



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response to Public Consultation on Improving
the Effectiveness of Hate Crime Legislation in NI**

March 2022

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Summary of Recommendations

The NIHRC recommends that:

- 2.9 the Department of Justice ensures that the threshold for hate crime legislation is of a sufficiently high level when criminalising a person for their behaviours/attitudes leading to hate motivated offences.**

- 2.10 the Department of Justice ensures that the model adopted to address hate crime is an effective deterrent. If this is deemed to be the statutory aggravation model, best practice from other jurisdictions should be evaluated and applied, as appropriate, in NI.**

- 2.20 the Department of Justice creates a unified statutory definition of hate crime that covers bias, hostility, prejudice, bigotry and contempt. Guidance should also be provided on how the different aspects of the definition apply in practice.**

- 2.27 the Department of Justice ensures that the motivators of hate crime included in legislation effectively protect and remedy victims and potential victims from hate crimes in law and practice.**

- 3.5 the Department of Justice includes a statutory aggravator of sectarianism in the proposed hate crime legislation.**

- 3.6 the Department of Justice includes a statutory definition of sectarianism in the proposed hate crime legislation. The Scottish Hate Crime review's proposed definition of sectarianism is a good starting point. The NIHRC also supports future proofing the**

legislation to accommodate the inclusion of sectarianism against a broader range of religious beliefs, descent, nationalities or citizenship, if evidence emerges to show this is required.

4.10 the Department of Justice repeals the dwelling defence. It should be replaced with a defence that is reflective of modern day living, including online settings, and ensures rights are only interfered with when it is lawful, necessary and proportionate in pursuit of a legitimate aim.

4.11 the Department of Justice ensures a definition, for example of private conversations, is provided to guarantee that any new defence is effective in practice. To enable the definition to keep pace with future technological advances, it may be most effective for this definition to be set out in guidance, as an explainer to the statutory provision setting out the new defence.

4.16 the Department of Justice does not include the requirement that the Director of Public Prosecutions personally decides whether or not to prosecute stirring up offences within hate crime legislation.

5.10 the Department of Justice ensures that a victim-centred approach is adopted when investigating, prosecuting and remedying hate crimes. Special measures for victims and witnesses during criminal proceedings should be a mandatory consideration. This includes requiring that individual assessments of the vulnerability and needs of victims of hate crime are conducted to determine whether and to what extent special measures are required for that particular victim during criminal proceedings.

5.11 the Department of Justice ensures that there is a presumption against the cross-examination of victims or vulnerable witnesses

by the defendant in hate crime cases. The burden should be on the defendant to prove that such cross-examination is required and is not being used in a vexatious way, such as to intimidate.

5.12 the Department of Justice ensures that the Hate Crime Advocacy Service is put on a permanent footing. To ensure all victims of hate crime are adequately supported, this service should be expanded in scope by appointing specialist advocates for each of the protected characteristics set out in the hate crime legislation.

5.18 the Department of Justice consider carefully the provisions of the EU Victims' Directive within the context of Protocol Article 2 in the development of hate crime legislation.

6.10 the Department of Justice includes gender as a protected characteristic within hate crime legislation. This should adopt a gender-sensitive approach and provide for intersectionality across the full range of protected characteristics.

6.11 the Department of Justice includes misogyny and transmisogyny as aggravating factors in hate crime legislation.

6.12 the Department of Justice ensures that the protected characteristics listed in hate crime legislation can be added to as evidence emerges that this is necessary. However, safeguards should be in place to ensure that the legislation cannot be used for fictitious claims with the purpose of abusing and traumatising a victim further.

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also mandated, under section 78A(1) to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the European Union (EU) Withdrawal Agreement, to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the United Kingdom's withdrawal from the European Union. In accordance with these functions the following statutory advice is submitted to the Department of Justice in response to its consultation on improving the effectiveness of hate crime legislation in NI.

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.¹ The relevant regional and international treaties in this context include:

- CoE European Convention on Human Rights 1950 (ECHR);²
- UN International Convention on the Elimination of All Forms of Racial Discrimination 1965 (UN CERD);³

¹ The NI Executive is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, section 26(1) of the NI Act 1998 provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations... [s]he may order direct that the proposed action shall be taken". The NIHRC further recalls that section 24(1)(a) of the NI Act 1998 states that "a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the [ECHR] rights".

² Ratified by the UK in 1951. The ECHR was given further domestic effect by the Human Rights Act 1998.

³ Ratified by the UK in 1969.

- UN International Covenant on Civil and Political Rights 1966 (UN ICCPR);⁴
- UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR);⁵
- UN Convention on the Elimination of All Forms of Discrimination against Women 1981 (UN CEDAW);⁶
- UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1987 (UN CAT);⁷
- UN Convention on the Rights of the Child 1989 (UN CRC);⁸
- CoE Framework Convention for Protection of National Minorities 1995;⁹
- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD);¹⁰ and
- CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (Istanbul Convention).¹¹

1.3 In addition, there exists a body of 'soft law' developed by human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include, inter alia:

- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985;¹²

⁴ Ratified by the UK in 1976.

⁵ Ratified by the UK in 1976.

⁶ Ratified by the UK in 1986.

⁷ Ratified by the UK in 1988.

⁸ Ratified by the UK in 1991.

⁹ Ratified by the UK in 1998.

¹⁰ Ratified by the UK in 2009.

¹¹ Signed by the UK in 2012. The UK has signed, but not ratified the Istanbul Convention. However, the UK Government has committed to ratifying the Istanbul Convention under the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017.

¹² UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985

- CoE European Commission against Racism and Intolerance's Policy Recommendation No 1;¹³
- UN Human Rights Committee's General Comment No 31;¹⁴
- UN CERD Committee's General Recommendation No 31;¹⁵
- UN CAT Committee's General Comment No 2;¹⁶
- EU European Parliament's Directive on Rights, Support and Protection of Victims of Crime;¹⁷
- UN Special Rapporteur on Violence against Women's Statement on Visit to UK;¹⁸
- UN Human Rights Committee's Concluding Observations on the UK 2015;¹⁹
- CoE European Commission against Racism and Intolerance's Policy Recommendation No 15;²⁰
- UN CERD Committee's Concluding Observations on the UK 2016;²¹
- CoE Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK 2017;²²
- UN CEDAW Committee's General Recommendation No 35;²³
- UN CRPD Committee's Concluding Observations on the UK 2017;²⁴

¹³ European Commission against Racism and Intolerance, 'Policy Recommendation No 1: Combatting Racism and Xenophobia', 4 October 1996.

