



Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth

Kay Goodall and Mark Walters

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About the Equality & Justice Alliance

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression.

The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, the Royal Commonwealth Society and Sisters for Change.

The Alliance was formed following the Commonwealth Heads of Government Meeting in London in April 2018 during which UK Prime Minister Theresa May announced that as Chair-in-Office of the Commonwealth the UK would support Commonwealth governments that want to reform their laws that discriminate against women and girls and lesbian, gay, bisexual and transgender people, many of which are a colonial legacy. The Equality & Justice Alliance was formed to provide this support, with funding from the UK Foreign and Commonwealth Office in support of the commitments made during CHOGM 2018.

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About the Human Dignity Trust

The Human Dignity Trust works with LGBT activists around the world to defend human rights in countries where private consensual sexual activity between adults of the same sex is criminalised. In collaboration with local partners and lawyers, we support strategic litigation to challenge laws that persecute people on the basis of their sexual orientation and/or gender identity.

Working with our Legal and Bar Panels, a network of 25 of the world's leading law firms and eminent barristers, we have helped local activists and civil society organisations across five continents access more than £9million of pro bono technical legal assistance since 2011.

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Abbreviations

CPS = Crown Prosecution Service
 FRA = EU Agency for Fundamental Rights
 LGB = lesbian, gay, bisexual
 LGBT = lesbian, gay, bisexual, transgender
 LGBTQI2S = lesbian, gay, bisexual, transgender, queer, intersex, two-spirit
 SO = sexual orientation
 SOGI = sexual orientation and gender identity
 NT = Northern Territory, Australia
 NSW = New South Wales, Australia
 OSCE = Organisation for Security and Co-operation in Europe
 Vic = Victoria, Australia

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Both Dr. Goodall and Dr. Walters are members of the Commonwealth Group of Experts on Reform of Sexual Offences, Hate Crimes and Related Laws to Eliminate Discrimination against Women and Girls and LGBT People. The Commonwealth Group of Experts works closely with the Human Dignity Trust to provide strategic advice, technical and thematic research and, upon request, support and advice to Commonwealth Governments that are seeking to review and reform laws that discriminate against women and girls and LGBT people.

Introduction

Anti-LGBT hate crimes are criminal offences that are motivated by, or which demonstrate, hate or prejudice towards the victim based on the victim's perceived sexual orientation or (trans)gender identity.¹ There have been significant increases in the number of recorded hate crimes across the globe over the past two years, including hate crimes directed against lesbian, gay, bisexual and transgender (LGBT) people (e.g. Southern Poverty Law Centre, 2016; Home Office, 2018).

The proliferation of anti-LGBT hate crime is no more felt and experienced than in a number of Commonwealth countries. A detailed analysis of the nature and extent of anti-LGBT hate crime and its impact on individuals and societies is provided in a separate publication produced in parallel to this report, entitled *"Hate Crimes against the LGBT Community in the Commonwealth: A Situational Analysis."*² This supplementary report provides a fully elaborated contextual analysis that will form a complementary component to the present report. The common types of bias-motivated crimes range from physical and sexual assault to torture and murder, and they are committed by family members, the public and state authorities alike.

The widespread problem of hate crime (including state-sponsored violence), and the failure of many countries to tackle the problem in law, means that this discriminatory type of offending continues to be one of the key human rights issues of our time. As will become evident throughout this report, some Commonwealth countries are actively challenging anti-LGBT hate crimes through the enactment of specific laws aimed at enhancing the penalties of offenders who commit crimes with an element of anti-LGBT bias. For these countries, hate crime legislation is now an important part of the state's toolkit in challenging violent prejudice in society. Annex A contains hate crime legislation that has been introduced across the Commonwealth.

¹ For a full list of legal definitions see Annex A.

² Human Dignity Trust, *Hate Crimes Against the LGBT Community in the Commonwealth: A Situational Analysis* (forthcoming).

This report focuses on the way that the law can help address hate crimes and the enhanced impacts these crimes have on LGBT communities within the Commonwealth.

We propose that legislatures should enact hate crime laws aimed at preventing the pervasive hostilities that are directed at LGBT people, often on a daily basis. The report provides a detailed analysis of the purpose of these laws and assesses how hate crime laws, already enacted in parts of the Commonwealth, are being used to tackle the problem. The aim is to identify and assess the different types and models of legislation that are being used and to provide recommendations for other Commonwealth legislators who wish to challenge the proliferation of anti-LGBT hate and prejudice through the use of such laws.

Some legal experts have argued that positive changes in national law to encompass LGBT rights have come about not through adopting the pathways that proved most successful in the developed West/Global North but through adapting existing national law. Many Commonwealth countries now have parallel laws (sentence enhancements for racial or religious prejudice; hate speech laws that take account of sexual orientation; protection against sexual orientation discrimination in the constitution) which could be drawn upon to point the way forward to LGBT hate crime laws. Some courts draw heavily on the sentencing guidelines of longer-established jurisdictions. For example, the Eastern Caribbean Supreme Court cites the UK Sentencing Guidelines in criminal cases: these guidelines specifically allude to sexual orientation and gender identity hostility as an aggravating factor at sentencing. A survey of these parallel legal developments will lay out potential pathways for advancing towards national or regional hate crime laws.

Section 1:

Why Legislate to Address Anti-LGBT Hate Crime?

There are a number of cogent reasons why some Commonwealth jurisdictions have begun to legislate for (anti-LGBT) hate crime. These relate to the disproportionate pervasiveness of this type of targeted violence:

- The distinct and enhanced impacts anti-LGBT abuse causes to individuals, families, victim groups, and broader society;
- The enhanced culpability that expressions of LGBT prejudice should carry in law;
- The need for state-based censure of anti-LGBT conduct;
- The role that the state should play in providing symbolic support to protect LGBT communities against targeted violence;
- The centrality of the law as a mechanism to ensure monitoring and measurement of violent crime including anti-LGBT crime.

Each of these are outlined (and evidenced) in turn below, and are integral to underpinning any Commonwealth member state's decision to embark on law reform to address hate crime.

1.1 The frequency of LGBT hate crimes

1.1.1 Availability of state-level hate crime data

UNITED KINGDOM

The UK publishes state-level hate crime data from police records and the Crime Survey for England and Wales. The data for England and Wales are analysed at least annually. The latest data provide comparisons between police and crime survey results (the latter estimates actual crime numbers in society). Between 2017 and 2018, the police recorded 11,638 sexual orientation hate crimes (up 27% from the previous year), compared to the crime survey³ estimates of 30,000 sexual orientation hate crimes per year. There were 1,651 transgender identity hate crimes recorded by the police (up 32%), but the crime survey reports were too few to allow a robust estimate nationwide. These strands have struggled in the past to achieve the priority that the more established strands of race and religion have. These latest results are thought to reflect increased reporting and improved identification and recording by police (Home Office, 2018).

In Northern Ireland, the NI Crime Survey does not disaggregate the experience of hate crime victims, but police data record 267 crimes and incidents with a homophobic motivation during 2017/18, up 13 from the year before. 72% were violence against the person offences. 17 transphobic crimes were recorded, up 12 from the year before (PSNI, 2018). The NI Public Prosecution Service reports that around 70% of cases considered by a prosecutor to be aggravated by hostility led to conviction. Over a third received an increased sentence where the judge accepted the aggravation (Public Prosecution Service, 2018).

In Scotland, 1,112 charges were reported for offences aggravated by sexual orientation in 2017/18, 3% more than the year before. The great majority were breach of the peace. Overall, there have been small year-on-year increases in charges reported since monitoring began in 2010. For offences aggravated by transgender identity prejudice, 49 charges were reported. This is the highest number of charges reported so far (COPFS, 2018). The 2017 Scottish Household Survey found that gay, lesbian and bisexual people were over three times as likely as heterosexual people to report having experienced discrimination or harassment in the last three years, although the base sizes are small and should be regarded with caution (Scottish Government, 2018). A comprehensive analysis of other datasets was recently carried out by McBride, confirming a continuing problem (2016).

³ Combined 2015/16 to 2017/18 CSEW dataset.

SOUTH AFRICA

There is at present no recording mechanism for hate offences in the criminal justice system in South Africa, even though it currently has sentence enhancement legislation on the grounds of race, gender or disability.⁴ The only records are of complaints of discrimination to the Equality Courts: these include complaints of hate speech and harassment which can be referred by the Court to the DPP for prosecution, but these are not disaggregated.

TABLE 1.

Complaints lodged in the equality courts 2017/18 (DOJCD 2018: 34)	
Dissemination and publication that unfairly discriminates	4
Harassment	15
Hate speech	83
Unfair discrimination	107
Unfair discrimination and dissemination and publication that unfairly discriminates	2
Unfair discrimination and hate speech	15
Unfair discrimination, hate speech and dissemination and publication that unfairly discriminates	2
Unfair discrimination, hate speech and harassment	8
TOTAL	236

The Hate Crimes Working Group's longitudinal research study of hate crime in five provinces of South Africa⁵ found that in 14% of the 945 cases analysed, victims suffered repeat victimisation because of their sexual orientation, and in 11% of cases because of their gender identity or expression. Only a third were reported to the police, and only one in ten of those complainants said that their case was properly investigated. The court had reached a verdict in 62 cases by the time the report was released, but only 16 convictions identified hate crime in the conviction or sentencing (Mitchell and Nel, 2017).

CANADA

Canada publishes police data⁶ on hate crimes including sexual orientation (but not yet gender identity, as it was added as a hate crimes aggravation in mid-2017). The majority of these in 2017 – around half – were property offences ("mischief").

⁴ Section 28(1), Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
<http://www.justice.gov.za/legislation/acts/2000-004.pdf>

⁵ Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo and Western Cape.

⁶ Statistics Canada, Table 35-10-0066-01: Police-reported hate crime, by type of motivation
<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510006601>
<https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2018051-eng.htm>

TABLE 2.

Police-reported hate crime, by type of motivation				
Canada, police services (except St John)				
Type of motivation	2014	2015	2016	2017
				Number
Race or ethnicity	611	641	666	878
Religion	429	469	460	842
Sexual orientation	155	141	176	204
Language	12	18	13	23
Disability	10	8	11	10
Sex	22	12	24	32
Age	6	4	5	4
Other similar factor	27	44	35	48
Unknown motivation	23	25	19	32
TOTAL POLICE-REPORTED HATE CRIME	1,295	1,362	1,409	2,073

"Other similar factor" includes motivations such as profession or political beliefs.

A 2016 analysis found that incidents motivated by sexual orientation "were more likely to be violent (71%) and were more likely to result in injuries to the victim (44%). Most (82%) of the victims were male and almost half (43%) of all victims were under the age of 25" (Simpson, 2018: 6).

TABLE 3.

Police-reported hate crime, by most serious violation, selected police services				
Canada, police services (except St John)				
Type of motivation	2014	2015	2016	2017
				Number
Homicide and other related violations	2	1	1	2
Assault, level 3, aggravated	5	3	3	9
Assault, level 2, weapon or bodily harm	46	66	70	92
Assault, level 1	131	137	195	215
Total robbery	9	10	8	20
Criminal harassment	55	62	82	93
Indecent/Harassing communications	21	35	45	40
Uttering threats	127	155	174	292
Other violent violations	27	18	25	33
Mischief	523	561	535	936
Mischief to religious property motivated by hate	89	59	63	74
Other non-violent violations	39	50	35	62
Public incitement of hatred	40	49	69	121
Other Criminal Code	53	63	52	77
Other violations	3	3	2	2
TOTAL	1,170	1,272	1,359	2,068

"Other violent violations" includes homicides, assaults against police officers, other assaults, sexual assaults etc.

"Other violations" consists of non-criminal code offences, including traffic violations, drug violations, and other federal statute violations.

Canada carries out a five-yearly General Social Survey, the last being in 2014.⁷ Of those who identified as LGB, just under one in five (19%) experienced some type of violent victimisation (sexual assault, robbery and physical assault) in the previous 12 months. Lesbian and gay people were more than twice as likely to report having experienced violent victimisation than those who identified as heterosexual. Bisexual people were, however, almost three times more likely to report this. Almost nine in ten bisexual victims (85%) said they had not reported the incident to the police, compared to under half of lesbian and gay victims (42%). 36% of heterosexual victims said they did not report such victimisation (Mitchell, 2018). There is also extensive qualitative research in Canada, and a recent NGO report on LGBTQI2S⁸ persons with disabilities suggests they are particularly at risk of violence (Bucik et al., 2017).

State-level data are almost entirely lacking elsewhere in the Commonwealth. Very few Commonwealth Member States record and publish hate crime statistics. A few smaller jurisdictions keep disaggregated data on police-reported hate crime but do not regularly publish it: for example, the Isle of Man has recently released figures for the period between 2012 and 2017. 47 crimes with a homophobic motivation were recorded, and one with a transgender motivation.⁹ Cyprus¹⁰ and Guernsey¹¹ regularly publish data on police-recorded racial incidents, but not sexual orientation or gender identity.

For the rest of the Commonwealth, there is a major gap in data collection on hate crimes. As we will see in section 1.5, the enactment of hate crimes legislation can help trigger better monitoring and measuring of hate crimes.

1.2 The direct and indirect impacts of anti-LGBT hate crimes

It is commonly stated that hate crimes “hurt more” (Iganski, 2001). Such an assertion is based on the premise that hate-motivated violence is likely to cause heightened physical, psychological and emotional traumas amongst direct victims, as well as “waves of harm” which emanate outwards affecting entire communities of people, and then more broadly damaging societal values (Iganski, 2001). Anti-LGBT hate crimes are likely to cause unique harms as incidents strike at the very essence of who someone is. This can create a unique set of challenges for LGBT people who will view the world as a more malevolent place, and many will become hyperaware that they are susceptible to future abuse. These challenges are further exacerbated by the fact that anti-LGBT violence can be particularly violent in nature, with victims more prone to experiencing injury compared with other forms of targeted victimisation. For instance, analysis of US FBI data by Wen Cheng and colleagues (2013: 789), suggests that homophobic hate crimes were more likely to be physical in

⁷ The data are adjusted for characteristics and experiences that can affect chances of victimisation.

