)(h), could promote awareness of the aggravating factor among prosecutors and judges. It would also emphasise that specific requirements apply when the factor is engaged and make it easier to identify and comply with them. Finally, it could strengthen denunciation at a general or symbolic level. Enacting specific sections dealing with hostility-motivated offending would make it clearer that the law treats hate crime seriously.

REQUIRING JUDGES TO STATE THE DIFFERENCE HOSTILE MOTIVATION MADE TO A SENTENCE

- 7.31 In our Consultation Paper, we sought feedback on whether sentencing courts should also be required to state the difference the hostility aggravating factor has made to a sentence (if any) and the reasons for that.³² We noted this would be a significant change from current sentencing practice. As we explain in more detail below, the courts consider all aggravating factors relating to an offence together when setting a starting point (rather than specifying discrete uplifts).

Consultation

- 7.32 Five submitters supported requiring judges to explain the difference an offender's hostile motivation made to their sentence.³³ Two other submitters thought it was desirable for judges to make it clear how hostile motivation affected the end sentence but did not specifically address whether this should be a legislative requirement.³⁴ Two submitters suggested that, if such a requirement was introduced, it may be appropriate to treat all aggravating factors in the same way.³⁵
- 7.33 The Law Association Criminal Law Committee said in its submission that the current approach does not adequately denounce hate crime because it is unclear what portion of a sentence starting point is attributed to hostile motivation. However, when we later consulted the Committee on our proposed recommendations, it said that requiring judges to state if the aggravating factor applies (as recommended above in R4) would help to address its concern that hostile motivation can be "wrapped up" with other aggravating factors, making it difficult for offenders and the public to understand its impact on the sentence.
- 7.34 The Maxim Institute suggested that requiring judges to state the difference hostile motivation made to a sentence would show the public "how the law deprecates hate crimes" and provide guidance to other judges so that like cases are treated alike.
- 7.35 Two other submitters commented on this option without indicating a view on whether it should be adopted. Luke Cunningham Clere said requiring judges to explain how an aggravating factor increased the offender's sentence would be a significant departure from current practice. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service noted

³² Consultation Paper at [5.13] and [7.13]–[7.14].

³³ Russell Hoban; Maxim Institute; Te Kāhui Ture o Aotearoa | New Zealand Law Society; Submission 90; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

³⁴ Dr David Harvey; and The Law Association of New Zealand Criminal Law Committee.

³⁵ Maxim Institute; and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

that, in relation to serious violence charges, hate crime is one of the factors in the *R v Taueki* guideline judgment that influences the sentencing band the offending falls within.³⁶

The current law

- 7.36 The Sentencing Act sets out the purposes and principles of sentencing and identifies aggravating and mitigating factors that must be taken into account where applicable.³⁷ It does not require any particular sentencing methodology — that has been left to the courts. Through case law, the courts have developed a two-step process for sentencing offenders.³⁸ The first step involves setting a ‘starting point’ for the sentence based on the circumstances of the offending. This takes into account all aggravating and mitigating factors relating to the offending. The second step involves adjusting that starting point to reflect aggravating and mitigating circumstances personal to the offender to reach an appropriate end sentence. This two-step process is intended to ensure that sentences fairly reflect the offender’s culpability and to encourage consistency between sentencing decisions (as starting points can be compared to those for similar offending).³⁹
- 7.37 The courts have also issued guideline judgments in relation to certain types of offences. These judgments identify different starting point bands for offending depending on the number and seriousness of the aggravating factors present. The guideline judgments for serious violent offending (*Taueki*)⁴⁰ and sexual violation (*R v AM*)⁴¹ identify hostile motivation as one of the aggravating factors that is relevant when assessing the seriousness of the offending and determining the appropriate starting point.⁴²
- 7.38 Whether or not a guideline judgment applies, hostile motivation is taken into account at the first step of the sentencing process (setting the starting point) since it affects the seriousness of the offence.⁴³ Because of this, the courts do not usually identify a discrete uplift for hostile motivation.⁴⁴ All aggravating factors relating to the offence are considered together to arrive at the starting point.
- 7.39 Nonetheless, the courts can — and sometimes do — make it clear that the hostility aggravating factor has influenced the starting point adopted.⁴⁵ The aggravating factor may also influence the type of sentence imposed. For example, in *R v Arps*, Te Kōti Pira |

³⁶ *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

³⁷ Sentencing Act, ss 7–8.

³⁸ *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [28]–[30] and [44]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [6].

³⁹ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [27]; *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [43]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [6].

⁴⁰ *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [31(n)].

⁴¹ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [51].

⁴² *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [31(n)]; and *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [51]. See *R v Petera* [2020] NZDC 16911, [2021] DCR 89 as an example of the court taking hostile motivation into account under the *Taueki* guideline.

⁴³ See for example *R v Angelich* [2018] NZHC 2429 at [29(f)] and [37]–[39]; and *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [64]–[65].

⁴⁴ An exception is *R v Davidoff* [2024] NZDC 19266 at [18] (affirmed in *Davidoff v R* [2026] NZCA 126 without comment on the practice of specifying a discrete uplift).

⁴⁵ See for example *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [64]–[65]; and *R v Angelich* [2018] NZHC 2429 at [29(f)] and [37]–[39].

Court of Appeal declined to convert the offender's sentence to one of home detention in part because his "prospects of rehabilitation or ... changing [his] views on religion or race are virtually non-existent".⁴⁶

Overseas approaches

7.40 In Scotland, if an offence is found to have been aggravated by prejudice, the court must state the difference the aggravation has made to the sentence and the reasons for that difference (or, if there is no difference, the reasons for that).⁴⁷ Notably, this approach is not restricted to hate crime. Other statutory aggravating factors in Scotland also contain a requirement for the court to state the difference in sentence.⁴⁸ Since most sentencing remarks in Scotland are not published, we have not been able to discern from case law how the requirement to state the difference in sentence operates in practice.

7.41 An independent review in Scotland recommended removing this requirement in relation to hate crime.⁴⁹ The review's consultation paper noted there was anecdotal evidence that the requirement was not consistently complied with.⁵⁰ The limited case law we located supports that view.⁵¹ The independent review also considered feedback from legal bodies and sheriffs (who deal with the majority of criminal cases in Scotland) that an overly mathematical approach to sentencing is not always realistic or helpful.⁵² In some cases, particularly where other factors are at play or where the aggravation is at a relatively low level, the overall difference in sentence might be small. The independent review agreed, saying:⁵³

Sentencing is a matter of judgement and the sentencer [is required] to take into account a range of considerations in assessing the appropriate sentence in a particular case. Some factors may point in different directions. In some cases the difference in sentence attributable to the aggravation may lead to disappointment and disillusionment on the part of the victim.

7.42 The Scottish Government did not accept the independent review's recommendation. It decided to retain the requirement to state the difference in sentence on the basis that it provides greater transparency.⁵⁴ The Government also noted its removal would be inconsistent with the requirements for other statutory aggravations.⁵⁵

7.43 In England and Wales, there is no legislative requirement to state the difference hostile motivation made to the sentence imposed. However, the courts are encouraged to do so

⁴⁶ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [16(f)]. See also at [68].

⁴⁷ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 2(2)(d).

⁴⁸ See for example Criminal Justice and Licensing (Scotland) Act 2010 (UK), s 29(5)(d); and Human Trafficking and Exploitation (Scotland) Act 2015 (UK), ss 5(5)(d), 6(3)(d) and 7(4)(d).

⁴⁹ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [3.64].

⁵⁰ Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Consultation Paper* (August 2017) at 32.

⁵¹ *R v Murphy* [2015] HCJAC 34, 2015 SCL 577 at [17]; and *Di Pinto v Procurator Fiscal, Glasgow* [2024] HCJAC 7, 2024 SLT 203 at [26].

⁵² Alastair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final Report* (Justice Directorate, May 2018) at [3.62].

⁵³ At [3.64].

⁵⁴ Scottish Government *Policy Memorandum: Hate Crime and Public Order (Scotland) Bill* (23 April 2020) at [100]–[101].

⁵⁵ At [102].

by the Sentencing Council, which issues guidelines on sentencing.⁵⁶ It is recognised that, in some cases (for example, those involving certain public order offences), the aggravation is such an integral part of the offending that it cannot sensibly be separated out.⁵⁷ In that situation, the court will assess the seriousness of the conduct as a whole. In practice, case law shows a mix of approaches, with some sentencing decisions specifying discrete uplifts for hostile motivation⁵⁸ and others taking it into account alongside other factors when setting a provisional sentence.⁵⁹

- 7.44 Relevantly, general sentencing approaches in England and Wales and in Scotland differ from Aotearoa New Zealand. In England and Wales, most aggravating factors relating to the offence and the offender are taken into account by way of discrete uplifts to a provisional sentence.⁶⁰ This makes it more straightforward for the courts to state what the sentence would have been without the hostility aggravation. In Scotland, a sentence range is selected based on the seriousness of the offence and aggravating factors are considered to determine placement within that range (or, in some cases, they may take the sentence outside the range).⁶¹
- 7.45 Neither Australia nor Canada require sentencing courts to state the difference hostile motivation has made to the sentence imposed. Like Aotearoa New Zealand, these jurisdictions do not generally specify discrete uplifts for aggravating factors relating to an offence (although they do not apply the same two-step process as the New Zealand courts).⁶² Nonetheless, in some cases (particularly in Canada), the courts do give an indication of how hostile motivation has influenced the sentencing process. For example, they may:
- (a) emphasise certain sentencing objectives (such as denunciation and deterrence) over others because of the hostile motivation;⁶³

⁵⁶ Sentencing Council (England and Wales) “Hate Crime” <www.sentencingcouncil.org.uk>.

⁵⁷ Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [17.20]; and Crown Prosecution Service “Homophobic, Biphobic and Transphobic Hate Crime — Prosecution Guidance” (3 March 2022) <www.cps.gov.uk>.

⁵⁸ *R v Cooke* [2015] EWCA Crim 1414. See also the examples in CPS Yorkshire and Humberside “Hate crime sentence uplift examples: Cases finalised between April to June 2021” <www.chcpcic.org.uk>; and CPS Yorkshire and Humberside “Hate crime sentence uplift examples: cases finalised October 2024” (19 December 2024) <www.cps.gov.uk>.

⁵⁹ *R v White* [2021] EWCA Crim 1511, [2022] 4 WLR 10 at [37] and [39]; and *R v Healey* [2021] EWCA Crim 181 at [9] and [30].

⁶⁰ Sentencing Council (England and Wales) “General guideline: overarching principles” (1 October 2019) <www.sentencingcouncil.org.uk>.

⁶¹ Scottish Sentencing Council *The sentencing process: Sentencing guideline* (22 September 2021) at 8.

⁶² In Australia, the dominant approach is to consider all features of the offending and the offender together to reach an appropriate sentence: *Markarian v The Queen* [2005] HCA 25 at [37]–[39] and [84]; and *Barbaro v The Queen* [2014] HCA 2 at [34]. The Canadian approach similarly emphasises judicial discretion and does not prescribe any particular process: *R v LM* 2008 SCC 31, [2008] 2 SCR 163 at [17].

⁶³ *R v Bissonnette* 2019 QCCS 354 at [625]; *R v Grant* 2025 ONCJ 231 at [53]–[54]; *R v Kandola* 2010 BCSC 841, [2010] BCWLD 7849 at [39]–[41]; and *R v Vrdoljak* [2002] OJ No 1332 at [9] and [20]–[21].

- (b) take the offender's motivation into account when determining the appropriate type of sentence⁶⁴ (for example, imprisonment versus a community-based sentence) or declining to grant a discharge;⁶⁵ and
- (c) explicitly impose a harsher sentence on an offender who was motivated by hostility compared to one who was not.⁶⁶

Reform not recommended

- 7.46 We do not recommend requiring the courts to state the difference hostile motivation has made to an offender's sentence. We acknowledge that, in some cases, such a requirement could help to demonstrate to victims, affected communities and the public that hate crime is treated seriously. However, our analysis indicates that such a requirement would not be practicable or desirable.
- 7.47 One reason is that, because of the general approach to sentencing in Aotearoa New Zealand, specifying a discrete uplift for the hostility aggravating factor would require the courts to consider it at a different stage of sentencing to other aggravating factors relating to the offence. Hostility would need to be taken into account at step two of the sentencing process (adjusting the starting point). Currently, all aggravating factors relating to the offence are considered together at step one to decide on the starting point.
- 7.48 The alternative would be to change Aotearoa New Zealand's sentencing process to more closely resemble the approach in England and Wales, with most aggravating factors being considered individually at the second stage. We have not considered such a change as it is outside the scope of this review. We also note there is significant debate over the merits of different sentencing approaches.⁶⁷ For present purposes, we proceed on the basis that the overall approach to sentencing would remain the same.
- 7.49 We consider it is undesirable to require the courts to address hostile motivation separately from other aggravating factors relating to the offence for three reasons:
- (a) In some cases, the hostility will be an integral part of the conduct that constitutes the offence (for example, in cases of graffiti vandalism or offensive behaviour or language). In such cases it will be difficult to reach a view on the seriousness of the offence — and therefore the appropriate starting point — without taking hostile motivation into account. Requiring judges to specify a discrete uplift would be artificial and may create a risk of double counting the factor.
 - (b) Hostile motivation may be closely related to other aggravating factors such as the extent of the harm caused by the offending or the fact that the offending targeted a vulnerable victim. Considering these related aggravating factors when setting the starting point and then applying a separate uplift for hostile motivation may further increase the risk of double counting.

⁶⁴ *R v Grant* 2025 ONCJ 231 at [63]–[65]; *R v Gillard* 2022 ONCJ 164 at [43] and [49]; and *R v Vrdoljak* [2002] OJ No 1332 at [9] and [21].

⁶⁵ *R v Grant* 2025 ONCJ 231 at [62]; *R v Gillard* 2022 ONCJ 164 at [38]; and *R v Shier* 2019 BCPC 399 at [28].

⁶⁶ *Grivell v Mackley* [2008] NTCCA 06 at [39] and [52]–[53].

⁶⁷ See for example *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [15] and [27]; and *Markarian v The Queen* [2005] HCA 25.