¹⁴ CCPR/C/21/Rev.1/Add. 13, 'UN Human Rights Committee General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004.

¹⁵ 'UN CERD Committee General Recommendation No 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System', 2005.

¹⁶ CAT/C/GC/2, 'UN CAT Committee General Comment No 2: Implementation of Article 2 of the UN CAT by State Parties', 24 January 2008.

¹⁷ European Parliament, 'Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁸ 'Oral End of Mission Statement by the UN Special Rapporteur on Violence against Women, Rashida Manjoo on Visit to the UK and NI', 16 June 2015.

¹⁹ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015.

²⁰ European Commission against Racism and Intolerance, 'Policy Recommendation No 15: Combating Hate Speech', 8 December 2015.

²¹ CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', 26 August 2016.

²² ACFC/OP/IV(2016)005, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK', 27 February 2017.

²³ CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017.

²⁴ CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', 29 August 2017.

- CoE European Commission against Racism and Intolerance's Policy Recommendation No 7;²⁵
- UN Special Rapporteur on Violence against Women's Report on Online Violence;²⁶
- UN CEDAW Committee's Concluding Observations on the UK 2019;²⁷
- UN CAT Committee's Concluding Observations on the UK 2019;²⁸ and
- UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression's Report on the Regulation of Online Hate Speech.²⁹

1.4 The Commission further advises on the UK Government's commitment in Protocol Article 2(1) to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, Section 6 of the Northern Ireland Act 1998 provides that the NI Assembly is prohibited from making any law which is incompatible with Protocol Article 2. Section 24 of the 1998 Act also provides that all acts of the Department should be compatible with Protocol Article 2.

1.5 The NIHRC welcomes the opportunity to respond to the Department of Justice's consultation on improving the effectiveness of hate crime legislation in NI. The NIHRC provided a comprehensive response to Judge

²⁵ European Commission against Racism and Intolerance, 'Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination', 7 December 2017.

²⁶ A/HRC/38/47 'UN Special Rapporteur on Violence against Women its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence Against Women and Girls from a Human Rights Perspective', 18 June 2018.

²⁷ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019.

²⁸ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019.

²⁹ A/74/486, 'UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, Report on the Human Rights Law that Applies to the Regulation of Online Hate Speech', 9 October 2019.

Marrinan’s review of hate crime in NI.³⁰ This response is structured around the specific questions posed by the Department of Justice in its follow-up consultation.³¹ The NIHRC is ready and willing to meet with the Department of Justice to discuss this advice or to provide further direction.

2.0 New Statutory Aggravation Hate Crime Model

Statutory aggravation model

2.1 Question 1 of the consultation document considers the threshold for behaviours/attitudes leading to hate motivated offences and increased sentencing.

2.2 Article 4(a) of UN CERD requires States to create an offence punishable by law addressing the “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”. The UN CERD Committee recommended that the UK Government and the NI Executive, among other things, “investigate all reported racist hate crimes, prosecute the perpetrators and punish them with sanctions commensurate with the gravity of the offence, and provide effective remedies to victims”.³²

2.3 The UN CEDAW Committee called on States to:

ensure that all forms of gender based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalised and introduced, without

³⁰ NI Human Rights Commission, ‘Submission to Hate Crime Review Consultation’ (NIHRC, 2020).

³¹ Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022).

³² CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland’, 26 August 2016, para 16(a).

delay, or strengthen, legal sanctions commensurate with the gravity of the offence.³³

- 2.4 The European Court of Human Rights (ECtHR) advises that “effective deterrence is indispensable... and it can be achieved only by criminal-law provisions”,³⁴ which requires an “adequate deterrent effect capable of ensuring the effective prevention of unlawful acts”.³⁵
- 2.5 The European Commission against Racism and Intolerance requires that “effective, proportionate and dissuasive” sanctions are accorded to racist offences.³⁶ It further states that the criminal law should penalise hate crimes against “a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin”.³⁷ Furthermore, all racist and xenophobic acts should be “stringently punished” through methods, such as defining common offences with racist or xenophobic elements as specific offences, or by enabling the racist or xenophobic motives of the offender to be specifically taken into account in the criminal justice process.³⁸
- 2.6 In line with Judge Marrinan’s recommendation,³⁹ the Department of Justice is proposing to replace the enhanced sentencing model with the statutory aggravation model.⁴⁰

³³ CEDAW/C/GC/35, ‘UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women’, 26 July 2017, at para 29.

³⁴ *X and Y v the Netherlands* (1985) ECHR 4, at para 27.

³⁵ *Opuz v Turkey* (2009) ECHR 870, at para 199.

³⁶ European Commission against Racism and Intolerance, ‘Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination’, 7 December 2017, at para 12.

³⁷ *Ibid*, at para 18.

³⁸ European Commission against Racism and Intolerance, ‘Policy Recommendation No 1: Combatting Racism and Xenophobia’, 4 October 1996.

³⁹ Hate Crime Review Team, ‘Hate Crime Legislation in NI: Independent Review’ (DoJ, 2020), at Recommendation 2.

⁴⁰ Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022), at para 6.9.

- 2.7 Human rights standards do not prescribe the best method for addressing hate crime but they are clear that whatever method is employed, it must be effective. There is evidence from UK jurisdictions that the statutory aggravated model is a more effective deterrence and has many additional benefits, such as allowing for more effective reporting and data collection across the criminal justice process.⁴¹
- 2.8 The NIHRC's previous recommendation was non-prescriptive regarding the model to be adopted.⁴² However, we did note that the evidence from other jurisdictions suggests that the statutory aggravation model is more effective and should be considered carefully. This should be in conjunction with an evaluation of best practice in its application.
- 2.9 **The NIHRC recommends that the Department of Justice ensures that the threshold for hate crime legislation is of a sufficiently high level when criminalising a person for their behaviours/attitudes leading to hate motivated offences.**
- 2.10 **The NIHRC recommends that the Department of Justice ensures that the model adopted to address hate crime is an effective deterrent. If this is deemed to be the statutory aggravation model, best practice from other jurisdictions should be evaluated and applied, as appropriate, in NI.**

Definition of hate crime

- 2.11 Questions 2 and 3 of the consultation document consider whether there should be a definition of hate crime and to what extent this should be set out in legislation.