⁸ Lesbian, gay, bisexual, transgender, queer, intersex, two-spirit.

⁹ <https://www.bailiwickexpress.com/jsy/news/new-law-crack-down-hate-crime/#.XFIZPVz7SUI>

The island also carries out a social attitudes survey but this does not ask questions about hate crime (Isle of Man Government, 2017).

¹⁰ http://www.police.gov.cy/police/police.nsf/dmlstatistical_en/dmlstatistical_en?OpenDocument

¹¹ <http://www.guernsey.police.uk/CHHttpHandler.ashx?id=115376&p=0>

nature (as against property) while also being correlated with the commission of more serious violent offenses such as aggravated assault. Research on transphobic hate crime shows a similar pattern of physical violence. Walters and colleagues (2018) reporting data from the Sussex Hate Crime Project found that 29% of trans people had experienced at least one hate-motivated physical assault over a three-year period, compared with 12% of non-trans LGB people.

There is also now a substantial body of evidence to show that the emotional impacts of hate crime are greater than parallel non-hate motivated offences (e.g. Benier, 2017; Herek et al., 1999; Iganski and Lagou, 2015; McDevitt et al., 2001). Gregory Herek and colleagues (1999) found that lesbian and gay victims of homophobic hate crime were more likely to report greater levels of anger, depression, post-traumatic stress, and anxiety compared to victims of non-hate crimes. Lesbian and gay victims of hate crimes were also more likely to be fearful of future incidents of crime while additionally experiencing “greater perceived vulnerability”, compared with victims of non-hate-motivated offences (Herek et al., 1999: 6). Experiences of depression can also last for longer periods of time compared with victims of non-hate crimes.

The “waves of harm” that are caused by anti-LGBT hate crimes are also likely to affect other victim group members. This is because hate crimes are “message crimes” aimed at terrorising entire groups of people who share the same or similar identity characteristics to that of the victim (Iganski, 2001; Weinstein, 1992). These indirect effects mean that a single incident of hate can have emotional and behavioural impacts that quickly extend across entire groups of people (Noelle, 2002; Perry and Alvi, 2012). Media coverage of anti-LGBT violence is likely to promote a message of danger to LGBT communities. Collectively, these messages create climates of fear amongst LGBT people who worry that they too will be attacked (Iganski, 2001; Herek et al., 1999).

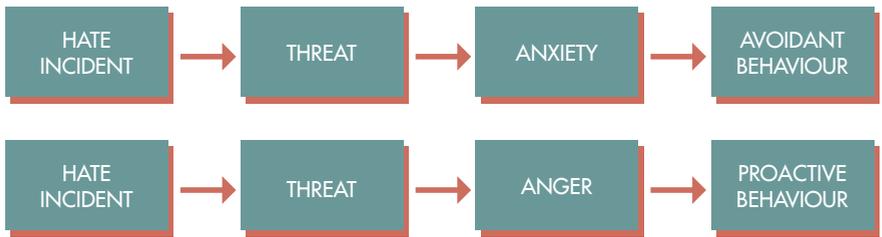
In 2002, Noelle carried out a small study involving questionnaires and semi-structured interviews with LGB participants in the wake of the homophobic murder of Matthew Shepard in the US in 1998. Noelle’s findings showed that high profile homophobic violence can have significant impacts on *other* gay, lesbian and bisexual people’s assumptions about “their” world as a safe place to live. Respondents in her study stated that they felt personally threatened as a consequence of sharing the victim’s LGB identity. Bell and Perry’s (2015) small focus group study into the community impacts of anti-LGB hate crimes in Canada found similar findings. However, they also found evidence of LGB people engaging in “victim-blaming”, such as where they considered gay male victims to have “provoked” their own victimisation by failing to curtail effeminate behaviours. Bell and Perry assert that these responses are an attempt at self-preservation, helping individuals to manage their fears about anti-LGB violence. Yet anti-LGBT violence does not only cause negative and traumatic emotional reactions. In a previous study, Perry and Alvi (2012) also found that individuals are likely to experience anger about others’ targeted victimisation, and that this often has a mobilising effect on other LGBT members. Such responses include a desire to educate others about LGBT identity.

The question of whether hate crimes have indirect “community” impacts on LGBT people formed the focus of a five-year research project conducted in the UK by Paterson and colleagues (2018). The project involved a total of 21 separate studies focusing on both quantitative methods (such as surveys and experiments) and qualitative methods (interviews).

In total, over 2,000 LGBT people participated in the project. The project found that simply knowing an LGBT person in the local community who had been a victim of a hate crime had significant impacts on their emotions (causing heightened levels of anger and anxiety and, in some cases, shame) (Paterson et al., 2018a; 2018b). The researchers found that these emotions were directly linked to their perceptions of threat, which was linked again to their identity as an LGBT person. In turn, these emotions were consistently correlated with avoidant behaviours (e.g. avoiding certain locations and changing one’s appearance) and proactive behavioural intentions (e.g. joining rights-based groups, community-focused charities, and being more active on social media) (Paterson et al., 2018a).

The researchers also tested the effects that media coverage of anti-LGBT hate crimes have on LGBT people, using both longitudinal and experimental studies. They found this time that media exposure to anti-LGBT hate crimes had lasting impacts on individuals’ emotions, highlighting that LGBT people, as a whole, live with the knowledge that they may be physically attacked at any time (Paterson et al., 2018b). Key to understanding these indirect impacts was empathy – described as the willingness or capacity to feel the emotions of other people (Batson et al., 1997). The project showed that individuals from within the LGBT community were more empathic towards other LGBT individuals’ experiences of hate crime. It was by feeling more connected to other LGBT people via group identity that individuals were more likely to experience heightened emotional responses to reading about LGBT hate crime victims, compared to non-hate crime victims.

FIGURE 1. Flow charts illustrating the emotional and behavioural impacts of hate crime¹²



The flow charts show the two most common emotional and behavioural reactions that either direct or indirect experiences of anti-LGBT hate incidents can lead to. Individuals who experience hate crime incidents will likely experience a heightened sense of threat (both to their physical safety and to their identity as an LGBT person). This sense of threat is most commonly linked to the emotions of anger and anxiety.¹³ Each of these emotions predict different behavioural responses. For example, feelings of anger are most likely to result in individuals mobilising and engaging “proactive” behaviours (e.g. joining an LGBT rights group, or posting rights-based comments on social media). However, anxiety has a very different effect on behaviour. Those who experience this emotion are more likely to engage in avoidant behaviour (e.g. change the way they look or act or where they are prepared to go).

¹² Flow chart taken from Paterson et al (2018) with permission of authors.

¹³ Shame is another emotional response but is less common.

1.3 Culpability and the importance of state denunciation

The unique harms caused by anti-LGBT hate crime are damaging, not just to LGBT people, but to any society that is committed to safeguarding personal security and protecting all citizens from violence. Hate crimes are a direct attack on societal principles and values as much as they are on individuals (Iganski, 2001). Because of this, anti-LGBT hate crimes can be considered as a more serious type of offence, and in turn offenders who commit such crimes should be declared as more morally blameworthy. That is to say, anyone who demonstrates homophobia, biphobia or transphobia through acts of violence and intimidation should be condemned for their action in the law to a greater degree. For example, a violent attack against someone because of their gender identity should be considered more morally reprehensible than someone who commits an act of violence because of anger, lust or greed. This is because anti-LGBT crimes directly undermine both the right of individuals to be free from targeted abuse, and more broadly the fundamental human right of all human beings to be treated with dignity and respect. Those who seek to deny equal respect of all citizens through acts of violence threaten and undermine a jurisdiction's commitment to universal human rights. As such, the enactment of hate crime laws is an important means of ensuring that an offender's culpability for targeting LGBT victims is reflected in law.

Criminal law theorists have argued that the criminal law, more than any other strand of law, furnishes the boundaries of (un)acceptable conduct (Duff, 2001). The criminalisation of anti-LGBT hate crime is a means through which the state publicly condemns violent expressions of prejudice. The aim is to provide for a longer-term message to any given society about the social acceptability of homophobia, biphobia and transphobia. Laws that specifically (re)criminalise anti-LGBT crimes can, therefore, be conceived as a statutory means through which the state communicates support for certain positive norms (i.e. acceptance of LGBT people) while simultaneously denouncing discriminatory social conducts (i.e. targeted LGBT violence) (Walters et al., 2018).

In this sense, hate crime laws are about changing behaviour. Members of society who resist such a message are challenged by their conviction of a "hate crime" offence. Their conviction as a hate crime offender is a public declaration of wrongdoing. The ultimate aim of the criminal law is to persuade members of society to refrain from prejudice-based offending because they realise that it is wrong. By using the law in this way, it has been argued that there can be a shift in public attitudes towards certain groups in society whereby a more tolerant and accepting social climate is promoted (Walters, 2018).

Research by Brian Levy and Denise Levy (2017) examined the relationship between state policies on gay and lesbian rights and reported hate crime incidence. They note that "[a]s public policies have liberalized, so too have people become more accepting of homosexuality" (Levy and Levy 2017: 5). Levy and Levy note that in the US when the Defense of Marriage Act (which specifically denied to same-sex couples all benefits and recognition given to opposite-sex couples) was passed, hate crimes towards LGBT people were rising. As has already been highlighted above, laws that actively discriminate against certain individuals are likely to foster a hostile environment against them, whereby perpetrators feel that they can demonstrate their acts of hate with impunity.

Human Rights Watch (HRW) concluded in their 2018a report that “the continued existence of laws criminalizing LGBT conduct, even if infrequently enforced, creates conditions that facilitate abuses in all seven [Eastern Caribbean] countries” covered by their research (HRW, 2018a: Section II). In at least three African Commonwealth member countries (The Gambia, Malawi, Nigeria), the gender expression of trans and gender-diverse people is in effect criminalised through ‘cross-dressing’ laws or provisions framed by reference to disguise or impersonation.¹⁴ Trans and gender-diverse people are further criminalised in at least seven African Commonwealth states (Botswana, The Gambia, Lesotho, Malawi, Namibia, Uganda, Zambia) through the application of public order, vagrancy or misdemeanour offences.¹⁵ Due to the lack of legal gender recognition, trans people are also criminalised through laws that prohibit same-sex intimacy.¹⁶

Reversing laws that deny fundamental human rights is therefore central to effectively challenging and reducing hate crimes against LGBT people. Levy and Levy note that in 2003 when same-sex marriage was legislated for, the Supreme Judicial Court of Massachusetts reported that hate crimes dropped by 30%. However, reductions in hate crime may also be produced by legislation that specifically criminalises hate crime. In their own study in the US, Levy and Levy found that “[h]ate crime laws that include sexual orientation are negatively related to hate crime incidence, whereas constitutional bans on same-sex marriage are positively associated with hate crimes” (Levy and Levy: 22). Though not conclusive evidence of causation, it provides the clearest evidence thus far that hate crime laws are directly correlated with a decrease in anti-LGBT hate crime.¹⁷

A paradox will exist if jurisdictions enact laws to address hate crimes but fail to repeal legislation that disadvantages LGBT people. For hate crime laws to yield their full potency they will need to be implemented in line with policies that remove barriers to equality and repeal laws that specifically harm LGBT people (e.g. criminalisation of consensual same-sex intimacy between adults). However, where this is not yet possible, it is clear that laws that criminalise the targeted abuse of LGBT people must still be implemented.

Even where criminal laws against consensual same-sex intimacy remain in force, there can be no justification for violence with impunity against LGBT people. Firstly, such offences do not “render every person who is gay a criminal”; what they prohibit is the commission of certain sexual acts.¹⁸ But even more importantly, violence against anyone cannot be condoned by states and must be criminalised and tackled for the proper and healthy functioning of a society.

Clearly, it is ideal for hate crime laws to be implemented hand in hand with other human rights-based laws including the decriminalisation of consensual same-sex intimacy between adults. However, it is likely in some jurisdictions that legal reform in these areas will be incremental. Hate crime legislation is one important step towards protecting LGBT people from targeted violence which, as we will see below, if implemented together with new public policies, guidelines and training can additionally improve law enforcement responses to hate crime.’ with ‘Hate crime legislation is one important step towards protecting LGBT people from targeted violence. This, as we will see below, if implemented together with new public policies, guidelines and training can additionally improve law enforcement responses to hate crime.

1.4 Importance of symbolic support to LGBT communities

The symbolic importance of hate crime legislation extends beyond the messages that the law sends to society as a whole, as it also provides a clear message of support to communities who are the targets of hate crime. The key message here is a direct recognition of the harms that LGBT communities have suffered historically. Alon Harel and Gideon Parchomovsky (1999-2000) refer to this approach as the “fair protection paradigm”, which requires the state to take account of groups within society who are particularly vulnerable to targeted victimisation. They explain that the enhanced protection provided by hate crime laws serves to achieve greater social equilibrium by reversing the disadvantages that certain minority groups have faced due to structural inequality. This aspect of hate crime legislation can be particularly important to LGBT groups who have experienced long histories of persecution within society and from state agencies, and who are therefore deserving of greater protection by the state from targeted victimisation.

The enactment of hate crime laws is especially significant to these groups considering the fact that many states have criminalised and persecuted LGBT people for who they are. Research by the Sussex Hate Crime Project in the UK found that LGBT people supported hate crime laws as being an important means of protecting them against targeted victimisation and giving recognition to the severe harms that such incidents cause (Paterson et al., 2018). They felt too that the state should have special measures in place (such as policing policies and guidance) to ensure that victims were treated with respect and that hate crime was taken seriously by the state. This will be especially important in countries where the criminalisation of consensual same-sex intimacy between adults has been used as a means of legitimising violence against LGBT people.

¹⁴ See Human Dignity Trust, *Injustice Exposed: The Criminalisation of Transgender People and its Impacts* (forthcoming in 2019).