- (c) Requiring judges to specify an uplift for hostile motivation and not for other aggravating factors could lead to it being given greater weight, even where other factors are as significant or more significant on the facts of the case.
- 7.50 Another reason we do not recommend requiring judges to state the difference hostile motivation made to the sentence is that we are not confident it would have the desired effect of strengthening denunciation of hate crime. We see some merit in the observation of the Scottish independent review (discussed earlier) that, in some situations, it may lead to disappointment and disillusionment on the part of the victim or the affected community. There will be cases where the hostility aggravating factor has no impact or only a small impact on the sentence imposed — for example, where the hostility is a relatively minor factor in the offending and so its impact on the victim and affected community is more limited. In these cases, it is still important for the sentencing judge to recognise and denounce the hostility to send a message about public values. Requiring them to state the difference in sentence may undermine that message if the uplift is small or non-existent.
- 7.51 There are ways for the courts to convey the significance of the hostility aggravating factor in appropriate cases without specifying a discrete uplift. For example, they can emphasise certain sentencing purposes (such as denunciation) over others, refer to the factor as a reason for choosing a certain sentence type (such as imprisonment instead of a community-based sentence) or explain that a harsher sentence is required compared to cases of similar offending that were not motivated by hostility. They may also expressly state that the factor has been given significant weight in setting the starting point or that the sentence imposed reflects society's condemnation of hate crime.
- 7.52 Further, as explained earlier, our recommendation to require sentencing judges to state if the aggravating factor applies (R4) would, along with appropriate training, draw judicial attention to the factor. This should also prompt sentencing judges to consider and explain the relevance of section 9(1)(h) to the sentencing process in a way that is appropriate to the case at hand.

SENTENCING GUIDELINES

Consultation

- 7.53 We did not identify the option of creating sentencing guidelines for hate crime cases in our Consultation Paper. However, five submitters suggested sentencing guidelines may be beneficial.⁶⁸ Two committees of the Law Association of New Zealand said guidelines could improve consistency and transparency in sentencing decisions.⁶⁹ The New Zealand Jewish Council suggested guidelines should require judges to consider whether hostile motivation is an aggravating factor and provide guidance on the appropriate sentences in such cases.

⁶⁸ Justice for Palestine, Alternative Jewish Voices and Dayenu (joint submission); The Law Association Criminal Law Committee; The Law Association Public and Administrative Law Committee; New Zealand Federation of Business and Professional Women; and New Zealand Jewish Council.

⁶⁹ The Law Association of New Zealand Criminal Law Committee; and The Law Association of New Zealand Public and Administrative Law Committee.

Reform not recommended

- 7.54 We agree there may be value in having general guidance for judges on the application of the hostility aggravating factor. This could help to ensure that sentencing decisions clearly address whether the factor applies on the facts of the case and, if it does, strongly denounce the offender's hostile motivation.
- 7.55 At present, however, there is no mechanism for issuing sentencing guidelines in Aotearoa New Zealand. In some jurisdictions, a statutory body (sometimes called a Sentencing Council) is responsible for issuing sentencing guidelines to promote consistency of sentencing.⁷⁰ In 2006, Te Aka Matua o te Ture | Law Commission recommended establishing a New Zealand Sentencing Council with a mandate to draft sentencing guidelines.⁷¹ This recommendation was accepted and the Sentencing Council Act 2007 was enacted. However, the Council was ultimately never established and the Act was repealed in 2017. In 2024, Te Tāhū o te Ture | Ministry of Justice raised the option of a Sentencing Council again,⁷² but at this time, there is no indication that the Government intends to establish one. Accordingly, we do not recommend the development of sentencing guidelines for hate crime as there is no body with the authority to issue such guidelines.
- 7.56 The courts occasionally issue guideline judgments, but that is done on their own initiative in response to a case before them. In any event, the purpose of a guideline judgment is to set out sentencing bands for certain types of offending. It would be difficult for the courts to identify sentencing bands for hate crimes, given the wide variety of offence types that may be motivated by hostility and the range of applicable maximum penalties. As discussed earlier, some guideline judgments for particular types of offences do already refer to hostile motivation as a relevant factor when selecting a sentencing band.
- 7.57 The courts can provide more general guidance on the application of the aggravating factor through case law. As more hate crime cases are considered by the courts, judicial precedent will continue to develop. Our recommendation earlier in this chapter (R4) should assist that process by encouraging the courts to clearly address the application of the aggravating factor in sentencing decisions.
- 7.58 Additionally, training materials provided to judges by Te Kura Kaiwhakawā | Institute of Judicial Studies may fulfil some of the functions of sentencing guidelines (in a less formal way) by ensuring judges are well informed about aspects of the law and their application. We discuss judicial training in Chapter 9.

⁷⁰ For example, the United States of America (federal and some state jurisdictions), England and Wales, Scotland and the Republic of Ireland.

⁷¹ Te Aka Matua o te Ture | Law Commission *Sentencing guidelines and parole reform* (NZLC R94, 2006) at 29 (recommendation 1).

⁷² Te Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Amendments to the Sentencing Act 2002* (30 May 2024) at 2 and [8]–[11].

EXPRESS PROVISION FOR COMMUNITY IMPACT STATEMENTS AT SENTENCING

Consultation

- 7.59 Although it was not an option we had identified in our Consultation Paper, the New Zealand Jewish Council suggested in its submission that there should be provision for affected groups (not just individual victims) to make victim impact statements at sentencing. It said this would help to ensure the courts understand the broader communal harm caused by the offending. We refer to these statements as ‘community impact statements’.
- 7.60 While no other submitters made this suggestion, many observed that hate crimes cause harm to the wider community to which the victim belongs.⁷³ Some submitters said hate crimes can:
- (a) create feelings of fear, anxiety and anger within the targeted community;⁷⁴
 - (b) cause the targeted community to decrease their public presence and voice;⁷⁵ and
 - (c) erode the community’s ability to safely practise their culture and religion.⁷⁶
- 7.61 Inclusive Aotearoa Collective Tāhono emphasised that hate crimes are directed towards a community. The essence of a hate crime and the intention of the offender is to send a message to the targeted community that they should be silent and know their place.

The current law

- 7.62 One of the purposes of sentencing in the Sentencing Act is to hold the offender accountable for harm done to the victim *and the community* by the offending.⁷⁷ Despite this, in most sentencing decisions where the hostility aggravating factor is applied, community harm is not specifically discussed.⁷⁸ The court’s assessment of the harm caused by the offending usually focuses on the impact on the individual victims.
- 7.63 The courts are informed of the harm caused to victims through victim impact statements. These statements detail the effect of the offending on the victim and are presented to the sentencing court under the Victims’ Rights Act 2002.⁷⁹ A ‘victim’ is defined as a person against whom the offence was committed or a person who suffered physical injury or property loss or damage.⁸⁰
- 7.64 There is no specific process for informing the courts of harm done to the community. However, under section 17AAB of the Victims’ Rights Act, a prosecutor may decide to

⁷³ 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.

⁷⁴ Grace Carroll; Inclusive Aotearoa Collective Tāhono; Submission 43; and Women’s Rights Party.

⁷⁵ Inclusive Aotearoa Collective Tāhono; Dr Mark Walters; and Women’s Rights Party.

⁷⁶ Submission 43; and Dr Mark Walters.

⁷⁷ Sentencing Act, s 7(1)(a).

⁷⁸ The only two exceptions we found were *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [111] (discussed further below); and *Arps v Police* [2019] NZHC 2113 at [49].

⁷⁹ Victims’ Rights Act 2002, ss 17 and 21(1).

⁸⁰ Section 4 (definition of “victim”). The definition also includes the immediate relative of a person who died or is incapable as a result of the offence, or the parent or legal guardian of a victim who is a child or young person.

treat a person as a victim (for the purposes of the victim impact statement provisions) if they were disadvantaged by the offence. The prosecutor can submit a victim impact statement from such a person if the sentencing judge grants leave to do so.⁸¹ The purpose of section 17AAB is not clear from the legislative history. The provision was added at the select committee stage without any explanation of the committee's reasons.⁸²

- 7.65 Section 17AAB has been used to admit impact statements on behalf of the wider affected community in some cases. The court that sentenced the perpetrator of the Christchurch terror attack on 15 March 2019 accepted statements from community groups about the impact of the offending on the Muslim community.⁸³ The judge took into account the harm caused “to the sense of security and wellbeing of members of the Muslim community, both in Christchurch and more widely throughout New Zealand as a whole”.⁸⁴ We did not find any other examples of community impact statements being admitted in hate crime cases, but it does occur occasionally for other types of offending (particularly environmental offending such as unlawful discharge of contaminants).⁸⁵
- 7.66 In addition, there is precedent for treating members of the wider community affected by hate crimes as victims in their own right (although not in the context of admitting impact statements). In *Arps v Department of Corrections*, the Court of Appeal considered the definition of ‘victim’ in the Sentencing Act, which is similar to the one in the Victims’ Rights Act.⁸⁶ Mr Arps was convicted of distributing video footage of the Christchurch terror attack. The Court was considering an appeal against special release conditions imposed on Mr Arps to protect the victims of his offending. In rejecting the appeal, the Court found that all members of the Muslim community were “persons against whom the offence was committed” and therefore qualified as victims.⁸⁷ That is because the offending was not targeted towards particular Muslims — it was intended to intimidate or denigrate any persons of the Muslim faith. If a similar approach was adopted under the Victims’ Rights Act, it could enable the presentation of community impact statements at sentencing even without relying on section 17AAB. It is not clear, however, that the courts would adopt the same broad approach to defining victims in all hate crime cases (particularly where the offending targets a specific victim).

⁸¹ Section 21(2).

⁸² Victims’ Rights Bill 2001 (331-2) (select committee report) at 17, referring to cl 20, which is now s 17AAB.

⁸³ *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [27] and fn 1 (referring to s 20 of the Victims’ Rights Act, which has since been renumbered as s 17AAB).

⁸⁴ At [111].

⁸⁵ See for example *Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd* (2014) 18 ELRNZ 68 at [28]–[29]; and *Bay of Plenty Regional Council v CRS Tauranga Ltd* [2021] NZDC 4071 at [77]–[80].

⁸⁶ *Arps v Department of Corrections* [2020] NZCA 547.

⁸⁷ At [13]–[15].

Overseas approaches

7.67 Community impact statements are provided for in legislation in Canada,⁸⁸ South Australia⁸⁹ and some jurisdictions in the United States of America.⁹⁰ They are also used on a non-statutory basis in England and Wales.⁹¹

7.68 In all these jurisdictions, community impact statements appear to be used on a case-by-case basis rather than as a matter of course. None of the jurisdictions limit their use to certain offence types. Community impact statements have been admitted in some hate crime cases in Canada⁹² and England and Wales.⁹³ They have also been admitted at sentencing for a range of other offending, including violent disorder offending,⁹⁴ drug offending,⁹⁵ child sexual offending⁹⁶ and robberies targeting elderly women.⁹⁷ In Canada and South Australia, they have been used to communicate the impact of offending on indigenous communities.⁹⁸

7.69 The purpose of community impact statements has been described by the Ontario Superior Court of Justice as follows:⁹⁹

Community impact statements ... are intended to provide a mechanism for enhanced public participation in the criminal sentencing process. They also recognize that the impact of certain offences is often felt by the community where the offence occurs and not just the individual victims of the specific offence or offences. Within permissible confines, community impact statements provide the court with meaningful and helpful information to be considered in arriving at a fit sentence for a particular offence.

7.70 In the context of hate crimes in particular, the Crown Prosecution Service in England and Wales states:¹⁰⁰

Hate crime offences often have a disproportionate impact on the victim because they are being targeted for a personal characteristic, whether it's their disability, race, religion, sexual orientation or transgender identity. The fear and lack of safety felt by the victims of hate crime can have a ripple effect on the wider community, undermining peoples' confidence and security. The use of a [community impact statement] allows for both the prevalence and the

⁸⁸ Criminal Code RSC 1985 c C-46, s 722.2.

⁸⁹ Sentencing Act 2017 (SA), s 15.

⁹⁰ See for example DC Code § 23-1904(f)(1); and Minn Stat § 611A.038(b).

⁹¹ Court of Appeal (Criminal Division) *Criminal Practice Directions 2023* (November 2025) at [9.5.19]–[9.5.23]; and Crown Prosecution Service “Community Impact Statements” (29 October 2019) <www.cps.gov.uk>.

⁹² See for example *R v Kroeplin* 2021 ONCJ 19 at [133]–[136]; *R v Veltman* 2024 ONSC 1054 at [102]–[109]; and *R v Akbari* 2025 ONCJ 398 at [18]–[31].

⁹³ Crown Prosecution Service “Community impact statements and their use in hate crime cases: Guidelines for prosecutors” (31 January 2023) <www.cps.gov.uk>.

⁹⁴ *R v Blackshaw* [2011] EWCA Crim 2312 at [49]–[51]; and *R v Davison* [2025] EWCA Crim 143.

⁹⁵ *R v Rodgers* [2024] EWCA Crim 257 at [7] and [19].

⁹⁶ *R v Laplante* 2021 NWTSC 29, [2021] AWLD 3768 at [39]–[41]; and *R v Brooker* [2024] SASC 84.

⁹⁷ *State of Wisconsin v Smalley* (Court of Appeals of Wisconsin, 2020AP954-CR, 2020AP955-CR, July 19, 2022) at 2.

⁹⁸ *R v Lean* [2017] SASCFC 101 at [10]; *R v Silverfox* 2022 YKSC 30 at [30]–[35]; and *R v Atkinson* 2024 YKSC 21, 2024 WCB 1694 at [40] and [45].

⁹⁹ *R v Theriault* 2020 ONSC 5784 at [4].

¹⁰⁰ Crown Prosecution Service “Community impact statements and their use in hate crime cases: Guidelines for prosecutors” (August 2018) <www.cps.gov.uk>.

impact of these crimes to be fully understood and taken into account in appropriate hate crime cases.

Reform not recommended

- 7.71 As discussed in Chapter 3, one of the reasons for treating hate crimes more seriously than equivalent non-hate crimes is that they cause additional harm to the wider community. Hate crimes are, in a sense, crimes against the whole group to which the victim belongs.
- 7.72 It is therefore appropriate and, in many cases, desirable for sentencing decisions in cases involving hate crime to acknowledge the harm caused to the wider community. Currently, it is rare for sentencing courts to refer explicitly to the community harm caused by hate crimes. We consider that, in some cases, community impact statements could help to inform the court about those wider harms.
- 7.73 Reform is not required to enable the use of community impact statements. As explained above, there is precedent for admitting such statements under section 17AAB of the Victims' Rights Act, including in hate crime cases. We acknowledge the Victims' Rights Act could be clearer about the ability to admit community impact statements, which could encourage their use in appropriate cases. However, that is not an issue specific to hate crime and it would not be appropriate for us to recommend reform as part of this review.
- 7.74 There are other types of offending that have impacts beyond individual victims and may equally benefit from consideration of community impact statements at sentencing. For example, as noted above, section 17AAB of the Victims' Rights Act is sometimes used to admit statements about the community impacts of environmental offending. A reform relating solely to hate crime could inadvertently call that practice into question. On the other hand, a broader amendment is outside the scope of this review and could have significant resourcing implications for Ngā Pirihimana o Aotearoa | New Zealand Police (which prepares victim impact statements) and the courts. There are also practical issues that would need to be worked through if community impact statements were to be widely used. For example, it may not always be straightforward to determine who should prepare a statement on behalf of a community.
- 7.75 Issues relating to victim impact statements were going to be considered by the Ministry of Justice in a review of the Victims' Rights Act, which was commenced in 2023 but put on hold the following year. We consider a review of the Victims' Rights Act is the appropriate forum to consider the use of community impact statements in general and whether amendment is desirable to facilitate it.
- 7.76 In the meantime, Police may wish to consider whether it is appropriate to prepare a community impact statement in cases where the hostility aggravating factor will be raised at sentencing. The Police Instructions on hate crime currently state that victim impact statements should capture fully the harm to the victim. Police could consider adding a prompt to assess whether a community impact statement may also be appropriate in the circumstances to capture the harm to the community. Additionally, there are general Police Instructions on victims, which cover victim impact statements but do not presently refer to the possibility of community impact statements. We discuss a review of the Police guidance relating to hate crime in Chapter 9.

