



Hate Crime Legislation Review Consultation Response on behalf of Raise Your Voice

Introduction

Raise Your Voice is a project designed to tackle sexual harassment and sexual violence in communities across Northern Ireland. It is a joint project bringing together the expertise of 4 different organisations, each with a wealth of experience in the women's sector and in grassroots feminist campaigning in Northern Ireland; Women's Resource & Development Agency (WRDA), Women's Support Network (WSN), Northern Ireland Rural Women's Network (NIRWN) Reclaim the Agenda (RTA) which includes a number of grassroots feminist groups including Belfast Feminist Network and Reclaim the Night Belfast. Raise Your Voice also has a steering group consisting of representatives from numerous organisations from the voluntary and community sector, including youth organisations, LGBT+ organisations, Trade Unions, and beyond.

As a project committed to fighting sexual harassment and sexual violence in Northern Ireland, part of our work is to hold workshops with women of all ages, all backgrounds, urban and rural, all across Northern Ireland. These workshops and the stories we are privileged to hear in them, form part of our knowledge base for this consultation response, alongside independent research. One thing that has become apparent over the period of time we have been working on this project is the sheer scope and breath of the issue. One workshop participant described misogyny as something that is "spread over everything, like butter on warm toast". This reality, recognised by so many women and apparently impossible to tackle issue-by-issue, is a part of the reason that we believe so passionately in the need to recognise misogyny as a form of hate crime.

In this consultation we will argue for gender to be a protected category, and we feel the need to stress again just how vital it is that we put this in the context of hate crime as a way of maintaining the hierarchies that exist in society already, of maintaining the status quo. As such misogyny is the issue, and this includes within it transmisogyny.

It is difficult to overstate the degree to which misogyny impacts the lives of women and girls in Northern Ireland and indeed worldwide. The women that we speak to as part of this project tell us of the frequency of incidents of harassment and assault, the alarmingly young age at which it happens, the ways in which this changes their behaviours and their life choices from that moment forward, and the impacts that they carry throughout their lives. This is true worldwide, something that the #MeToo

movement has highlighted for all of us, but it is true here too, and it is something that we have to begin to come to terms with if we are to tackle the epidemic of sexual violence and indeed domestic violence, harassment of public figures who are women, and indeed homophobia and transphobia.

Northern Ireland is an especially patriarchal society by the standards of the day. Still living in the shadow of a violent past, once described by Eileen Evason (quoting Cathy Harkin) as an “armed patriarchy”, the conflict here has left innumerable scars, one of which is the legacy of the violence carried out by men against women while the world was focused on the other kind of violence. Some of the women that we work with speak of the legacy of this violence. Others did not live through it, but they grew up in a society marred by violence and by silence and these unspoken wounds only reopen when something exposes them.

The Raise Your Voice project was partially inspired by the “Rugby Rape Trial” in 2018, or more specifically by the reaction to it. The public conversation around it exposed such viciously misogynistic language and beliefs, such cruel double standards around sex, alcohol and what consequences people “deserve” for transgression. We wanted to speak to the people who can tell us directly about the impact these societal views have had on them as well as to speak to those who buy into them, and to dismantle them that way.

Of course much of this is anecdotal, but there are hard facts to back it up.

- In 2019 there were 31,705 domestic abuse incidents recorded by the police in Northern Ireland, an increase of 399 (1.3%) on the previous 12 months and one of the highest 12 month periods recorded since the start of the data series in 2004/05.¹
- In 2019 the number of domestic abuse crimes recorded by the police reached 18,033 an increase of 2,322 (14.8%) on the previous 12 months and the highest of any 12-month period recorded since 2004/05.²
- From October 2018 to September 2019 the PSNI recorded 2,423 sexual offences and 1,023 reports of rape.³
- More than a quarter of students at universities or colleges in Northern Ireland have experienced unwanted sexual behaviour during their studies however only 5% had reported this to the police.⁴
- There have been 1,220 reports of online violence towards women in Northern Ireland since 2015 (the total could be even higher than the figures suggest as not all crimes specified the gender of the victim). In 2017-18 the PSNI saw the highest annual figure ever recorded with

¹ Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland, PSNI Statistics Branch, February 2020 https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/2019-20/q3/domestic-abuse_bulletin-dec-19.pdf

² Ibid

³ Police Recorded Crime in Northern Ireland, PSNI Statistics Branch, October 2019

https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/police-recorded-crime-statistics/2019/september/crime_bulletin-sep-19.pdf

⁴ kNOWMORE! NUS-USI Student Consent Survey, March 2019

<http://nus-usi.org/wp-content/uploads/2020/01/kNOWMORE-Report.pdf>

433 women feeling so threatened they reported to the police – 30 of these involved death threats with another 394 constituting harassment.⁵

As we will discuss below and as the consultation document itself notes, these numbers represent only the tip of an iceberg, as many do not report for all kinds of reasons. While not every one of these represents a crime motivated purely by misogyny, it is difficult to deny that the frequency of these incidents and the fact that many of the offenders are repeat offenders represents something that is borne of a certain kind of mentality, one our society desperately needs to deconstruct.

In early March Raise Your Voice worked alongside some Councillors in Belfast City Council to bring a motion in support of this submission, specifically with regards to misogyny (the letter which the Council sent to the Review will be attached with this submission for your reference). This motion saw a very welcome debate on the issue take place in our Council chamber and it was incredibly encouraging to see this motion passing with unanimous cross-party support. Our plans, interrupted by the COVID-19 pandemic, were to bring a similar motion to every Council in Northern Ireland. We believe firmly that sunlight is the best disinfectant and that talking openly about misogyny and the harms that it causes is the best way to begin that process.

The consultation paper notes that one of the roles of Hate crime legislation is to transmit a message about where society stands on these issues. We agree and this is a part of why including misogyny as a hate crime is such a vital step for this Review to take. We need to draw a line in the sand, for the lives of the women and girls of Northern Ireland.

⁵ <https://www.itv.com/news/utv/2018-12-18/1-220-reports-of-online-violence-towards-women-in-ni/>

Hate Crime Legislation Review Consultation – Questions

Chapter 1

Hate Crime: Definition and Justification

Part 1: Definition

1. What do you consider to be a hate crime?

A hate crime is an act of violence, hostility or intimidation directed towards a person or a group of people due to their identity or perceived identity. A wide range of incidents can constitute a hate crime if the incident or offence was motivated by, or provoked by, an existing bias. This can include, but is not limited to, verbal abuse, discriminatory practices, property damage, physical assault including sexual violence, online abuse and murder.

2. Do you consider that the working definition of a hate crime discussed in this chapter adequately covers what should be regarded as hate crime by the law of Northern Ireland?

No.

In our view this working definition is insufficient as it does not capture a defining feature of hate crime, as outlined by Barbara Perry in section 1.6 of the consultation paper⁶. Therefore, we believe the definition of a hate crime should be more specific and state that:

Hate crimes are acts of violence, hostility and intimidation directed towards people because of their identity or perceived 'difference'. These acts are usually directed toward already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order.

This power dynamic is key to the way in which these crimes work, both in terms of their motivation and in terms of their impact on victims and survivors of these incidents, and any sufficient definition of hate crime must capture that aspect of the crime.

Part 2: Justification for Hate Crime Law

3. Should we have specific hate crime legislation in Northern Ireland?

Yes

We agree with the statement in section 1.8 that hate crimes are unique in that the perpetrator is sending a message about the victim and their right to belong to that society. This view supports the definition of a hate crime provided under question 2 whereby hate crimes are a mechanism of power and oppressions, intended to reaffirm the precarious hierarchies that characterise a given social order. This is why it is so crucial to codify these crimes accurately; they must be recognised for

⁶ Perry, B. (2001) *In the Name of Hate: Understanding Hate Crimes* Oxon: Routledge, p.10

what they are and the harms that they cause in order so that society and the law are not complicit in reinforcing unjust hierarchies.

We also believe that we need to expand our definitions and protected categories in order to be able to deal with the issue of hate and the violence that issues from it. With the rise in reported hate crimes in Northern Ireland, and the increasing percentage of those with racial motivations, it is imperative that robust legislation is created to mitigate against this and to enable the various parts of the justice system to adequately deal with these kinds of incidents. Existing legislation that deals with crimes motivated by a person's race, religion, sexual orientation or disability do not adequately reflect the intersectionality between a person's identity, and the ways that some of these incidents may be motivated by the combination of two or more parts of a person's identity. Further, with the growing levels of gender-based violence in society as a whole, alongside increasing misogynistic and transphobic abuse towards women online, it is necessary to have a form of hate crime legislation that incorporates both gender as a protected category and social media as a site of abuse.

4. Should hate crimes be punished more severely than non-hate crimes?

Yes

Because hate crimes have additional consequences which set them apart from other crimes, it is necessary to have a more severe punishment for perpetrating a hate crime. In taking this approach, a clear message is sent both to the individual criminal and to society at large that prejudiced behaviours will not be tolerated. In line with the OSCE approach outlined in sections 1.8-1.10 of the consultation document, we agree with the three main justifications outlined in section 1.11⁷

These justifications are:

1. The symbolic value of the law as a reflection of the values of a society.
2. Criminal law penalises the harm caused and thus the offender's moral culpability is said to be greater than that of similar offences without elements of prejudice or hostility.
3. Hate crime law punishes the greater culpability of the perpetrator.