⁴¹ Law Commission, 'Hate Crime: The Case for Extending Existing Offences – A Consultation Paper' (LC, 2013); Law Commission, 'Hate Crime: Should the Current Offences be extended?' (LC, 2014); Lord Bracadale, 'Independent Review of Hate Crime Legislation in Scotland: Final Report' (Scottish Government, 2018).

⁴² NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at paras 38 and 3.9.

- 2.12 Human rights standards indicate that a broad approach should be taken to ensure that all forms of hate crime are prevented, prohibited and remedied. For example, the ECtHR refers to taking “all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events”.⁴³ Article 6 of the Framework Convention for the Protection of National Minorities and Article 20(2) of the UN ICCPR refer to “threats or acts of discrimination, hostility or violence”. Human rights standards do not expressly require that a definition of hate crime is provided, but the indication is that this would offer the clarity needed to ensure hate crime is effectively prohibited and addressed.
- 2.13 In terms of whether a definition of hate crime should extend beyond hostility, human rights standards are not prescriptive on this, but provide guidance. The NIHRC’s racist hate crime investigation found that ‘hate crime’ can be used to “incorporate acts of racism that may not amount to a criminal offence, such as name calling or anti-social behaviour”.⁴⁴ Victims who have experienced ‘hate’ aggravated incidents that do not constitute a crime, so called ‘signal incidents’, are also protected by international human rights law and require safeguards alongside material, medical, psychological and social assistance and support.⁴⁵ Moreover, in order to monitor the potential for escalation from hate signal incidents to hate crimes, full disaggregated data needs to be collected to inform the response of the criminal justice system and other agencies.⁴⁶ For this to be effective you need to know what it is you are collecting data on, which is aided by providing a broad definition of hate crime.

⁴³ *Nachova and Others v Bulgaria* (2005) ECHR 465.

⁴⁴ NI Human Rights Commission, ‘Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland’ (NIHRC, 2013), at 9.

⁴⁵ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, at paras 18-19.

⁴⁶ NI Human Rights Commission, ‘Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland’ (NIHRC, 2013), at 9.

- 2.14 The NIHRC repeats its original recommendation - that the definition of a hate crime should cover bias, hostility, prejudice, bigotry and contempt.⁴⁷
- 2.15 Human rights standards do not require that a definition of hate crime should be set out in statute. They are clear, however, that all necessary steps should be taken to ensure discrimination, such as a hate crime, is prevented, prohibited and prosecuted. Legislative measures (such as statute) are indicated as effective tools, but human rights standards also acknowledge that other measures (such as guidance) may be just as effective in certain contexts.⁴⁸
- 2.16 The NIHRC's investigation into racist hate crime exposed the need to ensure a clear and effective structure to prohibit, prevent and prosecute such crime was in place.⁴⁹ The UN Human Rights Committee also recommended that the UK Government addressed identified gaps with the purpose of "thoroughly investigating alleged cases of incitement to discrimination, hostility or violence, and alleged hate crimes, prosecuting the perpetrators and, if they are convicted, punishing them with appropriate sanctions, and providing victims with adequate remedies, including compensation".⁵⁰
- 2.17 Clarity about the definition of hate crime is required to ensure effectiveness in prohibiting, preventing and prosecuting. Moreover, potential perpetrators must be clear about what constitutes illegality. Responding to Judge Marrinan's review, the NIHRC recommended that a legal definition of hate crime is set out in a 'general interpretation for the purposes of the act' section.⁵¹ This is based on the view that a statutory definition, as opposed to offering a working definition within guidance, provides a strong sense of

⁴⁷ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at para 2.15.

⁴⁸ See also CCPR/C/21/Rev.1/Add. 13, 'UN Human Rights Committee General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, at para 7.

⁴⁹ NI Human Rights Commission, 'Racist Hate Crime: Human Rights and the Criminal Justice System in Northern Ireland' (NIHRC, 2013), at 9.

⁵⁰ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 17 August 2015, at para 10(d).

⁵¹ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at para 2.15.

clarity and enforceability. Limiting the definition to guidance offers flexibility for any future necessary changes, but it also creates a vulnerability to selective application.

- 2.18 The consultation document considers adopting an approach where a basic definition of hate crime is provided in statute, focusing on hostility. It suggests that the statutory definition is then expanded in guidance, which introduces the concept that hate crime can also include attitudes of bias, prejudice, bigotry and contempt.⁵² Judge Marrinan’s review suggested that each of these aspects formed one definition that was enshrined in statute.⁵³
- 2.19 The NIHRC is concerned that splitting the definition of a hate crime across statute and guidance will create an unhelpful hierarchy. The NIHRC therefore repeats its original recommendation - to create a unified statutory definition of hate crime, which is partnered with guidance on how the different aspects of the statutory definition apply in practice.
- 2.20 **The NIHRC recommends that the Department of Justice creates a unified statutory definition of hate crime that covers bias, hostility, prejudice, bigotry and contempt. Guidance should also be provided on how the different aspects of the definition apply in practice.**

By reason of threshold

- 2.21 Question 4 of the consultation document considers whether the ‘by reason of’ test should be included in hate crime legislation alongside the current thresholds of demonstration of hostility and motivated by hostility.

⁵² Ibid.

⁵³ Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022), at section 6.

- 2.22 Judge Marrinan recommended that the 'by reason of' test should be added to future hate crime legislation.⁵⁴ The Department of Justice is proposing to not include the 'by reason of' test in future hate crime legislation.⁵⁵ The explanation given is the anticipated difficulty in obtaining evidence of a direct link between the alleged criminality and the reason for its commission.
- 2.23 The NIHRC recommended that hate crime legislation should include a 'by reason of' threshold to ensure that the laws reflect sufficiently the harm done to victims and their communities through being targeted by reason of an immutable characteristic or fundamental aspect of their identity. To ensure a broad test is not so broad that it becomes ineffective, particularly in the context of gender, the NIHRC recommended that a form of words was included in hate crime legislation to ensure that gender can be and is adopted as a protected characteristic, if the 'by reason of' threshold is applied.
- 2.24 The NIHRC based its recommendations on the Organisation for Security and Cooperation in Europe's findings that "many States do not mention hatred or hostility at all in their hate crime laws" and instead require that the accused acted 'because of' or 'by reason of' the victim's protected characteristic.⁵⁶ The broader scope of this model was found to be an advantage as it "reaches those offenders who harboured no hostility but selected their victims based on prejudices or stereotyped information about victim vulnerabilities".⁵⁷ This model is "easier to apply in practice and may do a better job of addressing the kind of harm that hate crime laws are intended to prevent", in particular:

⁵⁴ Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020), at Recommendation 6.

