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Te Kāhui Ture o Aotearoa

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Hara ngākau kino | Hate crime project team
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Tēnā koutou

Issues Paper 55: Hara ngākau kino | Hate crime

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback to Te Aka Matua o te Ture Law Commission (**Commission**) on the *Hara ngākau kino | Hate crime* Issues Paper (**Issues Paper**).[1] The Issues Paper reviews the law relating to hate crime, asking whether it should be changed to create new hate crime offences in New Zealand. It examines three types of approaches.

1.2 This submission has been prepared with input from the Law Society's Criminal Law and Human Rights and Privacy Committees.[2]

2 General comments

2.1 The Law Society supports this review and is appreciative of the concise analysis of the law and issues provided in the Issues Paper. The very serious context of the review is also noted. It follows from the recommendations of the Royal Commission of Inquiry into the terrorist attack on Christchurch mosques on 15 March 2019: an horrific terror event driven by hate.[3]

2.2 The Law Society agrees that ensuring hate crime is prosecuted and denounced appropriately is a matter of utmost importance. However, there are also risks and concerns. The establishment of new criminal offences demands strong justification. Related to this, there are significant information gaps about how the criminal justice system is presently recognising, responding to and denouncing hate crime, that relate to understanding whether denunciation of this type of offending is presently insufficient.

2.3 To highlight main points of the Law Society's submission:

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1 Te Aka Matua o te Ture New Zealand Law Commission *Hara ngākau kino | Hate crime* (NZLC IP55, 2025).

2 More information about these committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

3 Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019

(a) The Law Society shares concerns identified in the Issues Paper about inadequacies of the status quo. It also has some reservations about moving too swiftly to establish new hate-motivated offences, and some doubt that new offences are the correct response.

(b) We lack sufficient information to fully understand the way the criminal justice system and its actors are presently addressing hate crime; and, in turn, a clear picture of the status quo as regards denunciation and deterrence. In the Law Society's view, policy and practice initiatives will be the best starting point to:

  (i) begin to build a clearer picture of how hate-motivated crime is being dealt with presently in the courts and criminal justice system;

  (ii) improve how it is being dealt with; and

  (iii) raise public awareness of hate as a general issue and public confidence that such crimes are taken seriously.

(c) Following the Royal Commission's work, some steps have been taken; however, these are likely too recent to see their full impact and there is no doubt more can be done. A systemic approach will be required.

(d) A human rights lens is a useful overlay on several of the key law reform considerations set out in the Issues Paper. In particular, the Law Society notes that:

  (i) Higher courts in both New Zealand and other jurisdictions have addressed and dismissed claims about hate crimes constituting an unreasonable infringement of the protected rights of their perpetrators.

  (ii) Internationally, there is not a consistent approach. Some jurisdictions have provided specific offences. Others continue to consider sentence aggravation, as in New Zealand, an appropriate and sufficient approach. Specific offences are not required to meet human rights obligations.

(e) Of the three models proposed in the Issues Paper, the Law Society favours, as a starting point:

  (i) working to improve the operation of the sentencing aggravation model; and

  (ii) as above, a preference in the first instance for practical, operational changes to achieve this, over legislative amendment.

(f) It is not clear changes are needed to what the Issues Paper terms 'protected characteristics' or 'enduring common characteristics' (in the language of the Sentencing Act 2002). These, raised in chapters 3, 7 and 8 of the Issues Paper, are presently contained in the Sentencing Act as an element of the hate crime aggravating factor. The Law Society supports criteria identified in the Issues Paper for considering which characteristics are included. Different drafting approaches are briefly discussed.

3 Hate crime and its impacts

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

3.1 A core question for the Issues Paper is whether the current law does enough to denounce hate crime.

3.2 In endeavouring to make informed assessments about the extent of hate crime in New Zealand and how the criminal justice system responds, the Law Society's first observation is the lack of information available to both evaluate the problem and develop appropriate responses. The statistics set out in the Issues Paper are informative. They are also quite recent. As the Issues Paper makes clear, processes set in place since 2019 by Police to gather information about hate crimes are still bedding down and evolving.[4]

3.3 This concern about inadequate information to support an informed assessment is not confined to (or even primarily directed at) the Police statistics that the Issues Paper provides. We do not know enough because we do not collect data at all or any of the necessary points through the criminal justice system. Of data that we do have, we further lack qualitative study both of how hate crime is experienced as an offence and then moves through the criminal justice process. For example:

(a) Statistics for reported offences flagged as perceived hate crimes have only been collected since 2019, with work ongoing to improve them by Police, particularly since 2021.[5] Regarding awareness of and response to hate crime in New Zealand, this fact alone is telling. One consequence is that the incidence of hate crime and trends in New Zealand over time is difficult to judge.