¹⁵ *Ibid.*

¹⁶ *Ibid.*, see also <https://www.reuters.com/article/us-uganda-lgbt-discrimination/new-masculinities-meet-ugandas-transgender-men-fighting-sexism-idUSKBN11B00D> N.B. Uganda’s Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014 would expressly criminalise trans consensual same-sex intimacy between adults, if enacted <https://www.equalrightstrust.org/news/ugandan-prohibition-promotion-unnatural-sexual-practices-bill-clearly-violates-international>; Malawi: Human Rights Watch (2018) “Let Posterity Judge”: Violence and Discrimination against LGBT People in Malawi <https://www.hrw.org/report/2018/10/26/let-posterity-judge/violence-and-discrimination-against-lgbt-people-malawi>

¹⁷ The authors acknowledge that “a definitive determination of causality would require rigorous control”. They try to overcome this by using a number of controls and using time lags to show that after a certain period of time post-enactment of law/policy there is then a reduction in hate crime/or increase in reporting.

¹⁸ *Kasha & Ors v Rolling Stone & Anor* (Misc. Cause 163 of 2010) <https://www.icj.org/wp-content/uploads/2012/07/Kasha-Jacqueline-David-Kato-Kisule-and-Onziema-Patience-v.-Rolling-Stone-Ltd-and-Giles-Muhamu-High-Court-of-Uganda-at-Kampala.pdf>

1.5 Focus given to monitoring and measuring hate crime

Creating hate crime offences that enhance criminal sanctions where a crime is motivated by, or demonstrates prejudice, helps to ensure that a meaningful focus to tackling hate crime is given by police forces and other criminal justice agencies who are now legally obliged to both recognise and attend to the “hate” element of offences. Without legal classification it is less likely that a state will create special measures and policies aimed at monitoring and measuring anti-LGBT crimes. Research by Walters and colleagues on the legal process for hate crime in England and Wales found that there were various practical reasons for codifying hate crimes in law. Many of the interviewees they spoke to noted the importance of “flagging” hate-based offences within the criminal justice system, which meant that statutory agencies were aware of the type of crime that an offender had been convicted of. They note that the recording of offences as “hate crimes” within a criminal justice system can have three important functions. The first is that it helps to identify repeat offenders when dealing with future incidents of hate. Without this specific labelling of an offence it is less likely that evidence of past hate-based conduct will be presented in court, meaning that sentencing of similar offences in the future could be impacted. Second, criminal justice agencies that are tasked with addressing offending behaviour post sentence are also likely to be assisted where offences are labelled to reflect the hate element of an offence. Third, accurate labelling of hate-based offences also ensures that victims and targeted communities see that justice has been done and that the crimes committed against them have been treated as “hate crimes”.

In a recent research report that compared five jurisdictions in the EU, Schweppe and colleagues concluded that “[i]t is clear across partner jurisdictions that without a clear understanding of the legislation, policies on the investigation of hate crime, or an understanding of the process of including a hate element in the prosecution, the hate element [of a crime] will be lost at the point of investigation” (Schweppe et al. 2018: 76-77). If the hate element of an anti-LGBT crime is lost from the very start of the criminal process it is less likely to be recognised within the system, and this means that the hate element of such crimes is not effectively challenged by the state.

Schweppe and colleagues (2018: 77) note that “where there are specialisms in investigation of hate crime, this results in more informed practices amongst investigators, and allows them to dedicate the additional time that is often required to conduct an investigation of this type.” Perhaps the clearest example of a jurisdiction with an extensive legislative and policy framework for anti-LGBT hate crime is England and Wales. England and Wales records, prosecutes and convicts more LGBT hate crimes than anywhere else in the world. In fact, the number of recorded LGBT hate crimes is likely to be larger than the rest of the Commonwealth countries (that officially record such offences) combined. This is at least partly because there is a well-established policy domain for hate crime in England and Wales which was initiated in the late 1990s.¹⁹

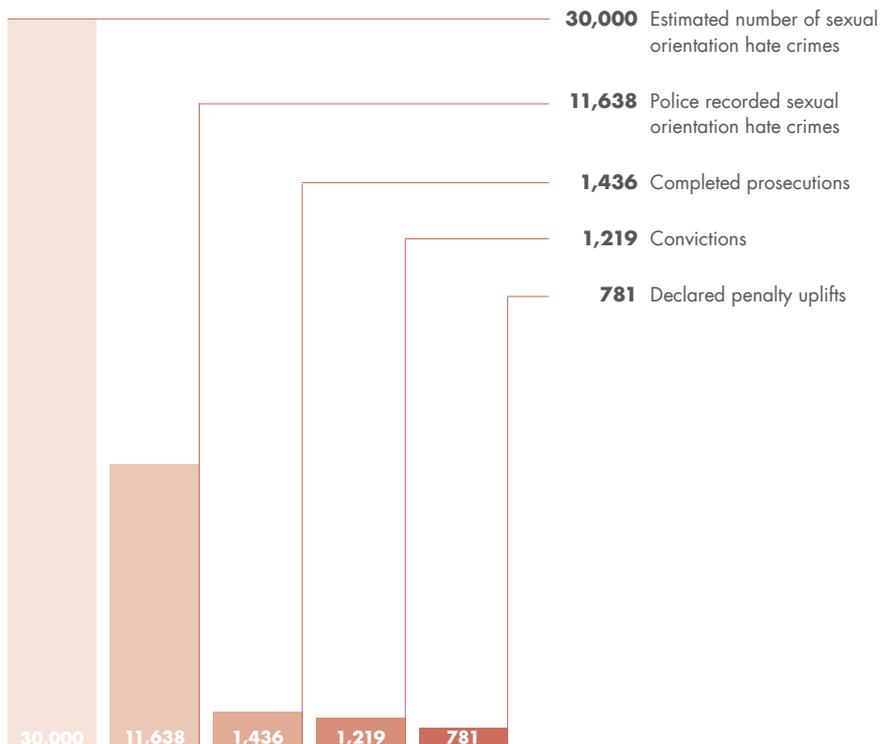
¹⁹ It is also likely to be linked to the broad definitions that the UK gives to anti-LGBT hate crimes (see sections below).

²⁰ The data and graph are adapted and updated from research by Walters et al. (2017), with the authors’ permission.

However, it should be noted that even in those jurisdictions with an established legal framework for LGBT hate crime, many cases can ‘drop out’ of the system. The diagram below shows the number of incidents that filter through the criminal justice system in England and Wales.²⁰ Data taken from the Crime Survey for England and Wales which estimates crime levels across both countries showed that between 2017 and 2018 there were an estimated 30,000 sexual orientation hate crimes. During the same period, official police figures showed that there were 11,638 sexual orientation hate crimes recorded across the 43 police services in England and Wales. Further, the Crown Prosecution Service reported that there were 1,436 prosecutions for crimes that involved sexual orientation hostility which resulted in 1,219 convictions. Out of this total, 64.1% of convictions also resulted in a “declared uplift” due to sexual orientation hostility. This meant that there were 781 cases in England and Wales where hate crime laws for anti-LGB hate crime were applied.

It should be reiterated that having anti-LGBT hate crime laws on the statute books may not be enough to ensure that such crimes are taken seriously by law enforcement or by the courts. As Figure 2 above shows, even in jurisdictions where there are long established hate crime laws, policies, guidance and training, many cases can still filter out of the system. The study by Schweppe and colleagues recommends that jurisdictions back legal change with a “dedicated policy in relation to the investigation of a hate crime... [which is] supported by comprehensive training programmes, which are delivered to all stakeholders in that process nationally. These should be supplemented with specific training packages designed specifically for those individuals who work directly with victims...” (2018: 76-77).

FIGURE 2. Number of sexual orientation hate crimes that drop out of the legal system



**Section 2:
International and
Regional Legal Standards
for LGBT Hate Crimes
across the Commonwealth**

2.1 Recognition of rights in international human rights law

Recognition of LGBT human rights has come late to international law. Even now, no international human rights instruments provide expressly for their protection (though express mention can be found in regional treaties: see Europe, below).

Nonetheless, international human rights bodies have repeatedly made it clear that human rights are universal and apply equally to all.²¹ Furthermore, anti-discrimination provisions in international human rights instruments have been interpreted as inclusive of discrimination on the grounds of sexual orientation or gender identity.

2.1.1 United Nations

Key treaties long ago set out an obligation on state parties to implement effective protection and remedies against racial discrimination. Early models for hate crime law can be found in the International Convention on the Elimination of All Forms of Racial Discrimination²² and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.²³ It is now regarded as clear that UN member states have an obligation to provide effective protection against sexual orientation and gender identity discrimination.

Key UN Moments for Sexual Orientation and Gender Identity Rights

- 1994** The UN Human Rights Committee decided in *Toonen v Australia*²⁴ that:
- adult consensual sexual activity in private is covered by the concept of “privacy” under Article 17 of the UN’s International Covenant on Civil and Political Rights (ICCPR)
 - the concept of “sex” as a protected characteristic in the ICCPR includes sexual orientation
- 2000** The UN Committee on Economic, Social and Cultural Rights stated that sexual orientation discrimination was specifically prohibited by Articles 2.2 and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁵
- 2009** The UN Committee on Economic, Social and Cultural Rights stated that gender identity discrimination was specifically prohibited by Article 2.2 of ICESCR²⁶
- 2010** The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasised intersecting forms of discrimination against women, including sexual orientation and gender identity. It is a core obligation of states to legally recognise and prohibit these.²⁷

²¹ This has been clear since the adoption of the Universal Declaration on Human Rights in 1948, as set out in Article 2 <http://www.un.org/en/universal-declaration-human-rights/>

²² <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

²³ <http://www.un.org/documents/ga/res/36/a36r055.htm>

²⁴ Communication No. 488/1992, U.N. Doc CCRP/C/50/D/488/1992 (1994) <http://hrlibrary.umn.edu/undocs/html/vws488.htm>

²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, E/C.12/2000/4, para. 18 <https://www.refworld.org/pdfid/4538838d0.pdf>

²⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 2 July 2009, E/C.12/GC/20, para. 32 <https://www.refworld.org/docid/4a60961f2.html>

²⁷ General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28

None of these developments require UN member states to legislate against hate crimes. The UN has however given priority to eliminating violence against LGBT persons. In 2011 the UN Human Rights Council adopted the first UN resolution on violence and discrimination based on sexual orientation and gender identity.²⁸ A report for the Human Rights Council (2015), pursuant to the second UN resolution on this topic, maintains:

“States have an obligation to exercise due diligence to prevent, investigate, punish and redress deprivation of life and other acts of violence. United Nations mechanisms have called upon States to fulfil this obligation by taking legislative and other measures to prohibit, investigate and prosecute all acts of targeted, hate-motivated violence and incitement to violence directed at LGBT and intersex persons, and to provide remedy to victims and protection against reprisals. They have called for State officials to publically condemn such acts, and to record statistics on such crimes and the outcomes of investigations, prosecutions and remedial measures.”

It would be consistent to introduce hate crime laws in fulfilment of these UN obligations.

2.1.2 Yogyakarta Principles

The “plus 10” version of the “Yogyakarta Principles” (2017) draws on international human rights law to insist that states must legislate to tackle hate speech and hate crime. The Principles have not been adopted by the United Nations, but have, for instance, been cited with approval in the national courts of the Commonwealth member states of Australia and India.²⁹

2.2 Recognition of rights in regional human rights law

Fundamental protections against discrimination and hate crime for LGBT people are also increasingly being addressed by regional human rights bodies, as illustrated by the following examples.

2.2.1 Africa

All Commonwealth countries in Africa are members of the African Union. Its main human rights body, the African Commission on Human and Peoples’ Rights, adopted in 2014 a Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.³⁰ This Resolution:

- calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and

²⁸ Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) - A/HRC/RES/32/2.

²⁹ *In re Alex*, Family Court of Australia, [2009] FamCA 1292 and *National Legal Services Authority v Union of India* 2014 5 SCC 438.

³⁰ Resolution 275 www.achpr.org/sessions/55th/resolutions/275/

- strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

2.2.3 Caribbean and Americas

All Commonwealth countries in the Caribbean and Americas are members of the Organisation of American States. Its General Assembly has adopted several resolutions on human rights, sexual orientation and gender identity, with two particularly strong ones in 2008 and 2016.³¹

In 2015, its Inter-American Commission on Human Rights stated that criminalisation of consensual same-sex intimacy between adults and cross-dressing, and the discriminatory use of public indecency laws, “violate the principles of equality and non-discrimination, in accordance with international human rights law” (2015: 15). In Recommendation 27, it concluded that member states “have various obligations with respect to violence against LGBTI persons, including measures to prevent, investigate, prosecute, punish and provide reparations” and that they should introduce appropriate criminal laws.

2.2.4 Europe

Express prohibition of discrimination based on sexual orientation is to be found in the Charter of Fundamental Rights of the EU.³² Cyprus, Malta and the United Kingdom (UK), the Commonwealth countries in Europe, are all members of the European Union (EU) although the UK is in the process of exiting the Union.

These states are also members of the Council of Europe (Canada is also an observer). Through its European Court of Human Rights, the Council of Europe has long taken a positive position on LGBT rights. In 1981 it held the criminalisation of consensual same-sex intimacy between adults to be a violation of the right to private and family life³³ and in 1992 it decided likewise as regards the failure to recognise transgender status.³⁴ The importance to the Council of Europe of eliminating violence and discrimination against LGBT persons was highlighted in its 2010 resolution on sexual orientation and gender identity.³⁵ Furthermore, in a 2010 recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, the Council of Europe recommended that “[m]ember states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.”³⁶

³¹ Resolution AG/RES. 2435 (XXXVIII-O/08) and Resolution (AG/RES. 2887 XLVI-O/16).

³² Article 21.1.

³³ *Dudgeon v United Kingdom*, [1981] 4 EHRR 149.

³⁴ *B v France*, [1992] ECHR, Series A.232; [Appl.13343/87], 25 March 1992.

³⁵ Discrimination on the basis of sexual orientation and gender identity, Resolution 1728 (2010).

³⁶ Recommendation CM/Rec(2010)5, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a. This was one of five recommendations made to member states relating to hate crimes and other hate-motivated incidents.

**Section 3:
National Legal
Models for LGBT
Hate Crime Across
the Commonwealth**

This section will examine those Commonwealth countries which have specific LGBT hate crime law. It will outline the current body of laws and review key court judgments that have interpreted and applied hate crime legislation. Extracts from this legislation are included as examples in this section, and fuller detail can be found in Annex A.