⁵⁵ Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022), at para 6.44.

⁵⁶ Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, 'Hate Crime: A Practical Guide' (OSCE, 2009), at 48.

⁵⁷ Ibid.

the impact on the victim and members of the victim's community is usually the same, regardless of whether the offender acted out of hate... A victim who is targeted because the offender assumes that some protected characteristic of the victim makes him/her especially vulnerable to crime.⁵⁸

2.25 Human rights standards do not specifically require that the 'by reason of' test is included in hate crime legislation. However, they do require that remedies for victims are effective in practice, as well as in law.⁵⁹ The UN Basic Principles of Justice for Victims of Crime and Abuse of Power state that "judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible".⁶⁰

2.26 Similar to human rights standards, it is for the State to determine how victims are effectively protected and remedied, but the measures taken should achieve this in law, policy and practice.

2.27 **The NIHRC recommends that the Department of Justice ensures that the motivators of hate crime included in legislation effectively protect and remedy victims and potential victims from hate crimes in law and practice.**

⁵⁸ Ibid.

⁵⁹ Article 13, European Convention on Human Rights 1950; Article 2(3)(a), UN International Covenant on Civil and Political Rights 1966; *Ilhan v Turkey* (2000) ECHR 354, at para 97; CCPR/C/21/Rev.1/Add.13, 'UN Human Rights Committee General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the UN ICCPR', 26 May 2004, at para 20.

⁶⁰ Principle 5, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

3.0 Sectarian Offending in Hate Crime Law

- 3.1 Questions 5 to 9 consider whether sectarianism should be added as an aggravator and, if so, whether a statutory definition of sectarianism should be provided and what this could include.
- 3.2 In 2017, the Advisory Committee on the Framework Convention for the Protection of National Minorities noted that “the fact that there is no legal definition of sectarianism and that it is taken rather to indicate discriminatory attitudes and opposition between the two main political/religious communities has insulated the terms from the broader equality framework”.⁶¹ The Advisory Committee found the lack of aggravated sentencing for sectarianism presented practical challenges and, “though sectarian crimes may be prosecuted through the notion of race, the high threshold for evidence generally prevents this happening”.⁶² Consequently, sectarian crime goes largely unreported.⁶³ To address this, the Advisory Committee recommended that definitions of ‘good relations’ and ‘sectarianism’ are introduced in legislation, which draw on “international standards relating to racism and human rights in general” and “ensure that sectarian crimes are dealt with in the criminal justice system in a way equivalent to other forms of hate crime”.⁶⁴
- 3.3 A definition of sectarianism is not provided within human rights standards. However, considering the recommendation of the Advisory Committee - that a definition should be based on racism-related standards - the definition should be broad. The UN CERD definition incorporates “race, colour, descent, or national or ethnic origin”.⁶⁵ The European Commission Against Racism and Intolerance adds “language”, “religion” and “nationality” to this list.⁶⁶

⁶¹ ACFC/OP/IV(2016)005, ‘Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK’, 27 February 2017, at para 86.

⁶² Ibid, at para 87.

⁶³ Ibid, at para 86.

⁶⁴ Ibid, at para 90.

⁶⁵ Article 1, UN Convention on the Elimination of All Forms of Racial Discrimination 1965.

⁶⁶ European Commission against Racism and Intolerance, ‘Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination’, 7 December 2017, at para 1.

However, measures to prevent and remedy sectarianism must be effective, which permits the definitional scope of sectarianism to be limited in a way that accurately reflects sectarianism in NI.

3.4 The NIHRC condemns strongly any form of sectarianism and instead supports a Northern Ireland society that promotes principles of tolerance, understanding and mutual respect.⁶⁷ The NIHRC agrees with Judge Marrinan that the Scottish Hate Crime review's proposed definition of sectarianism is a good starting point. This is "hostility based on perceived a) Roman Catholic or Protestant denominational affiliation; b) British or Irish citizenship, nationality or national origins; or c) a combination of a and b".⁶⁸ Given the broad approach taken to indicators of racial discrimination more generally, there is nothing to prevent 'future proofing' of the legislation to include other religious faiths or nationalities, which may also experience sectarianism, if evidence emerges to show that this is required.

3.5 **The NIHRC recommends that the Department of Justice includes a statutory aggravator of sectarianism in the proposed hate crime legislation.**

3.6 **The NIHRC recommends that the Department of Justice includes a statutory definition of sectarianism in the proposed hate crime legislation. The Scottish Hate Crime review's proposed definition of sectarianism is a good starting point. The NIHRC also supports future proofing the legislation to accommodate the inclusion of sectarianism against a broader range of religious beliefs, descent, nationalities or citizenship, if evidence emerges to show this is required.**

⁶⁷ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at para 6.44.

⁶⁸ Scottish Government, 'Final Report of the Working Group on Defining Sectarianism in Scots Law' (Scottish Government, 2018).

4.0 Stirring Up Offences

Dwellings and private conversations defences

4.1 Questions 10 to 13 of the consultation document consider whether the 'dwelling defence' should be repealed and, if so, whether it should be replaced with a specific defence protecting private conversations.

4.2 Everyone has the right to freedom of expression, but this right can be restricted when it is lawful, necessary and proportionate in pursuit of a legitimate aim (e.g. the prevention of disorder or a crime).⁶⁹ The right to freedom of expression applies "not only to information or ideas that are favourably received or regarded as inoffensive or as matter of indifference, but also those that offend, shock or disturb the State or any sector of the population".⁷⁰ However, conjointly reading Article 10 (freedom of expression) and Article 17 (prohibition of abuse of rights) of the ECHR, hate speech is not permitted. This applies when the aim of offending actions, such as hate speech, is to:

spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.⁷¹

4.3 Hate speech is defined by the European Commission against Racism and Intolerance as:

⁶⁹ Article 10, European Convention on Human Rights 1950; Article 19, UN International Covenant on Civil and Political Rights 1966; Article 13, UN Convention on the Rights of the Child 1989; Article 21, UN Convention on the Rights of Persons with Disabilities 2006; *Sunday Times v UK* (1979) 2 EHRR 245; *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 50; *Handyside v UK* (1979) 1 EHRR 737.

⁷⁰ *Handyside v UK* (1979) 1 EHRR 737, at para 49.