(b) As indicated by New Zealand Crime and Victims Survey data provided in the Issues Paper, the Law Society suspects hate crime is likely to be under-reported. There are gaps in understanding whether and, if so, why that is the case.

(c) The Issues Paper reports that, of the 12–18 per cent of reported hate offences investigated to the point there was sufficient evidence to charge a person with an offence and Police decided to take action, only about half were prosecuted. The reasons for this are unclear: does it in fact have to do with the offence framework, or other issues (the same issues presumably also affecting the much larger proportion of reported hate offences **not** arriving at this point). We do not know the underlying causes for the high proportion of cases not pursued: were there, for example, evidential problems? or issues to do with awareness of hate crime or attitudinal problems on the part of investigating officers? To some (unknown) extent, it seems likely that there are some factors in play that simple recourse to further criminalisation will not resolve.

(d) For those cases which do advance to a prosecution, it would in turn be useful to understand the percentage that resulted in convictions, and of those, the percentage uplift on sentence received because of the hate factor (including

4 Issues Paper, ch 4; see also [5.26].

5 The Christchurch attack was carried out on 15 March 2019. The Royal Commission of Inquiry into the terrorist attack on Christchurch mosques reported its findings on 26 November 2020.

whether that changed the type of sentence received, and especially, any influence that it may have had on the custody threshold). This would help to understand whether such crimes are being treated both appropriately and consistently in an aggravated sentencing model.

3.4 To the Law Society, such gaps suggest the importance, first, of an Executive-led plan for gathering both quantitative and qualitative data about hate crime in New Zealand, to support well-evidenced policy and law reform. Strengthened processes seem likely to matter as much, if not more than, new offences or legislative changes. The Law Society considers that interventions to better understand these questions would range from identification of hate offences when they occur and then tracking those offences through to the end-point of the criminal justice process. Other jurisdictions, such as Scotland, may be able to assist with expert advice from criminological policy makers on designing systems to achieve this.

4 Key reform considerations and human rights

4.1 Chapter 3 of the Issues Paper discusses key reform considerations. The Law Society agrees with the reform considerations the Commission has identified. We first address this responding to **Question 4** of the paper, followed by Questions 2 and 3 (which relate, respectively, to te Tiriti o Waitangi (**Treaty**) and 'protected characteristics'). In the Law Society's view, several of the key reform considerations are assisted by approaching them from a human rights perspective.

Question 4: What do you think about the key reform considerations we have identified for this review?

The need to treat hate crime more seriously – informed by international law requirements and the way that it is treated in other jurisdictions

4.2 International obligations and the approaches taken in jurisdictions to which New Zealand habitually compares itself are relevant guides to New Zealand's approach.

(a) *International law considerations:* As the Commission has identified, there is a growing consensus that international human rights obligations require hate crimes laws.[6]

(b) *Overview of cognate jurisdictions:* An overview of cognate jurisdictions suggests the same. Canada, the United States, the United Kingdom, and many European countries have some form of hate crime legislation.

4.3 International law, however, does not prescribe a particular form of hate crime legislation. Consistent with this, as New Zealand's Court of Appeal has outlined, the nature of the legislation differs among jurisdictions that have addressed hate-motivated offending.[7] In the European Union, for example, the sentence aggravation model (comparable to New Zealand's present approach) appears to be a baseline, with all Member States treating hate as an aggravating circumstance, albeit with significant differences regarding the crimes to which these aggravating circumstances may apply. In

6 Issues Paper at [3.42]–[3.45].
7 *Arps v Police* [2019] NZCA 592 at [22]–[26].

addition, at least 18 European Union Member States criminalise hate crime as a stand-alone offence.[8]

4.4 The Law Society agrees with the Commission's analysis that the reform of New Zealand's current sentence aggravation provision is not required for New Zealand to comply with its international law obligations.[9]

Countervailing human rights concerns raised by hate crimes?

4.5 As the Commission identifies, hate crime laws may themselves raise human rights concerns, specifically as regards freedom of thought and expression, and equality before the law.[10] Both domestic and overseas courts have addressed these concerns.