These justifications further embed the view that society does not tolerate hatred or deliberate harms based on prejudice or bias. Furthermore, the impact of a hate crime on victims, and indeed to the wider community they are from, is likely to be much more significant than non-hate motivated incidents. Denunciation of such crimes in the strongest possible terms, through more severe punishments, sends a vital message to marginalised and victimised groups that they are valued as equal members of society who are worthy of respect. By taking such an approach the State sends a clear and unequivocal message and signals its intent to eradicate disadvantage and prejudice.

Chapter 6

Operation of the Criminal Justice (NO.2) (Northern Ireland) Order 2004

⁷ OSCE Office for Democratic Institutions and Human Rights (2009) *Hate Crime LAws: A Practical Guide* Poland: OSCE ODIHR pp.7-21

5. Do you think the enhanced sentencing model set out in the Criminal Justice (No. 2) (Northern Ireland) Order 2004 should continue to be the core method of prosecuting hate crimes in Northern Ireland?

No (If No, go to Question 7 (Chapter 7))

Given the increase in the number of hate incidents and crimes in Northern Ireland in recent years, it is necessary to adopt a more effective response in the criminal justice system than what there has been to date. Enhanced sentencing is not an ideal system both in principle and in the manner in which it has been used.

This sentencing model has largely been treated as a symbolic gesture in a lot of cases dealing with hate crime in Northern Ireland. This is evident in past inspections by the Criminal Justice Inspection Northern Ireland, whereby evidence found that court clerks were unaware of provisions of Articles 2 and 4 of the 2004 Order ever being raised in court⁸. In addition, since the 2004 legislation had been introduced, there has been extremely limited evidence of prosecutors bringing a hate crime element of an offence to the court's attention; with even fewer examples of a judge imposing an enhanced sentence⁹. This points towards a larger issue with the legal system and with society as a whole; it indicates that securing a conviction is more important than capturing the full nature of what happened and the impacts of the incident, and it both demonstrates and contributes to a lack of knowledge among the population as a whole around the whole issue of hate crime. Further evidence suggests that less than one percent of hate crimes recorded by the PSNI resulted in a conviction involving aggravation by hostility¹⁰.

Over recent years, reported hate crime incidents have been rising disproportionately in Northern Ireland compared to the rest of the UK when population sizes are considered. The failures of the enhanced sentencing model are particularly unsettling in recent years, where the growth of hate crimes have had limited impacts on defendants receiving an enhanced sentence; figures for 2018/19 show that, for the rare number of hate crimes cases that made it to court, only 49 defendants out of a total of 138 received an enhanced sentence¹¹. Further, since 2015, only four defendants convicted received an increased sentence where the judge accepted that the aggravating feature of the offence had been proven beyond reasonable doubt¹².

Further issues with the enhanced sentencing model include failures to identify and investigate hostility at the appropriate stage in proceedings, inconsistency in sentencing practices and the imposition of unduly lenient sentences.

Chapter 7

⁸ Criminal Justice Inspection Northern Ireland (2007) *Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland, p.34

⁹ Criminal Justice Inspection Northern Ireland (2010) *A follow-up inspection of Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland* Belfast: Criminal Justice Inspection Northern Ireland, p.7

¹⁰ Jarman, N. (2017) "Acknowledgement, Recognition and Response: The Criminal Justice System and Hate Crime in Northern Ireland" in Haynes, A., Schweppe, J. and Taylor, S. (eds) *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* London: Palgrave MacMillan, p.61

¹¹ Public Prosecution Service for Northern Ireland (2019) *Statistical Bulletin: Cases Involving Hate Crime 2018/19* Belfast: PPS, p.21

¹² Ibid (2017-2019)

7. Do you think the statutory aggravation model as used in England and Wales and Scotland should be introduced into Northern Ireland law?

Yes (If Yes, go to Question 8)

8. If you think that the statutory aggravation model used in England and Wales and Scotland should be introduced into Northern Ireland law, should it be introduced as well as or instead of the enhanced sentencing model?

We believe that the statutory aggravation model should be introduced instead of the enhanced sentencing model due to the many limitations of the application of the enhanced sentencing model as we outlined in our response to question 5. In line with the views of Dr Robbie McVeigh, we believe that the model in GB is far from perfect in execution but it is much better than the inadequate methods to address hate crime that currently exist in Northern Ireland¹³, particularly in terms of the principles upon which it is based.

One key reason for our taking this position is the fact that the proof of hostility must be examined during the trial under a statutory aggravation model, rather than after the trial when the offender has been found or pleaded guilty to the basic offence; as is the case with enhanced sentencing. In the latter, the sentencing judge decides upon the appropriate sentence but as the evidence suggests in the response to question 5, this has proven to be both under-utilised and ineffective in practice. This approach contradicts the three main justifications used for punishing hate crimes more harshly as the symbolic value of the law is not visible to the defendants or the court; the greater moral culpability of the perpetrator of a hate crime is not highlighted. This compounded with the inconsistent records of the PPS, low levels of convictions and the rare increased sentences is evidence of the inadequacy of an enhanced sentencing model in accurately portraying the intolerance of hate crime in wider society.

The benefits of the statutory aggravation model include:

- The symbolic effects of offences carrying an aggravated label and higher maximum sentences;
- Potential deterrent effects of extending the aggravated offences;
- Increased public awareness, confidence in the system and reporting;
- Improved investigative and prosecution approaches;
- Higher maximum sentences;
- Greater “fair labelling” potential than enhanced sentencing;
- Benefits of a trial of the hostility element in open court.

9. Irrespective of whichever model is used (aggravated offences or enhanced sentencing), should there be specific sentencing guidelines for hate crimes in Northern Ireland?

Yes

Since models can be unduly complex and other prosecution difficulties exist, it is necessary that specific and clear sentencing guidelines are created. An effective model needs to be an operational

¹³ McVeigh, R. (2017) “Hate and the State: Northern Ireland, Sectarian Violence and Perpetrator-less Crime” in Haynes, A., Schweppe, J. and Taylor, S. (eds.) *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* London: Palgrave MacMillan, p.413

model and any model brought into Northern Ireland needs to both overcome the inadequacy of the current provision to effectively tackle rising hate crimes and set a clear and workable standard.

10. Irrespective of which model is used (aggravated offences or enhanced sentencing provisions), do you think that courts should be required to state in open court the extent to which the aggravation altered the length of sentence?

Yes

Doing so will increase awareness of the severity of hate crimes and the reasons that they are treated as they are by the justice system and as such the act of explaining the reasoning behind the sentence will act as both an educational tool and deterrent. Further, this should increase the accuracy of PPS record keeping and data collection on hate crimes.

Chapter 8

Protected Groups – Should Additional Characteristics be added?

11. Should gender and gender identity be included as protected characteristics in Northern Ireland hate crime legislation?

Yes

With regards to gender we must be mindful that this consultation already recognises that hate crime is most often directed toward “already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order”. In this context it is vital that we recognise that hate crimes based on gender are overwhelmingly targeted at women and girls, including transgender women and girls, and this definition should specify that misogyny, specifically, is the issue that must be addressed. Misogyny seeks to reinforce the dominant social hierarchy in a way that the reverse never could.

Incorporating misogyny into the definition of gender will, at least in principle, ensure that trans women are also able to report misogynistic hate crime. Including gender, alongside ‘transgender identity’, provides protection for individuals whether they are victimised because of one or both of these aspects of their identity. For instance, many trans women will experience hate crimes that are motivated by the fact that they are trans, but also by the fact that they are women; it is important to recognise both issues, and be able to report hate crime across multiple characteristics where these overlap.

Regarding the coexistence of gender and gender identity separately, although confusion about terminology is common the two effectively mean the same thing, and trans people who have accessed legal gender recognition in the UK or another recognised State are known in law to have an “acquired gender”. The term “transgender status”/“transgender identity” provides for a more readily understood term, and one which persists with trans people as a legal tool should they access legal gender recognition etc.

Misogyny is a motivator or aggravating factor in many crimes, including violent crimes like rape, sexual abuse and assault, domestic abuse, assault and murder, as well as stalking, sexual harassment and more. Including misogyny as a category of hate crime will allow many of these crimes to be prosecuted for what they truly are; crimes motivated by hate. This will also allow the record of these crimes to

accurately reflect what occurred, and this means that they will show up on background checks of perpetrators including in the checks allowed under the Domestic Violence Disclosure Scheme - an approach that will keep potential victims safer, as well as acting as a deterrent.

In addition to this, many crimes motivated by hate are motivated by more than one “type” of hate; for instance they may be motivated by both homophobia and misogyny, or both race and misogyny, etc. Including misogyny as a category can capture the intersectional nature of the issue and the true nature of the harm caused to the victim of the crime.