None of the Asian Commonwealth countries has a hate crime law that tackles LGBT victimisation, and only one of the African countries (South Africa) is likely to enact one soon. Although none of the Caribbean Commonwealth states has LGBT hate crime law, some recognise the concept of specific aggravated offences in their criminal codes: several have substantive aggravated offences on non-hate crime grounds.³⁷

Hate crime law can also vary within some countries: Australia in particular has no hate crimes law at the federal level,³⁸ but some of the states and territories have their own, each different from the other. The coverage across Australia is therefore patchy and variable.

As can be seen in the table below, only a minority of Commonwealth countries or their states and territories have hate crime legislation tackling LGBT victimisation. The table shows that those which do have it are most likely to use the sentence enhancement approach, which will be discussed in section 3.1. All fall under the animus model, discussed in section 3.2.

TABLE 4. Commonwealth countries and hate crime laws

AFRICA

Country	Type of hate crime legislation	Animus or group selection model	Sexual orientation and/or gender identity
Botswana	—		
Cameroon	—		
The Gambia	—		
Ghana	—		
Kenya	—		
Kingdom of eSwatini	—		
Lesotho	—		
Malawi	—		
Mauritius	—		
Mozambique	—		
Namibia	—		
Nigeria	—		
Rwanda	—		
Seychelles	—		
Sierra Leone	—		
South Africa (draft government bill)	Penalty enhancement	Animus	Sexual orientation and gender identity
Uganda	—		
Tanzania	—		
Zambia	—		

³⁷ Jamaica's Offences Against the Person Act, s 40, provides for a substantive offence of aggravated assault on women or children. The Montserrat Penal Code, s 185-189, provides for several substantive aggravated offences. Belize and Grenada's Criminal Codes have several substantive aggravated offences.

³⁸ Except for specific "urging of violence" against groups offences, Criminal Code Act 1995, s 80.2A & 2B.

ASIA

Country	Type of hate crime legislation	Animus or group selection model	Sexual orientation and/or gender identity
Bangladesh	—		
India	—		
Pakistan	—		
Sri Lanka	—		
Brunei Darussalam	—		
Malaysia	—		
Singapore	—		

CARIBBEAN AND AMERICAS

Antigua & Barbuda	—		
Bahamas	—		
Barbados	—		
Belize	—		
Canada	Sentence enhancement Substantive offence	Animus	Sexual orientation and gender identity
Dominica	—		
Grenada	—		
Guyana			
Jamaica			
St Kitts & Nevis			
Saint Lucia			
St Vincent & The Grenadines			
Trinidad & Tobago			

EUROPE

Cyprus	Sentence enhancement	Animus	Sexual orientation and gender identity
Malta	Substantive offences Sentence enhancement	Animus	Sexual orientation and gender identity
United Kingdom	England & Wales: - Sentence enhancement Northern Ireland: - Sentence enhancement Scotland: - Sentence enhancement	Animus Animus	E&W: Sexual orientation and transgender identity (narrowly defined ³⁹) NI: Sexual orientation Scotland: Sexual orientation and transgender identity (broadly defined ⁴⁰)

³⁹ "Being transgender" includes "being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment: Criminal Justice Act 2003, s 146(6).

⁴⁰ "Transgender identity" means transvestism, transsexualism, intersexuality or having changed gender via the Gender Recognition Act 2004, and also includes any other gender identity that is not standard male or female gender identity: Offences (Aggravation by Prejudice) (Scotland) Act 2009, s 2.

EUROPE: UK OVERSEAS TERRITORIES AND CROWN DEPENDENCIES⁴¹

Overseas territories

Country	Type of hate crime legislation	Animus or group selection model	Sexual orientation and/or gender identity
Akrotiri and Dhekelia	—		
Anguilla	—		
Bermuda	—		
British Virgin Islands	—		
British Antarctic Territory			
British Indian Ocean Territory	—		
Cayman Islands	—		
Falkland Islands	Sentence enhancement	Animus	Sexual orientation
Gibraltar	Substantive offences Sentence enhancement	Animus Animus	Sexual orientation Sexual orientation
Montserrat	—		
Pitcairn, Henderson, Ducie and Oeno Islands	Sentence enhancement	Animus	Sexual orientation and gender identity
St Helena, Ascension Island and Tristan da Cunha	—		
South Georgia & South Sandwich Islands	—		
Turks & Caicos Islands	—		

Crown dependencies

Guernsey	(murder only) - Sentence enhancement	Animus	Sexual orientation
Isle of Man	(persons in custody only) - Sentence enhancement	Animus	Sexual orientation
Jersey (proposed)	<i>Jersey's government is currently drafting hate crimes legislation</i>	<i>Unspecified</i>	<i>Likely to include sexual orientation</i>

⁴¹ The table shows hate crime laws only if these are distinct laws created specifically for the territory or dependency. In some of the overseas territories which contain military bases, there are complex legal regimes, and the hate crime law of the occupying military power, for example, may apply to some or all persons within the territory.

PACIFIC⁴²

Australia	New South Wales: - Sentence enhancement Northern Territory: - Sentence enhancement Victoria: Sentencing Act - Sentence enhancement	Animus Animus Animus	Sexual orientation Open-ended Open-ended
Fiji	—		
Kiribati	—		
Nauru	—		
New Zealand	Sentence enhancement	Animus	Sexual orientation and gender identity
Papua New Guinea	—		
Samoa	Sentence enhancement	Animus	Sexual orientation and gender identity
Solomon Islands	—		
Tonga	—		
Tuvalu	—		
Vanuatu	—		

3.1 Types of hate crime legislation

3.1.1 Sentence enhancements

In this model, the offender is charged with a basic offence (e.g. assault). If there has been hostility or bias in the commission of the offence, legislation may provide that the penalty be enhanced during the sentencing stage of the legal process. An example is section 718(2)(a) of Canada's Criminal Code. If the offence was motivated by bias, prejudice or hate based on sexual orientation or gender identity or expression, the court must treat this as an aggravating factor when sentencing.⁴³

Canada: Criminal Code, s 718(2)(a)

[...] a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

[...] evidence that the offence was motivated by bias, prejudice or hate based on [...] sexual orientation, or gender identity or expression [...] shall be deemed to be aggravating circumstances

⁴² The external territories of Australia and New Zealand do not have distinct hate crime laws of their own.

⁴³ Criminal Code [R.S.C., 1985, c. C-46]
<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-718.2.html>

This provides wider judicial discretion than a specific offence usually does. The usual requirement is that the sentence be increased, with some discretion left to those responsible for determining sentences to decide how much in any particular case. Unusually, the New South Wales (NSW) legislation specifically states that “[t]he fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.” Nevertheless, the fundamental presumption is that the aggravated offence is more serious than the basic offence.

Occasionally, hate crime legislation may state that the offence be given a fixed enhanced penalty. Articles 222A(2), 251D and 325A of the Maltese Criminal Code, for instance, specify that punishments for selected offences aggravated by sexual orientation or gender identity hatred are to be increased by one to two degrees.⁴⁴

Malta: Criminal Code, Article 222A

The punishments established in the foregoing provisions of this sub-title shall also be increased by one to two degrees when the offence is aggravated or motivated on the grounds of gender, gender identity, sexual orientation [...]

An offence is aggravated or motivated on grounds of gender, gender identity, sexual orientation [...] if:

- (a) at the time of committing the offence, or immediately before or after the commission of the offence, the offender demonstrates towards the victim of the offence hostility, aversion or contempt based on the victim’s membership (or presumed membership) of a group, denoting a particular gender, gender identity, sexual orientation [...] or
- (b) the offence is motivated, wholly or partly, by hostility, aversion or contempt towards members of a group as referred to in paragraph (a).

A disadvantage of the Maltese approach is that unfairness may be perceived if the “hatred” element was a minor part of the offence yet still captured by the wording (the “hatred” in the Maltese legislation can be “motivated” or “demonstrated”, and it is immaterial whether the offender’s hostility is also based, to any extent, on any other factor, so it is very broadly drawn). In practice, this legislation is unlikely ever to result in much case law as the “hatred” threshold is so high (see the discussion of thresholds in the next section).

An advantage of the sentence enhancement model is that it is simple to understand and apply. It is the simplest type of law to design and implement, but may be unsuitable for criminal legal systems that have narrowly-defined sets of offences with slender ranges of sentencing bands for them, as this will not allow for much sentence enhancement. Also, if there is no requirement to record the enhancement, reliable data will not be gathered, and those determining the sentence may fail to consider applying the law (for example, see the discussion of South Africa’s existing hate crime law in section 3.3.2 below).

⁴⁴ Maltese Criminal Code, as amended 2018, Article 83B (added in 2012: see side note) <http://www.justiceservices.gov.mt/downloaddocument.aspx?app=lom&itemid=8574>

3.1.2 Substantive offences

Some countries have created substantive hate crime offences. In this model, the offender is convicted of a named hate crime offence. Usually, these specific offences are a more serious version of a basic offence, such as assault. They may carry a higher maximum sentence. An example is Gibraltar's offences of "aggravated assault by reason of sexual orientation," which carries a higher maximum than the basic offence of common assault.⁴⁵

Gibraltar: Crimes Act 2011, s 113(C)

Aggravated assaults by reason of sexual orientation.

- (1) A person commits an offence under this section if that person commits—
- (a) an offence under section 166 or 167 (wounding with intent to do grievous bodily harm or malicious wounding);
 - (b) an offence under section 176 (actual bodily harm); or
 - (c) an offence under section 175 (common assault),
- which is aggravated by reason of sexual orientation for the purposes of this Part.
- (2) A person who commits an offence under subsection (1)(a) in relation to an offence under section 166 is liable on conviction on indictment to imprisonment for life
- (3) A person who commits an offence under subsection (1)(a) in relation to an offence under section 167 or commits an offence under subsection (1)(b) is liable—
- (a) on summary conviction to imprisonment for 12 months or the statutory maximum fine, or both;
 - (b) on conviction on indictment to imprisonment for 7 years, or to a fine, or both.
- (4) A person who commits an offence under subsection (1)(c) is liable—
- (a) on summary conviction to imprisonment for 12 months or the statutory maximum fine, or both;
 - (b) on conviction on indictment to imprisonment for 2 years or to a fine, or both.

These substantive offences help to focus the attention of criminal justice personnel, from police evidence gathering to prosecution to conviction. Research by Walters and colleagues (2017) indicated that this can increase the likelihood of these offences being used (see also Home Office, 2018). A disadvantage is that they may be more complex in their operation and hence more difficult for personnel to understand. For instance, in England and Wales this has led, on occasion, to "double-counting" in sentence uplift, where those responsible for determining sentences uplift both for the aggravating element and the greater seriousness of the offence, which in itself includes the hate element. A very similar problem has occurred in NSW, however, which uses a general sentence enhancement, so the problem is not restricted to specific offences (NSW Law Reform Commission, 2012: 8). As was said in the English case of *R v Fitzgerald*, "[t]here will be cases ... [in which] aggravation of the offence is so inherent and integral to the offence itself that it is not possible sensibly to assess the overall criminality involved in such a discrete way."⁴⁶

⁴⁵ Crimes Act 2011, as amended by the Criminal Justice (Amendment) Act 2013, Part 7, s 113C <http://www.gibraltarlaws.gov.gi/articles/2011-23o.pdf>

⁴⁶ *R v Fitzgerald* 2003 EWCA Crim 2875 at [10-12]. See also Walters et al. (2017:149).

“[t]here will be cases ... [in which] aggravation of the offence is so inherent and integral to the offence itself that it is not possible sensibly to assess the overall criminality involved in such a discrete way.”

3.1.3 Hybrid offence/sentence enhancements

An alternative model of legislating for hate crime is to create a hybrid system whereby any basic offence can be “aggravated” in law and at sentencing. Rather than creating new substantive offences with new maximum sentences for each offence, the legislation simply allows prosecutors to add the hate element to the basic offence which must then be proved at trial. If proved, the judge must then apply a sentence uplift during sentencing. This means that aggravation can be added to all criminal offences (as against a set list, see e.g. England and Wales), and works much the same as the sentence enhancements explained above, but with the key distinction that the offence is re-labelled in law upon conviction and must be recorded as such. Such an approach is taken by Scotland.

Scotland: Offences (Aggravation by Prejudice) (Scotland) Act 2009, s2

[...] the court must—

- (a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity,
- (b) record the conviction in a way that shows that the offence is so aggravated,
- (c) take the aggravation into account in determining the appropriate sentence, and
- (d) state—
 - (i) 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, or
 - (ii) otherwise, the reasons for there being no such difference.

This type of hate crime legislation may help to reduce some of the key problems that have been identified in relation to the sentencing enhancement model. However, as no new substantive offences are specifically created it is less likely that higher sentencing maxima can be set. This means that although the courts are expected to enhance the sentence, they can only sentence up to the maximum which is set for the basic offence.