New Zealand

4.6 As the Issues Paper observes, in *Arps v Police*, the Court of Appeal found that the limit section 9(1)(h) of the Sentencing Act 2002 places on the right to freedom of expression is justified given the important objectives of hate crime law.[11] The Court emphasised the importance of the right to freedom of expression as "one of the most cherished in a free and democratic society".[12] It observed, however, that there are multiple limitations on the right. Limitations may be necessary to protect society's interests such as national security, public order and public health and to protect individual interests, such as another's reputation or rights.[13] The Court identified the purposes of section 9(1)(h) as "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". It continued:[14]

> 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.

4.7 Having observed that similar measures had been found constitutional by the highest courts in the United States and Canada, the Court noted it had not found a single incidence of a final court in any free and democratic country expressing reservations about the way in which such measures impact upon a citizen's freedom of expression.[15]

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8 Beatrix Immenkamp *Criminalisation of hate speech and hate crime in selected EU countries* (European Parliamentary Research Service, November 2024) at 5. While this paper identifies Ireland as the only country which does not treat hate as an aggravating circumstance, since its publication the Irish Parliament (Oireachtas) has enacted the Criminal Justice (Hate Offences) Act 2024, which provides for both stand-alone hate crime offences, and for hatred to be treated as an aggravating factor for sentencing purposes in respect of certain offences.

9 Issues Paper at [3.45].

10 Issues Paper at [8.34]–[8.36].

11 *Arps v Police*, above n 7 at [52].

12 At [35].

13 At [43].

14 At [48].

15 At [51].

United States

4.8 In *Wisconsin v Mitchell*, the US Supreme Court unanimously upheld the constitutionality of a statute which created a specific aggravated offence with a higher penalty where a defendant selected their target based on one of a number of specified characteristics, including race.[16]

4.9 The lower Court had held that the statute was unconstitutional because it punished the defendant's motives, and therefore restricted freedom of thought.[17] It noted that two defendants who commit essentially the same crime will have different sentences and maximum penalties based on how they selected their target.[18] However, in upholding the statute, the Supreme Court observed that motive is commonly considered during sentencing.[19] While "abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge", evidence relating to these beliefs which is shown to be related to a criminal offence is admissible.[20] Motives are also considered in other contexts, such as unlawful discrimination against an employee.[21]

4.10 The lower court had also been concerned that, because the defendant's prior speech or associations could be used to prove that the defendant intentionally selected his victim on account of the victim's protected status, this would have a chilling effect on free expression.[22] The Supreme Court did not share this concern. It considered the proposition that an individual would suppress their expression because they believed they might in the future commit an offence motivated by hostility to a certain group was "too speculative a hypothesis".[23]

Europe

4.11 The European Court of Human Rights (**ECtHR**) is also supportive of hate crimes offences despite the limitation on freedom of speech. Interpreting the European Convention on Human Rights, the ECtHR has consistently found that hate speech and hate crime are particularly serious offences, given the impact they have on the values of the European Union and the fundamental rights that the Union protects.[24] As to the argument that hate crimes could result in differential treatment, in *Abdu v Bulgaria*, the ECtHR found that:[25]

> Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights. A failure to make a distinction in the way in

16 *Wisconsin v Mitchell* 508 US 476 (1993) at 479. The provision applied if the defendant "[i]ntentionally selects the person against whom the crime… is committed… because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person". Wis Stat. § 939.645(1)(b) (1989–1990) cited in *Wisconsin* at 480.

17 *Wisconsin*, above n 16, at 482.

18 *Wisconsin*, above n 16, at 484–485.

19 *Wisconsin*, above n 16, at 485.

20 *Wisconsin*, above n 16, at 485–486.

21 *Wisconsin*, above n 16, at 485–487. Discrimination in an employment context is also illegal in New Zealand: Employment Relations Act 2000, s 104; Human Rights Act 1993, s 21.

22 *Wisconsin*, above n 16, at 482, 488.

23 *Wisconsin*, above n 16, at 489.

24 Immenkamp, above n 8 at 3. See e.g. *Beizaras and Levickas v Lithuania*, ECtHR, Case No 41288/15, 14 January 2020; *R.B. v Hungary*, ECtHR, Case No 64602/12, 12 April 2016.

25 *Abdu v Bulgaria*, ECtHR, Case No 26827/08, 11 March 2014, at [44].

> which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention [prohibiting discrimination].

4.12 In short, courts have not shared concerns that the limitations on perpetrators' human rights involved in establishing hate crimes offences are unjustified.

When is it appropriate to create new offences?