In jurisdictions that have already taken this approach eg in Nottinghamshire County in England, it has been a success – it greatly increases the confidence of victims in the police and in surveys the majority of respondents who brought complaints to police reported feeling like their concerns were taken seriously and agreed that they would encourage others to report (even if their case made it no further). This, in itself, is a significant result, given that a fear of being mocked, derided or dismissed is one of the main reasons why victims don’t report elsewhere and why so many feel alienated from the justice system. This tells us what we have long suspected: it means a lot to be seen, heard and taken seriously.

12. Should Transgender identity be included as a protected characteristic in Northern Ireland hate crime legislation?

Yes

There currently exists a glaring flaw in hate crime legislation: the inability to adequately recognise, prosecute and address rising transphobic hate crime and hate speech. Transphobic hate incidents were previously mis-recorded as homophobic by the PSNI, and to this day, if a transphobic crime goes through to prosecution, the hate motivation is almost always lost or changed.

Given the prevalence of transphobia in our national and local media, the daily incitement to hatred many experience online, and the continued physical and verbal abuse and harassment trans individuals face, there is no question of the need for inclusion of transgender identity as a protected characteristic in any new hate crime legislation

Including transgender identity as a protected characteristic avoids the confusion with the previous suggestion and allows for the specific reporting and data collection of transphobic hate crimes and incidents. This should be accompanied with an interpretation clause to recognise and include the experiences of non-binary and gender diverse individuals.

13. Should Intersex status be included as a protected characteristic in Northern Ireland hate crime legislation?

Yes

Trans and intersex communities are overlapping and interconnected but still maintain distinct identities, experiences and needs. Many intersex people would not identify themselves as transgender, and it is important therefore to be able to capture the nuanced and diverse experiences of interphobia in hate crime law.

14. Should age be included as a protected characteristic in Northern Ireland hate crime legislation?

We defer to our colleagues in the age sector and children's sector in answering this question.

15. Should a general statutory aggravation covering victim vulnerability and/or exploitation of vulnerability be introduced into Northern Ireland hate crime legislation?

We believe that there is a need to ensure the protection of older people given the ageing population and that this is likely to be a growing problem. We understand from the consultation that the introduction of a general statutory aggravation covering vulnerability could help with the issue of elder abuse if there was no specific characteristic for age.

However, we are unsure of the best way of dealing with the issues of vulnerability not just for age but for other characteristics including disability or incapacity. We note that the consultation states at paragraph 8.69 that this could add complexity and that paragraph 8.70 states that courts already take into consideration vulnerability issues when sentencing. It is therefore difficult for us to take a view on whether this would be beneficial or not.

16. Should homeless status be included as a protected characteristic in Northern Ireland hate crime legislation?

Yes

17. Do you consider any other new characteristics should be protected in Northern Ireland hate crime legislation other than those mentioned above?

Yes.

We think there should be further consultation with sex worker led groups such as Sex Workers Alliance Ireland on the potential to include sex workers through any new hate crime legislation. In three jurisdictions in England local forces have made a decision to include sex workers in their hate crime policing, as a none formally recognised group Merseyside Police report this allows them when building cases to point to the targeting of vulnerability to make a case for enhanced sentences under existing sentencing aggravating factors. This approach also appears to have increased sex worker's confidence in reporting crimes to the police. We believe laws on sexual and violent crime should apply to all, regardless of whether someone is a sex worker or not. Within the trans community in particular, many of the most targeted and abused individuals are sex workers and existing legal frameworks governing sex work does not protect sex workers from these increasing levels of violence. In fact, evidence suggests the contrary as it acts as a deterrent from reporting abuse and violent acts against them. The legislation within Northern Ireland focuses on the reduction of demand for sex work, rather than focusing on protecting sex workers. Regardless of ones view on what model to address sex work is the best approach, we feel that sex workers still have the right to be free from being targeted through sexual and violent crime because of their status as sex workers. This is of particular importance as violence against sex workers in Northern Ireland has increased significantly since the introduction of legislation aimed at reducing demand by criminalising clients¹⁴. In addressing this increased, targeted

¹⁴ See Department of Justice (2019), 'A Review of the Criminalisation of Paying for Sexual Services in Northern Ireland', <https://www.justice-ni.gov.uk/news/report-published-impact-sex-purchase-offence>; Between 2015 and 2018 there has been an increase in the number of reports on the Uglymugs.ie website in relation to, for example, assaults (from 3 to 13) sexual assaults (from 1 to 13) and threatening behaviour (from 10 to 42); see Swarm, (2019), 'Nordic Model in Northern Ireland a Total Failure: No Decrease in Sex Work, But Increases in Violence and Stigma', <https://www.swarmcollective.org/blog/2019/9/20/nordic-model-in-northern-ireland-a-total-failure-no-decrease-in-sex-work-but-increases-in-violence-and-stigma>

violence, it is essential to recognise sex workers and their right to protection and support against hate crimes.

Intersectionality

18. Do you consider that intersectionality is an important factor to be taken into consideration in any new hate crime legislation?

Yes (If Yes, go to Question 19))

Intersectionality is a vital tool to truly understand how hate crime works, what it is intended to do, and the ways in which it impacts on those who are targeted by hate incidents, hate speech and hate crime.

Articulated originally by American lawyer and scholar, Kimberlé Williams Crenshaw, intersectionality is best understood as a tool or as a lens through which to understand the way that forms of oppression work with each other. It explains how overlapping identities relate to systems and structures of oppression, domination or discrimination. Intended to explain why the experience of a black woman cannot be understood in terms of being black and of being a woman considered independently, but must include the interactions between the two, which frequently reinforce each other, it can and should be used to explain how multiple elements of an individual's identity overlap and create a unique relationship with structures of power and even with the state.

We believe that the above theory of intersectionality is crucial to understanding the experiences of hate crime victims; and marginalised groups more generally. We also agree with the view in 8.79 that hate crime policy has emerged through an identity of politics which tends to over-simplify victim groups and does not necessarily take into account the diverse and intersecting experiences of victims and the nuances of the harms that they might suffer. It is crucial to understand that a hate crime can be the outcome of multiple prejudices and in recognising this, a clearer understanding of the experience of victimisation and the commission of the offence can be gained. This approach would also allow for more comprehensive monitoring and responses to hate crimes by the PSNI, PPS and indeed the judiciary.

19. If you consider intersectionality to be an important factor to be taken into consideration in any new hate crime legislation, what is the best way to achieve this?

We believe that any new legislation should be able to accommodate the importance of intersectionality, particularly if the law protects all of the acknowledged characteristics equally, which we believe it should. Therefore, in any given case the Judge should be able to apply multiple aggravating hostility-related factors at sentencing. For example, if someone was attacked for being both a woman and a Muslim, adding "multiple group hostility" would not suggest that they were harmed more than someone attacked solely for their religion or gender; but that their intersecting identities directly led to them being an even greater risk of being a victim of such hostility.

By incorporating an intersectional approach, it will be possible to reflect multiple hostilities at both the offence/sentencing stage of a hate crime, in recording data and in understanding how to support victims; these are not mutually exclusive benefits. Further, in adopting "multiple group hostility", this would enable the recognition of some crimes being intersectional. In order to overcome complications for judges and juries, well-explained guidelines and training should be made available based on the wealth of academic legal theory on intersectionality.

Difficulties in understanding on the parts of judges, juries and the police should not be a factor against incorporating intersectionality, as the current provisions are not fit for purpose and through adding this

recognition, it better reflects the realities of motivations behind hate crimes and the impacts on victims. This would support wider efforts to identify, through data collected, the most common intersecting areas of prejudice and better protect people from these groups. As Northern Ireland does not have one single anti-discrimination act along the lines of the Equality Act, an updated hate crime model would address the inability to challenge discrimination, oppression and hostility under one form of legislation.

We support the view in 8.91 that a consolidated hate crime legislation can ensure all victims can expect the same level of justice through fully catering for intersectionality. Hate crime is often intersectional in nature and having legislation that does not reflect this would ignore the reality for many who are more likely to fall victim of hate crime due to their intersecting identities. For example, the majority of Islamophobic attacks in the UK are carried out by men against women; only an intersectional approach can fully address this injustice and the multiple ways in which the victim is harmed.

Chapter 9

Towards a new hate crime law for Northern Ireland

20. If the enhanced sentencing model remains as the core provision for dealing with hate crime in Northern Ireland, should it be amended to provide for the recording of convictions on the criminal record viewer?

Yes

In all eventualities it is vital that any such conviction be recorded accurately. This is in part to help with the collection of statistics and to ensure that the depth and breath of the problem is grasped and understood. Most importantly, however, it is vital that these kinds of convictions can be known to certain parties, for example a conviction for a crime motivated by misogyny is key information for any future female partners that someone may have. Such offences should also be made available via the Domestic Abuse Disclosure Scheme – regardless of whether said offence was “domestic” in nature.