7.77 Community impact statements will not be necessary in all, or even most, hate crime cases. The likely impact of such a statement would need to be balanced against the time and cost involved in producing it and presenting it in court. For some offences, community impacts may be general in nature and able to be inferred by the judge from the circumstances of the offending. For example, sentencing notes sometimes refer to the community impacts of stranger sexual assaults (causing women to be fearful in public places) and drug offending (causing addiction and associated crime) without reference to an impact statement.¹⁰¹ Similarly, an impact statement may not be required for the court to take account of the fact that hate crimes generally cause wider fear among the affected community.¹⁰² There may, however, be value in a community impact statement in cases where the court requires further information to properly assess the harm the offending has caused to the affected community.

¹⁰¹ See for example *R v Tepania* [2021] NZHC 2015 at [14]; and *R v Fitzsimmons* [2017] NZDC 22449 at [10]–[12].

¹⁰² See for example *R v Porco* 2017 ONCJ 676 at [16]–[19].

CHAPTER 8

Wording of section 9(1)(h)

INTRODUCTION

- 8.1 In this chapter, we recommend two reforms to the wording of section 9(1)(h) of the Sentencing Act 2002. Section 9(1)(h) provides that the court must take into account (where applicable):

that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic:

- 8.2 As explained in Chapter 1, we have not been asked to conduct a comprehensive ground-up review of New Zealand hate crime law. The Government asked us to focus our attention on whether the law should be changed to create standalone hate crime offences.
- 8.3 For this reason, we have not sought to re-draft section 9(1)(h) from scratch. Nevertheless, we consider it appropriate to recommend straightforward reforms to the wording of section 9(1)(h) where they address issues that arise as a consequence of other reforms we propose or where we have identified a clear problem with the current operation of the law.
- 8.4 On that basis, we recommend:
- (a) removing the requirement in section 9(1)(h)(ii) that the offender must have believed the victim has the relevant protected characteristic; and
 - (b) adding 'sex' to the illustrative list of enduring common characteristics.
- 8.5 We also discuss several other issues on which we sought feedback in our Consultation Paper or that were raised by submitters but make no other recommendations for reform.

THE VICTIM REQUIREMENT

- 8.6 In accordance with paragraph (ii) of section 9(1)(h), the aggravating factor only applies if "the offender believed that the victim has ... [a protected] characteristic". We refer to this as the 'victim requirement'.
- 8.7 The victim requirement means that section 9(1)(h) may not apply if the victim is only associated with the targeted group (such as family members or people providing support services to the group) or is an innocent bystander (such as the owner of public-facing property that is vandalised to spread hateful messages).

- 8.8 As an example, members of Destiny Church New Zealand vandalised rainbow pedestrian crossings on Council-owned property in Auckland and Gisborne in March 2024.¹ Ngā Pirihimana o Aotearoa | New Zealand Police said it was treating the acts of vandalism as hate crimes.² However, it is debatable whether the aggravating factor would cover the situation since the victims (Auckland Council and Gisborne District Council) were not — and were probably not believed to be — members of the rainbow community. In our Consultation Paper, we sought feedback on whether the victim requirement is causing problems in practice.³

Consultation

- 8.9 Six submitters discussed the victim requirement. Three did not think there is a problem with the current wording.⁴ They said judges have broad sentencing discretion and are unlikely to be prevented from taking hostile motivation into account merely because the direct victim is not a member of the targeted group.⁵ They also said the subjective element of section 9(1)(h) is important because it distinguishes section 9(1)(h) from other aggravating factors.⁶ One submitter considered that direct victimisation such as vandalism of a person's home is more serious than public vandalism because it is more likely to create fear of future targeting in the victim and others who share the characteristic.⁷
- 8.10 Conversely, three submitters identified potential problems with the victim requirement. Some arguments they made included the following:
- (a) Hate crimes cause harm to wider society regardless of whether the victim is a member of the targeted group.⁸ The direct victims of hate crimes are, to some extent, interchangeable because the offender's focus is on the characteristic itself. On this basis, it seems logical to provide protection to people only assumed to be associated with members of the targeted group.
 - (b) Prejudice-motivated offending can have ripple effects beyond the person or property directly targeted.⁹ This supports treating prejudice as an aggravating factor and raises questions about whether, for example, vandalism of rainbow crossings should engage section 9(1)(h).

¹ Pedestrian crossings of this type are installed with colours and art of the rainbow flag to celebrate the rainbow community.

² RNZ “Three charged over Gisborne rainbow crossing vandalism” (29 March 2024); and RNZ “Police treat painting over of Auckland’s K’ Road rainbow crossing as hate crime” (28 March 2024).

³ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper) at [5.51]–[5.53].

⁴ Graeme Edgeler; Te Kāhui Ture o Aotearoa | New Zealand Law Society; and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁵ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

⁶ Te Kāhui Ture o Aotearoa | New Zealand Law Society (it did not refer to any other specific aggravating factors).

⁷ Graeme Edgeler.

⁸ Luke Cunningham Clere.

⁹ Grace Carroll.

- (c) The victim requirement prevents some hate crimes from being treated as such, including offending that targets a group symbolically rather than through an individual victim.¹⁰

The need for reform

- 8.11 We are not aware of any cases in Aotearoa New Zealand in which the victim requirement in section 9(1)(h) has caused problems in practice. Our research did not uncover cases involving victims associated with, but not a member of, the relevant group nor any judicial consideration of whether section 9(1)(h) can apply where the victim is an innocent bystander. We are aware of one case in which the aggravating factor was applied to property damage involving a Sikh temple, but it is unclear who the court treated as the victim.¹¹
- 8.12 In relation to the two instances of rainbow crossing vandalism, the defendant in the Auckland case pleaded guilty and was convicted and discharged.¹² It is unclear whether the aggravating factor was considered. In the Gisborne case, two defendants pleaded guilty to wilful damage and applied for a discharge without conviction.¹³ That application was dismissed but no further penalty ordered. In dismissing the application, the judge accepted the Police submission that the offending could properly be characterised as a hate crime.¹⁴ Again, however, it is unclear who the court treated as the victim for the purposes of section 9(1)(h).
- 8.13 Although the victim requirement does not seem to be causing difficulties at this stage, if the other reforms we propose in this Report are made, we consider the opportunity should be taken to remove it.
- 8.14 A key reason is that the reforms we propose may well make the victim requirement more problematic. As Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service observed in its submission, one reason the victim requirement may not currently be causing difficulties is that the courts have a broad discretion in section 9(4) of the Sentencing Act to take into account any factor they consider to be relevant, in addition to the specific aggravating factors listed in section 9(1). This broad discretion may mean the courts are not overly concerned with the specific wording of section 9(1)(h). If a judge considers offending involved an element of hate or prejudice, they may treat that as an aggravating factor whether or not the specific requirements of section 9(1)(h) are met.
- 8.15 This position will change if the reforms recommended in Chapters 6 and 7 are adopted. Those reforms will require judges to state at sentencing if section 9(1)(h) applies and to make an entry on the permanent court record. These requirements will only be engaged if the court has determined that section 9(1)(h) applies — not if the court relies on its

¹⁰ Dr Kyle R Matthews.

¹¹ *Bryan v Police* CRI 2009-404-45, 3 April 2009. The defendant may have believed the owner would be Sikh or the court may have treated the people that used the temple as victims. The victim requirement was not discussed. There are likely to be other hate crime cases involving vandalism or other property damage, but they would mostly be heard in the District Court and so the sentencing notes are unlikely to be published.

¹² RNZ “Man pleads guilty to vandalising K Road rainbow crossing, to pay \$16,000” (Aotearoa New Zealand, 15 April 2024).

¹³ *New Zealand Police v Packer* [2026] NZDC 2920.

¹⁴ At [23].

general discretion under section 9(4). Therefore, the precise requirements of section 9(1)(h) are likely to become more important.

- 8.16 It is possible sentencing courts will take a wide view of who qualifies as a victim for the purposes of section 9(1)(h). The Sentencing Act defines a ‘victim’ as a person against whom an offence is committed or who suffers physical injury or property damage as a result of an offence.¹⁵ As explained in Chapter 7, while the definition of ‘victim’ has not been discussed by the courts in relation to section 9(1)(h), it was considered by Te Kōti Pira | Court of Appeal in a different context in *Arps v Department of Corrections*.¹⁶ Mr Arps was convicted of distributing video footage of the Christchurch terror attack on 15 March 2019. The case concerned special release conditions imposed on Mr Arps to protect the victims of his offending. The Court of Appeal found that all members of the Muslim community were “persons against whom the offence was committed”.¹⁷ It said:¹⁸

Here, the primary purpose of distributing the video and modifying it to add crosshairs and a kill count, was to glorify and trivialise the shooting of Muslims. The offending was not targeted towards particular Muslims; it was targeted towards any persons of the Muslim faith. It was motivated by hostility towards Muslims, by bigotry and by racial hatred. There is no numerical limit to the number of persons who can be victims. Where offending is intended to intimidate or degrade an entire community, then all members of that community will be the victims of the offence.

- 8.17 If the courts were to take this approach of treating the wider affected group as victims for the purposes of section 9(1)(h), the victim requirement is unlikely to cause difficulty. However, the Court of Appeal in *Arps* recognised that the question of who qualifies as a victim is case specific.¹⁹ In that case, the offending was not directed at particular individuals but at the Muslim community as a whole.
- 8.18 Similar reasoning may apply in some other types of hate crime cases such as those involving vandalism of public property or property used by a specific group (for example, religious buildings). Often, however, hate crimes are directed at an identifiable individual or individuals, even though they cause indirect harm to the wider community. It is uncertain whether a court would take the same approach in those circumstances. For example, an offender who is hostile towards transgender people might assault or threaten a doctor who provides gender-affirming care without believing the doctor is transgender. It is not clear that the transgender community would be treated as victims in this situation for the purposes of section 9(1)(h).
- 8.19 Clarifying the law to ensure that the aggravating factor can apply even when the offender does not believe the direct victim is a member of the targeted group would bring New Zealand law into line with most of the other jurisdictions we examined. Hate crime laws in these jurisdictions either contain a broader victim requirement — extending to people associated with the relevant group — or no victim requirement at all.

¹⁵ Sentencing Act 2002, s 4 (definition of “victim”). The definition also includes the parent or legal guardian of a victim who is a child or young person and the immediate family members of a person who dies or is incapable as a result of an offence.

¹⁶ *Arps v Department of Corrections* [2020] NZCA 547.

¹⁷ At [13]–[15].

¹⁸ At [14].

¹⁹ At [15].

- 8.20 Some jurisdictions have two alternative tests for establishing that an offence was aggravated by hostility.²⁰ The first test is whether the offender *demonstrated* hostility towards a victim and the second is whether the offender was *motivated* by hostility. When the demonstration test is relied on, a specific victim is required. However, in all but one of the jurisdictions we examined that use this test,²¹ it is sufficient (at least in relation to some protected characteristics) if the victim was believed to be *associated* with the targeted group.²² When the motivation test is relied on, there is no victim requirement — it need only be shown that the offender was motivated by hostility towards a group of people.²³
- 8.21 Other jurisdictions use a motivation test only. In some of these jurisdictions, there is a victim requirement but it includes people associated with the targeted group.²⁴ In others, there is no victim requirement and offending need only be motivated by hate towards a group of people or based on a protected characteristic.²⁵
- 8.22 In contrast, New South Wales and South Australia have a victim requirement similar to that in Aotearoa New Zealand.²⁶ In 2013, the New South Wales Law Reform Commission recommended amending the hostility aggravating factor to cover hostility towards groups with which the offender believed the victim was associated.²⁷ The intention was to protect individual victims targeted for providing advocacy or support services to the relevant group.²⁸ To date, this recommendation has not been implemented.²⁹
- 8.23 An independent review in Scotland in 2018 discussed the difficulties of a victim requirement.³⁰ Under the previous law in Scotland, coverage for victims associated with the relevant group existed for some protected characteristics but not others. The

²⁰ This is the case in England and Wales, Scotland, Northern Ireland, the Republic of Ireland and Western Australia. In the Republic of Ireland, the alternative demonstration/motivation tests only apply to specific hate crime offences. There is also an aggravating factor, which uses a motivation test only and is discussed below.

²¹ The exception being Western Australia: Criminal Code Act Compilation Act 1913 (WA), s 80I.

²² Crime and Disorder Act 1998 (UK), s 28(3)(a) and (6)(c) (as amended by the Crime and Policing Act 2026 (UK), s 145); Sentencing Act 2020 (UK), s 66(4)(a) and (6)(c); Hate Crime and Public Order (Scotland) Act 2021 (UK), s 1(5); The Criminal Justice (No 2) (Northern Ireland) Order 2004 (UK), art 2(5); Non-Fatal Offences against the Person Act 1997 (Ireland), s 1A(3); Criminal Damage Act 1991 (Ireland), s 2A(7); and Criminal Justice (Public Order) Act 1994 (Ireland), s 3A(3). In England and Wales, “association” is only expressly covered in relation to racial and religious groups.

²³ Crime and Disorder Act 1998 (UK), s 28(3)(b) (as amended by the Crime and Policing Act 2026 (UK), s 145); Sentencing Act 2020 (UK), s 66(4)(b); Hate Crime and Public Order (Scotland) Act 2021 (UK), s 1(1)(b); The Criminal Justice (No 2) (Northern Ireland) Order 2004 (UK), art 2(3)(b); Criminal Code Act Compilation Act 1913 (WA), s 80I; Non-Fatal Offences against the Person Act 1997 (Ireland), s 1A(1)(b); Criminal Damage Act 1991 (Ireland), s 2A(2)(b); and Criminal Justice (Public Order) Act 1994 (Ireland), s 3A(1)(b). This approach is retained in the Bill currently before the Northern Ireland Assembly: Criminal Justice (Sentencing etc) Bill 2026 (26/22-27), cl 33(2)(b) and (4) (definition of “membership”).

²⁴ This is the case in Tasmania and Victoria: see Sentencing Act 1997 (Tas), s 11B(1)(b)(ii); and Sentencing Act 1991 (Vic), s 5(2)(daaa).