4.13 The Issues Paper sets out considerations that, according to guidance issued by New Zealand's Legislation Design Advisory Committee (**LDAC**), are relevant to deciding when new offences may be appropriate.[26] The Law Society agrees with this approach and notes further that the LDAC criteria align well with the analytical framework under the New Zealand Bill of Rights Act 1990 (**Bill of Rights**). Considering this provides a further way of fleshing out a rights analysis and responding to concerns that may be raised.

Bill of Rights considerations

4.14 The considerations identified in the LDAC's *Legislation Guidelines* for establishing new offences reflect those that that apply when assessing whether a rights limitation in legislation is justified under section 5 of the Bill of Rights:[27]

(a) The LDAC's view that new offences should be included in legislation only if they are necessary to achieve a significant policy objective is consistent with the requirement that the limiting measure serve a purpose sufficiently important to justify curtailment of the right.

(b) The requirement that any new offence can achieve its purpose reflects the requirement that the limiting measure be rationally connected with its purpose.

(c) New offences may not further criminalise conduct that is already addressed by the criminal or civil law unless doing so would serve a goal that is not currently served by the law. It also must be clear the policy objective cannot be achieved effectively in a less restrictive way. This is consistent with the requirement that the limiting measure impair the right or freedom no more than is reasonably necessary. If there are less restrictive means to achieve a desired outcome (for example the need to recognise the additional harm caused by hate crime and/or the need for denunciation) the measure risks being Bill of Rights-inconsistent.

(d) As the Supreme Court has recently noted, the final inquiry as to whether the limit on a right is in due proportion to the importance of the objective draws together for consideration the above factors.[28]

4.15 In the Law Society's view:

(a) If the Commission ultimately considers that a recommendation for new hate-motivated criminal offences is appropriate, the guidance above from the LDAC will provide a suitable, rights-consistent framework for assessing whether such offences are warranted. Ensuring the criteria are satisfied will assist in ensuring there is nothing inconsistent in doing so from a human rights or Bill of Rights perspective.

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26 Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at 121–123.
27 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and [104] per Tipping J.
28 *Attorney-General v Chisnall* [2024] NZSC 178.

(b) The above LDAC considerations inform the Law Society's own perspective regarding the need — before establishing a new offence — for there to be a goal that is not currently met by the law, and clarity that the policy objective cannot be achieved effectively in a less restrictive way.

Te Tiriti o Waitangi and tikanga

Question 2: How can we best uphold the Crown's obligations under Te Tiriti o Waitangi | Treaty of Waitangi in this review?

4.16 The Issues Paper notes that Māori may experience hate crimes as both victims and participants. It flags for consideration whether the over-representation, generally, of Māori in the criminal justice system may be one concern when assessing the consequences of establishing new hate crime offences, and provides data showing the extent to which Māori are already disproportionately represented as alleged hate crime offenders.[29] Treaty-relevant options are touched on, such as resourcing iwi, hapū and other Māori entities to understand how hate-motivated crime may be affecting them, and equipping them to respond.

4.17 The Law Society agrees with the Law Commission's analysis of the relevance of articles 2 and 3 of the Treaty to its review. In the Law Society's view:

(a) It is unclear whether the initiatives mentioned above, which some have suggested,[30] would or could involve enabling Māori to better support Māori groups and individuals who are victims of hate crime — and/or, going further, might enable iwi and hapū to take steps towards taking kinship responsibility according to tikanga when Māori are involved in hate-motivated offending. Either way — perhaps particularly in the latter case — the Law Society considers that such initiatives could assist in restoring aspects of tino rangatiratanga and in doing so would offer in this context one article 2-consistent response.

(b) Information also seems incomplete about the extent to which Māori are experiencing hate crime as victims. It is not clear from the chapter 2 statistics provided what information is being kept about this, and the extent to which hate motivates offending against Māori victims. The Law Commission could recommend urgently addressing this, as an aspect of the information gaps identified above, and a matter relevant to article 3.

4.18 The Law Society further considers that both Treaty partnership and the present reality of Māori engagement with the criminal justice system, where Māori are overrepresented in all criminal justice statistics, make it imperative that any responses and system design processes, not just consult but include Māori from the beginning, whatever their form. This would not be confined to Māori legal professionals. When it comes to considering the Government Response, and developing work going forward, the Law Society notes the desirability of a working group or advisory group to support the work and would support Māori representation on the group and a requirement for such a group to further specifically scope this issue.

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29 Issues Paper at [2.20(b)].
30 Issues Paper at [3.39].

Protected characteristics

Question 3: What characteristics should be protected by hate crime laws? Why?