21. Do you believe there is a need to introduce a statutory aggravation model of hate crime law similar to that which exists in Scotland and in England and Wales under the Crime and Disorder Act 1998?

Yes (If Yes, go to Questions 22 - 25)

Addressing hate crime through sentencing provisions alone, such as the enhanced sentencing model, will not ensure that the hate element of a crime will be consistently addressed from the point of reporting through to sentencing. We believe that the introduction of the aggravated offences model would have significantly greater potential to address hate crime effectively, because it provides for a system-wide response to the criminalisation of the hateful motivations of these crimes in a manner which enhanced sentencing fails to do.

It is important to note that in most jurisdictions, express hate crime laws are not necessary to police, prosecute or sentence prejudice-related crime as most of the conduct they target is already criminalised. Therefore, hate crime laws ‘top-up’ the traditional criminal law by imposing a heavier penalty than that which is applicable to parallel crimes. The imposition of an extra penalty for proven prejudice, bias, hostility and hatred is a core feature of hate crime law. This top-up feature has been neglected in the enhanced sentencing model in Northern Ireland and has been much more successful in other jurisdictions; therefore, we support an aggravated sentencing model that is embedded throughout all aspects of the criminal proceedings including statutory aggravations.

22. In dealing with an aggravated offence, should the court state on conviction that the offence was aggravated?

Yes

23. In dealing with an aggravated offence, should the court record the conviction in a way that shows that the offence was aggravated?

Yes

24. In dealing with an aggravated offence, should the court take the aggravation into account in determining the appropriate sentence?

Yes

25. (Part 1)

In dealing with an aggravated offence, should the court state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference?

Yes

25. (Part 2)

In dealing with an aggravated offence, should the court otherwise state the reasons for there being no such difference?

Yes

26. Do you consider that aggravated offences should be recorded as such in criminal justice records so that statutory agencies and others are aware of the hostility element of an individual's criminal history?

Yes

We have answered yes to the above questions in chapter 9 also to reflect our position that these approaches are necessary to embed within the criminal justice system a certainty that hate crime will not be tolerated, as a means of increasing awareness of the consequences of perpetrating a hate crime, as a means of justice for the victim and in order to educate the wider public.

Due to the inconsistency in England and Wales in applying the Criminal Justice Act 2003 provisions, we believe Northern Ireland needs a model that incorporates aggravated offences rather than enhanced sentencing to reflect the more serious nature of aggravated offences than their counterparts. This represents a recognition of the particular seriousness of hate crime, the greater culpability of the perpetrators and the greater harms it can cause. We believe this should be for all protected characteristics including the suggested categories named earlier in this response, and that it should be cognisant of the intersectional nature of many of hate incidents.

Chapter 10

Adequacy of the Current Thresholds for Proving the Aggravation Of Prejudice

- 27. If any new hate crime law in Northern Ireland follows the statutory aggravation model as in Section 28(1) of the Crime and Disorder Act 1998, do you consider that the current thresholds of (a) demonstration of hostility, and (b) motivation are appropriate or should there be a third threshold: the “by reason of” threshold?**

We believe the thresholds above should also include the “by reason of” threshold. The demonstration test of Section 28(1) is complex, however, the motivating factor is rarely used in practice. The selection of the victim based on the victim’s identity or perceived “difference” from a given social order is a form of hostility in itself, although, this is rarely accepted in providing evidence of hostility. We believe it is appropriate to include “by reason of” to address this gap in addressing the discriminatory selection behaviour by the offender.

- 28. If you consider that there should be a third threshold, do you consider that this should be in addition to the two thresholds of “demonstration of hostility” and “motivation”, or should there be a third threshold to replace the motivation threshold?**

We believe the third threshold should be in addition to the two existing thresholds. This will strengthen the ability to reach those offenders who harboured no hostility but selected their victim based on prejudices or on stereotyped information about the victim’s identity and vulnerabilities. This is connected to the definition we set out for a hate crime; whereby the offender acts as a means of sustaining a social order based on power and oppression of certain marginalised groups. We believe that the perceived vulnerability of the protected groups cannot be disentangled from the judgements that the offenders make about the worthiness of their victim’s value as human beings.

For this reason we argue that adding the threshold of “by reason of”, there will be no dilution of the “symbolic power” of hate crime legislation; rather it enhances the ability of the legislation to address how the offender views their victim’s within a social order and that this is evidence of identity based prejudice. A victim being ‘selected’ due to perceived difference from a social order means that they are being judged as less deserving of respect, and their worth as equal members of society is diminished. By adding this threshold to existing thresholds, the majority of cases would still fall within Section 28(1)(a), which is an important tool, but this would provide greater flexibility for prosecutors to pursue certain forms of prejudice based crimes that the current motivation of hostility tests fail to do.

We also recognise the concerns outlined in 10.20 about the potential problematic consequences on the protected characteristic of gender in adding a third threshold. To address this, we refer back to our response to questions 11 and 12, where we specifically advocate for the explicit recognition of misogyny and transphobia when referencing gender. To avoid the unintended consequence of the hostility threshold becoming too broad when relating to gender, it is possible to adopt the concept that the “offender selected the victim by reason of a bias towards the victim’s “group identity”. This would allow for a broader group selection test and remove the need for the word “hostility” and, instead, include only cases where there is some element of bias towards the victim because of their identity.

- 29. Do you consider that there should be a statutory definition of the term “hostility”?**

Yes (If Yes, please provide a suggested definition in the box below.)

As there is no current legal definition of hostility, we believe there should be a wide range of attitudes including “bias, prejudice or contempt”.

The laws around Hate Crime as they apply in England & Wales do not include a definition of hostility, stating that “we use the everyday understanding of the word which includes ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike”.

This lack of legal definition is broad and purposely so, and it would be ideal if we used a similarly broad definition in NI Hate Crime legislation, and it should specifically name contempt.

30. Whether or not you believe that the term “hostility” should be defined or not, do you consider that this term should be expanded to include other terms such as “bias, hostility, prejudice, bigotry or contempt”?

Yes.

In our view this expanded approach allows for both a better understanding of the nature of hate crimes and hate incidents, it also allows wider society to better grasp what “hatred”, in this context, truly means. Since some of the purpose of legislation around Hate Crime is to act as a preventative in society, it is important to make clear what exactly it is we are trying to prevent, and how a motivation that may not legally be considered equivalent to “hate” may well meet the requirements for “contempt”.

Chapter 11

Stirring up Offences

31. Do you consider there is merit in adding equivalent provisions to Sections 4, 4A and 5 of the Public Order Act 1986 to the Public Order (Northern Ireland) Order 1987?

Yes

It is important to criminalise conduct which encourages others to hate a particular marginalised group, as well as the hate incidents that result from such conduct. Stirring up hatred encourages others to hate certain groups and it is important that hate crime legislation recognises the direct and real harm this causes through criminalising the stirring up of this hatred. Evidence outlined in paragraph 11.6 highlights that Part III of the Public Order (Northern Ireland) Order 1987 is rarely used and there is limited awareness of it.

Considerable evidence shows that hate speech, particularly racist hate speech, is on the rise. This type of speech incites acts of hatred and violence towards certain groups and is extremely damaging towards victims. Legislation needs to adequately address the severity of this, focusing only on resulting hate incidents will not tackle the root of the issue.

32. Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be retained?

No.

This provision is outdated and especially so in light of the ways in which modern technology allows for the blurring between the private dwelling and the public place. This is visible in the rise of online harassment and abuse motivated specifically by the identity or perceived identity of the subject. While

some of the responsibility for tackling this issue must fall on social media companies, the removal of this defence would prevent the argument being made in court that the incident occurred in a private dwelling.

Further, it is difficult to understand why stirring up hatred in a building is considered acceptable but the same act or expression of hatred outside of said building is an offence. Hateful acts, words or written materials displayed inside a dwelling can be as powerful in inciting hatred and violence towards protected groups. For example, following the tragic murder of Jo Cox by Thomas Mair, the police found significant extreme nationalist, racist and far right materials and literature in his home (or dwelling), the same was true of Elliot Rodger who wrote and disseminated misogynist propaganda from within his home before setting out on a murderous rampage (the Isla Vista killings); it makes sense that his actions should have been criminalised before he began to kill. These kinds of cases highlight the extremely dangerous thoughts and behaviours that lead to harassment, violence and, in some cases, murder.

33. Do you consider the requirement that the Director of Public Prosecutions gives consent to any prosecutions taken under Part III of the Public Order (Northern Ireland) Order 1987 to be necessary and appropriate?

Yes

It is important to ensure consistency in the application of prosecution policies. There should, however, be room to review this process to ensure that this requirement is meeting its purpose.

34. Do you consider the term "hatred" as the appropriate test to use in the Public Order (Northern Ireland) Order 1987?

No.