²⁵ This is the case in the Northern Territory, Queensland and Canada as well as in the Republic of Ireland under its aggravating factor: see Sentencing Act 1995 (NT), s 6A(1)(e); Criminal Code Act 1899 (Qld), s 52B; Criminal Code RSC 1985 c C-46), s 718.2(a)(i); and Criminal Justice (Hate Offences) Act 2024 (Ireland), s 8(1). As discussed above, the Republic of Ireland also has specific hate crime offences, which use the alternative demonstration/motivation tests.

²⁶ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h); and Sentencing Act 2017 (SA), s 11(1)(ca).

²⁷ New South Wales Law Reform Commission *Sentencing* (R139, 2013) at [4.190] (recommendation 4.8).

²⁸ At [4.189].

²⁹ New South Wales Law Reform Commission *Serious Racial and Religious Vilification* (R151, 2024) at [8.50].

³⁰ Alistair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final report* (May 2018) at [3.37]–[3.39].

independent review recommended extending protection to include association for all protected characteristics, saying:³¹

It would seem appropriate for legislation to apply in cases where hostility is demonstrated because of a protected characteristic, even if the person to whom the hostility is expressed does not actually have the characteristic. In their submission to the Justice Committee considering the 2009 Bill, Action on Hearing Loss Scotland (the Royal National Institute for Deaf People) referred to examples of deaf families being the victims of crimes, and gave anecdotal evidence that such crimes also affected hearing members of the family. Such a provision would also catch offending behaviour against individuals who act as advocates or champions for groups with one of the protected characteristics.

- 8.24 This recommendation was implemented when Scotland's hate crime legislation was passed in 2021.³²
- 8.25 Under the current law in England and Wales, the demonstration limbs of the hostility aggravating factor and hate crime offences similarly only apply to victims by association in relation to some protected characteristics.³³ The Law Commission of England and Wales recommended extending this protection to other protected characteristics in 2014³⁴ and again in 2021.³⁵ It considered this was necessary to avoid inconsistency and a gap of protection in the law.³⁶ This change has not yet been implemented.
- 8.26 A reform to ensure that the aggravating factor applies even when the direct victim does not share the protected characteristic would be consistent with the rationales for hate crime law. As discussed in Chapter 3, hate crimes are treated more seriously than equivalent non-hate offences because of the additional harm they cause to the wider community and because the offender's motive affects their moral blameworthiness. These rationales apply whether or not the offender believed that the direct victim was a member of the relevant group. The harm to the affected community will not necessarily be less where the victim is only associated with the group or is an innocent bystander. The offending is still intended to send a message to the targeted group about their place in society. The level of harm caused to the affected group and the culpability of the offender will differ depending on the facts, but those considerations are properly taken into account by the courts when deciding what weight to give the aggravating factor (as opposed to whether it applies at all).
- 8.27 Overall, if the other reforms we recommend are implemented, we consider it desirable to remove the victim requirement. This would address the ambiguity in the current law and to ensure the law can apply in a broad range of circumstances consistent with its underlying rationale.

³¹ At [3.39] (recommendation 5).

³² Hate Crime and Public Order (Scotland) Act 2021 (UK), s 1(5).

³³ Sentencing Act 2020 (UK), s 66(4)(a) and (6)(c); and Crime and Disorder Act 1998 (UK), s 28(3)(a) and (6)(c) (as amended by the Crime and Policing Act 2026 (UK), s 145). The separate motivation test is not restricted in this way since, as noted above, it does not contain a victim requirement.

³⁴ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [8.7]–[8.11]. The hostility aggravating factor was at that time in ss 145–146 of the Criminal Justice Act 2003 (UK).

³⁵ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [4.288] (recommendation 7).

³⁶ Law Commission (England and Wales) *Hate Crime: Should the Current Offences be Extended?* (R348, 2014) at [6.37]–[6.41]; and Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [4.285].

Recommendation

R5

Section 9(1)(h)(ii) of the Sentencing Act 2002, which requires that “the offender believed that the victim has that characteristic”, should be repealed.

- 8.28 For the reasons given, we recommend amending section 9(1)(h) to remove the requirement in paragraph (ii) that the offender must have believed the victim has the relevant characteristic.
- 8.29 We considered an alternative option of extending section 9(1)(h) to victims who are associated with the targeted group. However, that would not address the situation of other victims who are not associated with the group (such as the owners of property vandalised to spread hateful messages). It may also complicate proceedings due to disputes about the meaning of ‘associated’. We see no need to restrict the provision in this way.
- 8.30 As explained above, most of the jurisdictions that provide for victims by association have separate demonstration and motivation tests and have no victim requirement under the motivation limb. A victim requirement may well be necessary under a demonstration test to ensure a sufficient link between the hostility and the offending — otherwise a verbal slur used during unrelated offending and not heard by any member of the relevant group could lead to the offence being treated as a hate crime. However, there is no demonstration test currently in Aotearoa New Zealand. Under section 9(1)(h), the offending must occur because of the hostility. That test explicitly requires a link between the hostility and the offending, rendering a victim requirement unnecessary.
- 8.31 If this amendment is made, it may present an opportunity to simplify the wording and structure of section 9(1)(h). The concept currently conveyed by paragraph (i) (“the hostility is because of the common characteristic”) could potentially be reflected more simply — for example, by referring to hostility towards a group of people “based on” or “on account of” an enduring common characteristic.³⁷ This could make the provision more concise and understandable. However, this is ultimately a matter on which Te Tari Tohutohu Pāremata | Parliamentary Counsel Office is best placed to advise.
- 8.32 To avoid any doubt, we emphasise that removing the victim requirement will not mean every offence targeting public property will be treated as a hate crime. There must still be clear evidence that the offence was committed because of hostility towards a group of people.

WHICH CHARACTERISTICS SHOULD RECEIVE PROTECTION

- 8.33 Most of the issues we address in this chapter concern the characteristics that should be protected by section 9(1)(h). Currently, section 9(1)(h) applies to offending motivated by hostility towards a group of people who have an ‘enduring common characteristic’. The provision lists the following examples: “race, colour, nationality, religion, gender identity, sexual orientation, age, or disability”. This list is illustrative, not exhaustive. Offending

³⁷ See for example Criminal Code Act 1899 (Qld), s 52B; and Criminal Justice (Hate Offences) Act 2024 (Ireland), s 8(1).

based on other ‘enduring common characteristics’ may also fall under the aggravating factor (we refer to this as the ‘residual category’).

- 8.34 We address below the following issues in relation to the current wording of section 9(1)(h) on which we consulted or that were raised with us during consultation:
- (a) Whether the list of characteristics in section 9(1)(h) should be exhaustive (closed) rather than inclusive (open).
 - (b) Whether the list of protected characteristics should mirror the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993.
 - (c) Whether the term ‘enduring common characteristic’ should be removed or replaced.
 - (d) Whether the illustrative list of protected characteristics should include ‘sex’.
 - (e) Whether the illustrative list of protected characteristics should include having an innate variation of sex characteristics.
 - (f) Whether ‘age’ and ‘disability’ should be removed from the illustrative list due to overlap with another statutory aggravating factor (section 9(1)(g)) that applies to offending against victims who are particularly vulnerable.
- 8.35 Before addressing these specific issues, it is helpful to consider at a general level why particular characteristics are or should be singled out for protection under hate crime law.
- 8.36 The characteristics already listed in section 9(1)(h) represent types of prejudice that hate crime provisions are directed towards in Aotearoa New Zealand and overseas. The legislative history of section 9(1)(h) does not, however, explain why these characteristics were singled out for protection under New Zealand law. Nor was much attention paid during the legislative process to which additional characteristics might qualify as ‘enduring common characteristics’ under the residual category. Aside from listing the current protected characteristics, the select committee that recommended inserting the aggravating factor simply said the law should also protect others who belong to “a specific or identifiable group”.³⁸
- 8.37 There is scant New Zealand case law interpreting the term ‘enduring common characteristic’. We are aware of only two cases in which the prosecution clearly sought to rely on the residual category and neither decision contains substantial reasoning on its application.³⁹
- 8.38 Some assistance in understanding the reasons why certain characteristics are singled out for protection can be derived from the work of overseas law reform bodies and academic commentaries on hate crime law. From these sources, we have identified two main considerations. These two considerations were also remarked on by a number of submitters to our review.
- 8.39 The first consideration is the disadvantage or marginalisation of the targeted group — both historically and in a contemporary context.⁴⁰ For this consideration to be relevant,

³⁸ Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 11.

³⁹ *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010; and *Lawrence v Police* [2015] NZHC 1122.

⁴⁰ See Law Commission (England and Wales) *Hate crime laws: A consultation paper* (CP250, 2020) at [10.89] and [10.122]; Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [3.43]; Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 47–48, 56 and 71; and James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 60–65.

there does not necessarily need to be clear evidence or data showing that hate crimes are being committed against the group. Direct evidence of that kind is unlikely to be available until protection has been extended to the particular group.⁴¹ Generally speaking, however, the groups that are singled out for the protection of hate crime law are ones that have experienced a history of hostility, disadvantage or marginalisation.

- 8.40 It is that history of marginalisation that engages the underlying rationale of hate crime law. As discussed in Chapter 3, a key reason that hate crime is treated more seriously than equivalent non-hate crimes is the additional harm it causes to the wider group. That harm is likely to be more severe where the group has historically been the target of hostility, violence or marginalisation.
- 8.41 The second consideration is whether the particular characteristic is a marker of group identity that it would be unreasonable or oppressive to expect people to change.⁴² Characteristics of this kind should be protected because hostility based on them undermines the values of tolerance and respect for difference.⁴³ As discussed in Chapter 3, this aspect of hate crime offending increases the moral blameworthiness of the offender. The targeting of people based on a shared identity is also closely connected to the additional harm that distinguishes hate crimes from other offending. It is the reason why hate crimes cause other people with the same characteristic as the victim to experience fear and marginalisation.
- 8.42 This second consideration also helps to explain why not all groups that experience disadvantage or marginalisation should be protected by hate crime law. Characteristics are only protected if they are ones that it would be unreasonable or oppressive to expect people to change. For that reason, hate crime laws do not generally extend protection to people who can be identified as a group because of the harm they cause others (for example, paedophiles). Protecting such groups would be contrary to the values of respect, dignity and tolerance underpinning hate crime law.⁴⁴

An open list of characteristics

- 8.43 Section 9(1)(h) applies to enduring common characteristics “such as” race, colour, nationality, religion, gender identity, sexual orientation, age or disability. That wording means the list of characteristics in section 9(1)(h) is illustrative rather than exhaustive. The courts can apply the provision to other ‘enduring common characteristics’. As noted earlier, we call this the ‘residual category’.

⁴¹ See Kate O'Donovan “Hate Crime: A critical analysis into whether an evidence-based approach is best in determining what groups are afforded protection in hate crime legislation” (2022) 2 *Plassey Law Review* 52 at 66.

⁴² Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 47; and Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [3.84].

⁴³ Mark A Walters “Conceptualizing ‘Hostility’ for Hate Crime Law: Minding ‘the Minutiae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998” (2014) 34 *Oxf J Leg Stud* 47 at 53; and Jennifer Schweppe “Defining Characteristics and Politicising Victims: A Legal Perspective” (2012) 10 *Hate and Political Discourse* 173 at 186, citing Andrew Ashworth (ed) *Principles of Criminal Law* (6th ed, Oxford University Press, Oxford, 2009) at 256.

⁴⁴ James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review* (University of Glasgow, July 2017) at 65–66.

- 8.44 In our Consultation Paper, we said we were interested to understand whether this approach is too broad or vague.⁴⁵ We also sought views on whether to limit the aggravating factor to a closed list of specific characteristics.⁴⁶
- 8.45 We identified in the Consultation Paper two examples of cases in Aotearoa New Zealand in which the application of the residual category has arguably led to inconsistency or uncertainty:
- (a) In *R v Pahau*, Te Kōti Matua | High Court applied the aggravating factor where the victim was targeted because they were affiliated with a rival gang.⁴⁷ However, in more recent cases involving offending against rival gang members, the courts have not applied the hostility aggravating factor.⁴⁸
 - (b) In *Lawrence v New Zealand Police*, the sentencing judge applied the aggravating factor to offending based on hostility towards members of a political party. On appeal, the High Court held that the aggravating factor was misapplied both because the hostility was towards a particular government policy rather than politicians themselves⁴⁹ and because political party membership was not an ‘enduring common characteristic’.⁵⁰
- 8.46 We also discussed cases from New South Wales (NSW) in which an analogous hostility aggravating factor has been applied to vigilante attacks on alleged paedophiles. In NSW, the aggravating factor applies when an offence is motivated by hatred for “a group of people”, followed by a list of example characteristics that are similar to those in the New Zealand sentencing provision.⁵¹ There is no requirement that the targeted group has an ‘enduring common characteristic’.
- 8.47 In *Dunn v R*, the NSW Supreme Court took a literal interpretation of the words “group of people” and found that targeting a victim because of his presumed paedophilia came “fairly and squarely” within the scope of the aggravating factor.⁵² In *R v Davies*, the Supreme Court again applied the provision to paedophiles saying they “are members of a particular and well-known group of people” and there is no reason to “read down the provision”.⁵³

Consultation

- 8.48 Some submitters to our review said it is unclear how the residual category should be applied in practice and expressed concern that there could be incongruous outcomes

⁴⁵ Consultation Paper at [5.46]–[5.48].

⁴⁶ At [7.33].

⁴⁷ *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [39]–[40]. This decision was appealed but the hostility aggravating factor was not considered in later judgments.

⁴⁸ For example, *R v Ormsby-Turner* [2023] NZHC 406; *R v Kahia* [2019] NZHC 1021; and *R v Te Tomo* [2015] NZHC 2671. Notably, in 2009, the list of aggravating factors in s 9(1) of the Sentencing Act was amended to include, as a separate aggravating factor, the fact the offender was a participant or otherwise involved in an organised criminal group or association: Sentencing Amendment Act (No 3) 2009, s 4.

⁴⁹ *Lawrence v Police* [2015] NZHC 1122 at [28].

⁵⁰ At [29].

⁵¹ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h).

⁵² *Dunn v R* [2007] NSWCCA 312 at [32].

⁵³ *R v Davies* [2024] NSWSC 786 at [131].

regarding which groups are protected.⁵⁴ These submitters considered it problematic that some groups (such as paedophiles) could meet the threshold for protection even though society, in general, might consider they should not be protected by hate crime law. Some submitters said hate crime law is not intended to protect socially deviant groups. Submitters that held these views sometimes referred to the New Zealand and NSW cases we had identified in the Consultation Paper.