4.19 The Issues Paper identifies, as a law reform consideration, the question of what characteristics should be protected by hate crime laws, presently provided for in section 9 of the Sentencing Act 2002.[31] Criteria are proposed for considering what characteristics should be protected.[32]

4.20 In this submission, the Law Society does not take a position on specific characteristics. Noting that this question arises in the Issues Paper under chapters 3 (criteria), 7 (whether New Zealand's present sentence aggravation model requires any legislative amendment) and 8 (other legal models), we have consolidated the response to this question under Question 6 below, which notes:

(a) the Law Society's present preference to retain the current framing of section 9 (although open to being convinced to the contrary);

(b) criteria to guide assessment of protected characteristics identified in chapter 3 the Issues Paper are a useful framework, which the Law Society supports; and

(c) merits of a non-exhaustive (open-ended) vs exhaustive (closed) approach.

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

Question 5: Do you think there are problems with how Aotearoa New Zealand's current hate crime law is working? If so, what are those problems?

5.1 Yes. In the Law Society's view, our criminal justice system and process is not dealing adequately with hate crime.

5.2 Elsewhere, the Issues Paper also puts the question in perhaps a slightly different way: seeking feedback on "whether *the current law* adequately denounces hate crime and, if not, why that is the case".[33] For the Law Society, the response to the systemic question (how the law is *working*) is 'yes'. Whether the law itself (in the form of offences and penalties, and the sentence aggravation model) is insufficient or problematic is more doubtful.

5.3 At least one significant part of the problem is as earlier identified:[34] it is hard to assess the claim that the law is not treating hate crime with due seriousness. There are undoubtedly flags present in the Issues Paper, consistent with the Royal Commission's consideration that "the current law is inadequate because it does not reflect the seriousness of hate crime".[35] For instance, this conclusion might be borne out by the seeming lack of attention to hate crime as an issue, pre 2019; by the observation that "the sentences imposed in hate crime cases are not routinely near the maximum";[36] or by the earlier discussion of the low proportion of prosecuted offences.

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31 Sentencing Act 2002, s 9.
32 Issues Paper at [3.52]–[3.53].
33 Issues Paper at [5.5].
34 See further Question 1, above.
35 Issues Paper at [5.2].
36 Issues Paper at [5.12].

5.4 Even so, as earlier discussed, too little is known about hate-motivated offending and how we treat it. In the Law Society's view, it is almost certain that across police, prosecutors, criminal justice professionals and the judiciary there are lapses in looking for and seeing hate crime for what it is; even once realised, it may not be treated adequately or consistently. The Law Society agrees with the issues identified and reviewed in chapter 4 of the Issues Paper, which span recognising, recording, investigating, prosecuting, and sentencing practices for hate crime, encouraging reporting, and other measures. The interwoven and complex nature of the issues, and the processes make it unlikely, in the Law Society's view, that they would be remedied simply by creating new offences. The temptation to create new offences — too often a simplistic way of being seen to 'do something' about crime — should be resisted. If, collectively, there is insufficient understanding of hate crime to begin with, new offences are likely to change little. Recommending changes to offences may be premature.

6 Preferred option: improving the sentence aggravation model

Question 6: If there are problems with how Aotearoa New Zealand's hate crime law is working, can they be addressed while keeping the current legal model (sentence aggravation)? If so, how?

6.1 For two reasons, the Law Society's preference is to improve the current 'sentence aggravation' model.

(a) The Law Society shares the Commission's view that "[i]t is therefore not clear to us that the sentence aggravation model is inhibiting the recording of hate crimes and collation of accurate data on them."[37] Improvements that raise awareness, improve consistency, and ensure hate motivation is visibly addressed and properly denounced can happen within this model. Better ways are needed to 'mark' and respond accordingly to offences where hate is a factor, from beginning to end of the criminal justice process. They should be supported by any necessary changes in training, in practices, and systems.

(b) The sentence aggravation approach also has significant benefits from a rights perspective, including the judge's ability to weigh up various, and sometimes competing considerations to ensure a proportionate and rights-compliant result. As the Commission has identified, the weight given to the hate crime aggravating factor differs depending on the circumstances of the case.[38] The Court's discretion at sentencing allows the sentence to be tailored to the specific facts of the individual's case and the culpability of the individual offender in light of all relevant factors, including any hate motivation. This should operate as a safeguard to ensure the individual's rights are protected. This judicial discretion and related flexibility was a central plank of the Court's reasoning in *Arps*. The Court noted that the sentencing court's decision is to be exercised applying all relevant principles and purposes of sentencing as set out in the Sentencing Act, including a requirement to assess both mitigating and aggravating factors. This requirement "places a restraint on the application of s 9(1)(h) of the Sentencing

37 Issues Paper at [5.34].
38 Issues Paper at [4.37].

Act that demonstrates why s 9(1)(h) abridges the rights in section 14 of the Bill of Rights no more than it is necessary to sufficiently achieve the purpose of s 9(1)(h)."[39]

6.2 Suggestions follow relating to:

(a) ways of systemically improving the model through policy and practice (or operational) interventions;

(b) whether the hate crime aggravation factor in section 9 of the Sentencing Act requires legislative amendment; and

(c) questions the Issues Paper raises about defining 'protected characteristics'.