As discussed above in our response to questions 29 & 30, "hatred" is too narrow a test and too difficult to prove, as well as the issue, acknowledged by the consultation document, of defining terms with circular references to itself. We also believe that the use of the term "hatred" in the Public Order (Northern Ireland) Order 1987 sets the bar too high to enable the criminal justice system to tackle the rise in hate crimes. As the threshold for hate speech/incitement to hatred is high and unidentifiable in the aforementioned legislation, we agree with arguments set out in 11.58 that *"hatred should be defined by reference to concepts such as hostility, bias, prejudice, bigotry or contempt or that it should be replaced altogether by terms such as those"*.

35. If gender, gender identity, age or other groups are included in the protected groups, should they also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987?

Yes.

Any additional groups protected under new hate crime legislation should also be protected under the stirring up provisions of Part III of the Public Order (Northern Ireland) Order 1987. The argument for the inclusion of the protection of gender is supported by several international treaties and forms of human rights legislation that relate to harassment. For example, through the Istanbul Convention on Violence Against Women. Specifically, articles 34 and 40 deal with stalking and sexual harassment respectively.

Article 34 – Stalking

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.

Article 40 - Sexual harassment

Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.

In England and Wales, the Anti-Social Behaviour Crime and Policing Act 2014 provides for Public Space Protection Orders (PSPOs). These have been used to prohibit protest and other activity outside clinics providing abortion services. However, this legislation does not apply to Northern Ireland and there are no equivalent powers in Northern Ireland legislation. In Northern Ireland pregnant people are relying on the Protection from Harassment legislation which simply is not adequate for women and pregnant people in these circumstances. Protection from Harassment legislation requires that the same person harassed the victim on two or more instances. In terms of harassment outside abortion clinics many of the anti-choice protestors are aware of this law and change their behaviour so they target different people meaning that victims are unable to rely on this legislation for protection.

The UN CEDAW Inquiry into abortion law in Northern Ireland recommended the adaptation of a harassment provision to:

“protect women from harassment from anti-abortion protestors by investigating complaints, prosecuting and punishing perpetrators. “

The adoption of such provisions is a legally binding duty on the NI Secretary of State in domestic law. However, the abortion framework created through the Northern Ireland Office provides no such provision as they stated “this framework will not include any powers to establish exclusion zones in Northern Ireland” . In the absence of legislative provisions to protect abortion-seekers from harassment when accessing services, amending the aforementioned legislation on preventing harassment to include gender would be an effective remedy.

In general, UN CEDAW in relation to gender-based violence against women and girls has noted “with particular concern the inadequacy of laws and policies to protect women in Northern Ireland” and has called for implementation of the provisions of the Istanbul Convention. This is in addition to general duties on states to take all appropriate measures to prevent acts which result in gender-based violence against women. Such acts would encompass gender-based incitement to hatred, harassment, intimidation and threats of provocation of violence against women as a group.

In addition, hate speech and incitement to hatred has been specifically targeted to trans people; especially trans women. This has become an accepted facet of our society, media and culture. Any new hate speech regulations that deal with the incitement to hatred must address this steadily worsening problem for the trans community. These are just some examples of how including additional groups in stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987 could further protect marginalised communities from targeted harassment and hatred.

In summary, we support the inclusion of additional groups to the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987. The amendment of legislation should also consider additional obligations under international treaties and bodies such as the Istanbul Convention and the outcome of the CEDAW inquiry to create a robust form of legislation to adequately protect these additional groups from harassment, fear and hatred. This includes the offences of stalking, and harassment of a sexual nature (as required by the Istanbul Convention) and provisions to prevent the harassment of women and pregnant people accessing abortion services

36. Should the defences of freedom of expression present in the Public Order Act 1986 for religion and sexual orientation be specifically added as defences to Part III of the Public Order (Northern Ireland) Order 1987?

No.

We do not believe that the defence of freedom of expression for religion and sexual orientation should be added. This would be creating a legislative provision to justify homophobia, sectarianism and various anti-religious discourses.

37. Should the express defence of freedom of expression for same-sex marriage in Article 8(2) of the Public Order (Northern Ireland) Order 1987 be retained in law or repealed?

No, as per question 36, this defence should be repealed, it allows for the use of homophobic beliefs as a defence.

38. Under Article 9(1) of the Public Order (Northern Ireland) Order 1987, should the test remain referring to a person using “threatening, abusive or insulting words or behaviour or displaying any similar written material which is threatening, abusive or insulting” or should the words “abusive” or “insulting” be removed from the test for the commission of the offence?

No.

We believe that the test should remain as it stands regarding “threatening, abusive or insulting words or behaviour or displaying any similar written material which is threatening, abusive or insulting”. We do not support the narrowing of the test specifically because of the unreasonably high thresholds that have existed in proving hatred.

We do acknowledge that this is a tricky area, and that it is a difficult balance between words being offensive or grossly offensive enough to be likely to stir up hatred. In line with the comments in 11.74 and 11.75 of the consultation notes, it is clear that there is little official guidance on interpreting the provisions of Part III of the 1987 Order and this should be an area for future clarification and work, so that the laws can work in the way they are intended to work.

39. If there are to be offences dealing with the stirring up of hatred against protected groups, do you consider that there needs to be any specific provision protecting freedom of expression?

Debates about the balance between freedom of expression and human rights protections have been ongoing and live for decades and especially so recently, but very often they do not consider something that is crucial to understanding the current law; already there is no right to stir up hatred or to practice hate speech.

There is, of course, legitimate disagreement about what meets the threshold for the stirring up of hatred, which is for the practice of the law to parse in more detail. It would, however, be an abdication of duty on the part of the entire Criminal Justice system to allow concerns about overstepping to prevent effective action on the problem of hate speech and the harms that it causes. Improvements to the existing legislation highlighted in 11.64 is a matter for national courts rather than the creation of new hate crime legislation.

Chapter 12

Online Hate Speech

40. Should social media companies be compelled under legislation to remove offensive material posted online?

Yes.

Abuse towards minority individuals and groups online is on the rise, and it is imperative that social media companies have a duty to ensure the speedy removal of offensive material online, a duty that is enforceable with legislation. This is particularly evident through the drastic rise in misogynistic and transphobic abuse directed towards women, both cis and trans, online. Given the financial resources at the disposal of social media companies, they should be legally required to create adequate ways to remove offensive material in a fast manner. The existing policies for removing offensive material by sites such as Facebook, Twitter and Instagram often fail victims, as offensive and targeted abuse does not fit the algorithms or company-created thresholds to be removed, and usually these methods mean that reported issues are not reviewed by human beings. This is highlighted in 12.3 as:

“Experts warn that AI [Artificial Intelligence] still falls dramatically short when it comes to policing “grey area” content, particularly hate speech or harassment, that requires understanding of nuance or knowledge of the latest slang”¹⁵.

This is extremely problematic as the harm derived online can be extremely broad, through targeted abuse in public or private forums, creating an atmosphere of hate or fear through hateful or threatening comments or, even more worryingly, through the radicalisation of individuals as a part of global hate movements. Social media companies are platforming these views and enabling the spread of hate or fear, therefore, it must be their legal duty to address this. Failure to do so puts people at further risk and allows for the growth of the kind of movements that have already inspired multiple terror attacks¹⁶ and unknown numbers of “domestic” incidents of violence and abuse against women and minorities.

This is crucial when it comes to gender, as cis women and trans women often face daily onslaughts of abuse, threats and harassment, particularly if they are in a public position of leadership. Social media can be an extremely toxic space for women and recent studies have found alarming levels of abuse towards women; something that worsens for intersectional groups such as women of colour, trans women, migrant

¹⁵ Murphy, H. (2019) “Can Facebook really rely on artificial intelligence to spot abuse?” *The Financial Times*, 8 November.

¹⁶ Quek, N. (2019) “Bloodbath in Christchurch: The Rise of Far-Right Terrorism”
<https://dr.ntu.edu.sg/bitstream/10356/106471/1/CO19047.pdf>

women and so on¹⁷. This abuse has immeasurable consequences and causes an immeasurable ripple effect for gender equality and the visibility of women and can intimidate protected groups and decrease their public presence on social media.

This targeted discrimination and expression of hatred needs to be adequately dealt with by the social media platforms that enable it to grow through the permanency and reach of the internet, and social media companies that generate enormous wealth for their owners must be compelled to take real responsibility for what is published on their platforms, as traditional media have always been obliged to.

41. Are there lessons from the English and Welsh experience of the Public Order Act 1986 that may apply for Northern Ireland?

The Protection from Harassment (Northern Ireland) Order 1997 is wholly insufficient to address online hatred. Whilst it can be used against targeted online hate towards an individual, there are constraints highlighted in 12.37. One of the biggest constraints is the need for the perpetrator to be identified, which is increasingly difficult online as perpetrators often opt on creating fake profiles to ensure anonymity and can use proxy servers so as to obscure their IP address and, therefore, their location. This highlights the importance of social media companies themselves being responsible for removing hateful content, as the PHO offers no recognition of the additional harm caused to the victim through an attack being carried out on a public platform nor is there any mechanism to request the removal of offensive or hateful materials. As the PHO does not mention hate, it is largely inapplicable to online hate crimes and lessons need to be learned from the English and Welsh experience of the Public Order Act 1986.