⁷¹ *Lehideux and Isorni v France* (1998) ECHR 90, at para 2.

the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes race, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age.⁷²

- 4.4 For hate speech to reach the criminal threshold it must be of a “more serious character – namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination – and the use of concerned occurs in a public context”.⁷³ In agreement, the UN CEDAW Committee warns that:

the criminalisation of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, *inter alia*, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.⁷⁴

- 4.5 Considering the right to a private life,⁷⁵ a person is permitted to discuss whatever they choose, including abhorrent views, as long as others’ rights are not unjustifiably interfered with and there is no intention of acting on or suggestion that others act on hatred being expressed. Judge Marrinan noted

⁷² European Commission against Racism and Intolerance, ‘Policy Recommendation No 15: Combating Hate Speech’, 8 December 2015, at para 19.

⁷³ *Ibid*, at para 173.

⁷⁴ CERD/C/GC/35, ‘UN CERD Committee General Recommendation No 35: Combating Racist Hate Speech’, 26 September 2013, at para 12.

⁷⁵ Article 8, European Convention on Human Rights 1950; Article 17, UN International Covenant on Civil and Political Rights 1966; Article 16, UN Convention on the Rights of the Child 1989; Article 22, UN Convention on the Rights of Persons with Disabilities 2006; *Soering v UK* (1989) ECHR 14.

his concern that protections should be in place to ensure the 'illusion' of a private conversation could not be used for planning hate crime acts. That concern is shared by the NIHRC.

- 4.6 Similar to freedom of expression, the right to a private life can be restricted when it is lawful, necessary and proportionate in pursuit of a legitimate aim (e.g., the prevention of disorder or a crime).⁷⁶ When determining the balance of rights, consideration must be given to whether other rights are impacted and if potential or actual interference with these rights is justified. For example, could alleged private discussions with hate crime elements cause a chain reaction that could encroach on the right to life, freedom from torture or ill-treatment, or the right to physical or moral integrity. States are required to be particularly proactive in protecting these rights,⁷⁷ which may outweigh an individual's claim that an alleged private discussion is protected by the right to a private life.
- 4.7 Whether the dwelling defence should be repealed, the NIHRC agrees with Judge Marrinan's assessment that it should take into account technical advances (eg the internet) that extend private spheres beyond a dwelling.⁷⁸ A number of UN Special Rapporteurs have confirmed that human rights standards extend to online settings.⁷⁹ The ECtHR has considered online comments in the context of defamation. This is a separate issue to the topic of the consultation document, but basic principles can be drawn from these

⁷⁶ Article 8, European Convention on Human Rights 1950; Article 17, UN International Covenant on Civil and Political Rights 1966; Article 16, UN Convention on the Rights of the Child 1989; Article 22, UN Convention on the Rights of Persons with Disabilities 2006; *Soering v UK* (1989) ECHR 14.

⁷⁷ Articles 2 and 3, European Convention on Human Rights 1950; Articles 6 and 7, UN International Covenant on Civil and Political Rights 1966; UN Convention Against Torture 1984; Articles 6 and 37, UN Convention on the Rights of the Child 1989; Articles 10 and 15, UN Convention on the Rights of Persons with Disabilities 2006; *Öneryildiz v Turkey* (2004) ECHR 657; *LCB v UK* (1999) 27 EHRR 212, at para 36; *Burke v UK*, Application No 19807/06, 11 July 2006, at para 1; *YF v Turkey* (2003) ECHR 391, at para 33; *Bensaid v United Kingdom* (2001) ECHR 82, at para 47.

⁷⁸ Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020), at Recommendation 14.

⁷⁹ A/74/486, 'UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, Report on the Human Rights Law that Applies to the Regulation of Online Hate Speech', 9 October 2019, at para 33; A/HRC/38/47 'UN Special Rapporteur on Violence against Women its Causes and Consequences, Dubravka Simonovic,

Report on Online Violence Against Women and Girls from a Human Rights Perspective', 18 June 2018, at para 50.

judgments. The ECtHR has stated that there must be a “certain level of seriousness” for freedom of expression or the right to a private life to be interfered with.⁸⁰ It continued that:

the reality is that millions of internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive... However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage.⁸¹

4.8 Nevertheless, the ECtHR has also stressed that “it is the utmost importance to combat racial discrimination in all its forms and manifestations”.⁸² It considers that:

incitement to hatred does not necessarily require the call for a particular act of violence or another criminal act. Attacks on persons committed by insulting, ridiculing or defaming certain sections of the population and specific groups thereof or incitement to discrimination... are sufficient for the authorities to favour the fight against racist discourse in the face of irresponsible freedom of expression that undermines the dignity and even the safety of these parts or groups of the population. Political discourse that incites hatred based on religious, ethnic or cultural prejudice represents a danger to social peace and political stability in democratic States.⁸³

4.9 Thus, to ensure the appropriate balance is achieved in protecting the right to freedom of expression and the right to a private life, an alternative

⁸⁰ *Tamiz v United Kingdom*, Application No 3877/14, Judgment of 19 September 2017, at para 80.

⁸¹ *Ibid.*

⁸² *Féret v Belgium*, Application No 15615/07, Judgment of 16 July 2009, at para 72.

⁸³ *Ibid.*, at para 73.

defence that reflects modern day living is required. As the NIHRC previously recommended, hate crime law should apply to the online context and be adapted to address the specific way in which online hate is manifested.⁸⁴ If it is deemed that a new private conversations defence is the most effective way to achieve this, in the interests of clarity a definition of private conversations should be provided. To future proof and not run into the same issue as has arisen with the dwelling defence, it would be useful for this particular definition to be set out in guidance, as an explainer to the statutory provision setting out the new defence. Human rights standards do not provide a definition of what constitutes private conversations. However, a general human rights principle is that laws, including definitions, should be effective in practice.

4.10 The NIHRC recommends that the Department of Justice repeals the dwelling defence. It should be replaced with a defence that is reflective of modern day living, including online settings, and ensures rights are only interfered with when it is lawful, necessary and proportionate in pursuit of a legitimate aim.

4.11 The NIHRC recommends that the Department of Justice ensures a definition, for example of private conversations, is provided to guarantee that any new defence is effective in practice. To enable the definition to keep pace with future technological advances, it may be most effective for this definition to be set out in guidance, as an explainer to the statutory provision setting out the new defence.

⁸⁴ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at para 7.25.