Ways of improving the model – operational initiatives

6.3 Before New Zealand legislates new offences, there are other tools to improve how the sentencing aggravation model is working and how the criminal justice system responds. Chapter 7 of the Issues Paper discusses improvements which the Law Society supports, such as:

(a) Changes in police training and guidance, which may assist in changing the perception hate is not taken seriously, and in turn victims' confidence in reporting crimes against them to Police.

(b) Measures to improve the consistency with which hate motivation is addressed in investigations and prosecutions — including advice for prosecutors, on whom the courts rely to raise hate motivation at sentencing and ensure there is enough evidence for courts to apply the aggravating factor.

(c) Flagging hate crime cases in the courts' case management system (as occurs for family violence).

(d) Consistently stating, where applicable, that the hate motivation aggravating factor is relevant, and the difference it has made to the sentence.

6.4 In addition, the Law Society would recommend, for **prosecutors and Police:**

(a) Building a picture of how Police and prosecutors treat hate crime, and how/where they might improve by investigating:

- How do they learn about it and understand it?
- How do they identify it?
- How do they treat it in process?
- How do they treat it in substance?
- How do they record it?
- What quality control checks exist to ensure consistency in treatment?

(b) For Police, intervention points could include training processes, the Police Manual, investigative practices, and recording practices (e.g. charge coding).

(c) For Crown prosecutors, they could include the Crown Prosecution Guidelines and Crown Solicitor Network training processes.

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39 *Arps*, above n 7 at [50].

(d) For both Police and Crown prosecutors, a review of sentence practices and outcomes would be useful, with the purpose of improving consistency.

6.5 To raise awareness within the profession, **legal education** has a role, including:

(a) legal education at university or through continuing professional development;

(b) for the judiciary, Institute of Judicial Studies training.

6.6 **For victims**, steps might include:

(a) reviewing information and resources provided to victims and victims' groups;

(b) changes to the Victims' Code.

6.7 **For staff of courts and the Ministry of Justice** they might include:

(a) providing training for victims' advisors and related processes;

(b) looking at data recording practices, such as offence coding, and coding sentencing practices and outcomes (convictions, uplifts, sentence types, etc).

Legislative amendments – the hate crime aggravating factor definition

6.8 The further question, whether there is a need for legislative amendment of the hate crime aggravating factor definition**,** is considered in two parts:

(a) brief thoughts on the several elements of section 9;

(b) questions and options relating to protected characteristics (one of the elements).

6.9 For the following reasons, the Law Society is not presently persuaded of the need for changes to be made to section 9, although open to learning of others' perspectives:

(a) The Law Society is not aware that the 'partly' part of the hate aggravation factor is problematic or deleterious. For any instance of offending, it is plausible that there may be multiple aggravating factors. There will also not always be direct evidence, and the Issues Paper notes both of these points.[40] However, if this aspect were to be removed, the Law Society also recommends removing the reference to 'wholly'. This is because sentencing judges must weigh all relevant aggravating factors in arriving at a sentence.

(b) Perhaps the English could be plainer, but the Law Society is not convinced that 'enduring common characteristic' is unclear. If it is, the usual legislative solution is to define that term.

(c) In the Law Society's view, the subjective element ("the offender believed …") is important for distinguishing the aggravating factor from others already available.[41]

Protected characteristics

6.10 Noting that this issue spans chapters and options, the comments following are located here as most pertinent (presently) to the section 9 discussion. However, they will be relevant no matter where the 'protected characteristics' test is ultimately located.

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40 Issues Paper at [5.37]–[5.40].

41 Sentencing Act 2002, s 9(h)(ii).

Criteria to guide assessment of protected characteristics

6.11 The Issues Paper identifies, from a review of overseas approaches, criteria that could be used to guide the assessment of which characteristics should be protected by hate crime laws, such as:[42]

(a) A demonstrable need for people with a particular characteristic (a targeted group) to be protected by hate crime laws. This includes looking at the prevalence and severity of hate crime against a targeted group.