There are problems with using legislation what was created before the existence of social media to tackle hatred and harassment on social media platforms that include:

- Issues over jurisdiction as social media platforms are global in their nature and reach,
- The wide definition of publication which may not be appropriate for the internet,
- The existence of the outdated “dwelling” defence which does not reflect the operationalisation of the internet,
- The need for material to be both threatening/abusive/insulting **and** for there to be either an intention to stir up hatred/arouse fear or that there was a likelihood of hatred being stirred up or fear aroused,
- The need for consent for the Director of Public Prosecution’s permission for prosecuting online offences,
- The high threshold leading to very few offences being prosecuted make these particularly inappropriate for the sheer number of offences which occur online.

We support the recommendations outlined in 12.71 to deal with the above issues by amending some of the POA as follows:

- Stating that any materials downloadable in the UK fall within the jurisdiction of the UK,

¹⁷ Perraudin, F. and Murphy, S. (2019) “Alarm over number of female MPs stepping down after abuse” *The Guardian*, 31 October

- Amending the definition of the word ‘publication’ to include ‘posting’ or ‘uploading’ materials online,
- Removing the ‘dwelling’ defence as it is outdated,
- Consider removing the need for the Director of Public Prosecution’s permission for prosecuting online offences (particularly given the volume of online offences),
- Consider changing the wording from ‘stirring up hatred’ to ‘incitement to hostility or discrimination’.

These are some of the lessons that can be learned from the experience in England and Wales of the POA 1987, and how to amend legislation created before the introduction of social media to address the growing problem of hate speech through social media. Given the inadequacy of the PHO in Northern Ireland, these lessons above must be applied to any consolidated form of hate crime legislation dealing with online hate crime.

42. Should the dwelling defence under Article 9(3) of the Public Order (Northern Ireland) Order 1987 be amended/removed?

Yes.

As stated earlier, this defence is especially worrisome in relation to the world we now live in, where speech that would be seen as a stirring up offence if committed in a public space can now be typed in the privacy of one’s home and seen the world over immediately.

In addition, we are concerned that some of this speech can take place in “private” online spaces such as individual closed forums and servers. This must not be allowed to become a place protected from the eyes of the law, giving rise to phenomena like the rise of fora where terrorist acts can be planned, but yet no crime is committed until killing begins. We see this for example in the rise of so-called “incel” forums online that allow the most extreme misogynist speech and often encourages acts of violence against women¹⁸. These need to be treated as public spaces for the purpose of the law.

43. Should the term “publication” in the Public Order (Northern Ireland) Order 1987 be amended to include “posting or uploading material online”?

Yes.

As suggested in the consultation document and elsewhere in this submission, we believe that this is an essential change in order to realistically meet the needs of a changing world.

44. Should there be an explicit defence of “private conversations” in the Public Order (Northern Ireland) Order 1987 to uphold privacy protection?

¹⁸ “ Inside the Secret World of Incels: Misogyny, murder and cowardice” by Ed Power (The Irish Times, 1st August 2019)

Yes – provided there are clear, unambiguous guidelines as to what “private” means.

In the context of the online world, “private” no longer means what it meant just a few decades ago. While, on the one hand, one of the basic principles of freedom of expression and the right to a private and family life is the right to private conversations, on the other hand this freedom is often deliberately and consciously used to create “private” forums online where acts of violence and terrorism can be planned, and where individuals can be groomed, recruited and radicalised. For the sake of these individuals and the people they may harm in their lives, it is imperative that we craft our laws with enough precision to allow us to penetrate these forums which can and do act as the terrorist training camps of our time.

45. Should gender, gender identity, age and other characteristics be included as protected characteristics under the Public Order (Northern Ireland) Order 1987?

Yes.

The data shows us that hate based offences against these groups are increasing and there is no reason to believe that this will halt. Further, it is important that the provisions that we have to deal with these offences are designed with enough flexibility to capture the multiple axes upon which a given person may be targeted for a hate-based offence and as such intersectionality must be at the core of any approach.

46. Should the Malicious Communications (Northern Ireland) Order 1988 be adapted to deal with online behaviour?

Yes.

As stated already in this submission, those who wish to stir up and orchestrate hate against minority groups gravitate to the internet because it is easy to access and far more powerful in terms of influence and reach than any traditional method has been in the past. For this reason it is imperative that this change is made in order to deal with a host of problems, most relevant for us is the growth of misogyny and transphobia online and the way in which this has become normalised and that normalisation has led to a steady increase.

In order to adequately address online harm, the Malicious Communication (Northern Ireland) Order 1988 needs to be adapted to deal with growing malicious behaviour online. A recommended adaptation would be to extend the reference of sending another person a “letter or other article” to include electronic communications. The Malicious Communications Act 1988 which applies in England and Wales was amended in 2001 to explicitly bring within its ambit electronic communications. The Communications Act 2003 has also been adapted to deal with online behaviour; it would make sense to do the same with the Malicious Communication (Northern Ireland) Order 1988.

47. Should the wording of the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 use terms such as “grossly offensive”, “indecent” and “obscene”?

In England and Wales, crimes prosecuted under the Malicious Communications Act 1988 have increased from 122 in 2005 to 897 in 2014. Whilst it is not possible to tell how many of these were online crimes; it is encouraging to see the increased awareness and prosecutions of malicious communications. In relation to the application of this legislation to cyber hate, there are some careful considerations needed around the wording that is applied. For a communication to fit under the MCA 1999, it must be found to be

‘indecent’ or ‘grossly offensive’. The latter term is particularly problematic given that under the ECHR we do have the right to offend.¹⁹ However, as stated in 12.78, our right to freedom of expression does not justify us intending to cause distress or anxiety, and the essence of the law is clear that core of the offence lies in sending a communication that is indecent or grossly offensive; the impact on the victim or intended victim is not important. It is argued in 12.79 that the wording of the Malicious Communications Act 1998 through ‘indecent’ or ‘grossly offensive’ is consistent with our freedom of expression, but that these terms seem outdated for modern problems and the issue of cyberhate.

In addition the Malicious Communications (Northern Ireland) Order refers to the sending of “a letter or other article”, something which does not account for the nature of online harassment, and that aspect of it needs to be amended to reflect the nature of online communications.

48. Are the offences under the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and Communications Act 2003 too broadly drafted and require some modification to clarify and narrow their application?

Yes.

Due to the extremely broad nature of the offences in the legislation mentioned above, coupled with the arguably outdated terms within them, it is possible that this breadth makes offences untenable, as noted in 12.87 and 12.88. Whilst it is extremely encouraging to see drastic increases in the number of prosecutions through these forms of legislation in recent years, it is vital to ensure the wording of the legislation is adequate to fully address the nature of online crimes.

The PPS in NI have introduced guidelines of prosecuting electronic communications; however, these have not been made public. For these laws to be functional, modification is needed to the wording of the legislation and these guidelines should be published as soon as possible.

49. Should online harm be part of a general law applying to hate crime?

Yes.

It is absolutely vital that the law recognises and attempts to address the harms caused by online hate speech. This includes harms directly to the victims of online harassment, especially misogynistic harassment and transphobic harassment, and victims are often both individuals targeted by this kind of harassment, and to the groups to which they belong. Any such approach should capture the harm of individual incidents while at the same time seeing those incidents as part of a larger problem, for example when a person the subject of an online “pile on”, where organised groups target this person with dozens, sometimes hundreds or thousands, or messages in a short period of time²⁰ or when they have a degree of public profile for their views or their existence (e.g. they are a prominent feminist or they are a well known trans person) and receive such communications daily over a period of years or decades. It should also be cognisant of related online activities including “doxxing” and “swatting” the former of which is a tactic designed to bleed from the online world into the real life of the victim by revealing their address, workplace, childrens’ schools, partners’ identity and other details that mean that their opponents can target them in person. This tactic has led to multiple women writers, targeted for their part in the ‘Gamergate’ controversy in 2014, to have to move house multiple times to avoid very real threats²¹. This

¹⁹ Sunday Times v UK (No 2) [1992] 14 EHRR 229.

²⁰ K. Lumsden, E. Harmer (eds) Online Othering: Exploring Digital Violence & Discrimination on the Web (2019) p. 389

²¹ Aja Romano, “What we still haven’t learned from Gamergate”, Vox, 20th January 2020

kind of thing not only harms the person at the centre of the harassment, it harms also other women writers who may consider commenting on the issue but are reasonably afraid to do so.

The main goal of this is to recognise the harms done against victims and the groups they belong to, but a further benefit would be to communicate clearly, to victim, to perpetrator and to society as a whole, that these kinds of behaviours and the attitudes that fuel them will not be tolerated by society.

50. Is the current law contained in the Malicious Communications Act 1988, the malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 sufficiently clear to protect freedom of expression?