- 8.49 Although several submitters expressed these general concerns, only two submitters suggested the aggravating factor should be amended to apply to a closed list of protected characteristics.⁵⁵ Both considered this would ensure clarity in the criminal law. The Maxim Institute added that this approach would ensure the aggravating factor does not apply in situations where Parliament did not intend it to.
- 8.50 Nine submitters expressed support for keeping an open list of characteristics with a residual category.⁵⁶ They said this allows flexibility so other groups can be recognised in the future.⁵⁷ Te Kāhui Ture o Aotearoa | New Zealand Law Society thought that a more restrictive approach may exclude certain groups that are deserving of protection. Te Kāhui o Ināia Tonu Nei Charitable Trust said the provision should be “flexible enough to ensure other groups may be included in the future” but also sufficiently specific to ensure those with transgender identity and variations in sex characteristics are legally recognised.

Reform not recommended

- 8.51 We do not recommend reform to adopt a closed list of protected characteristics for the following reasons.
- 8.52 First, there was no real call for reform from submitters. Only two submitters said there should be a closed list.
- 8.53 Second, although England and Wales and Northern Ireland have sentencing provisions with closed lists of protected characteristics,⁵⁸ most of the jurisdictions we examined have open lists. Canada and three Australian jurisdictions (NSW, South Australia and Tasmania) have sentencing provisions with an open list and a residual category.⁵⁹ Two other Australian jurisdictions (Victoria and Northern Territory) have sentencing provisions with a single open category (“a group of people”) and no illustrative list.⁶⁰

⁵⁴ Madeline Ash; Te Tari Ture o te Karauna | Crown Law; Luke Cunningham Clere; Maxim Institute; Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; and Submission 11.

⁵⁵ Graeme Edgeler; and Maxim Institute.

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ Sentencing Act 2020 (UK), s 66; and Crime and Disorder Act 1998 (UK), s 28 (as amended by the Crime and Policing Act 2026 (UK), s 145); and The Criminal Justice (No 2) (Northern Ireland) Order 2004 (UK), art 2(3).

⁵⁹ Criminal Code RSC 1985 c C-46, s 718.2(a)(i); Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h); Sentencing Act 2017 (SA), s 11(1)(ca); and Sentencing Act 1997 (Tas), s 11B.

⁶⁰ Sentencing Act 1995 (NT), s 6A(1)(e); and Sentencing Act 1991 (Vic), s 5(2)(daaa).

- 8.54 The recognition of paedophiles as a protected group by the courts in NSW (discussed above) led the NSW Law Reform Commission to recommend adopting a closed list but that recommendation has not been implemented.⁶¹ In Tasmania, on the other hand, a recent review recommended moving from a closed list to an open list, and this was implemented in December 2025.⁶²
- 8.55 Third, there are clear benefits to having an open list and residual category. We agree with submitters who said an open list is more responsive to changing social context and more consistent with the fact-specific nature of sentencing. It enables judges to recognise hostile motivation where it is appropriate to the case before them and to address evolving forms of hostility. If a closed list were adopted, adding an additional characteristic would require political willpower and significant advocacy by a targeted group. Given targeted groups are likely to be marginalised, the task of pursuing recognition through legislative enactment would be especially challenging. Groups not mentioned in the illustrative list could also be targeted infrequently so may not attract legislative attention, yet recognition of hate crimes against them may still be consistent with the purposes of the aggravating factor. For example, as we discuss later, people with innate variations of sex characteristics may fall into this category.
- 8.56 Finally, we have not found evidence of any significant problem with the current operation of the law. Of the New Zealand cases discussed earlier, one (*Lawrence*) was corrected on appeal. The other (*Pahau*) dates from 2010, and later cases have not followed the same approach. There is little to indicate that New Zealand courts will take an unduly wide view of the residual category in future.
- 8.57 Some submitters expressed particular concern about the approach of the NSW courts in recognising paedophiles as a protected group. As noted earlier, in NSW, the aggravating factor applies broadly to offences motivated by hatred for “a group of people”.⁶³ There is no limiting language similar to the phrase “enduring common characteristic” in the New Zealand legislation. Even so, the NSW approach has been criticised for taking a literal construction without regard for the list of illustrative groups in the NSW legislation and extrinsic material.⁶⁴
- 8.58 We consider the New Zealand courts are highly unlikely to follow the lead of the NSW courts and extend protection to groups such as paedophiles.⁶⁵ It is clear from both the legislative history of section 9(1)(h) and case law that the purpose of the aggravating factor is to respond to offending that undermines fundamental societal values.⁶⁶ Applying the residual category to groups that cause harm to others or undermine important societal values would be inconsistent with that purpose.

⁶¹ New South Wales Law Reform Commission *Sentencing* (R139, 2013) at [4.190] (recommendation 4.8).

⁶² Sentencing Advisory Council *Prejudice and Discrimination as Aggravating Factors in Sentencing: Final Report* (February 2024) at 22; and Sentencing Amendment (Aggravating Factors) Act 2025 (Tas), s 4.

⁶³ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h).

⁶⁴ Gail Mason “Hate crime laws in Australia: Are they achieving their goals” (2009) 33 Crim LJ 326 at 337–339.

⁶⁵ See Legislation Act 2019, s 10, stating that legislation must be interpreted from its text and in the light of its purpose and its context.

⁶⁶ Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 12; and *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [48].

Protected characteristics and consistency with the Human Rights Act

- 8.59 Although it is not an issue on which we specifically sought feedback, a few submitters raised the possibility of aligning the list of characteristics in section 9(1)(h) with the prohibited grounds of discrimination in section 21 of the Human Rights Act. The Human Rights Act contains a closed list of 13 prohibited grounds. Although there is substantial cross-over with the eight examples of ‘enduring common characteristics’ in section 9(1)(h), the two lists do not align fully.
- 8.60 Whether there should be better alignment between the two lists could be considered as part of any future comprehensive review of New Zealand hate crime law.⁶⁷ In the context of this more limited review, it would not be appropriate to substitute the existing illustrative list of protected characteristics in section 9(1)(h) with the list in the Human Rights Act for the following reasons.
- 8.61 First, it was not a matter on which we specifically sought feedback and therefore we cannot be satisfied that we heard a full range of views on the issue.
- 8.62 Second, although a few submitters raised the general possibility of aligning the two lists, there was minimal discussion of why specific grounds in the Human Rights Act not currently protected by hate crime law should be included. Conversely, during the limited consultation that we undertook on this issue once it had been raised with us, several people pointed to grounds of discrimination in the Human Rights Act (such as marital status or employment status) that they did not consider were immediately relevant to hate crime law.
- 8.63 Third, while there is significant crossover in the explanations that are given for singling out groups for protection from hate crime and from discrimination, respectively,⁶⁸ the focus of each body of law is different. Discrimination law focuses not on criminal conduct but on the effect on an individual of being treated differently in a range of environments like employment, education and other areas of service provision.
- 8.64 Fourth, the list of prohibited grounds in section 21 of the Human Rights Act is closed rather than open. There is no residual category. By contrast, listing every characteristic that could potentially qualify for protection under section 9(1)(h) is unnecessary as we do not recommend removing the residual category.
- 8.65 In sum, we have not found evidence of any problem with the operation of the current law that suggests aligning the protected characteristics in section 9(1)(h) with the prohibited grounds of discrimination in the Human Rights Act is appropriate as part of this review.

The term ‘enduring common characteristic’

- 8.66 As we have explained, section 9(1)(h) applies to hostility directed at people with an ‘enduring common characteristic’ and provides an illustrative list. In our Consultation Paper, we sought feedback on the use of the word ‘enduring’ in this context.⁶⁹ We pointed to a decision in which the High Court described some characteristics in the

⁶⁷ See Chara Bakalis “The victims of hate crime and the principles of the criminal law” (2017) 37 Legal Studies 718 at 722, pointing to an “inextricable link between the underlying justification for hate crime and the broader equality agenda”.

⁶⁸ See Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at [4.22], [4.43] and [4.55].

⁶⁹ Consultation Paper at [5.43]–[5.45] and [7.35].

illustrative list as “changeable and impermanent”⁷⁰ and we queried whether the term ‘enduring’ was therefore unsuitable.

- 8.67 The reference to ‘enduring’ characteristics does not appear in equivalent legislation in other jurisdictions. For example, as noted earlier, the aggravating factors in some Australian jurisdictions apply to hatred towards any “group of people” without further qualification.⁷¹ Other Australian jurisdictions refer to any “group of people with common characteristics”.⁷² In Canada, the aggravating factor applies to hate based on listed characteristics “or any other similar factor”.⁷³

Consultation

- 8.68 Some submitters said the term ‘enduring common characteristic’ is unclear⁷⁴ or that the term seems anomalous as some of the listed characteristics may be amenable to change.⁷⁵ The New Zealand Law Society said the existing wording could be plainer but was not convinced it is unclear. The Society noted that usually an unclear term would be defined in legislation but that there is difficulty “formulating a provision that provides sufficient protection for groups that are victims of hate crime, while remaining grounded in the rights-based justification for the legislation”. It did not favour replacing ‘enduring common characteristic’ with other language if an open list was retained.
- 8.69 In contrast, Te Tari Ture o te Karauna | Crown Law suggested the description used in Australian jurisdictions of a “group of people with common characteristics” is preferable.

Reform not recommended

- 8.70 We do not recommend amending section 9(1)(h) to remove the word ‘enduring’. We have not found evidence of a significant problem in practice resulting from it.
- 8.71 We accept that, read strictly and in isolation, the word ‘enduring’ could be understood to mean that protected characteristics must be immutable or unchanging. Read in that way, it could limit the kinds of characteristics that can be recognised under the residual category. In our view, protected characteristics need not be immutable or unchanging. Some characteristics that can be changeable such as religion nonetheless act as markers of group identity⁷⁶ and hostility towards people on that basis undermines values of tolerance and respect for difference.
- 8.72 However, the word ‘enduring’ can also be read more broadly to mean lasting or durable rather than a passing preference. We consider this is the correct and intended interpretation when ‘enduring’ is read in the context of the illustrative list of characteristics. It captures the idea discussed earlier that hate crime law aims to protect

⁷⁰ *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [39]. Specifically, the judge mentioned religion and sexual orientation.

⁷¹ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h); and Sentencing Act 1995 (NT), s 6A(1)(e).

⁷² Sentencing Act 1991 (Vic), s 5(2)(daaa).

⁷³ Criminal Code RSC 1985 c C-46, s 718.2(a)(i). See also Sentencing Act 2017 (SA), s 11(1)(ca), which lists certain characteristics “without limiting” the operation of the aggravating factor.

⁷⁴ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service; and Submission 11.

⁷⁵ Graeme Edgeler; Rex Landy; and Women’s Rights Party.

⁷⁶ Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 47.

markers of group identity that it would be unreasonable or oppressive to expect people to change. This interpretation is available on the current wording of the provision, and we found nothing to suggest the courts are likely to take a different approach.

- 8.73 As noted earlier, the term ‘enduring common characteristic’ is likely doing some important work to ensure that section 9(1)(h) is not applied to any common characteristic, no matter how undeserving. Whether ‘enduring’ is the most apposite term could usefully be revisited as part of any future comprehensive review of hate crime law. We do not consider there is sufficient evidence of a current problem to recommend reform as part of this more limited review. Further, as the New Zealand Law Society noted in its submission, there is a challenge in formulating an alternative that extends sufficient protection while retaining a clear link to the underlying purposes of hate crime law.

Including sex in the illustrative list

- 8.74 During preliminary engagement, some people asked us to consider whether ‘sex’ should be added to the illustrative list of characteristics in section 9(1)(h). Currently, the list includes ‘gender identity’ but not sex or gender. In our Consultation Paper, we observed that there are varying views about whether it is appropriate to treat offending motivated by misogyny as a hate crime.⁷⁷ We sought submitters’ views.

Consultation

- 8.75 Nine submitters said ‘sex’ should be included as a listed protected characteristic.⁷⁸ Submitters said this would recognise that offences committed because of hostility towards women are worthy of condemnation, denunciation and deterrence. They gave the following reasons:
- (a) It sends the wrong message to exclude sex as a listed protected characteristic and it can be overlooked by courts because it is not listed.⁷⁹
 - (b) Misogyny is an issue in Aotearoa New Zealand⁸⁰ and should be properly denounced.⁸¹
 - (c) Research shows protection from gender-based violence is required.⁸² Sex-based violence is not taken seriously enough.⁸³
 - (d) Publicity around the addition of sex to the list of aggravating factors will help educate the public about misogyny and crimes against women.⁸⁴
- 8.76 The New Zealand Law Society, Public Defence Service and Luke Cunningham Clere did not take a position on whether ‘sex’ should be added to the illustrative list but commented

⁷⁷ Consultation Paper at [3.55]–[3.56], [3.58] and [5.47].

⁷⁸ 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.

⁷⁹ Women’s Rights Party.

⁸⁰ New Zealand Federation of Business and Professional Women; Tamsen Williams; Dr Chris Wilson; and Women’s Rights Party.

⁸¹ New Zealand Federation of Business and Professional Women.

⁸² Inclusive Aotearoa Collective Tāhono.

⁸³ Tamsen Williams.

⁸⁴ Women’s Rights Party.

generally on the level of hostility towards women or misogynistic motivation and its connection to hate crime.

- 8.77 No submitters opposed sex being added to the illustrative list of characteristics in section 9(1)(h).

The need for reform

- 8.78 For the following reasons, we consider that the absence of sex from the illustrative list of characteristics is an issue that should be addressed in this review.
- 8.79 First, an appreciable number of submitters had concerns about the omission of sex from the list of protected characteristics, and no submitters opposed adding it.
- 8.80 Second, the omission of sex from the list is out of line with many jurisdictions that we have examined and with the general direction of travel in some others. As in Aotearoa New Zealand, the law in New South Wales only refers to ‘gender identity’.⁸⁵ By contrast, ‘sex’ or ‘gender’ is specified as a protected characteristic in sentence aggravation laws in Canada, South Australia, the Republic of Ireland and Tasmania.⁸⁶ As of 2022, 25 states that are part of the Organisation for Security and Co-operation in Europe had hate crime laws relating to sex or gender.⁸⁷
- 8.81 Independent reviews of hate crime law in Scotland and Northern Ireland have recommended that hate crime laws should include sex or gender as a protected characteristic to address hostility towards women (although in the context of a closed list and different legal models to the New Zealand legislation).⁸⁸ The Scottish Parliament subsequently passed hate crime laws without listing sex as a protected characteristic but included an enabling power to add it at a later date.⁸⁹ The Scottish Government has since announced plans to rely on this power and an order was made in March 2026 to come into effect in April 2027.⁹⁰
- 8.82 Although the Law Commission of England and Wales did not recommend listing sex as a protected characteristic,⁹¹ the UK Government has taken a different view. Amendments

⁸⁵ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h).

⁸⁶ Criminal Code RSC 1985 c C–46, s 718.2(a)(i); Sentencing Act 2017 (SA), s 11(1)(ca); Criminal Justice (Hate Offences) Act 2024 (Ireland), s 3(1)(g); and Sentencing Act 1997 (Tas), s 11B(3)(e).

⁸⁷ Organization for Security and Co-operation in Europe *Hate Crime Laws: A Practical Guide* (2nd ed, Office for Democratic Institutions and Human Rights, 2022) at 53. Twenty-one states had laws relating to gender identity.