(b) Evidence that hate crime against a targeted group causes additional harm to the victim, members of the targeted group and wider society.

(c) The kind of hostility shown towards a targeted group is such that society (through Parliament) would wish the group to be protected by hate crime laws.

(d) Hate crime laws are an appropriate response to the offending against a targeted group.

6.12 The Law Society agrees that these provide a useful policy framework for considering protected characteristics. In particular, 'demonstrable need' (the first criterion above, which considers protected characteristics should reflect those groups who have, historically or currently, been targeted by hate-based crime) should be a cornerstone of protection.

6.13 It is clear from the Commission's review of cases applying the aggravating factor that race, ethnicity, colour and nationality are frequently targeted characteristics in New Zealand.[43] Because hate crimes legislation will reflect the society in which it is enacted, jurisdictions may vary. A review by the European Parliamentary Research Service shows wide variation in the range of characteristics protected between European jurisdictions. Core protected characteristics are race, colour, religion, descent or national or ethnic origin, while some countries also protect sex, gender, gender identity and sex characteristics, sexual orientation, age, disability, language, political status and political convictions.[44]

6.14 Broadly, these findings are consistent with section 9. The Issues Paper points out the different approaches taken overseas to the inclusion of sex or gender as a protected characteristic and the rationale for this.[45] The Law Society agrees with the issues identified. On the other hand, Te Mana Whakaatu | the Classification Office has recently reported on the growing recognition of the threat of violent extremism posed by the misogynist "incel" (involuntary celibate) ideology.[46] This consideration could be relevant to weighing the 'demonstrable need' (as above) against other considerations that the paper discusses.

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42 Issues Paper at [3.53].
43 Issues Paper at [4.41].
44 Immenkamp, above n 8 at 4.
45 Issues Paper at [3.55].
46 Te Mana Whakaatu | the Classification Office Online Misogyny and Violent Extremism, Understanding the Landscape (Summary Report) (May 2024) at 14.

Open-ended vs exhaustive approaches

6.15 An additional consideration is whether, if section 9(1)(h) is to be amended, the group of protected characteristics should be open-ended (as presently) or exhaustive.[47]

6.16 Given the significant consequences for the individual, community and wider society,[48] it is vital that the groups protected from hate crime in legislation align with those in society who may suffer from such crime. An overly-restrictive approach to protected characteristics could fail to protect certain groups. In the Law Society's view, this is one risk of a closed or exhaustive category and at this time it is hard to see what the case would be for change of this kind. While a 'closed' approach (naming specific groups) provides certainty, and singling out groups sends a strong signal regarding the groups who are named, it also risks excluding other groups in ways which may indicate they are "not worthy of protection".[49]

6.17 An open-ended list of protected characteristics arguably better provides for changing circumstances and allows the legislation to be utilised flexibly, as needed. Conversely, this, too, can have drawbacks. As the Issues Paper observes, in *Dunn v The Queen*, the Court of Criminal Appeal for New South Wales considered that an aggravated sentence provision, with a non-exhaustive list of protected groups, included paedophiles as a protected group.[50] The New South Wales Law Reform Commission subsequently recommended the relevant provision be amended to a restricted group of protected characteristics.[51] In its view, "the focus of the legislation should be on the minority and vulnerable or subjugated groups in whose interest hate crime laws have traditionally been developed".[52] The recommendation has not yet been implemented.[53] The Issues Paper also points to the example of gang membership being found to be a protected characteristic under section 9(1)(h).[54]

6.18 These cases illustrate the difficulty of formulating a provision that provides sufficient protection for groups that are the victims of hate crime, while remaining grounded in the rights-based justification for the legislation. Hate crime legislation, by definition, protects

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47 As the Commission has detailed, if New Zealand moves to a specific offences model, the need for certainty in relation to the criminalised conduct will require that protected characteristics be specified in respect of those offences.

48 See for example Immenkamp, above n 8 at 2.

49 James Chalmers and Fiona Leverick *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Review* (University of Glasgow, July 2017) at 57 (emphasis omitted).

50 *Dunn v The Queen* [2007] NSWCCA 312 at [32]. The relevant legislation provided that an aggravating factor in sentencing was that "[t]he offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability): Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2)(h), cited in *Dunn* at [29]–[33].

51 New South Wales Law Reform Commission *Sentencing* (R139, 2013) at [4.186]. The recommended amendment would protect "a group of people to which the offender believed or perceived the victim belonged, comprising people of a particular religious belief, racial, ethnic or national origin, age, sexual orientation, transgender status or having a particular disability or illness."