TABLE 5. Hate crime legislation models, compared

<p>Sentence enhancement (offender is convicted of a basic offence and receives an enhanced penalty at sentencing)</p> <p><i>Advantages</i></p> <ul style="list-style-type: none">• simple for legislators to design• may not require proof of the hate element during trial• may allow greater judicial discretion over the amount of the increased penalty <p><i>Disadvantages</i></p> <ul style="list-style-type: none">• does not reflect the hate element of the offence in law• unsuitable for criminal legal systems that have narrowly-defined sentencing bands, as this will not allow for much sentence enhancement• if there is no requirement to record the enhancement, reliable data will not be gathered, and some of those responsible for determining sentences may fail to consider the hate element as an aggravating factor
<p>Substantive offence (offender is convicted of a named hate crime offence)</p> <p><i>Advantages</i></p> <ul style="list-style-type: none">• the hate element of the offence is officially recorded, so it is easy to monitor how the hate crime law is being used• focuses the attention of criminal justice personnel on investigating/prosecuting the hate element of an offence• may increase the likelihood of the hate crime law being used <p><i>Disadvantages</i></p> <ul style="list-style-type: none">• may be more complex in their operation• more difficult for criminal justice personnel to understand• if the hate element of the offence is not proved the offender may escape all criminal liability
<p>Hybrid (offender is convicted of a basic offence, but a named aggravation is attached to it)</p> <p><i>Advantages</i></p> <ul style="list-style-type: none">• eliminates the need for a dual system of sentencing enhancements and substantive offences which can be complex and confusing for criminal justice personnel• may be easier for criminal justice personnel to understand• the hate element of the offence is officially recorded and data can be monitored <p><i>Disadvantages</i></p> <ul style="list-style-type: none">• the courts may only be able to sentence up to the maximum penalty set for the basic offence

TABLE 6. Types of hate crime legislation dealing with LGBT-related hate crime in Commonwealth countries

Country/Territory	Sentence enhancement	Substantive offence(s)	Hybrid
Country/Territory	✓		
Australia: NSW	✓		
Australia: NT	✓		
Australia: Vic	✓		
Canada	✓	✓	
Cyprus	✓		
England & Wales	✓		
Falkland Islands	✓		
Gibraltar		✓	
Guernsey	✓ (murder only)		
Isle of Man	✓ (in prisons only)		
Malta	✓	✓	
New Zealand	✓		
Northern Cyprus		✓	
Northern Ireland	✓		
Pitcairn Islands	✓		
Samoa	✓		
Scotland			✓
South Africa (draft)			✓

3.1.4 Sentencing guidelines

This report focuses specifically on hate crime legislation, but a third option is the use of sentencing guidelines, either developed through judicial interpretation or laid down by bodies such as sentencing councils. These are not a substitute for hate crime legislation but may be a basis from which to develop it.

Trinidad & Tobago has case law which has developed a concept of aggravation on racial grounds.⁴⁷ The Eastern Caribbean Supreme Court⁴⁸ has expressly made use of UK sentencing guidelines; these recognise aggravation on the ground of sexual orientation or gender identity, albeit that that ground was not related to the cases at hand, so it remains to be seen whether these would be drawn upon.

⁴⁷ *Attorney General's Reference Nos 29, 30 and 31 of 1994* [1995] 16 Cr App R (S) 698.

⁴⁸ See e.g. *R v Sprauve*, Criminal Case No.4 of 2014, July 18 2014

<https://www.eccourts.org/queen-v-kevin-sprauve/>

and *R v Nelson*, Case No. SLUHRD2012/0556, January 20, 22, June 5, July 14 2014

<https://www.eccourts.org/the-queen-v-craig-nelson/>

The Eastern Caribbean Supreme Court is the common court for the Organisation of Eastern Caribbean States.

Its Commonwealth members include Anguilla, Antigua and Barbuda, the British Virgin Islands, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent.

3.2 Analytical models for defining hate crime in legislation

There are two main approaches to defining a hate crime in law: based either on the animus model or the group selection model (Lawrence, 1999). All Commonwealth countries that have hate crime legislation appear to use an animus model, as will be shown below, but distinguishing between the two in practice is not always easy.

3.2.1 Animus

In the “animus model”, an offence is a hate crime if there is an element of prejudice or hatred in the commission of an offence. This is the approach used for example in the UK’s legal systems. The English definition requires that the offence has been (wholly or partly) “motivated by hostility”, or that the perpetrator “demonstrated hostility” towards the victim, based on a characteristic such as their sexual orientation.

Criminal Justice Act 2003, s 146 Increase in sentences for aggravation related to disability, sexual orientation or transgender identity

- (1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).
- (2) Those circumstances are—
- (a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—
- (i) the sexual orientation (or presumed sexual orientation) of the victim,
[...] or
 - (b) that the offence is motivated (wholly or partly)—
- (i) by hostility towards persons who are of a particular sexual orientation

This approach focuses on the moral culpability of the perpetrator/s. It applies where the perpetrator either intended the harm or was knowingly indifferent to the harm he might cause. This fits well with the individual responsibility that most criminal legal systems require.

It also fits well with popular conceptions of a prejudice such as racism (Goodall, 2013). The animus model may be more likely to dovetail with lay understanding of what a hate crime is, and so new hate crime legislation may be more easily understood if it adheres to this model.

A potential difficulty is that hostility can be hard to prove. Hate crime law may lie unused unless the officers of the justice system are trained to be vigilant at every stage, from reporting and recording through investigation and prosecution to conviction (Schweppe et al., 2018).

Much depends however on the thresholds for defining animus. A hate crime law may require proof of “hate”, or merely “prejudice” or “intolerance”. The laws in Commonwealth countries vary along a spectrum.

CASE HIGHLIGHT: ANIMUS (AUSTRALIA: VICTORIA)

In *Katsakis*, four young men set out on a pre-meditated plan to find and attack people who were gay. They found two men on the street, repeatedly punched and kicked them in a prolonged attack, then robbed them.

When interviewed by police, *Katsakis* said he wanted to "fuck up their day because they were gay."

The men were left significantly injured, and their victim impact statement described their serious distress at the attack and its homophobic motive.

DPP v Katsakis [2013] VCC 1321

Another element is whether "motivation" must be proved. A law may require that the offender be motivated by animus (as in NSW, Australia); or it may be sufficient that the offender "demonstrated" it (as in the case of England and Wales). This latter approach captures cases where the offender may not have begun the offence with a hostile motivation, but nevertheless demonstrated hostility during the commission of the offence. This is easier to prove and, in the UK, the great majority of hate crime prosecutions are brought under this heading (Walters, et al., 2017).

Some scholars have argued, however, that there should be a subjective element. If the hate element carries additional moral blame, the offender ought to at least be aware that his or her action or motivation might have a prejudiced effect (Walters, 2014; Goodall, 2013; Malik, 1999). Walters and colleagues found in England and Wales that it will be extremely rare that a case will involve a perpetrator who is completely unaware that his objective demonstration of hate was in fact an expression of identity-based prejudice. By far the most frequent source of evidence of demonstrated hostility in English case law is the offensive insult, using prejudiced language that all parties will recognise as such (2017). Walters (2014) does, however, give an example of a situation that should not be treated as a demonstration of hostility: this is where an offender uses a particular insult that has taken on a new and unprejudiced meaning within colloquial parlance. Walters and colleagues (2017) in their study of English cases also found a case where an insult used during the commission of an offence had been used in its old (non-racist) meaning but which was perceived by the victim in its more contemporary sense to be racist.⁴⁹

The test to be applied by the courts is central to the scope of hate crime law, directly affecting the number of cases likely to be investigated, prosecuted and convicted. Some commentators argue that remarks made after conflict has begun are not usually made with the "deliberate intention" to be offensive (Mason and Dyer, 2013: 890). Others argue that knowingly expressing prejudice or hatred in the course of an offence is not merely "incidental": it is an integral part of the offence and enhances the harm caused (Goodall, 2013; Walters, 2014; Duff and Marshall, 2018).

⁴⁹ In the case, the accused had used the phrase "black bastard" meant as an old colloquial derogatory term referring to a police officer, and not to the race or colour of anyone.

3.2.2 Group selection

In the “group selection” model, all that needs to be shown is that the offender acted “because of” or “by reason of” the victim’s protected characteristic. This approach is said to be the approach favoured by several US states, although this has been disputed (Goodall, 2013).

The advantage of the group selection model is that it recognises the impact on the victim. Whether or not the perpetrator felt some sort of prejudice or hatred, the impact on the victim and on those who fear falling into that victim’s group may be just as severe – and likewise the threat to public order.

CASE HIGHLIGHT: GROUP SELECTION WITHOUT ANIMUS (NEW SOUTH WALES)

In *Asiettt*, the perpetrators broke into the home of a family they identified as Asian. They claimed that they chose this property because such families tended to keep money and jewellery in their homes.

There was no evidence that the appellants harboured hostility or contempt towards Asian families. They claimed simply to have made an actuarial calculation that that house would be more likely than others to contain portable valuables.

In New South Wales, the legislation requires that the offence be “motivated by hatred for or prejudice against a group of people.” Here, there was no evidence that the offender hated or felt prejudice against Asians; rather he chose them for the offence because “he believed that as Asians they fell into the category of people whose homes might contain valuables suitable for stealing.” This did not fall within the hate crime provision.

R v Asiettt [2006] NSWCCA 49, [124]. Crimes (Sentencing Procedure) Act 1999, section 21A(2)

It has been asserted that the group selection model helps to recognise the structural aspects of targeted victimisation (Wang, 2000). The argument here is that the targeted victimisation (whether motivated by hate or not) of already marginalised social groups serves to compound the social disadvantage of these groups. For example, by specifically targeting a disabled person because the victim is perceived to be vulnerable or an “easy target”, the offender’s conduct serves to sustain a social hierarchy that characterises disabled people as weak because of their identity. Hence, even where there is no evidence of an outward motivation or demonstration of hostility, the offender’s conduct is discriminatory towards disabled people and as such should attract additional culpability while falling within the meaning of “hate crime”.

In some ways it can be easier to prove that there was group selection than to apply a test that is restricted to “motivation”. The Organisation for Security and Co-operation in Europe considers that this approach therefore “may do a better job of addressing the kind of harm that hate crime laws are intended to prevent” (2009: 48-49). On the other hand, it may also exclude some cases caught by the broadest animus approaches: a requirement that the offence be committed “because of” the victim’s protected characteristic may not catch cases where the prejudiced behaviour arose spontaneously in the course of the offence.

Yet the model is deemed by some commentators to be controversial as it may capture cases where the perpetrator does not consciously hate the victim. Labelling these types of targeted victimisation as a form of “hate” may be in conflict with the principle of “fair labelling”, as it may inappropriately describe what the offender intended to do and provide misleading information to decision makers (see Chalmers and Leverick, 2008). It is a model that some feel is more appropriate for civil law than criminal law, as it recognises the flaws of the society which placed the victim group at a disadvantage (Goodall, 2013: 221).

Furthermore, although a legal system might decide that such a case of exploitation is more serious, it need not necessarily be labelled as “hate crime.” Instead, it can be understood as taking advantage of the victim’s vulnerability, which can itself be an aggravating factor at sentencing. For example, it was held in the English case of *R v Bickley*⁵⁰ that singling out a Muslim home to burgle during the religious festival of Eid because it was likely to be empty did not make the offence religiously-aggravated; it was nonetheless an aggravating factor going to culpability.

On the other hand, Walters and colleagues (2017) found that a focus on “vulnerability” in crimes against people with disabilities in England and Wales has hampered recognising hate or prejudice against these groups. Many have also argued that the constant labelling of disabled people as vulnerable serves to perpetuate a false representation of disabled people as innately weak and unable to care for themselves, and this is in and of itself a form of prejudice (Walters et al., 2017).

⁵⁰ *R v Bickley* [2014] EWCA Crim 2375 at [17].

3.3 Thresholds for proving the hate crime element

Although all the Commonwealth hate crime laws use an animus approach, there is very wide variation among the thresholds for proof. Because few of the leading cases deal with sexual orientation or gender identity, this section will discuss other forms of aggravation where they are useful in understanding how the domestic courts might approach LGBT hate crime.

3.3.1 Minimum threshold is motivation by “hate/hatred”

In Malta and Australia’s Northern Territory, the relevant aggravation of an offence cannot be proven unless it is motivated by hatred or hate.

Northern Territory (Australia), Sentencing Act 1995, s 6A

any of the following circumstances in relation to the commission of an offence may be regarded as an aggravating factor for that section:
[...] the offence was motivated by hate against a group of people

Both the motivation for an offence and the emotion of hatred are hard to prove, making this a very demanding threshold. It is not surprising therefore that the Northern Territory has had little reported case law. The section also does not specify the victim groups covered: it simply provides that the offence is to be “motivated by hate against a group of people.”⁵¹ An interpretation that includes gender identity and sexual orientation seems likely however, as the territory has extensive equality and LGBT discrimination law.

Malta recognises that hate may only be part of the motivation, but nonetheless it lacks reported cases interpreting its sentence enhancements, even though there are several reported cases on incitement to hatred. As discussed below (see NSW (Australia) and Canada), it is not essential that a law explicitly prescribes that a partial motivation of hate or prejudice is sufficient to meet the hate crime threshold. However, it is probably more likely that an offence will be charged and convicted as such if the law makes this clear.

Malta: Criminal Code, Article 83B

The punishment established for any offence shall be increased by one to two degrees when the offence is aggravated or motivated, wholly or in part by hatred against a person or a group, on the grounds of gender, gender identity, sexual orientation [...]

⁵¹ Sentencing Act 1995, s 6A
<https://legislation.nt.gov.au/Legislation/SENTENCING-ACT>

Malta additionally has specific sentence enhancements for certain offences when aggravated or motivated on the grounds of gender identity and sexual orientation. The punishments for the offences of bodily harm, threats, private violence and harassment, and crimes against public safety and injury to property, must be increased by one to two degrees. The test for these is different, based on “hostility, aversion or contempt”, and the offence can be proved by evidence of either motivation or demonstration (for an explanation of “demonstration,” see section 3.3.4 below).⁵²

Malta: Criminal Code, Article 222A

An offence is aggravated or motivated on grounds of gender, gender identity, sexual orientation [...] if:
the offender demonstrates towards the victim of the offence hostility, aversion or contempt based on the victim’s membership (or presumed membership) of a group, denoting a particular gender, gender identity, sexual orientation [...] or the offence is motivated, wholly or partly, by hostility, aversion or contempt towards members of a group

3.3.2 Minimum threshold for motivation is “prejudice,” “bias” or “intolerance”

Four jurisdictions also focus on motivation, but have an additional option of proving the hate crime element by a lower standard: their legislation extends beyond hatred to encompass a motivation that is less than hatred:

- Canada uses the term “motivated by bias, prejudice or hate”
- Australia’s NSW uses the term “motivated by hatred for or prejudice against”
- Cyprus uses the term “motivation of prejudice”
- South Africa in its draft legislation uses the term “motivated by that person’s prejudice or intolerance.”