⁸⁸ Alistair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final report* (Justice Directorate, May 2018) at [4.50] (recommendation 9); and Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at [7.119] and [7.138] (recommendation 9).

⁸⁹ Hate Crime and Public Order (Scotland) Act 2021 (UK), s 12. When the legislation was passed, the decision about whether to include the characteristic of sex was deferred until receiving recommendations from a Working Group on Misogyny and Criminal Justice. The Working Group was set up to consider whether legislation was needed to address violence and harassment against women, as groups consulted on the initial bill preferred “the development of a standalone offence for misogyny to tackle the unique features of violence and harassment against women”: Scottish Government *Policy Memorandum: Hate Crime and Public Order (Scotland) Bill* (23 April 2020) at [255].

⁹⁰ Phil Sim “Scottish government drops plans for new misogyny law” *BBC* (2 May 2025) <www.bbc.com>; and The Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 (UK), reg 2. Although the independent review had used the term ‘gender’, the Scottish Parliament adopted the term ‘sex’ on the basis that this was consistent with the Equality Act 2010 (UK): Scottish Government *Policy Memorandum: Hate Crime and Public Order (Scotland) Bill* (23 April 2020) at [247].

⁹¹ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [5.381] (recommendation 8).

passed in April 2026 extend the hate crime offences that apply in England and Wales to the protected characteristic of sex (as well as other characteristics).⁹² The Government supported this on the basis that it furthers objectives to address violence against women and girls and will ensure that offences motivated by hostility towards a victim's sex are treated as seriously as those motivated by hostility towards other characteristics.⁹³

- 8.83 Including sex or gender as a protected characteristic is consistent with the explanations we identified earlier in this chapter for why particular characteristics should attract the protection of hate crime law. One of the considerations we identified is the present and historical disadvantage or marginalisation of the targeted group. In recommending amendments to address hostility towards women, the independent reviews in Scotland and Northern Ireland both considered it relevant that there is evidence of disproportionate targeting of women due to prejudice or hostility based on their sex.⁹⁴
- 8.84 Because sex is not currently listed as a protected characteristic in section 9(1)(h), offending based on hostility towards women is not identified or recorded by Police as a discrete category of offending.⁹⁵ This means there is limited specific evidence of hate crimes against women in Aotearoa New Zealand. However, women are overrepresented as victims of violent offending, and there is evidence that sexual, family and intimate partner violence is linked, at least in part, to misogyny and harmful gender norms.⁹⁶
- 8.85 Commentaries in Aotearoa New Zealand and overseas have explored the prevalence of misogyny and how it can manifest in harassment, threats and violent offending.⁹⁷ The

⁹² See Crime and Disorder Act 1998 (UK), s 28(2) (as amended by Crime and Policing Act 2026 (UK), s 145). The legislation has a carve-out for the offence of sex-based harassment.

⁹³ (4 March 2026) 853 UKHL 1296–1298.

⁹⁴ Alistair P Campbell *Independent Review of Hate Crime Legislation in Scotland: Final report* (Justice Directorate, May 2018) at [4.35]; and Desmond Marrinan *Hate crime legislation in Northern Ireland: Independent Review* (Department of Justice, December 2020) at [7.109]. The Law Commission of England and Wales also acknowledged this, but concluded that a ground of sex-based hostility was unsuitable for other reasons, which we discuss below: see *Hate crime laws: A consultation paper* (CP250, 2020) at [12.85]; and *Hate crime laws: Final report* (R402, 2021) at [5.378].

⁹⁵ Police currently record perceived hate crimes based on sex under the 'gender identity' characteristic.

⁹⁶ Manatū Wāhine | Ministry for Women "Women's Safety — Data and research" <www.women.govt.nz>; Te Tāhū o te Ture | Ministry of Justice "Research & Data: Family violence and sexual violence research" (6 January 2026) <www.justice.govt.nz>; Violence Information Aotearoa "Violence statistics: Population-based research" <www.vine.org.nz>; World Health Organization "Violence against women" (25 March 2024) <www.who.int>; Marama Davidson *Te Aorerekura: The Enduring Spirit of Affection — The National Strategy to Eliminate Family Violence and Sexual Violence* (Te Kāwanatanga o Aotearoa | New Zealand Government, December 2021) at 11–12; Manatū Wāhine | Ministry for Women *Women's Equality Strategy: Aotearoa New Zealand* (2023) at 14; and Brenda C Gutierrez and Campbell Leaper "Linking Ambivalent Sexism to Violence-Against-Women Attitudes and Behaviours: A Three-Level Meta-analytic Review" (2024) 28 *Sexuality & Culture* 851.

⁹⁷ Te Mana Whakaatu | Classification Office *Online Misogyny and Violent Extremism: Understanding the Landscape* (Summary Report, May 2024) at 13–15; Rhiannon Watson and others "Misogyny, racism, and threats to our families: a qualitative study of harassment of female politicians" (2025) 20 *Kōtuitui: New Zealand Journal of Social Sciences Online* 979; Susanna Every-Palmer, Oliver Hansby and Justin Barry-Walsh "Stalking, harassment, gendered abuse, and violence towards politicians in the COVID-19 pandemic and recovery era" (2024) 15 *Frontiers in Psychiatry* 1; Helena Kennedy QC *Misogyny — A Human Rights Issue* (Scottish Government, March 2022) at 30–39; and Katie Harris "Expert's concern after attempted murder of Auckland students: 'Closest to an incel attack NZ has had'" *RNZ* (Aotearoa New Zealand, 9 March 2023). Overseas, various acts of mass violence have been attributed to this type of motivation, including attacks in California (2014), Oregon (2015), Toronto (2018), Florida (2018), Arizona (2020) and Plymouth (England) (2021). In some cases, the perpetrator was convicted and local hate crime law applied: see United States Attorney's Office Southern District of Ohio "Highland County man sentenced to more than 6 years in prison for

United Nations Committee on the Elimination of Discrimination against Women has raised concerns about such harms and recommended improved responses to hate crimes against women in public life.⁹⁸

- 8.86 As explained earlier in this chapter, another reason sometimes given for why characteristics should attract protection under hate crime law is that they are markers of group identity that it would be unreasonable or oppressive to expect people to change. Sex manifestly meets this criterion. As a result, offending motivated by hostility towards women is likely to cause victims and other women to fear future targeting and to modify their behaviour. Failure to recognise this in the law risks reinforcing gender inequality.
- 8.87 One argument against reform is that it is already open to a sentencing court to apply section 9(1)(h) in cases where the offender was motivated by hostility towards women — whether under the gender identity ground or the residual category.⁹⁹ We agree that section 9(1)(h) would already apply to offending involving hostility towards women. Within the context discussed above, however, we accept the point made by submitters and others we engaged with that including sex in the illustrative list would have an important signalling effect. The absence of such signalling in the current law may explain the small number of cases to date in which the hostility aggravating factor has been applied due to hostility towards women.¹⁰⁰ The legislative history of section 9(1)(h) suggests little focus on offending against women. We also note that it is not uncommon for New Zealand legislation to refer to ‘sex’ and ‘gender identity’ separately.¹⁰¹
- 8.88 Some other arguments against including sex as a protected characteristic are that a hate crime framework may not capture structural causes of gendered violence,¹⁰² may shift focus away from prevention¹⁰³ or may be unnecessary as existing offences already treat violence against women seriously.¹⁰⁴ The Law Commission of England and Wales

attempting hate crime” (29 February 2024) <www.justice.gov>; and Summer Lin “Self-proclaimed Anaheim ‘incel’ gets prison term for hate crimes in 2021 pepper spray attacks” *Los Angeles Times* (online ed, Los Angeles, 13 September 2024).

⁹⁸ United Nations Committee on the Elimination of Discrimination against Women *Concluding observations on the ninth periodic report of New Zealand* CEDAW/C/NZL/CO/9 (30 October 2024) at [26]–[27].

⁹⁹ The New South Wales courts have held that the residual provision applies to women as a group: *R v ID* [2007] NSWDC 51 at [70].

¹⁰⁰ See for example Charlotte Brown “Legislating against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence” (2004) 35 VUWLR 591 at 596, suggesting that the term gender identity is “more likely to alert lawyers and the courts” to hostility directed at people who are transgender. We are aware of only two cases in which the courts applied the aggravating factor to hostility-motivated offending against women, both more than 20 years ago: see *R v Coleman* HC Auckland T024701, 25 March 2004 at [15] and [24] (s 9(1)(h) was not referred to directly); and *R v Johnston* HC Auckland T023336, 5 August 2003 at [17].

¹⁰¹ See for example Legislation Act, s 14(1); Marriage Act 1955, s 2 (definition of “marriage”); and Property (Relationships) Act 1976, s 2D(1).

¹⁰² See Marian Duggan “A Socio-Legal Analysis of Gender-Based Victimization, Misogyny and the Hate Crime Paradigm in England and Wales” (2021) 85 *Studies in Law, Politics, and Society* 101 at 122–123; and Mark Austin Walters and Jessica Tumath “Gender ‘Hostility’, Rape, and the Hate Crime Paradigm” (2014) 77 *MLR* 563 at 592–593.

¹⁰³ See for example Fiona Vera-Gray and Bianca Fileborn “Hiding the harm? An argument against misogyny hate crime” in Edward Hall, John Clayton and Catherine Donovan (eds) *Landscapes of Hate: Tracing Spaces, Relations and Responses* (Bristol University Press, Bristol, 2022) 38.

¹⁰⁴ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [5.28].

concluded that sex-based hostility was unsuitable for inclusion in hate crime laws because it would be difficult to prove and a hate crime lens might be inappropriate.¹⁰⁵

- 8.89 Submitters and others we engaged with during this review did not share these concerns. We consider they have less salience in the context of a sentence aggravation model. Including sex in the illustrative list would not displace other legal responses to sexual or family violence. Rather, it would ensure that offences motivated by hostility towards women are recognised and denounced consistently with other forms of hate crime.
- 8.90 The aggravating factor would apply only where there is clear evidence of hostility based on sex. It is likely relatively few cases would meet that criterion. For example, as far as we have been able to ascertain, the Canadian courts have applied the aggravating factor on rare occasions to condemn criminal behaviour motivated by particularly blatant hostility of this kind.¹⁰⁶ The cases involved threatened or actual bodily harm to the female victims where the behaviour was gratuitous and accompanied by evidence that it was driven by a persistent misogynistic attitude. The European Office of Democratic Institutions and Human Rights advises that some gender-based violence should be treated as hate crime where there is evidence of bias or hostility.¹⁰⁷ It says that may be the case where offending is accompanied by serious misogynistic insults or threats, where the victim is targeted because of their association with feminist causes or where the offender is aligned with male supremacist ideology.

Recommendation

R6

Section 9(1)(h) of the Sentencing Act 2002 should be amended to include 'sex' in the illustrative list of characteristics.

- 8.91 For the reasons above, we recommend that sex be included in the illustrative list of characteristics in section 9(1)(h).
- 8.92 As we have explained, hate crime laws in several overseas jurisdictions refer specifically to 'sex' or 'gender' to address hostility towards women. In the New Zealand context, given that 'gender identity' is already included in the illustrative list, we consider the term 'sex' is preferable to address hostility towards women. Although the term 'gender' is sometimes used as a synonym for sex, it has various other meanings depending on the context. It is sometimes used to refer to a person's social or personal identity as male or female or another gender such as non-binary, gender fluid or bigender. It is sometimes used to refer to the social and cultural norms, roles and hierarchies associated with men,

¹⁰⁵ Law Commission (England and Wales) *Hate crime laws: Final report* (R402, 2021) at [5.379]–[5.381] (recommendation 8). As noted earlier, the UK Government has since enacted law contrary to this recommendation.

¹⁰⁶ There are few reported cases in Canada of the aggravating factor being used in relation to the listed sex ground. All those recorded involve female victims. A study found only three cases where it was applied between 2007 and 2020: Kundera Provost-Yombo, Cynthia Loudon and Susan McDonald *Hate as an Aggravating Factor at Sentencing: A Review of the Case Law from 2007–2020* (Department of Justice Canada, 2020) at 27–28. We found a further three cases since that study was published: *R v Lockhart* 2025 BCPC 21; *R v Grant* 2025 ONCJ 231; and *R v Bushby* 2021 ONSC 4082.

¹⁰⁷ Organization for Security and Co-operation in Europe *Gender-Based Hate Crime* (Office of Democratic Institutions and Human Rights, 2021) at 2.

women and other genders. It is also sometimes used as an umbrella term covering both gender identity and gender expression.¹⁰⁸

Innate variations of sex characteristics

- 8.93 One submitter to our review said people with variations in sex characteristics should be “specifically noted” in hate crime legislation.¹⁰⁹ A person with an innate variation of sex characteristics is someone who was born with sex characteristics that differ from medical and social norms for male or female bodies (although, in some cases, the variation may not be evident until later in life). Some people with an innate variation of sex characteristics refer to themselves as intersex, although not everyone favours this term.¹¹⁰
- 8.94 If we were conducting a comprehensive review of hate crime law, we would need to examine whether having an innate variation of sex characteristics should be included in any legislative list of protected characteristics. Having an innate variation of sex characteristics is clearly a marker of group identity that it would be unreasonable or oppressive to expect people to change.¹¹¹ Although there is little contemporary data about the experiences of people with innate variations of sex characteristics, the long history of violence, stigmatisation and dehumanisation suffered by people who fall into this category is well known.¹¹² Te Aka Matua o te Ture | Law Commission recently recommended including “having an innate variation of sex characteristics” in the list of prohibited grounds of discrimination in section 21 of the Human Rights Act.¹¹³
- 8.95 We do not, however, recommend adding this characteristic to the illustrative list in section 9(1)(h) as part of this review.
- 8.96 First, as we did not seek feedback on this issue, we are unlikely to have heard a full range of views on it. For example, we have not had the opportunity as part of this review to consult with people with innate variations of sex characteristics about whether adding this characteristic to section 9(1)(h) is desirable and, if so, how it should be worded.¹¹⁴

¹⁰⁸ Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) at [2.9]–[2.11].

¹⁰⁹ Te Kāhui o Ināia Tonu Nei Charitable Trust.

¹¹⁰ Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at ch 1, n 1.

¹¹¹ Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at [4.49].

¹¹² Te Aka Matua o te Ture | Law Commission *Ia Tangata: A review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC IP53, 2024) at [3.47]–[3.68]; and Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at [4.32].

¹¹³ Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at [4.164].

¹¹⁴ See Te Aka Matua o te Ture | Law Commission *Ia Tangata: Protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics* (NZLC R150, 2025) at [7.110]–[7.146] for discussion of some of the complexities that might be involved in selecting appropriate wording.