Approval of Director of Public Prosecutions

- 4.12 Question 14 of the consultation document considers whether the Director of Public Prosecutions must decide whether or not to prosecute 'stirring up' offences.
- 4.13 Judge Marrinan recommended this safeguard to help protect private individuals from abuse of prosecution by others to pursue trivial disputes or grievances, to ensure consistency of prosecution policy, to ensure balance regarding freedom of expression and given the small number of prosecutions involved.⁸⁵ However, based on the practicalities of applying this recommendation, the Department of Justice is proposing to not require the personal input of the Director of Public Prosecutions on decisions regarding stirring up offences.⁸⁶
- 4.14 The NIHRC previously recommended that the assessment of the complex balance between Articles 10 and 17 of the ECHR and the rights of persons and communities who are the targets of hate speech, alongside the test to ensure that any prosecution meets the criminal threshold, is made by the Director of Public Prosecutions before any such prosecution is undertaken.⁸⁷ On further reflection, the NIHRC recommends that this is unnecessary.
- 4.15 Human rights standards require that remedies for victims are effective in practice, as well as in law.⁸⁸ This includes that judicial and administrative mechanisms for remedy are "expeditious, fair, inexpensive and accessible".⁸⁹ Considering the positive direction of travel with the proposed hate crime legislation more broadly, this additional step that risks slowing down and decreasing accessibility of the process is unnecessary. The

⁸⁵ Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020), at Recommendation 14.

⁸⁶ Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022), at paras 6.66 and 6.67.

⁸⁷ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at para 7.23.

⁸⁸ *Ilhan v Turkey* (2000) ECHR 354, at para 97; CCPR/C/21/Rev.1/Add.13, 'UN Human Rights Committee General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the UN ICCPR', 26 May 2004, at para 20.

⁸⁹ Principle 5, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

legislation and its partnering guidance should provide sufficient clarity to guide decisions by the Public Prosecution Service and court judgments, as opposed to requiring the personal input of the Director of Public Prosecutions.

- 4.16 **The NIHRC recommends that the Department of Justice does not include the requirement that the Director of Public Prosecutions personally decides whether or not to prosecute stirring up offences within hate crime legislation.⁹⁰**

5.0 Special Measures and Cross Examination

Victim-centred approach

- 5.1 Questions 16 to 20 consider introducing special measures for victims of hate crimes within NI's criminal justice system.
- 5.2 Reflecting the NIHRC's previous recommendations,⁹¹ Judge Marrinan recommended that complainants in criminal proceedings involving the proposed aggravated offences or stirring up offences should automatically be eligible for consideration for special measures when giving evidence. These include use of live links or screens and protection from cross-examination by the defendant.⁹² The Department of Justice proposes to support this recommendation.⁹³

⁹⁰ This recommendation revises the NIHRC's previous position that the assessment of the complex balance between Articles 10 and 17 of the ECHR and the rights of persons and communities who are the targets of hate speech, alongside the test to ensure that any prosecution meets the criminal threshold, is made by the Director of Public Prosecutions before any such prosecution is undertaken.

⁹¹ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at paras 8.12-8.16.

⁹² Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020), at Recommendation 24.

⁹³ Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022), at para 9.48.

- 5.3 Supported by the NIHRC,⁹⁴ Judge Marrinan also recommended that the Hate Crime Advocacy Service was expanded, made permanent (including being placed on a statutory footing) and provided with sustainable funding.⁹⁵ The Department of Justice supports these findings, but proposes not placing this service on statutory footing.⁹⁶
- 5.4 Human rights standards are clear that an effective remedy and access to justice require a victim-centred approach.⁹⁷ This includes adopting the “necessary sensitivity”,⁹⁸ taking the appropriate measures to ensure victims’ “safety, physical and psychological well-being and privacy, as well as those of their families”, and providing a victim who has suffered violence or trauma with “special consideration and care to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation”.⁹⁹
- 5.5 The ECtHR has confirmed that secondary victimisation can constitute a violation of the physical and moral integrity element of the right to a private life and that “cross-examination should not be used as a means of intimidating or humiliating witnesses”.¹⁰⁰ The ECtHR referenced the CoE Istanbul Convention and the EU Victims’ Directive in its reasoning.¹⁰¹ The Istanbul Convention requires that “the necessary legislative or other measures” should be taken “to protect the rights and interests of victims,

⁹⁴ NI Human Rights Commission, ‘Submission to Hate Crime Review Consultation’ (NIHRC, 2020), at paras 8.11-8.13.

⁹⁵ Hate Crime Review Team, ‘Hate Crime Legislation in NI: Independent Review’ (DoJ, 2020), at Recommendation 23.

⁹⁶ Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022), at 15.

⁹⁷ CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland’, 29 August 2017, at para 19; ‘UN CERD Committee General Recommendation 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System’, 2005, at para 19(b); CEDAW/C/GC/35, ‘UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women’, July 2017, at para 28; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, at para 10.

⁹⁸ ‘UN CERD Committee General Recommendation 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System’, 2005, at para 19(b).

⁹⁹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, at para 10.

¹⁰⁰ *Y v Slovenia* (2015) ECHR 519, at 108. See also *JL v Italy* (2021) ECHR 444, at para 128.

¹⁰¹ *Y v Slovenia* (2015) ECHR 519, at para 104.

including their special needs as witnesses, at all stages of investigations and judicial proceedings".¹⁰² This includes providing for the protection of victims, "as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation".¹⁰³ In the context of a child victim or witness, the best interests of the child must be a primary consideration.¹⁰⁴ The EU Victims' Directive requires safeguarding the victim from "secondary and repeat victimisation, from intimidation and from retaliation" and requires Member States to put in place measures to protect victims and their family members including from the risk of emotional or psychological harm.¹⁰⁵

5.6 A victim-centred approach also requires considering an individual victim's particular needs or vulnerabilities and ensuring that any necessary individualised special measures are reasonably accommodated.¹⁰⁶ The EU Victims' Directive requires that victims receive "timely and individual assessments to assess their specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings".¹⁰⁷ Any such assessment should take into account the personal characteristics of the victim and the nature and circumstances of the crime, noting that particular attention should be paid to victims who have suffered considerable harm including victims of hate crime, gender-based violence and disabled victims.¹⁰⁸ The EU Victims' Directive sets out a number of measures which should be used to protect victims during criminal investigations and court proceedings, including measures to "avoid visual contact between victims and offenders during the

¹⁰² Article 56(1), CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

¹⁰³ Article 56(1)(a), CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

¹⁰⁴ Article 3, UN Convention on the Rights of the Child 1989; Article 56(2), CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011

¹⁰⁵ Article 18, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹⁰⁶ Article 5, UN Convention on the Rights of Persons with Disabilities 2006; CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 39; CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 12.