A fifth jurisdiction, Northern Cyprus, uses phrasing which is likely to be interpreted as similar to that of “motivation.” Its legislation makes reference to named offences carried out “as a result of” hatred or prejudice:

Northern Cyprus: criminal code as amended, section 151

(2) Whoever commits the offence [...] as a result of his/her hatred or prejudice against the victim’s sex, sexual orientation or gender identity

Canada and NSW have a considerable body of reported case law.

⁵² Article 222A(2), 251D and 325A. Although the term “aggravation” appears in the initial wording of the Maltese legislation, it is defined as meaning “demonstrated.”

New South Wales

New South Wales (NSW) was the first state in Australia to introduce hate crime law, but although it has significant case law, few deal with sexual orientation (Mason and Dyer, 2013) or gender identity. Those that do are concerning. Attention was drawn early on to the failure to use the legislation in cases of homophobia (McDonald, 2006) and concern has continued since.

New South Wales: Crimes (Sentencing Procedure) Act 1999, s 21A

Aggravating factors

[...] the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular [...] sexual orientation [...])

Even clear evidence of hatred or prejudice as part of the motivation has not always been sufficient to meet the NSW “motivation” test. *El Masri*⁵³ involved an attack on a man in a toilet who had made a gesture that El Masri interpreted as being a sexual act or advance. Although the Crown submitted at trial that the offence was motivated by hatred for or prejudice against sexual orientation, neither that court nor the appeal court made such a finding, or commented further. This was despite the appellant himself stating that the claimed advance had upset and angered him. Mason and Dyer examine this and other such cases involving sexual orientation, to argue that too much focus has been placed on the victim’s conduct rather than the offender’s (2013: 902).

The limits of the “motivation” test have been another feature of NSW case law. Ross involved the horrific murder of an infant. During the attacks that led to her death, Ross shouted foul and angry racist slurs at her. It was held that this was not, however, the motivation for the offences.⁵⁴ In *O’Brien and Hudson*,⁵⁵ two men carried out a very serious and unprovoked attack on a young Vietnamese student, again using foul racist language. During police interview, O’Brien also admitted to hatred of several racial groups. Here, the test was met, but it was held that racial hatred was “a very small part of the motivation” as the two men were frequently inclined to carry out attacks on people of all backgrounds.

In *Dean-Willcocks*, the offender randomly attacked a man in the street, repeatedly abusing him in offensive language as “Japanese” and telling him to “go back to Japan”. The victim died. Dean-Willcocks did not have a history of racism, but this was nevertheless held to be an offence motivated by prejudice against people from Japan or Asia. It may be that the difference between this and *O’Brien and Hudson* was that Dean-Willcocks had a history of good character and none of random violent attacks.

Both *Ross* and *O’Brien and Hudson* are a reasonable interpretation of the statutory language, but they exemplify a problem with the requirement of “motivation”. Neither sends a message of denunciation of the racism expressed during the commission of extreme offences.

⁵³ *R v Said El Masri* [2005] NSWCCA 167 [29 April 2005]
<http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2005/167.html>

⁵⁴ *Ross v R* [2016] NSWCCA 176 at [49]
<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2016/176.html>

⁵⁵ *R v O’Brien & Hudson* [2012] VSC 592
<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2012/592.html>

On the other hand, Mason and Dyer conclude from several cases in NSW that a prejudiced motivation can be inferred from racist (and in one case, misogynist) slurs. In one case, the racist motivation was inferred from the lack of any other possible motivation (2013: 887). Thus it seems there may be variation in judicial attitudes.

The “motivated by” requirement did not prevent racial aggravation being recognised within sentencing discretion in an assault case where the offenders racially abused a security guard after they were asked to leave a hotel. It was held that their offending was not motivated by racism but that their racial abuse constituted an aggravating feature.⁵⁶ This would not, however, be recorded as a hate crime.

Nevertheless, a partial motivation can meet the test. During an election period, there was a riotous attack by a mostly Sunni Muslim group on a mostly Shiite Muslim group. Their differences were both religious and political. The offender had helped organise the riot and took part in it. He handed out political leaflets and also used abusive words to describe the Sunnis he attacked. Although there was more than one motivation, and although both belonged to the same religion (albeit different sects) it was held that his offences had been motivated by religious hatred for a group of people as well as by political hatred.⁵⁷

More notorious and controversial are the cases of *Dunn and Robinson*.⁵⁸ These show a contrasting potential problem with the “motivation” requirement. The NSW law is open-ended, requiring that the offence be “motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).”⁵⁹ It is sufficiently open-ended to facilitate surprisingly wide interpretations of a “group of people”.

Dunn unfairly believed his neighbour was an active paedophile. He lit fires on the neighbour’s property, eventually burning down the man’s home. The offence was held to be motivated by hatred or prejudice against the neighbour because Dunn believed him to be a member of a particular group; that is, paedophiles.

In *Robinson*, a prisoner in custody attacked and killed another prisoner, who was a convicted paedophile. Robinson had an attitude of hatred towards “persons other than of an orthodox sexuality” and it appears, although the connection is not made entirely explicitly, that this caused it to fall within the hate crime section.

These decisions have been heavily criticised for several reasons, not least the interpretation of the statute (Mason, 2009; Mason, 2014). Active paedophiles, although clearly marginalised, are not victims of structural discrimination in common with the groups named as examples in the list. In an English case, it was held that sexual orientation does not include paedophilia.⁶⁰ The New South Wales Law Reform Commission (2013) has recommended the section be revised to include instead a closed list (including gender identity).

⁵⁶ *R v Robinson*, Robinson and Bertram [2007] NSWDC 344 at [26]
<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWDC/2007/344.html>

⁵⁷ *R v El Mostafa* [2007] NSWDC 219 at [16]
<http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWDC/2007/219.html>

⁵⁸ *Dunn v R* [2007] NSWCCA 312 at [32]
<http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCCA/2007/312.html>

R v Robinson [2004] NSWSC 465 at [16]
<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2004/465.html>
Crimes (Sentencing Procedure) Act 1999, s 21A(2)(h)

⁵⁹ <https://www.legislation.nsw.gov.au/#/view/act/1999/92/part3/div1/sec21a>

⁶⁰ *R v B* [2013] EWCA Crim 291 at [14]. It was noted there that section 12 of the Equality Act 2010 in Britain defines sexual orientation specifically to exclude “orientation based on, for example, a preference for particular sex acts or practices”.

Canada

Canada's main hate crime law is a general sentence enhancement. It also has a substantive aggravated offence of mischief relating to religious property, educational institutions, etc., similarly based on motivation by bias, prejudice or hate on a closed list of grounds which include sexual orientation and gender identity. The sentence mandates imprisonment (specifying a maximum term but not a minimum).⁶¹ Aggravation on the ground of gender identity or expression was only recently added in 2017 and there is no reported case law interpreting this.⁶² There is, however, case law on sexual orientations, and on general points of interpretation.

In *JS*, a group of youths murdered a man after going to a park to beat up "peeping toms". The Canadian legislation requires "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation **or any other similar factor.**"⁶³ It was held that the offence was motivated by a factor similar to sexual orientation, since being a voyeur "represents a sexual lifestyle which some may consider deviant, but is a sexual lifestyle all the same."⁶⁴ In *Cran*, however, it was stated that there was no authority in the Criminal Code for this interpretation.⁶⁵

In *Wright*,⁶⁶ a man committed a robbery to obtain cash. Upon his arrest several hours later, the appellant made a derogatory comment about people of the victim's ethnicity. There was no basis to conclude that the beliefs expressed were the motivation for the offence. This seems an appropriate interpretation. Similar cases in England have decided that this was neither motivation nor demonstration, as it could not be held proximate enough to be connected to the offence.⁶⁷

Oxford Pro Bono Publico cite several cases in the lower courts establishing that using a slur, having a hate tattoo or sending a hate message can be sufficient, though are not necessarily proof in themselves. However, in their view it is "reasonably settled" in case law and prosecution guidance that hate need only be part of the motivation for the offence (2014: 31-32). Lawrence and Verdun-Jones also discuss several Canadian cases where the motivation has been inferred from circumstantial evidence, but in contrast they give examples of inconsistency on how significant the hate motivation must be. Judges have variously required it to be the "cause of" the offence, a "predominant" feature of it, or merely a "part" or an "element" (Lawrence and Verdun-Jones, 2011: 50).

Overall, the difference between the NSW and the Canadian case law, despite their similar tests, is a reminder that the culture of the criminal justice system plays a large part in how legislation is applied and interpreted.

⁶¹ Criminal Code RSC 1985, c C-46, s 430(4.1)

<https://www.canlii.org/en/ca/laws/astat/sc-2017-c-23/latest/sc-2017-c-23.html>

⁶² Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code.

⁶³ Criminal Code [R.S.C., 1985, c. C-46]

<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-718.2.html>

⁶⁴ *R v JS* 2003 BCPC 442 <http://canlii.ca/t/1g7d2>

⁶⁵ *R v Cran* 2005 BCSC 171.

⁶⁶ *R v Wright* 2002 ABCA 170 <http://canlii.ca/t/5km1>

⁶⁷ See *R v Dent* [2015] EWCA Crim 2095, *Parry v DPP* [2004] EWHC 3112 (Admin), *R. v Babbs* [2007] EWCA Crim 2737.

Cyprus

Cyprus has a sentence enhancement that encourages (but does not mandate) a court to take sexual orientation or gender identity victimisation into account as an aggravating factor. The threshold of proof of motivation is set at the level of “prejudice”. There is no reported case law on this; the Cypriot legislation was only introduced in 2017.

Northern Cyprus

The disputed territory known as Northern Cyprus introduced hate crime law in 2014. The offences of sexual “abuse” (harassment) and sexual assault may be aggravated “as a result of hatred or prejudice against the victim’s sex, sexual orientation or gender identity”.⁶⁸

South Africa

South Africa alone among the Commonwealth African countries has hate crime legislation, in the form of sentence enhancement. At present, this does not include LGBT victims.⁶⁹ However, in 2016 the government released for consultation a draft Prevention and Combating of Hate Speech Bill.⁷⁰ The final version is expected by the end of 2019.⁷¹

The draft section 3(1) provides for a general “offence of hate crime” which appears to be an example of the hybrid legislative approach (see section 3.1). It will include sexual orientation and gender identity. The “hate” element must be identified by the charging stage, as a prosecution must be authorised by the Director of Public Prosecutions. Section 6 sets out the penalties. The court must regard the hate element as an aggravating circumstance.

The South African Human Rights Commission raised concerns about the first draft⁷² on whether the government intended to create a substantive offence or a sentence enhancement.⁷³ The revised draft has not clarified this. If section 3 and 6 are read together, it appears that the Government intends the court to be empowered to declare any existing offence as aggravated in law (and not just at sentencing). Section 3 is to be layered on any existing “base crime or offence.”⁷⁴

⁶⁸ Criminal Code, as amended, sections 151 and 152.

⁶⁹ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 28(1).

⁷⁰ The latest revised version is available at

<http://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf>

⁷¹ Dept of Justice and Constitutional Development, Annual Performance Plan 2018/19

<http://www.justice.gov.za/MTSF/dojcd-app-2018-2019.pdf>

⁷² “SAHRC Submission to DOJCS regarding Hate Crimes & Hate Speech Bill”, 31 January 2017

<https://www.sahrc.org.za/home/21/files/SAHRC%20Submission%20to%20DOJCS%20re.%20Hate%20Crimes%20&%20Hate%20Speech%20Bill-31.1.17%20FINAL.pdf>

See also the first draft of the Bill at

<https://web.archive.org/web/20161121185258/http://www.justice.gov.za/legislation/bills/2016-HateCrimes-HateSpeechBill.pdf>

⁷³ Department of Justice and Constitutional Development (2018), Annual Performance Plan 2018/19.

<http://www.justice.gov.za/MTSF/dojcd-app-2018-2019.pdf>

⁷⁴ Briefing to the Portfolio Committee on Justice and Correctional Services, 30 May 2018

<https://www.parliament.gov.za/press-releases/justice-and-correctional-committee-updated-hate-crimes-and-hate-speech-bill>

If passed, the legislation will fill a justice gap. In a keynote speech on the bill, the deputy justice minister said that “not enough emphasis is placed on the finding of motive.”⁷⁵ Oxford Pro Bono Publico state that there are very few cases where the South African courts have used their common law discretion to establish the hate element for sentencing, and only one that attributed prejudice against sexual orientation. In particular, the report highlights egregious cases of “corrective rape” of gay men and lesbians that have failed to declare the acknowledged homophobic element to be an aggravating factor (2014: 17, 28-30).⁷⁶

3.3.3 *Minimum threshold for motivation is “prejudice” or similar, and the offence may also be motivated partly by other factors*

The legislation discussed above focuses on the most clear-cut hate crimes where the motivation for the offence is hatred or prejudice. Most scholars, however, would conceive of hate crime more widely to include cases where there is more than one motivation for the offence. For example, in one case, a young man had been part of a group who had repeatedly committed serious offences against a Somalian family, while making “constant reference” to their national origins. It was accepted that part of the motivation may have been a “broken friendship” between one of the group and a member of the family, but the offences were nonetheless held also to have been racially motivated.⁷⁷

Although the legislation discussed above could be interpreted to include such cases, it is unlikely to be. Therefore, in several jurisdictions, hate crime laws state clearly that an offence can be a hate crime even when hate or prejudice is not the sole motivation. Examples of such legislation are discussed here and also in section 3.3.4 below.

⁷⁵ http://www.justice.gov.za/m_speeches/2018/20181120-HateCrimesBill_dm.html

⁷⁶ “Corrective rape’ is a misnomer for the targeted rape of lesbians and bisexual women, including by family and community members, with the stated aim of ‘correcting’ the victim’s sexual orientation”. It is “reported to be common in several countries including India, Cameroon, Kenya, Zimbabwe, Jamaica, Uganda and South Africa.” (HDT, 2016: 24).

⁷⁷ See *G v DPP* [2004] EWHC Admin 183. This is an English case; the English legislation is discussed below at 3.3.4.

Victoria

Victoria: Sentencing Act 1991, s 5

In sentencing an offender a court must have regard to—
[...] whether the offence was motivated (wholly or partly) by hatred for or prejudice
against a group of people with common characteristics with which the victim was
associated or with which the offender believed the victim was associated [...]