52 New South Wales Law Reform Commission, above n 52 at [4.176].

53 "Crimes (Sentencing Procedure) Act 1999" (1 December 2024) New South Wales Consolidated Acts <www.austlii.edu.au>.

54 Issues Paper at [5.44], citing *R v Pahau* HC New Plymouth CRI-2008-043-4555, 16 August 2010 at [39]–[40].

minority groups in society. However, to use paedophiles as an example, Parliament was unlikely to have intended, and members of the public are unlikely to consider it appropriate that, minority groups whose group identity is based on serious and socially abhorrent criminal behaviour should be protected by the legislation. Moreover, as the New South Wales Law Commission observed, the reasoning in *Dunn v The Queen* could also apply "to any group with common characteristics, for example, cyclists or lawyers".[55]

6.19 The Organization for Security and Cooperation in Europe guide to hate crime prosecution, while acknowledging national differences in which characteristics should be protected, suggests that "[p]rotected characteristics must: create a common group identity; and reflect a deep and fundamental aspect of a person's identity".[56] This is consistent with the current requirement in section 9(1)(h) that hostility be shown towards a group of people who have an "enduring common characteristic". As the Issues Paper says, equivalent provisions with open characteristics in Canada and some Australian jurisdictions are broader than section 9(1)(h).[57] By contrast, Germany's hate crime provision focuses on the rights-based origin of hate crimes, identifying as potential aggravating circumstances "the offender's motives and objectives, in particular including racist, xenophobic, antisemitic *or other motives evidencing contempt for humanity*" (emphasis added).[58]

6.20 Given the risks of an overly-broad formulation, if an open-ended list of protected characteristics is retained, the Law Society does not recommend replacing the "enduring common characteristic" requirement with broader language.

7 The other models

Question 7: If specific hate crime offences are adopted, what offences should they cover? Why?

7.1 The Law Society has not addressed this question because of its preference for continuing to work with the sentence aggravation approach (see further the responses to Questions 6 and 8).

Question 8: Should a different legal model, such as specific hate crime offences or the Scottish hybrid model, be introduced in Aotearoa New Zealand? Why or why not?

7.2 Despite the position stated above, the Law Society does not rule out that there could be future scope to consider new offences. It is plain that the Royal Commission has expressed valid concerns.

7.3 New offences could take the 'base' offence and motivation element form. However — given the plethora of offences in which a hate motivation may feature — the Law Society has concerns regarding the challenge of finding a principled basis on which to decide what 'base' offences to include (and those to exclude).

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55 New South Wales Law Reform Commission, above n 52 at [4.186].

56 Organization for Security and Cooperation in Europe Organization for Security and Cooperation in Europe *Prosecuting Hate Crimes: A Practical Guide* (2014) at 37–39.

57 Issues Paper at [7.35].

58 German Criminal Code 1998, s 46(2).

7.4 If there is to be a 'motivation', this will also need to be extensively consulted upon with stakeholders, especially the judiciary, to get it right. The challenges are not insurmountable. There are precedents for litigating subjective states of mind, and the courts are used to directing on them. However, the more elevated the consequence of proof in terms of a premium sentence tariff, the more concerned we should be to ensure unintended consequences are avoided. The Issues Paper discusses a case in point, providing an example of the risks of arbitrariness when identifying 'demonstrated hostility'.[59]

7.5 From a rights perspective, as detailed above, Courts domestically and internationally have addressed the human rights justification for hate crimes legislation, in the context of both the sentence aggravation and specific offence models. It is not inevitable that one model is more or less rights limiting that the other; rather, both models have been found to be justified limitations on the right to freedom of expression.

7.6 Should the Law Commission's review identify a gap in protection of fundamental human rights that can only be filled by specific hate crime offences (or the hybrid model), the introduction of a different model in addition to the aggravated model is likely to be justifiable.

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

7.7 The Law Society considers that:

(a) If specific new hate offences were introduced, the sentence aggravation provision should be retained alongside the new offences (applicable to any other offences). Trying to codify all hate offences is unlikely to be a viable approach.

(b) However, the retention of the sentence aggravation model in addition to the more expansive Scottish hybrid model risks excessive complexity in the law.

8 Next steps

8.1 We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform & Advocacy Advisor, Claire Browning (claire.browning@lawsociety.org.nz) if you have any questions or wish to discuss this feedback further.

Nāku noa, nā

David Campbell
Vice President

59 Issues Paper at para [8.9].