No

The consultation document clearly highlights the inconsistencies in the MCA 1988 and CA 2003 in reference to freedom of expression under the ECHR. Clarity is needed in relation to the CA 2003 section 127(1). We would suggest that the laws are, in some cases, too broad and even contradictory, and could create significant difficulties in prosecuting instances of online harm. We agree with the need expressed in 12.86 of the consultation for *“a much clearer articulation of the harm caused by cyberhate so that offences are both clear and certain, and come within the Article 10(2) exceptions”*.

Clarity on these issues is absolutely vital – not least in order to avoid the need to constantly re-tread the same waters in the debate about the difficulties in reconciling these two rights – the right to free expression and the right not to be harmed by malicious communications in any format.

Chapter 13

Sectarianism and Hate Crime Legislation in Northern Ireland

51. Would you support a specific reference to the term ‘sectarian’ within any new hate crime legislation?

Yes.

The consultation sufficiently highlights the difficulties with the lack of a definition of sectarianism in much of the existing legislation and the inconsistencies and complexities that this causes. Other organisations will be presenting much more detailed evidence in their response to chapters 13 and 14, but we want to echo many of the calls for increased legislative powers to deal with sectarianism. This includes making a specific reference to ‘sectarian’ within any new hate crime legislation.

Dr. Robbie McVeigh said of the existing laws dealing with sectarianism: *“In short, it would be difficult for anyone to argue that there is not a ‘problem’ with hate and hatred in contemporary Northern Ireland. In other words, it is not the absence of hatred in Northern Ireland that explains the absence of prosecutions for incitement to hatred. There is obviously something else going on – if the law is intended to prevent the profusion of hatred, it is not working very well.”*²²

Both the United Nations and Council of Europe expert treaty bodies on racism have, when examining the UK, held that sectarianism in Northern Ireland is to be treated as a specific form of racism. When discussing sectarianism, the NI Human Rights Commission who have stated that *“this does not mean that*

²² Hate and the State: Northern Ireland, Sectarian Violence and Perpetrator-less Crime, Dr Robbie McVeigh, April 2017

sectarianism should not continue to be individually named and singled out just as other particular forms of racism are, for example, anti-Semitism or Islamophobia."²³ Given the difficulties to deal with sectarianism in existing criminal law, we support including reference to 'sectarian', alongside a definition of the term, in any new hate crime legislation.

52. Should the list of indicators for sectarianism (i.e. religious belief and political opinion) be expanded?

Both yes and no

Yes - As alluded to in the previous answer, the lack of a widely accepted definition of sectarianism has led to negative impacts on policy and limited success in dealing with sectarianism through criminal law. In defining sectarianism for the purpose of hate crime legislation, sectarianism should be treated as a specific form of racism. This would involve nearly all the same grounds being included: race; language; religion; nationality or national or ethnic origin. The existing incitement to hatred legislation covers all these indicators except for language and we believe this is a necessary addition to the list of indicators due to the examples provided in 13.18.

No - 'Political opinion' is an indicator that is used in relation to anti-discrimination legislation. The differences in anti-discrimination legislation and hate crime legislation are outlined in 13.9 of the consultation document. One of the main concerns with expanding the list of indicators to include 'political opinion' when dealing with hate expression is that this would risk capturing legitimate political speech, and conflict with human rights obligations on freedom of speech such as ECHR Article 10. Due to this risk of criminalising protected political freedom of expression, we do not believe that political opinion is an appropriate indicator for incitement to hatred and hate crimes legislation capturing expressive behaviour. For example, when an LGBT+ rights protester at the 2017 Belfast Pride Parade held a "F*ck the DUP" placard, the PSNI initiated criminal proceedings and questioning under caution of the woman holding the placard. This led to an investigation under the 'stirring up hatred' provisions in the 1987 Order despite the incident not relating to any of the protected grounds listed in the legislation. In this example, the placard against the DUP was not grounds for prosecution as it was not directed towards a group of persons defined by religious belief, disability, race, sexual orientation, colour, nationality or ethnicity.²⁴

Chapter 14

Removing Hate Expression from Public Space

53. Should the law relating to the duties of public authorities to intervene to tackle hate expression in public space be strengthened or further clarified?

Yes.

The reality is that Northern Ireland is a place where hate incidents – most obviously sectarian, but increasingly also racist, homophobic, misogynist and transphobic – are common. The danger of allowing this to become normalised does not have to be imagined, we already live with the reality of it. Graffiti which calls for genocide (such as "kill all Taigs" or "kill all Huns") is a reality around gable walls and entry

²³ NI Human Rights Commission 'Parallel Report to the Advisory Committee on the Third Monitoring Report of the United Kingdom on the Framework Convention on National Minorities', February 2011 paragraph 59.

²⁴ <https://www.irishlegal.com/article/woman-will-not-prosecuted-f-dup-placard>

ways across Northern Ireland. In this environment it cannot be surprising that racist, homophobic and other graffiti are also met with a degree of numbness, and while authorities often remove these more efficiently than we deal with sectarian slurs, the slowness to act must be understood as part of a larger problem in our society.

Other forms of hate expressions in public spaces includes the extremely complicated nature of burning flags and other emblems in Northern Ireland. There have been examples of burning migrant community flags, rainbow flags, tricolour flags, Celtic Football shirts, effigies etc. Flags have also been placed in prominent positions in public spaces that include racist hate expression (for example, Nazi flags, Confederate Flags, apartheid South Africa flags) alongside flags associated with paramilitaries. These are often placed in an area or context to constitute sectarian or racist intimidation of persons living in a certain area.

Whilst the expression of hate in public spaces moves beyond gender, we believe that no form of hate expression is acceptable in a public space. Given the limited policy or interventions to date to deal with this issue by public authorities, we support the creation of a statutory duty on relevant public authorities to take reasonable steps to remove hate expression on their own property and, where it engages their functions, broader public spaces. This view is in relation to combating hate expression in public spaces and is not to be confused with wider debates and policy questions relating to flags and bonfires that do not relate to expressions of hatred.

Chapter 15

Restorative Justice

54. Should restorative justice be part of the criminal justice process in dealing with hate crime in Northern Ireland?

Yes, provided strict conditions are met.

We believe that the primary goal of such a provision must be to ensure better outcomes for victims of hate crimes, and we are aware that there is evidence that the current punitive approach often fails to satisfy many victims. For this reason it is worth considering restorative justice, and it may have the additional benefit of reducing the chance of the perpetrator reoffending, as they may learn more about the damage they have caused and rethink some of their harmful beliefs and attitudes.

However, any restorative justice process that is created needs to be led by victims entirely. Victims must not be put into a position where they can be pressurised by the offender, for example through the virtue of their relationship, to opt for restorative justice measures as an alternative to seeking punitive justice. Any form of restorative justice needs to work alongside the judicial system and be made up of adequately trained professionals. Further, restorative justice should only be an option in cases of “low-level” crimes. In order to test the effectiveness on reducing recurring incidents and increasing awareness, the changing attitudes or views of the perpetrator needs to be evaluated and tested.

55. Should restorative justice schemes be placed on a statutory footing?

Yes

We believe that restorative justice schemes should be placed on a statutory footing, alongside the judicial system, to ensure the process has credibility and is less likely to be considered as a soft or “non-justice” option. In addition, this would help ensure consistency in the application of restorative justice processes and enable the system to be completely victim-led and victim-focused.

56. Should there be a formal justice system agency responsible for the delivery of adult restorative justice for hate crime?

Yes.

In Northern Ireland, it is clearly important for such a scheme to work effectively in relation to hate crimes, any agency must be accepted by and have the confidence of all parts of the community. In paragraph 15.14 important points relating to funding are raised, which relates to our points in the previous question that formality can create greater credibility for the process. As stated in 15.15, the likely provider would be the Probation Board for Northern Ireland and given that it currently enjoys this position, it would seem reasonable that this continues. However, if additional protected characteristics are to be catered to, it will be necessary for any formal justice system agency to work with the women’s sector, transgender organisations, LGBT+ organisations, migrant groups etc. to ensure those professionals within the agency are fully aware of the needs of each sector and how to cater systems to work best for victims from these groups.

57. What role do you envisage for the accredited community based restorative justice organisations in the delivery of adult restorative justice for hate crime?

Given the prominence of and trust in the community sector in Northern Ireland, we understand the utmost importance of a community-based approach. This is especially relevant when considering protected groups in NI, who often have low levels of trust and confidence in the police and criminal justice system given the track record of prosecuting hate crimes. In creating any restorative justice approach, it is important to have statutory backing to reflect this as a part of, and not separate to, the judicial process. Further, in delivering restorative justice, it is worth identifying the victims-groups that will place more trust in community organisations to represent their needs and ensure effective, victim-focused collaboration with these organisations.

58. Do you consider diversion from prosecution is an appropriate method of dealing with low level hate crimes as per the practice in Scotland?

Yes.

Since the goal of such an approach would be to intervene in the development of problematic beliefs and actions, this approach has been shown to work well. There is reason to believe that it would work well in Northern Ireland also. Again, we would urge the centring of victims in this process and the need to ensure that the “level” of the crime is not the only determining factor in deciding which incidents are subject to this process; always the needs of the victim must come first. In order to ensure this, professionals working on alternative means such as restorative justice must be completely trained and aware of the power dynamics that may exist between victims and perpetrators. This is one of the reasons why we stress the need for involvement from community organisations that work with protected groups on a regular basis. Finally, this is not a straight-forward matter and this must be assessed on a case-by-case basis; with the input from the victims themselves.