Victoria's sentence enhancement is open-ended and does not specify the protected group other than as "a group of people with common characteristics."⁷⁸ The intention was to allow the courts to develop the law case by case (Mason and Dyer, 2013: 877). It seems likely that both sexual orientation and gender identity would be included: the direction of travel in Victorian legislating may be indicated by a new government bill defining sex discrimination as including gender identity.⁷⁹

The case of *Katsakis*⁸⁰ highlighted earlier (the young men who set out with a pre-determined plan to attack people who were gay) is a clear example of motivation on the grounds of sexual orientation. *Katsakis'* confession made this straightforward. The decision in *Rintoull and Sabatino*,⁸¹ however, must raise strong concerns about the value of a test of "motivation."

Rintoull had complained to police three days before that he had been chased by a group of Sudanese men carrying knives. Around the time of the murder, he had been heard ranting phrases such as "[t]hese blacks are turning the town into the Bronx. I am going to take my town back, I'm looking to kill the blacks" and using foul racist slurs. He and Sabatino set out with a pole and repeatedly struck a lone Sudanese man who was drunk, "hapless and helpless."

The court however concluded that Rintoull had been "intent on violence directed towards the people who congregated around the Noble Park Railway Station, whatever their race." He had recently taken food to a homeless Sudanese boy, which the court held was inconsistent with his actions on the night of the killing being wholly or partly racially motivated. Rather, the motivation was frustration and anger directed to a group of persons irrespective of their race whom he regarded as violent and out of control.

Although the Victorian legislation explicitly states that the offence may be "wholly or partly motivated by hatred or prejudice," and so makes it clear that there can be more than one motivation, *Rintoull* nevertheless failed to meet the test. The decision seems extraordinary given that the victim was selected not as an identified member of that smaller group, but simply because he was Sudanese.

⁷⁸ Sentencing Act 1991, s 5(2)

http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/sa1991121/

⁷⁹ The Justice Legislation (Police and Other Matters) Bill 2018 would insert a new s 174A in the Victoria Police Act 2013
<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/bill/jlaomb2018443/>

⁸⁰ *DPP v Katsakis* [2013] VCC 1321

<http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCC/2013/1321.html>

⁸¹ *R v Rintoull & Sabatino* [2009] VSC 617 at [104, 106-108]

<http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2009/617.html>

New Zealand

New Zealand, the Pitcairn Islands and Samoa use almost identical wording for their threshold of proof, focusing on offences committed “wholly or partly because of hostility.”

New Zealand has an open-ended sentence enhancement dealing with “hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability.”⁸² The purposes of the legislation were set out in the case of *Bryan*. Two men set off bombs in a Sikh temple and then at a later date defaced it, using spray paint, with among other things a swastika and a reference to the Ku Klux Klan. A restorative justice conference was held and they were also sentenced to imprisonment. The judge commented that offenders who commit hate crimes “need to be punished/dissuaded further, as prejudice presents a long-term threat. A focus on hate crimes has the effect of both denouncing them and encouraging awareness of their existence.”⁸³

Case law suggests that the “because of” test, which is linked to a type of animus (in this case hostility), has been interpreted as meaning “motivated by” and has a high threshold. In *C v Police, C*, who was very drunk, appeared at the home of two gay men, forced his way in while making comments about “gays” and then assaulted them. It was held on the facts that he was not motivated by hostility against their sexual orientation, but that the allusions to the victims’ sexuality during the assaults were nonetheless an aggravating factor.⁸⁴

The New Zealand Court of Appeal has emphasised that a “hate” element will act as a significant aggravating factor.⁸⁵ This, however, does not prevent judges becoming prey to misunderstandings of alternative sexualities or gender expressions. In the case of *Galloway v R*,⁸⁶ it was clear from the repeated statements made by Galloway during police interview that his “motive was borne of his vehement distaste for the lifestyle Mr Jones led as a transvestite”. Nonetheless, for several reasons the appeal court felt that the sentence enhancement had been too severe. Disturbingly, one reason was that Galloway had been sexually abused by his step-father when a young child. The panel’s view was that: “[i]t may be that that sexual abuse had something to do with his attitude to what he considered were sexually deviant people.”

The experience of appalling child abuse might *separately* be considered as a mitigating factor for the basic offence, but there is little justification for the court to use this to reduce the seriousness of the hate element in the murder of a person who merely expressed themselves in a different gender. Furthermore, the comment is speculative and the matter was reportedly not considered at trial so it is unclear why it was given weight on appeal.

⁸² Sentencing Act 2002, s 9(1)

<http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html>

⁸³ *Bryan & Anr v New Zealand Police* HC AK CRI 2009-404-45 [2009] NZHC 403 at [47]

<http://www.nzlii.org/nz/cases/NZHC/2009/403.html>

⁸⁴ *C v Police* HC Auckland CRI 2008-404-307 [2009] NZHC 627 [35]

<http://www.nzlii.org/nz/cases/NZHC/2009/627.html>

⁸⁵ As stated in *Lawrence*, below, citing e.g. *R v Taueki* [2005] 3 NZLR 372 (CA) at [31].

⁸⁶ *Galloway v R* [2011] NZCA 309 at [23] and [41]

<http://www.austlii.edu.au/cgi-bin/viewdoc/nz/cases/NZCA/2011/309.html>

The case is worryingly reminiscent of a comment in the NSW Supreme Court decision in *R v Robinson* (discussed above) where the judge remarked that his paedophile victim was at risk because Robinson felt hatred “not only to persons other than of an orthodox sexuality, but in particular to persons thought to be homosexual”, even though there appears to have been no evidence regarding the sex of the children who were abused.⁸⁷

Pitcairn Islands

The Pitcairn Islands have a similar sentence enhancement to New Zealand’s. Although the Pitcairn Islands have their own legislation in some areas of criminal law, such as some offences against the person and against public order,⁸⁸ English law applies otherwise.⁸⁹

Samoa: Sentencing Act 2016, s 7

In sentencing or otherwise dealing with a defendant, the court must take into account the following aggravating factors to the extent that they are applicable in the case: [...] that the defendant committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as [...] gender identity, sexual orientation [...]

Samoa

Samoa has introduced sentence enhancement for offences aggravated by sexual orientation hostility.⁹⁰ As noted above, the wording of its provision is very similar to New Zealand’s.

Samoa had already recognised hate crime as an aggravating factor under New Zealand precedent, and now has instantiated it in legislation. There are no reported cases directly interpreting the legislation, other than a comment which rejects an extension of the scope of the concept of “discrimination” to include status belittlement. In *Ropati*, the prosecution argued that the case fell within hate crime law because the assault was inflicted by the offender as a person of authority and that he “looked down on the victim as a mere security guard resulting in the victim feeling inferior or belittled.” The judge, however, took the view that the focus of the law was on discrimination, and that feelings of belittlement and embarrassment were more aligned with emotional and psychological harm.⁹¹

⁸⁷ *R v Robinson* [2004], above, at [16].

⁸⁸ See the Laws of Pitcairn, Henderson, Ducie and Oeno Islands, *passim* <http://www.government.pn/Laws/Revised%20Laws%20of%20Pitcairn,%20Henderson,%20Ducie%20and%20Oeno%20Islands,%202017%20Rev.%20Ed.%20-%20Volume%201.pdf>

⁸⁹ See Article 42 of the Pitcairn Constitution <http://www.government.pn/Laws/The%20Constitution%20of%20Pitcairn.pdf> and also *Warren v The State*, PI Supreme Court, 28 November 2014 <http://www.government.pn/Laws/28-11-2014%20Haines%20%20Judgment.pdf>

⁹⁰ Samoa also no longer criminalises “female impersonation” (cross-dressing), in support of its fa’afafine community. Fa’afafine and (to a lesser extent) fa’afatama are traditionally accepted as a third gender.

⁹¹ *Police v Ropati* [2018] WSDC 9 [11 May 2018] [31] <http://www.paclii.org/ws/cases/WSDC/2018/9.html>

3.3.4 Minimum threshold is “hostility,” and no motivation need be proved if there has been a “demonstration” of hostility

The widest of all are the laws which extend beyond proof of a hostile “motivation” to include situations where the offender “demonstrates” that hostility. A case example illustrates this approach in English law. The victim had heard that the offender was spreading rumours that the victim was gay. On being told of the victim’s belief by a mutual friend, the offender forced his way into the house where the victim was staying and carried out extreme assaults on him, insisting that he admit to being gay. The offender was held to have demonstrated “homophobic animosity” during the attack and so had committed offences that were aggravated on the ground of sexual orientation.⁹²

A constellation of jurisdictions linked to the United Kingdom has almost identically-worded substantive offences or sentence enhancements which make provision for the “demonstration” of hostility. Guernsey’s, however, covers only murder, and the Isle of Man’s applies only to offences against discipline by persons held in custody.

All include sexual orientation, but only the Scots and English laws extend to transgender identity. Although Scotland’s law varies from the others in the words used to express the hate crime element,⁹³ the language it uses is traditional in Scots criminal law and was chosen for the hate crime legislation to have the same meaning as the English law.⁹⁴ Nonetheless, it has recently been recommended that “demonstrating hostility” be adopted in Scotland, as laypeople find this easier to understand (Bracadale, 2018:16).

An important difference within this group of jurisdictions is that some require those responsible for determining sentences to declare expressly that the offence was aggravated, and that it should be included in the record of conviction. A recent report on Scots hate crime law stated that this was essential:

“The requirement to record enhanced the transparency of the justice system. It showed that hate crime was being taken seriously; it would increase confidence in the justice system; and encourage reporting. It was also important to ensure that records were kept so that the offending appeared on the criminal record of the perpetrator. Good records allowed for monitoring the impact of legislation and the maintenance of statistics. This informed the development of effective policy and practice.” (Bracadale, 2018: 28)

Otherwise, the differences in the sentence enhancement laws are minor; other than that in Guernsey, “sexual orientation” includes whether the person engages in prostitution.⁹⁵ As well as its general sentence enhancement, Gibraltar also has substantive aggravated offences. These include aggravated assault, criminal damage, public order and harassment, and apply to sexual orientation but not to gender identity.⁹⁶

⁹² *Attorney General’s Reference [No 57 of 2013]* [2013] EWCA Crim 2144.

⁹³ “Evince” and “malice and ill-will” rather than “demonstrate” and “hostility”.

⁹⁴ See the Lord Advocate (Lord Hardie) in Hansard, HL Deb, 12 February 1998, vol 585, col 1305 https://api.parliament.uk/historic-hansard/lords/1998/feb/12/crime-and-disorder-bill-hl#column_1305

⁹⁵ The Criminal Justice (Minimum Terms for Sentences of Life Imprisonment) (Bailiwick of Guernsey) Law, 2011, ss 3 and 13 <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=115514&p=0>

⁹⁶ Crimes Act 2011, *ibid.*, ss. 113C, 114C, 115C, 116C.

Several of the jurisdictions (the Falkland Islands, Gibraltar, Guernsey and the Isle of Man) have no case law on hate aggravation reported online. Northern Ireland has very little.

Northern Ireland

There are few reported cases interpreting the Northern Irish legislation, probably partly because the number of prosecutions is low compared to its larger neighbours, and because English law has extensive jurisprudence on its similarly-worded sentence enhancements. Decisions of the UK Supreme Court will be binding if they are in point. The case law of the High Court and Court of Appeal in England and Wales is persuasive and will usually be followed unless there is good reason.

Johnston is a straightforward example of the demonstration of religious hostility during a violent offence. As a man walked through a children's park, two others questioned him then severely assaulted him while using the sectarian slurs "taig" and "Fenian" to emphasise to him that as he was a Catholic they would not allow him to use that route.⁹⁷

England and Wales

England and Wales has an extensive body of case law which has been widely analysed (in particular, see Walters et al., 2017 and Law Commission, 2014), so we will highlight only a few key topics here.

As well as general sentence enhancement, England and Wales also have substantive aggravated offences which cover only racial and religious aggravation.⁹⁸ As there has been research on the operation of the substantive offences in practice, it is useful to consider their flaws and benefits as a model for future LGBT-related legislation. In essence, the key findings are that these are complex to apply and can be hard for criminal justice personnel to understand so there is evidence of errors in their application, despite prosecution and judicial training (Walters et al., 2017).

Nonetheless, on balance, they have proven valuable because they are particularly effective at focusing attention on the named hate crime offences and helping to ensure they are prioritised at all stages. The result in England and Wales has been that racially and religiously aggravated cases tend to have been treated with more seriousness than the types of hate crime covered only by a general sentence enhancement (Walters et al., 2017: 189-194).

The case of *Peters*⁹⁹ provides an example of a prosecution failure to take even blatant homophobia into account in charging. Despite the offender "plainly and intentionally" making remarks prompted by his "mistaken belief about the presumed sexual orientation" of his victims whom he had randomly seen in a public street before attacking them, this homophobic element was not considered during trial or treated as such at sentencing.

⁹⁷ *R v Johnston & Anr* [2006] NICC 37
<https://www.bailii.org/cgi-bin/format.cgi?doc=/nie/cases/NICC/2006/37.html>

⁹⁸ Scotland also has a substantive offence of racially-aggravated harassment (Criminal Law (Consolidation) (Scotland) Act 1995, s 50A).

⁹⁹ *R v Peters* [2007] EWCA Crim 435 at [4].