¹⁰⁷ Article 22, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹⁰⁸ Ibid.

giving of evidence” and to “ensure that the victim may be heard in the courtroom without being present”.¹⁰⁹ The EU Victims’ Directive also provides that, “the exact nature of such measures should be determined through the individual assessment, taking into account the wish of the victim”.¹¹⁰

5.7 A defendant’s right to a fair trial must also be taken into account.¹¹¹ This is not an absolute right and can be limited under exceptional circumstances. Consideration should be given to the “proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is prosecuted and, where necessary, to the rights of witnesses”.¹¹² The EU Victims’ Directive provides that “the extent of any [special] measure[s] should be determined without prejudice to the rights of the defence and in accordance with rules of judicial discretion”.¹¹³ The ECtHR notes that:

Article 6(3)(d) [of the ECHR] enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either

¹⁰⁹ Article 23(2) and (3), Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

¹¹⁰ Recital 58, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

¹¹¹ Article 6, European Convention on Human Rights 1950; Article 7, 18(1), 20(1) and 23(1), Recital 58 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012; Articles 9(3) and 14, UN International Covenant on Civil and Political Rights 1966.

¹¹² *Al-Khawaja and Tahery v UK* (2011) ECHR 2127, at para 118.

¹¹³ Recital 58 Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

when that witness makes his statement or at a later stage of the proceedings.¹¹⁴

5.8 The ECtHR has found that if “a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined” it is likely to violate the right to a fair trial.¹¹⁵ This extends to situations where a conviction is based solely or to a decisive degree on evidence from an anonymous witness.¹¹⁶ However, this can be countered by having “strong procedural safeguards” in place including “measures that permit a fair and proper assessment of the reliability of that evidence to take place”.¹¹⁷

5.9 The ECtHR confirms that “there must be a good reason for the non-attendance of a witness”.¹¹⁸ Absence owing to death or fear are two factors that have been identified as potentially legitimate reasons.¹¹⁹ However, “a distinction must be drawn between two types of fear: fear which is attributable to threats or other actions of the defendant or those acting on his or her behalf and fear which is attributable to a more general fear of what will happen if the witness gives evidence at trial”.¹²⁰ Regarding the former, “to allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses”.¹²¹ Thus, “a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses”.¹²² Consequently:

¹¹⁴ *Al-Khawaja and Tahery v UK* (2011) ECHR 2127, at para 118.

¹¹⁵ *Ibid*, at para 119.

¹¹⁶ *Ibid*, at paras 126-127.

¹¹⁷ *Ibid*, at para 147.

¹¹⁸ *Ibid*, at para 119.

¹¹⁹ *Ibid*, at para 120.

¹²⁰ *Ibid*, at para 122.

¹²¹ *Ibid*, at para 123.

¹²² *Ibid*, at para 123.

it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant.¹²³

- 5.10 **The NIHRC recommends that the Department of Justice ensures that a victim-centred approach is adopted when investigating, prosecuting and remedying hate crimes. Special measures for victims and witnesses during criminal proceedings should be a mandatory consideration. This includes requiring that individual assessments of the vulnerability and needs of victims of hate crime are conducted to determine whether and to what extent special measures are required for that particular victim during criminal proceedings.**
- 5.11 **The NIHRC recommends that the Department of Justice ensures that there is a presumption against the cross-examination of victims or vulnerable witnesses by the defendant in hate crime cases. The burden should be on the defendant to prove that such cross-examination is required and is not being used in a vexatious way, such as to intimidate.**
- 5.12 **The NIHRC recommends that the Department of Justice ensures that the Hate Crime Advocacy Service is put on a permanent footing. To ensure all victims of hate crime are adequately supported, this service should be expanded in scope by appointing specialist advocates for each of the protected characteristics set out in the hate crime legislation.**

¹²³ Ibid, at para 123.

Protocol Article 2 and the Victims' Directive

- 5.13 The NIHRC welcomes consideration of the rights of victims pursuant to the EU Victims' Directive within this consultation. We note however that no consideration has been given to the wider context of Protocol Article 2.
- 5.14 Protocol Article 2 requires the UK Government and the NI Executive to ensure that no diminution of rights, safeguards and equality of opportunities contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK's withdrawal from the EU. This includes an obligation to "keep pace" with any changes made by the six Annex 1 Equality Directives which improve the minimum levels of protection available, on or after 1 January 2021.¹²⁴
- 5.15 For other EU obligations which underpin the rights, safeguards and equality of opportunity in Article 2, the UK Government commitment to ensure 'no diminution' is measured by the relevant EU standards on 31 December 2020.¹²⁵
- 5.16 The parties to the Belfast (Good Friday) Agreement affirmed their commitment to "the mutual respect, the civil rights and the religious liberties of everyone in the community". In addition to a number of rights which are "affirmed in particular", the relevant chapter specifically recognises "the right of victims to remember as well as to contribute to a changed society".¹²⁶ The UK Government has recognised a non-exhaustive list of

¹²⁴ UK Government, 'UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland' (NIO, 2020), at 13.

¹²⁵ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

¹²⁶ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity.

relevant measures which fall within scope of the commitment in Protocol Article 2, which include the EU Victims' Directive.¹²⁷

5.17 The EU Victims' Directive reinforces existing national laws and establishes minimum standards on victims' rights and its purpose is to ensure victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings¹²⁸ The EU Victims' Directive recognises that victims of hate crime are at a high risk of secondary and repeat victimisation and as such that there should be a strong presumption that those victims will benefit from special protection measures during criminal proceedings.¹²⁹

5.18 **The NIHRC recommends that the Department of Justice consider carefully the provisions of the EU Victims' Directive within the context of Protocol Article 2 in the development of hate crime legislation.**

6.0 Gender Based Approach

6.1 Question 21 considers the inclusion of gender as a protected characteristic. Questions 21 to 23 consider the inclusion misogyny/transmisogyny and whether such inclusion should be as aggravating factors or standalone crime/specific offences.