Chapter 16

Victims

59. Do you have any views as to how levels of under reporting might be improved?

Sections 16.1 -16.4 of the consultation document provide extensive evidence on the under reporting of hate crimes and suggested a number of reasons as to why this is the case. These include:

- (i) Previous experience of or lack of confidence in the criminal justice system,
- (ii) A perception that police and criminal justice agencies are not interested,
- (iii) A perception of how said agencies will respond,
- (iv) A fear of a breach of privacy and being exposed to further incidents,
- (v) A lack of knowledge of the reporting system,
- (vi) Language difficulties,
- (vii) Personal status, e.g. immigration status,
- (viii) Perception that is acceptable for affected groups to be treated this way,
- (ix) Concern of the implications of the action, e.g. for members of the LGBT+ community being “outed”,
- (x) Fear of victimisation, retribution or reprisals,
- (xi) Concerns that no action will be taken.

These are not all the explanations but highlight just some of the reasons for under-reporting. These are concerns that exist not only in Northern Ireland, but in other regions too, as highlighted in 16.4. In order to improve levels of under-reporting, effort must be put in to understanding why victims have the above concerns. Clearly, this is an area where detailed research is needed to understand why hate crimes are under-reported in a Northern Ireland context. For this research to be effective, we believe collaboration with the community-based organisations that support affected groups should be included in this.

As hate crimes are not only under-reported, but on the rise in Northern Ireland, it is crucial that a significant body of work is undertaken to address the impact of hate crimes have on victims, such as those in the examples provided in 16.6. A multi-agency approach is needed alongside the criminal justice system to assist in improving hate crime reporting levels. This would also include civil society organisations that would be able to identify specific reasons for under-reporting and advocate for the improvements needed to increase the confidence of the affected groups. The community organisations across Northern Ireland have spent decades gaining the trust of the communities they represent and collaborating with these groups could lead to an improvement in reporting.

Creating robust laws that can be effectively applied to address all forms of hate crimes are crucial. This review is a huge body of work, and for any new legislation to be effective, collaboration with the third sector is crucial. In addition to this, wide-spread training and educational programmes will be needed to support this and to send a powerful message that this type of behaviour is unacceptable in our society. For example, age-appropriate education in schools on the harms of misogyny will hopefully

reduce the number of offences, but also increased awareness among victims on the unacceptability of misogyny and the support available to them in reporting this and seeking justice.

Laws will remain symbolic, or worse, tokenistic, if the ability to fully implement them is not there. Collaboration, education, training and support is crucial to the success of any hate crime legislation review.

60. Do you consider that the Hate Crime Advocacy Scheme is valuable in encouraging the reporting of hate crime?

Yes

We believe the Hate Crime Advocacy Scheme is extremely valuable in supporting victims and encouraging the reporting of hate crimes. As stated in 16.4, victims found the service to be trustworthy and evaluations indicated high-levels of user satisfaction. As stated in the answer to the previous question, victims may trust community organisations more and through creating hate crime advocacy schemes within community-based organisations that already support each protected group, it is likely that reporting will increase and victims will be better supported throughout the reporting process.

61. Do you consider that the Hate Crime Advocacy Scheme is valuable in supporting victims of hate crime through the criminal justice process?

Yes (If Yes, go to Question 62)

Section 16.4 of the consultation document highlights the outcomes of the Criminal Justice Inspection Northern Ireland report into the Hate Crime Advocacy Scheme. Crucially, this raised the issue that *“some victims stated that they would have abandoned their complaints had the advocacy service not provided support”*. In stepping forward to report a hate crime, it is absolutely crucial that a victim feels supported enough to go through with the rest of the reporting process and it is clear that the scheme supports victims in continuing with their complaints.

As hate crime reporting is worryingly low, the above report would suggest that reporting would be even lower without the scheme as victims would not feel confident enough or fully supported to continue the process. The criminal justice system can be very daunting, and when compounded with the reasons for under-reporting highlighted in the answer to question 59, it is clear that support is needed for all victims. The Hate Crime Advocacy Scheme is a crucial service that breaks down what can be an overwhelming burden of seeking justice through the criminal justice process. It also provides vital support for victims who do not choose to pursue justice.

62. How might the current Hate Crime Advocacy Scheme be improved?

Consistent and multi-year, sustainable funding is needed to enable the Hate Crime Advocacy Scheme to reach its full potential. This involved creating funding pots for further advocates to be created across the community sector to ensure all protected groups have an advocate they can approach. Further, funding must be introduced to better advertise the scheme to ensure all victims are aware of the support available. Finally, effort must be taken to ensure protected groups in rural communities are able to access the scheme.

63. Do you consider that the funding model for the Hate Crime Advocacy Service should be placed on a permanent basis as opposed to the present annual rolling contract model?

Yes

This will lead to greater consistency within the Hate Crime Advocacy Service and enable providers to build upon existing skills regularly rather than facing staff retention issues due to short-term funding contracts. This will lead to an improved service that can better support victims of hate crime. Guarantees must be made to ensure that funding for the Hate Crime Advocacy scheme is increased substantially to reflect any new protected characteristics. Finally, this funding should be protected from any reduced budgets or austerity, as justice for victims cannot be lost due to financial decision-making.

64. Do you consider that, in certain circumstances, press reporting of the identity of the complainant in a hate crime should not be permitted?

Yes (If Yes, go to Question 65)

Since fear of further hate incidents, reprisals, and public “outing” is a major factor in the reluctance of many victims to engage with the criminal justice system, it makes sense that the risk of the press reporting of the identity of the complainant would be a huge factor in the weighing of options by any given victim.

Allowing for anonymity for complainants in a variety of circumstances, making those set of circumstances clear and understandable by the public at large, and expressly making it clear that this is a good faith move on the part of the justice system to ease the fears of victims would also go some way to increasing the confidence of marginalised communities in the criminal justice system as a whole.

65. In what circumstances should a restriction on press reporting of the identity of the complainant in a hate crime be permissible?

Restrictions should be permissible in instances where the victim faces the risk of being re-victimised. For example, outing a LGBT+ person by identifying them as a victim of a hate crime due to their sexual orientation or transgender identity can put them at greater risk of further homophobic, transphobic, biphobic crimes. It is important that a victim’s consent is given to their identity being released in press reporting to ensure greater harm is not inflicted through sensationalist reporting.

In addition, living as we do in a time of unprecedented connectedness and mindful of the co-ordinated cyber abuse against prominent women and trans people that has been orchestrated remotely and sustained for years, misogynist hate crimes are often dismissed and derided. Publishing the names of the victims may invite this kind of attack.

Further, within the context of Northern Ireland, it may be necessary to restrict reporting on the identity of victims of sectarian crimes due to evidence of intimidation and control within communities from perpetrators of these crimes.

The complications of special measures to protect victims are pertinent in populations as small as Northern Ireland, which was identified in the recent Gillen Review into the law and procedures of

serious sexual offences in Northern Ireland.²⁵ Gillen noted also that Northern Ireland is a small place, and that privacy is difficult enough to ensure as it is; this would be one small step that could make a real difference. Regardless, measure to protect victims should still be introduced in appropriate cases and victims should be consulted throughout.

Chapter 17

Legislation: Consolidation and Scrutiny

66. Do you believe that there is benefit in bringing all hate crime/hate speech legislation in Northern Ireland together in one consolidated piece of legislation?

Yes

We consider the consolidation of hate crime legislation to be a necessary step to simplify and bring consistency to how hate crimes are handled within the criminal justice system in Northern Ireland. Many of the existing laws referenced throughout this consultation are outdated, do not cover enough protected characteristics, are under-utilised or misunderstood and do not recognise crucial elements of hate crimes including intersectionality and online hate crime/cyberhate. We agree with the comments in 17.6 that consolidation could *“be said to be helpful in raising awareness and understanding of hate crime”*.

67. Should any new legislation on hate crime be subject to post-legislative scrutiny?

Yes (If Yes, go to Question 68)

68. In what way should post-legislative scrutiny be provided for?

There should be at least two independent reviews following the implementation of any new legislation. This should include extensive consultation with the voluntary and community sector as supporters and service providers to many marginalised groups and victims. Further, any future consultations or evidence gathering as a means of post-legislative scrutiny should be made accessible to all groups. As highlighted by our colleagues in the Committee on the Administration of Justice (CAJ) in 17.12 of the consultation, *“there is little value in amending or complementing current legislation with additional protections, if these provisions are left unused or underused in the statute book”*.

We recommend following this guide on [Women at the Heart of Public Consultation](#).

ENDS

²⁵ Report into the law and procedures in serious sexual offences in Northern Ireland, Gillen Review, April 2019, Paragraph 29

For any questions or queries about this consultation response, please contact:

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