- 8.97 Second, as explained earlier, we would only recommend reform to the wording of section 9(1)(h) as part of this review if there was a clear problem with the operation of the current law. We have no evidence that is the case. We have no information about the prevalence in Aotearoa New Zealand of hate crimes against people in this group. We are not aware of any case in which the issue has been raised. We received only one submission on the issue, and it did not identify a specific problem with the operation of the current law.
- 8.98 Third, we are confident that crimes motivated by hostility towards people with innate variations of sex characteristics would already fall within the scope of section 9(1)(h). Having an innate variation of sex characteristics is evidently an enduring common characteristic. This distinguishes the position from that under the Human Rights Act, which, as explained earlier, contains a closed list of prohibited grounds of discrimination.
- 8.99 Finally, it is worth noting that, in a hate crime context, it is the offender's perception that a person has a characteristic that matters — not whether they in fact do have that characteristic. If, for example, an offence was committed against a person with an innate variation because the offender perceived them to be gender non-conforming or gay, that would be covered by the 'gender identity' or 'sexual orientation' characteristic.

Hostility based on age and disability

- 8.100 In our Consultation Paper, we asked whether certain characteristics listed in section 9(1)(h) might overlap so directly with other aggravating factors in the Sentencing Act that their inclusion in the list might lead to confusion or double counting. We identified, in particular, section 9(1)(g), which lists as an aggravating factor the "vulnerability of the victim". We suggested this aggravating factor will often apply in circumstances where the victim is vulnerable due to their age or disability and sought feedback on whether it is therefore unnecessary to also list age and disability as characteristics in section 9(1)(h).¹¹⁵

Consultation

- 8.101 Eleven submitters said section 9(1)(h) should continue to refer to disability¹¹⁶ and made the following points:
- (a) Aotearoa New Zealand has a shameful history regarding its treatment of disabled people.¹¹⁷ The recent Royal Commission of Inquiry into Abuse in Care highlighted that disabled people experience abuse underpinned by ableism.¹¹⁸
 - (b) Having disability as a protected characteristic offers additional protection.¹¹⁹

¹¹⁵ See for example *Houkamau v Police* [2022] NZHC 152 at [15]; *F (CA691/2021) v R* [2022] NZCA 217 at [41]; and *Pearson v R* [2020] NZCA 573 at [24] and [28].

¹¹⁶ 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; and Te Kāhui o Ināia Tonu Nei Charitable Trust.

¹¹⁷ Parents of Vision Impaired.

¹¹⁸ Donald Beasley Institute and People First New Zealand (joint submission).

¹¹⁹ Parents of Vision Impaired.

- (c) Disabled people are targeted both because they are vulnerable¹²⁰ and because some people believe they should not exist.¹²¹
- (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 afforded reasonable accommodations in justice processes.¹²²

8.102 No submitters clearly supported removing disability from the list of characteristics.

8.103 Eight submitters said section 9(1)(h) should continue to apply to age.¹²³ One of these submitters said that hate crimes based on age appear uncommon because older people are invisible to Police and justice processes.¹²⁴ One submitter said crimes based on age are due to a person's vulnerability, not due to hostility, and supported removing age from the illustrative list.¹²⁵ Many submitters who commented on age as a protected characteristic acknowledged there is debate about its inclusion in section 9(1)(h).

Reform not recommended

8.104 We do not recommend removing the characteristics of age or disability from section 9(1)(h) as part of this review. There was no clear support from submitters for doing so, and we have not identified a significant problem with the status quo. Removing these characteristics from an existing list would send the undesirable message that hostility towards these groups is not taken seriously. This would be inconsistent with one of the objectives of hate crime law — to reassure victims and affected communities.

8.105 Although there may be a theoretical risk of double counting due to overlap with the vulnerability aggravating factor, we found no evidence this has occurred to date. Indeed, we did not identify any cases in which the hostility aggravating factor has been applied based on age or disability.¹²⁶

8.106 As discussed in Chapter 7, all aggravating factors relating to an offence are considered together at the first step of the sentencing process to assess the seriousness of the offence and determine the sentence starting point. In practice, it is uncommon for courts to identify discrete uplifts for specific aggravating factors. This assessment of seriousness

¹²⁰ Disabled Persons Assembly and VisAble (joint submission).

¹²¹ Inclusive Aotearoa Collective Tāhono.

¹²² Disabled Persons Assembly and VisAble (joint submission); and Donald Beasley Institute and People First New Zealand (joint submission).

¹²³ 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.

¹²⁴ Disabled Persons Assembly and VisAble (joint submission).

¹²⁵ Inclusive Aotearoa Collective Tāhono. Luke Cunningham Clere also referred to this issue but did not take a clear position whether age should be included.

¹²⁶ There is a similar situation in Canada, where the hostility aggravating factor specifies both age and disability but there are few police-recorded incidents or reported cases. Between 2007 and 2020, there were no published hate crime cases in which disability was identified as the motivating factor: Kundera Provost-Yombo, Cynthia Loudon and Susan McDonald *Hate as an Aggravating Factor at Sentencing: A Review of the Case Law from 2007–2020* (Department of Justice, 2020) at 30. In 2018, there were nine police-reported hate crimes motivated by hatred towards the victim's disability, less than 1 per cent of reported hate crime. For the age factor, there was a single published case during the 2007–2020 period: Kundera Provost-Yombo, Cynthia Loudon and Susan McDonald *Hate as an Aggravating Factor at Sentencing: A Review of the Case Law from 2007–2020* (Department of Justice, 2020) at 27. In 2018, there were 10 police-reported hate crimes motivated by hatred towards the victim's age, less than 1 per cent of reported hate crime.

in the round means double counting is less likely to occur. The law reforms we recommend will not interfere with that — judges would be required to state when they have relied on section 9(1)(h) (under R4) but would not be required to specify a discrete uplift.

- 8.107 Hostility and vulnerability are different considerations that can apply in different situations. Not all offending that targets people based on age or disability will involve hostility. In many cases, the vulnerability factor may be more relevant. In some instances, however, people may be targeted because of hostility based on their age or disability. Where that occurs, the hostility aggravating factor can and should apply.

PARTIAL MOTIVATION

- 8.108 The final aspect of the wording of section 9(1)(h) on which we consulted was the provision made in section 9(1)(h) for situations of partial motivation. Section 9(1)(h) applies if the offender committed the offence “partly or wholly” because of hostility towards a relevant group. Commentators had expressed concern that this could lead to the courts relying on the aggravating factor where the hostile motivation was only a “trivial factor” in the offending.¹²⁷ In our Consultation Paper, we sought feedback on this concern.¹²⁸

Consultation

- 8.109 No submitters told us the inclusion of partial motivation in section 9(1)(h) is problematic. Some submitters made the following points:
- (a) For any offence, it is plausible that there may be multiple motivations and a lack of direct evidence of them.¹²⁹
 - (b) Section 9 requires the court to take the offender’s hostility into account only to the extent it is applicable in the case.¹³⁰ If the hostility was not a significant motivation, this aggravating factor would not weigh heavily in the court’s determination.
 - (c) If there is an issue as to the extent of the motivation, this can be dealt with under section 24 of the Sentencing Act.¹³¹ Section 24 provides that, if a fact relevant to sentencing is disputed by the offender, it must be proven beyond reasonable doubt at a disputed facts hearing.

Reform not recommended

- 8.110 We do not recommend reform on this issue as part of this review. There was no support for reform from submitters, and from the case law we have reviewed, we have not identified a problem in practice. Specifically, we did not find any examples of the courts

¹²⁷ Gail Mason and Kristin Macintosh “Hate Crime Sentencing Laws in New Zealand and Australia: Is there a Difference?” [2014] NZ L Rev 647 at 678.

¹²⁸ Consultation Paper at [5.37]–[5.40].

¹²⁹ Te Kāhui Ture o Aotearoa | New Zealand Law Society (note the submission refers to *multiple aggravating factors*, but the context suggests this was intended to refer to motivations).

¹³⁰ Maxim Institute. See also Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, noting “How much weight a judge gives the factor, once proven, is up to the judge, but will no doubt reflect the level of the motivation.”

¹³¹ Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

relying on the aggravating factor where the hostile motivation was only a trivial factor in the offending.

- 8.111 It is also unlikely such problems will eventuate in future. We agree with submitters that the risk of a relatively minor motivation having a significant impact on a sentence is low. The fact that an aggravating factor applies does not automatically increase an offender's sentence. When determining the appropriate sentence, the courts consider not only *whether* an aggravating factor applies but also *the extent to which* it applies and its significance in the context of the case.¹³² If hostility was a relatively minor factor in offending, its impact on the sentence would likely be small. Our recommendations elsewhere in this Report would not change that.
- 8.112 There are good reasons for applying the aggravating factor where an offence is committed only partly because of hostility. It is often difficult to identify one single motivation for an offence. For example, in a case involving robbery or burglary, an offender may be motivated partly by financial gain as well as by hostility towards a group of people. The existence of other motivations does not necessarily diminish the harm caused by the offending — the victim has still been targeted based on their identity and this is likely to create fear of future victimisation for both the victim and the wider community. Nor does it necessarily diminish an offender's culpability. The best approach is for the courts to apply the aggravating factor in such cases and to assess the significance of the hostility in the round.
- 8.113 New Zealand law on this issue is consistent with approaches in other jurisdictions (including those with sentence aggravation provisions and those with specific offences). Most hate crime legislation specifies that partial motivation is sufficient.¹³³ Some equivalent legislation does not specify the level of motivation required,¹³⁴ but in practice, the courts may treat partial motivation as sufficient.¹³⁵ None of the jurisdictions we examined specifically require that offending be motivated solely or predominantly by hostility towards the targeted group.

¹³² Sentencing Act, s 9(1).

¹³³ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h) (as amended by the Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025); Criminal Code Act 1899 (Qld), s 52B; Sentencing Act 2017 (SA), s 11(1)(ca); Sentencing Act 1997 (Tas), s 11B; Sentencing Act 1991 (Vic), s 5(2)(daaa); Criminal Code Act Compilation Act 1913 (WA), s 80I; Sentencing Act 2020 (UK), s 66; Hate Crime and Public Order (Scotland) Act 2021 (UK), s 1(1)(b); The Criminal Justice (No 2) (Northern Ireland) Order 2004, art 2(3)(b); and Criminal Justice (Hate Offences) Act 2024 (Ireland), ss 5–7.

¹³⁴ Sentencing Act 1995 (NT), s 6A(1)(e); and Criminal Code RSC 1985 c C-46, s 718.2(a)(i).

¹³⁵ In Canada, see *R v Vrdoljak* [2002] OJ No 1332 at [4]; and *R v Grant* 2025 ONCJ 231 at [32].

CHAPTER 9

Operational matters

INTRODUCTION

- 9.1 In this chapter, we set out some operational recommendations that support or supplement the law reform recommendations we make elsewhere in this Report.
- 9.2 The recommendations we make in this chapter will help to ensure that our recommendations in earlier chapters have the desired impact. As discussed in Chapter 1, wider operational or policy responses to hate crime are outside scope of this review.
- 9.3 We recommend that:
- (a) Ngā Pirihimana o Aotearoa | New Zealand Police review the guidance provided to police officers and prosecutors to ensure they are informed about any changes to the law as a result of this review;
 - (b) Te Kura Kaiwhakawā | Institute of Judicial Studies consider providing guidance and training to judges on any legislative amendments; and
 - (c) Police and Te Tāhū o te Ture | Ministry of Justice publish data on hate crimes annually.

GUIDANCE FOR POLICE AND PROSECUTORS

- 9.4 In Chapter 4, we explained that prosecutors often have limited time to become familiar with a case, and many have no experience of applying the hostility aggravating factor in section 9(1)(h) of the Sentencing Act 2002. We also explained that the investigating officer may not always provide evidence of hostile motivation. These factors may increase the likelihood of hostile motivation being overlooked, both before and during court proceedings.
- 9.5 In our Consultation Paper, we sought feedback on whether the training and guidance on hate crime introduced by Police since the report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 has helped to improve the Police response to hate crime.¹ We also explained that, while the Police Instructions on hate crime include some guidance for police prosecutors, hate crime cases may also be

¹ Te Aka Matua o te Ture | Law Commission *Hara ngākau kino | Hate crime: Consultation Paper* (NZLC IP55, 2025) (Consultation Paper) at [5.21] and [5.26].

prosecuted by Crown solicitors. We suggested that an option in response might be for the Solicitor-General to provide advice to Crown solicitors on prosecuting hate crime.²

Consultation

- 9.6 Some submitters and other organisations we spoke with suggested further training or guidance for Police may be needed.³ However, 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 that some incidents reveal gaps in understanding of antisemitism. The New Zealand Federation of Business and Professional Women supported adopting an education programme similar to that implemented by police in the Australian state of Victoria, which it said had led to increased recognition of prejudice-motivated crimes.
- 9.7 Other organisations we spoke with during consultation also expressed views about training for Police. Two organisations told us they did not think the training had had any effect. One noted the training is online but that face-to-face engagement with communities is important for education.
- 9.8 Five submitters supported providing advice, guidance or training for prosecutors.⁴ Te Kāhui Ture o Aotearoa | New Zealand Law Society noted that the courts rely on prosecutors to raise hostile motivation at sentencing and ensure there is enough evidence to apply the aggravating factor. Te Tari Ture o te Karauna | Crown Law said it could direct Crown solicitors to Police material on hate crime, suggest in-house training and assist with the implications of any legislative reform.

Our view

- 9.9 As we have explained, we do not make any recommendations about the substance of Police training and guidance on responding to hate crime generally because that is beyond the scope of our review and our area of expertise. Additionally, Police hate crime training and updated guidance were only introduced recently and it is too early to assess their effectiveness. We encourage Police to evaluate the success of the training and guidance once they have had sufficient time to become embedded.
- 9.10 In Chapters 6 and 7, we recommended legislative amendments to create a court hate crime flag and to require the court to specify (in both sentencing decisions and on the court record) when the aggravating factor is being applied. We would expect the hate crime flag process to prompt Police to consider if the aggravating factor may apply when laying charges and prosecutors to raise it at relevant points in a proceeding. However, for the process to work as intended, both police officers and prosecutors will need to be aware of the new provisions — including the need to specify that hostile aggravation is

² Consultation Paper at [7.21]–[7.22].

³ 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.

⁴ 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.

alleged on the charging document and the requirements on the court at sentencing if the aggravating factor applies.

- 9.11 As well as police prosecutors, Crown solicitors also prosecute some hate crime cases. Currently, they do not have any specific guidance or training on prosecuting hate crimes. We consider Crown solicitors should also have access to relevant guidance and training to ensure that all prosecutors who may deal with hate crime cases are aware of and understand the new court flag process and other legislative amendments we recommend. Guidance will also help to improve general understanding of the aggravating factor, providing more clarity about when and how to raise it in proceedings.

Recommendations

R7

Ngā Pirihimana o Aotearoa | New Zealand Police should review and update its guidance on hate crimes and other relevant guidance to ensure police officers and prosecutors are informed about any changes to the law as a result of this review.