6.2 Contrary to the NIHRC's previous recommendations,¹³⁰ Judge Marrinan recommended including sex/gender as a gender-neutral protected

¹²⁷ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹²⁸ Article 1, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹²⁹ Article 8 and Recitals 56-58, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹³⁰ NI Human Rights Commission, 'Submission to Hate Crime Review Consultation' (NIHRC, 2020), at paras 6.15 and 6.16.

characteristic within hate crime legislation. He further recommended that intersectionality across the protected characteristics is recognised and that provision is made for protected characteristics to be added to over time.¹³¹

6.3 Human rights standards prohibit discrimination on the basis of sex.¹³² The 'other status' aspect of non-discrimination and equality provisions extends these protections to discrimination on the basis of gender identity.¹³³ UN CEDAW and Article 6 of the UN CRPD specifically require the elimination of discrimination against women and girls and, when relevant, that the intersectional nature of discrimination is addressed.¹³⁴

6.4 The UN CEDAW Committee, UN CAT Committee and UN Special Rapporteur on violence against women, confirm that all forms of gender-based violence should be prohibited, protected against and effectively remedied.¹³⁵ This obligation applies to a range of settings, such as public, private, online and violence that transcends national boundaries.¹³⁶ The EU Victims' Directive confirms that gender-based violence extends to violence directed "against a person because of that person's gender, gender identity or gender expression".¹³⁷

¹³¹ Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review' (DoJ, 2020), at Recommendations 9, 10 and 11.

¹³² Article 14, European Convention on Human Rights 1950; Preamble, UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 2(1) and 26, UN International Covenant on Civil and Political Rights 1966; Article 2(2), UN International Covenant on Social, Economic and Cultural Rights 1966; Article 2, UN Convention on the Rights of the Child 1989; Article 3(g), UN Convention on the Rights of Persons with Disabilities 2006.

¹³³ *Identoba and Others v Georgia* (2015) ECHR 474, at para 96.

¹³⁴ CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland', 29 August 2017, at para 19.

¹³⁵ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 30(b); CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 57(c); CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 6; 'Oral End of Mission Statement by the UN Special Rapporteur on Violence against Women, Rashida Manjoo on Visit to the UK and NI', 16 June 2015; A/HRC/38/47 'UN Special Rapporteur on Violence against Women, its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence against Women and Girls from a Human Rights Perspective', 18 June 2018, at para 14.

¹³⁶ CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 6.

¹³⁷ Recital 58, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

6.5 Human rights standards are clear that a gender-sensitive approach should be taken to addressing gender-based violence.¹³⁸ For example, the EU Victims' Directive emphasises that "women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence".¹³⁹ Human rights are also clear that existing gender-neutral laws and policies should be examined "to ensure that they do not create or perpetuate existing inequalities and repeal or modify them if they do so".¹⁴⁰

6.6 Reflecting that gender-based abuse and violence is overwhelmingly directed against and experienced by women and girls, specific obligations to address this are rightly set out within human rights standards. However, general non-discrimination protections apply to sex and gender more broadly.¹⁴¹ The UN CAT Committee acknowledges that men can also be subject to gendered violations of human rights.¹⁴² This can include being subject to human rights violations "on the basis of their actual or perceived non-conformity with socially determined gender roles".¹⁴³ The UN CAT Committee is clear that States should ensure that any situations of gender-based violence are identified and measures taken to punish and prevent them.¹⁴⁴ It identifies "continual evaluation" as "a crucial component of effective measures".¹⁴⁵

¹³⁸ CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017; A/HRC/38/47 'UN Special Rapporteur on Violence against Women, its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence against Women and Girls from a Human Rights Perspective', 18 June 2018, at para 102.

¹³⁹ Recital 17, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹⁴⁰ CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 32.

¹⁴¹ Article 14, European Convention on Human Rights 1950; Preamble, UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 2(1) and 26, UN International Covenant on Civil and Political Rights 1966; Article 2(2), UN International Covenant on Social, Economic and Cultural Rights 1966; Article 2, UN Convention on the Rights of the Child 1989; Article 3(g), UN Convention on the Rights of Persons with Disabilities 2006.

¹⁴² CAT/C/GC/2, 'UN CAT Committee General Comment No 2: Implementation of Article 2 of the UN CAT by State Parties', 24 January 2008, at para 22.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid, at para 23.

- 6.7 The NIHRC stresses that the UN CAT Committee's comments should not be used as a basis to adopt a gender-neutral approach. The issues affecting women and girls are largely different to those affecting men and boys; this should be reflected as such in law and practice. Furthermore, the NIHRC is aware in its work on stalking that situations can arise where abusers manipulate the legal system to further traumatise and prevent access to justice for victims. A gender-sensitive approach to hate crime is crucial for preventing or mitigating such scenarios. However, for a gender-sensitive approach to be effective, gender-based issues (such as misogyny and transmisogyny) should be dealt with in a gender sensitive way that recognises each issue as its own separate entity.
- 6.8 The NIHRC stresses that the conversation and decisions concerning misandry should be separate to and should not inhibit the necessary inclusion of misogyny and transmisogyny in hate crime legislation.
- 6.9 Human rights standards are not prescriptive on how a potential violation should be addressed, but are clear that the measures taken should be effective in law and practice.¹⁴⁶ Given the prevalence and hidden nature of gender-based violence there is the need for the Department of Justice to develop strong, visible protections and remedies aimed at eliminating this issue. Adopting a gender-sensitive approach to hate crime does not preclude the Department of Justice from introducing statute that criminalises gender-based crimes or offences, such as misogyny or transmisogyny, more generally. However, the NIHRC highlights that this issue is separate to the focus of this consultation, which is on hate crime legislation, and is worthy of comprehensive consideration. We are therefore not in position to advise at this point as to whether a separate crime or offence of misogyny or

¹⁴⁶ CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the United Kingdom of Great Britain and Northern Ireland', 26 August 2016, para 16(a); CEDAW/C/GC/35, 'UN CEDAW Committee General Recommendation No 35: Gender Based Violence against Women', 26 July 2017, at para 29; *X and Y v the Netherlands* (1985) ECHR 4, at para 27; *Opuz v Turkey* (2009) ECHR 870, at para 199; European Commission against Racism and Intolerance, 'Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination', 7 December 2017, at paras 12 and 18.

transmisogyny should be created, but welcome the opportunity to consider this issue fully in the appropriate context.

- 6.10 **The NIHRC recommends that the Department of Justice includes gender as a protected characteristic within hate crime legislation. This should adopt a gender-sensitive approach and provide for intersectionality across the full range of protected characteristics.**

- 6.11 **The NIHRC recommends that the Department of Justice includes misogyny and transmisogyny as aggravating factors in hate crime legislation.**

- 6.12 **The NIHRC recommends that the Department of Justice ensures that the protected characteristics listed in hate crime legislation can be added to as evidence emerges that this is necessary. However, safeguards should be in place to ensure that the legislation cannot be used for fictitious claims with the purpose of abusing and traumatising a victim further.**

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