R8

Updated Ngā Pirihimana o Aotearoa | New Zealand Police guidance relating to hate crime prosecutions should be shared with Crown solicitors.

R9

Ngā Pirihimana o Aotearoa | New Zealand Police and the Crown Solicitor Network (supported by Te Tari Ture o te Karauna | Crown Law) should provide training on any changes to the law as a result of this review.

- 9.12 We recommend that Police review existing guidance on hate crime to ensure it reflects any changes to the law implemented as a result of this review. We also recommend that the parts of the updated guidance that are relevant to prosecutions should be shared with Crown solicitors.
- 9.13 Both the Crown Solicitor Network (supported by Crown Law) and Police should provide training to prosecutors and relevant Police staff on the new hate crime provisions. Further, it would be helpful if legal professional bodies provide training on any changes to the law to ensure defence counsel are informed.
- 9.14 As part of Police's review of its guidance on hate crime, it may wish to consider whether the current guidance ensures police officers and prosecutors are adequately informed about section 9(1)(h) and how to apply it generally. For example, Police Instructions (discussed in Chapter 2) contain prompts to include evidence of hostility in summaries of fact and witness statements. However, there is little detail about the kind of evidence that may be used to establish hostile motivation. There is also little guidance on the legislative requirements that must be met for section 9(1)(h) to apply. While there is reference to addressing section 9(1)(h) at sentencing, there is no prompt to consider it at other stages of a proceeding such as at bail hearings. Guidance on these matters could help to ensure hostile motivation is appropriately addressed in court proceedings.
- 9.15 Additionally, as discussed in Chapter 7, we consider that the existing law allows the use of community impact statements at sentencing and that they may assist the court in some hate crime cases. Police could consider adding a prompt to the hate crime instructions to assess whether a community impact statement may be appropriate in the circumstances.

- 9.16 As well as the Police Instructions, there may be other Police guidance that could usefully refer to section 9(1)(h). For example, there are general Police Instructions relating to victims, which provide guidance on victim impact statements and could be updated to refer to the possibility of using community impact statements in hate crime cases (and potentially others).

JUDICIAL TRAINING

- 9.17 As discussed in Chapter 4, given how few hate crime cases there are in the courts, there is a risk that the aggravating factor may not always be front of mind for judges. This may be a particular challenge when judges are dealing with high caseloads (especially in Te Kōti ā Rohe | District Court).
- 9.18 In Chapters 6 and 7, we recommended changes to court processes and procedure to help ensure hostile motivation is identified and addressed in relevant proceedings. Further, in Chapter 8, we recommended some changes to the wording of section 9(1)(h).

Consultation

- 9.19 Although it was not something we discussed in our Consultation Paper, three submitters suggested there should be training for members of the judiciary.⁵ One said this training should cover how to identify hate crimes and recognise their systemic impact.⁶ The other two submitters did not specify what the training should cover. The New Zealand Law Society said there were likely to be lapses in seeing hostile motivation “for what it is; [and] even once realised, it may not be treated adequately or consistently”. Some groups we spoke with during consultation also thought judges do not always recognise hostility-motivated offending or understand how to deal with these cases.

Our view

- 9.20 If our recommendations in earlier chapters are accepted, it would be beneficial for judges to have access to guidance and training to ensure they are aware of the legislative changes and the new requirements they impose. More generally, guidance and training could help to ensure judges are aware of the aggravating factor and consider it in appropriate cases.

Recommendation

R10

Te Kura Kaiwhakawā | Institute of Judicial Studies should consider developing guidance and providing training to judges on any changes to the law as a result of this review.

- 9.21 We recommend that the Institute of Judicial Studies consider developing guidance and training for judges to ensure they are informed of any changes to the law as a result of our recommendations in this Report.

⁵ Justice for Palestine, Alternative Jewish Voices, and Dayenu (joint submission); Dr Kyle R Matthews; and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

⁶ Justice for Palestine, Alternative Jewish Voices, and Dayenu (joint submission).

- 9.22 The Institute of Judicial Studies may also wish to consider whether training and guidance on the application of the aggravating factor more generally would be helpful. For example, this could cover the following:
- (a) The kinds of hate crimes the courts may encounter and types of evidence that may establish hostile motivation.⁷
 - (b) The test in section 9(1)(h) (or any new provision defining when offending is aggravated by hostility). Guidance might discuss, for example, the fact that partial motivation is sufficient to engage the aggravating factor.⁸
 - (c) Considerations that may affect the weight given to the aggravating factor.⁹

PUBLISHING DATA ON HATE CRIME CASES

- 9.23 In Chapter 2, we explained that data collection and analysis by Police have improved since the Royal Commission's report as a result of more structured recording and quality assurance practices. However, Police does not proactively publish data that it collects. In addition, as discussed in Chapter 4, information about how hate crime is dealt with in the court system (for example, how often the aggravating factor is applied at sentencing) is not easily accessible. This makes it difficult to assess how the justice system is responding to hate crime and where in the justice process any problems are occurring. The lack of publicly available data also makes hate crime and the justice system's response to it less visible to affected communities and the general public.
- 9.24 In Chapter 6, we recommended introducing a hate crime flag in the court system. That would help to improve recording of when the hostility aggravating factor is alleged to apply to an offence and of the court's finding on the matter.

Consultation

- 9.25 We did not discuss publication of hate crime data in our Consultation Paper. However, one submitter called for public reporting of data alongside better collection practices.¹⁰ In addition, two submitters commented on the value of wide access to the full range of data about hate crime. One said that information about charges or convictions for hate crimes could help researchers to understand why hate crimes occur and to identify circumstances that might give rise to a heightened risk of hate crimes.¹¹ The other said publishing data on policing responses and resourcing as well as sentencing data could enhance public perceptions of procedural justice and, in turn, support positive perceptions of policing and judicial practice.¹²

⁷ See Consultation Paper at [4.35].

⁸ The sufficiency of partial motivation appears to have been overlooked in some cases. For example, in *Police v Purves* [2025] NZDC 7514, the Court appeared to suggest that offending needed to be "purely" motivated by hostility for the aggravating factor to apply: at [8].

⁹ Some examples are discussed in Sentencing Council (England and Wales) "Hate Crime" <www.sentencingcouncil.org.uk>.

¹⁰ Justice for Palestine, Alternative Jewish Voices, and Dayenu (joint submission).

¹¹ Dr Chris Wilson.

¹² Grace Carroll.

Our view

- 9.26 Regular publication of both Police and courts data on hate crime would help address the issues discussed above in relation to the visibility of hate crime and the justice system response to it. Commentary from other jurisdictions suggests that, from the public's perspective, hate crime processes and data "are often shrouded in mystery".¹³ Regular publication of data is a way for the government to acknowledge the seriousness of hate crimes and increase public awareness.¹⁴ Reporting of data would also enhance the transparency and accountability of the justice process.¹⁵ Transparency may improve trust in Police and the courts, and encourage people to report incidents of hate crime.¹⁶ Finally, publication would enable people outside government to monitor trends, identify developing risks and assess the justice system's response. Independent research and scrutiny of this kind could contribute to robust operational and policy decision-making in future.
- 9.27 Data about hate crime is regularly published in some other jurisdictions. For example, in England and Wales, the Home Office publishes Police data on hate crimes annually.¹⁷ The Crown Prosecution Service also publishes data on prosecutions and convictions for hate-flagged offences.¹⁸ In Canada, Statistics Canada compiles and publishes Police hate crime data.¹⁹

Recommendations

R11

Ngā Pirihimana o Aotearoa | New Zealand Police should publish data on perceived hate crimes annually.

R12

If the amendments in R1 are made, Te Tāhū o te Ture | Ministry of Justice should publish court data on hate crime cases annually.

- 9.28 We recommend that Police and the Ministry of Justice should publish data on hate crimes annually.
- 9.29 While Police has made some data available online in recent years, this is not a regular proactive publication but the collation of statistics provided in response to requests under

¹³ Barbara Perry and Kanika Samuels-Wortley "'We're Not Where We Should Be': Enhancing Law Enforcement Responses to Hate Crime" (2021) 63 CJCCJ 68 at 80.

¹⁴ EU High Level Group on combating racism, xenophobia and other forms of intolerance *Key Guiding Principles on Encouraging Reporting of Hate Crime: The Role of Law Enforcement and Relevant Authorities* (European Commission, March 2021) at 8.

¹⁵ Barbara Perry and Kanika Samuels-Wortley "'We're Not Where We Should Be': Enhancing Law Enforcement Responses to Hate Crime" (2021) 63 CJCCJ 68 at 80.

¹⁶ EU High Level Group on combating racism, xenophobia and other forms of intolerance *Key Guiding Principles on Encouraging Reporting of Hate Crime: The Role of Law Enforcement and Relevant Authorities* (European Commission, March 2021) at 8.

¹⁷ Home Office "Hate crime, England and Wales, year ending March 2025" (9 October 2025) <www.gov.uk>.

¹⁸ Crown Prosecution Service "CPS data summary Quarter 4 2024–2025" (17 July 2025) <www.cps.gov.uk>.

¹⁹ Statistics Canada "Police-reported crime in Canada, 2024" (22 July 2025) <www.statcan.gc.ca>.

the Official Information Act 1982.²⁰ Police should publish this information in a regular and discrete way so that its availability is more apparent and it can be more readily evaluated across time.

9.30 Publication of data by Police should include the following:

- (a) The number of perceived hate crimes reported, in total and by offence type.
- (b) The proportion of perceived hate crimes targeting each protected characteristic, including further detail about the group targeted (for example, the relevant religious or ethnic group).
- (c) Closure reasons and methods of proceeding for perceived hate crimes. These indicate how investigations are resolved (for example, if the investigation is closed due to no further line of inquiry or if there is a prosecution or alternative resolution).
- (d) Alleged offender demographics.

9.31 As discussed in Chapter 4, the accuracy of Police data is dependent on quality assurance processes that ensure hate crimes are properly recorded. We noted in that chapter that funding for the Hate Crime Quality Assurance Team has expired and suggested that Police may wish to consider whether some form of quality assurance can be continued. The benefits of publishing data would be significantly lessened should quality assurance processes be discontinued.

9.32 With regard to the courts, the Ministry of Justice already publishes data on family violence offences, which are identified based on the family violence court flag.²¹ This includes data on offence type, outcomes, sentence types and offender demographics. If our recommendation to introduce a court hate crime flag is adopted, we recommend the Ministry of Justice publish similar data on hate crime cases annually. This should include the following:

- (a) For each alleged offence where section 9(1)(h) was flagged on the charging document and each conviction where the court recorded that section 9(1)(h) applied at sentencing:
 - (i) the offence type;
 - (ii) the protected characteristic and group alleged to have been targeted (if available — see Chapter 6);
 - (iii) the outcome; and
 - (iv) the defendant's or offender's demographic information.
- (b) For offences resulting in conviction where section 9(1)(h) was flagged on the charging document, the proportion where the court applied the aggravating factor at sentencing.
- (c) The number of offences resulting in conviction (if any) where section 9(1)(h) was not flagged on the charging document but the court took the aggravating factor into account at sentencing.

²⁰ New Zealand Police "Hate-motivated Crimes Official Information Act responses" <www.police.govt.nz>.

²¹ Te Tāhū o te Ture | Ministry of Justice "Family violence offences data tables" (December 2024) <www.justice.govt.nz>.

- 9.33 If feasible, it would be helpful for the Police and courts datasets to be matched for the purpose of publication. This would show, for example, what proportion of offences recorded as perceived hate crimes by Police were also flagged as section 9(1)(h) offences on charging documents. As with our recommendation to share court information with Police and Ara Poutama Aotearoa | Department of Corrections (R2) discussed in Chapter 6, we understand this could likely occur consistently with the Privacy Act 2020 but further consideration would be required of the best way to ensure that consistency.
-

APPENDIX 1

Terms of reference

PROJECT OVERVIEW

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

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

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

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

SCOPE OF THE REVIEW

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

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

- how the hatred or hostility element of the offences should be established;
- what maximum penalties are appropriate; and
- whether any amendments to the Sentencing Act are desirable to take account of the new offences and to ensure hate crime offenders are sentenced appropriately.

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

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

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

TIMING AND PROCESS

The Law Commission intends to publicly consult in early 2025.

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

ABOUT THE LAW COMMISSION

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

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

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

APPENDIX 2

Public consultation

SUBMITTERS

We received 96 submissions on our Consultation Paper — 26 on behalf of organisations and 70 from individuals. The submitters are listed below, except those individual submitters who requested anonymity. The submissions are available on our website along with a summary of them.

Organisations

Annette Sykes & Co

Destiny Church 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 Tūmatanui | 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

Individuals

Madeline Ash	Dr Sanjana Hattotuwa	Graeme Minchin
George Balani	Russell Hoban	Tim O'Sullivan
Kevin Bird	Brian Jones	Roelie van Rijs
Dr David Bromell	Ruth Jones	Greg Rzesniowiecki
Grace Carroll	Karun Lakshman	Murray Stirling
Trevor Dance	Rex Landy	Dr Mark Walters
Gary Durey	Maire Leadbeater	Fergus Wheeler
Graeme Edgeler	David Le Breton	Don Whitfield
Clive Elliot KC	Richard Lillywhite	Tamsen Williams
David F	Amos Mann	Peter Williamson
Michael Fitzgerald	Andrew Marchant	Dr Chris Wilson
Ken Gorbey	Dr Kyle R Matthews	Rod Young
M Guenole	Dr John McDonald-Wharry	
Dr David Harvey	Murray Merriman	

We have withheld the names of 30 additional individual submitters who requested anonymity and refer to them by submission number in this Report.

OTHER ORGANISATIONS WE ENGAGED WITH

During the public consultation period, we met with various individuals and organisations. Some made submissions and are listed above. The other organisations we met with were:

- Federation of Islamic Associations of New Zealand
 - Islamic Women's Council of New Zealand
 - Qtopia
 - InsideOUT
 - Speak up for Women
 - Te Ngākau Kahukura
-

APPENDIX 3

Technical Advisory Group

We appointed a Technical Advisory Group for this review, comprising academic and legal experts. The function of the Group was to test our proposals for reform. The Group met once in November 2025.

The members of the Group were:

- Charlotte Brook
- Dr Warren Brookbanks
- Professor John Ip
- Mark Lillico (Te Tari Ture o te Karauna | Crown Law)
- Bill Peoples (Ngā Pirihimana o Aotearoa | New Zealand Police)
- Tania Singh (Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service)
- Annette Sykes
- Dr Susann Wiedlitzka

The feedback provided by the Group assisted us in finalising our recommendations. All views expressed in this Report are our own and do not necessarily reflect the views of Technical Advisory Group members.



Address: Level 9, Solnet House, 70 The Terrace, Wellington 6011

Postal: PO Box 2590, Wellington 6140

Telephone: 0800 832 526

Email: com@lawcom.govt.nz