The English and Welsh model of hate law is particularly interesting for its range of thresholds for proof. The legislation is set out in two parts. The first part states that the hate element can be proved where the offender demonstrates hostility towards the actual or presumed victim based on the victim's sexual orientation or transgender identity during the commission of the offence (CJA 2003, s 146). The second part states that, alternatively, the offender was partly or wholly motivated by the presumed sexual orientation or transgender identity of the victim.¹⁰⁰

The motivation test is very rarely used. It can be extremely difficult to prove (Law Commission, 2014: 2.33), even though evidence of past hostility may be admissible.¹⁰¹ The great majority of prosecutions and convictions instead involve a demonstration of hostility and in the early days of the legislation a considerable body of appeals was needed to clarify the limits of the concept. In *Rogers*, Baroness Hale drew the distinction between an "outward manifestation" of hostility (i.e. demonstration) and the "inner motivation of the offender" (motivation).¹⁰² The courts have also made it clear that an offender need not be motivated by prejudice or hostility in order for the demonstration test to be fulfilled (*Woods*).¹⁰³

However, there remains some degree of reluctance by courts and juries to regard spontaneous expressions of prejudice as a demonstration of hostility, not least because many erroneously believe this to be labelling the offender (rather than the offence) as, for example, a "racist" or a "homophobe."¹⁰⁴ As one barrister interviewee in Walters et al.'s research said:

"The irony is, of course, when it comes to trial, the whole case is taken up as to whether your client is racist. So what you do is you call his black dentist, his Chinese doctor, his best friend – and I've done this – his best friend who is a black shop steward, who specialises in race relations. And as a result, of course, the jury are absolutely convinced you're the least racist person in the country and they acquit you of everything – including the crime you were charged with. So actually, it's God's gift to defence, I would say." (2017: 125)

The significance of multiple motivations is further highlighted in this legislation: the section emphasises that it is "immaterial ... whether or not the offender's hostility is also based, to any extent, on any other factor." Hence, there is a specific additional form of words to make it clear that other motivations/factors should not prevent conviction for a hate crime.

Although this has been recognised and applied by police, prosecution and judiciary, multiple causes of an offence can sometimes mask the hate element. Nonetheless, it is striking, when comparing the English and Scots jurisprudence to other case law considered in this report, that cases which would not succeed in other jurisdictions are now routinely held to be aggravated offences in England and Wales and Scotland.

¹⁰⁰ Criminal Justice Act 2003, s 146.

¹⁰¹ *G v DPP* [2004] EWHC 183 (Admin) [14].

¹⁰² *R v Rogers* [2007] UKHL 8 [6].

¹⁰³ *R v Woods* [2002] EWHC 85 (Admin).

¹⁰⁴ For examples of this reluctance among the judiciary, see the conclusions of the trial judges as criticised in e.g. *DPP v Woods* [2002] EWHC 85 (Admin) and *DPP v Green* [2004] EWHC 1225 (Admin) and in the interview quotes in Walters et al., 2017: 117-131.

For example, in *McFarlane*, the victim parked in a disabled parking bay, preventing McFarlane from using it. An altercation began and during the argument he used extremely racist language. On appeal it was held “that the language in question demonstrated hostility to the victim based on the victim’s membership of a racial group, was inescapable ... it is immaterial ... that the respondent had or may have had an additional reason for uttering the racial words in question, for example because he also was angry in respect of the victim’s conduct in parking in a disabled bay.”¹⁰⁵

In *Taylor v DPP*, a woman’s stream of racist abuse about another she alleged had slept with her partner was held to have been motivated in part by hostility towards the woman because she came from a different racial group. The judge stated:

“I am satisfied that hostility towards one member of a racial group is sufficient to qualify ... so long as it forms part of the motivation. ... Indeed, I go further. One would expect [the section] to cover a case where a person hearing the racial abuse is not themselves a member of that race but where the racial abuse is about an absent loved one, with the result that distress is caused to the person who hears the racial abuse. That seems to be something which one would have expected Parliament to have covered by the language” of the section.”¹⁰⁶

It is clear from English jurisprudence that the threshold test created by the option of “demonstrated hostility” enables a wide range of everyday displays of prejudice to be captured. This, however, is not limitless. In *Rogers*, the court discussed concerns that the “very width of the meaning of racial group for the purposes of [the section] gives rise to a danger that charges of aggravated offences may be brought where vulgar abuse has included racial epithets that did not, when all the relevant circumstances are considered, indicate hostility to the race in question ... If that is what the evidence suggests, of course, the normal criteria for bringing proceedings would not be met.”¹⁰⁷

Scotland

Since 2009, Scotland has included sexual orientation and transgender identity in its sentence enhancements.¹⁰⁸ “Transgender identity” is defined more widely than in its English counterpart, as meaning “transvestism, transsexualism, intersexuality or having changed gender via the Gender Recognition Act 2004, and also includes any other gender identity that is not standard male or female gender identity.” This would presumably include a non-binary identity. The English law defines it as “being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.” There is, however, no case law to indicate whether this has made a difference in practice.

¹⁰⁵ *DPP v McFarlane* [2002] EWHC 485.

¹⁰⁶ *Taylor v DPP* [2006] EWHC 1202 (Admin).

¹⁰⁷ *Rogers*, above, at [17]. See also *DPP v Pal* [2000] Crim LR 7 and *DPP v Howard* [2008] EWHC 608.

¹⁰⁸ Offences (Aggravation by Prejudice) (Scotland) Act 2009, s 2.

In both English and Scots law there are several cases on circumstances where the victim of the prejudiced behaviour is not the person who was targeted. These reflect the social value of punishing prejudiced behaviour because of its effects on society, not merely its effect on a victim. *Martin v Bott* is a straightforward early example of this. While watching a football match, Martin swore and shouted racist abuse at players who were of African origin. The abuse had alarmed or distressed a schoolboy sitting beside him. The victim of the abuse was therefore someone other than the person towards whom it had been directed, but Martin was ultimately convicted of a racially aggravated breach of the peace.¹⁰⁹

Nor is it an excusing factor that the behaviour may be socially acceptable among a community. In *Brown and Clark v HMA*, the offenders smashed a display unit in a takeaway shop and called the staff “black bastards”. It was submitted that they were not “ideological racists” and that “the choice of words used in the heat of the moment in Glasgow was indicative of the bigoted phrases used on a daily basis’ and that such phrases are used so frequently that they are accepted”. This second argument was rejected. The racist abuse was taken to enhance the seriousness of the offence.¹¹⁰

A particular feature of Scottish cases has been the intersection of the religious and the political where there have been group demonstrations of sectarian hostility aimed at Catholic- or Protestant-associated victims. Songs sung at football matches which contain lyrics supporting proscribed terrorist organisations have been defended on the ground that they are political and do not constitute “hate”. They may also, however, be sung in a context likely to incite disorder and cause religious offence. The facts are frequently complex because the supporters of such teams have developed a sophisticated language of indirect insult; such cases will unavoidably turn on a careful examination of the facts.¹¹¹ It is not possible to prescribe precise rules for this type of case and it must be governed by general principles of criminal law.

¹⁰⁹ *Martin v Bott* 2005 HCJAC 73. In English law see e.g. *DPP v Dykes* [2008] EWHC 2775 (Admin) and *Parry v DPP* [2004] EWHC 3112 (Admin). It has however been concluded that to prove an offence has been motivated by hostility, rather than demonstrating it, the victim does need to be present: see again *DPP v Dykes*.

¹¹⁰ *Brown and Clark v HMA* 2000 SCCR 736.

¹¹¹ See e.g. the discussion in *Donnelly and Walsh v PF Edinburgh* [2015] HCJAC 35 <https://www.scotcourts.gov.uk/search-judgments/judgment?id=e84dd2a6-8980-69d2-b500-f0000d74aa7>

Failed and proposed hate crimes legislation

Jersey's government is currently drafting hate crimes legislation, which appears likely to include sexual orientation.¹¹² Jersey has no reported cases on aggravation in hate crime cases, but the courts may have regard to the factors in the English Sentencing Council Guidelines for similar offences in England and Wales, as an aide to assessing seriousness and aggravating and mitigating factors.¹¹³

In 2010, the Isle of Man's government introduced a draft bill which contained sentence enhancements for aggravation related to race, religion, disability or sexual orientation (at present its only hate crime legislation is a sentence enhancement that applies only to persons in prison custody).¹¹⁴ This bill appeared to receive support and was strongly backed by the government¹¹⁵ but was never enacted. The Isle of Man does have general sentencing guidance for all offences which includes sexual orientation as an aggravating factor. There are, however, no formal guidelines for the jurisdiction, and sentencing guidance is provided by the precedents of the Staff of Government (Appeal Division) of the High Court. Decisions of the Judicial Committee of the Privy Council apply, and the decisions of the English Court of Appeal and the UK Supreme Court and other Commonwealth courts can also be referred to in the absence of binding precedent.¹¹⁶

¹¹² "New law to crack down on hate crime", 2 August 2017
<https://www.bailiwickexpress.com/jsy/news/new-law-crack-down-hate-crime/#.XEik2Iz7SUK>
"Jersey begin work on new hate crime laws", 2 December 2016
<https://www.itv.com/news/channel/2016-12-02/jersey-begin-work-on-new-hate-crime-laws/>

¹¹³ See e.g. *Attorney General v P* [2018] JRC 151
http://www.bailii.org/cgi-http://www.bailii.org/je/cases/UR/2018/2018_151.html

¹¹⁴ As part of the Criminal Justice (Miscellaneous Provisions) Bill 2010, to amend the Criminal Justice, Police and Courts Act 2007
<https://legislation.gov.im/cms/images/LEGISLATION/GAZETTES/2010/2010-0001/ManxLawNewsletterIssue4January-September2010.pdf>

¹¹⁵ See the discussion of Clause 85 on pp. 120-121
<http://www.tynwald.org.im/business/pp/Reports/2011-PP-0096.pdf>

¹¹⁶ <https://www.courts.im/court-information/sentencing/>

Section 4: Recommendations for Law Reform

This final section outlines recommendations for legislating against anti-LGBT hate crime across the Commonwealth. The recommendations are based on our analyses of case law, legislation, existing statistics, and previous empirical research conducted by the authors (focused mostly in Europe). Although these recommendations are grounded in socio-legal analyses, we recognise that the diversity of jurisdictions and legal systems within the Commonwealth will mean that there is no single approach to legislating for anti-LGBT hate crime that will suit all countries. As such, we outline alternative models that might better suit different legal systems.

4.1 General approaches to advocating for legislative reform for hate crime

In this report, we have discussed the growing consensus that protecting LGBT people against hate crime is a fundamental human rights concern. Not all Commonwealth states have decriminalised or legalised consensual same-sex intimacy between adults or the expression of alternative gender identities, but this does not preclude legislating to protect LGBT people more from hate crime.

In section 1, we set out evidence that supports five findings justifying hate crime legislation:

- Disproportionate levels of targeted violence
- Heightened direct and indirect impacts of hate crime, compared to other crimes
- Additional culpability of the offender for prejudice-based conduct
- Symbolic support needed for targeted communities
- The need to improve monitoring and measurement of hate in society.

In jurisdictions where attributing a hate crime motivation has been left to the courts, the most egregious cases can fail to be recognised as hate crimes. Even on the occasions when these have been recognised, without legislation there has rarely been recording, measuring and monitoring of their prevalence. Furthermore, courts and legislators have frequently cited the importance of denouncing hate crime and of sending a message to offenders and the public to educate and to deter. Legislation is an effective and enduring means of doing this.

4.2 What type of legislation should be enacted?

As has been outlined in section 3.1, there are three main types of hate crime legislation: sentence enhancements, substantive offences and the hybrid approach. We recommend that legislatures give primary consideration to enacting either substantive anti-LGBT hate crime offences or, where possible, follow the hybrid approach. Both substantive offences and the hybrid approach place the hate element of offences into criminal law and in doing so we believe that they send the strongest message to societies across the Commonwealth that anti-LGBT hate crime will not be tolerated. The legal proscription of hate crime provides for the strongest possible condemnation of anti-LGBT prejudice. Research conducted in the UK, which as outlined above has a dual system of substantive offences and sentence enhancement provisions (the former used for racially and religiously aggravated offences and the latter for anti-LGBT hate crimes), provided for a comparative assessment of these different types of legislation. The analysis suggested that substantive offences are generally enforced more consistently by the courts. This is predominantly due to the fact that law enforcement agencies and prosecution services are required to investigate and collate evidence of “hostility” or prejudice in order to prove the hate element of an offence in court.¹¹⁷ Moreover, substantive offences are more likely to result in an official documentation of the hate element on the offender’s criminal record.¹¹⁸ In addition, the research suggests that hate crimes that are dealt with by sentencing enhancement provisions only can be more liable to the “filtering out” of evidence of the hate element during the legal process, as this is not required for the purposes of proving the offence at trial (Walters et al., 2017; Schweppe et al., 2018).

The use of substantive offences (or the hybrid approach) additionally helps to ensure that these types of crime are treated *seriously* by the state agencies tasked with protecting LGBT people from violence and intimidation. Substantive (hybrid) laws are also more likely to lead to official monitoring responsibilities by criminal justice agencies, ensuring that governments record and publish figures relating to the numbers of hate crime that occur each year. This, in turn, assists with the ongoing measurement of hate crime and with resource deployment (including training on policing and prosecuting), further supporting the effectiveness of the law. Collectively, this can improve confidence amongst communities to come forward and report incidents.

Where substantive offences are enacted, the legislature will need to determine what basic offences will be covered by the legislation. This will entail a determination of the main types of anti-LGBT crimes that are most prevalent and/or impactful in society for which the legislature should give primary focus. In the UK these are: assaults; criminal damage, public order offences (such as abusive and threatening behaviour) and harassment and stalking. For each of these new offences in England and Wales a higher sentencing maximum is provided.

¹¹⁷ Note also that substantive offences require the court (or jury in most common law systems) to determine whether the hate element is proved. This ensures that the trier of fact decides the hate element, while the defendant’s rights are better protected as the offence must be proved beyond reasonable doubt (Owusu-Bempah et al., 2019).

¹¹⁸ Also noted as important by a separate review of hate crime law in Scotland (Bracadale, 2018).

Where possible legislators should alternatively explore the possibility of enacting what we label as hybrid laws, which can be used to apply aggravation to *any* criminal offence in *law* (i.e. not just at sentencing). This is the case in Scotland where any crime can be aggravated by hostility and where the court must state on conviction that the offence was (for example) aggravated by prejudice relating to sexual orientation or transgender identity and where the court must record the conviction in a way that shows that the offence was so aggravated. It is also a key proposal by Walters and colleagues who conclude that hate crime legislation in England and Wales should be reformed so that all criminal indictments can be adjusted to add LGBT aggravation where this is relevant to the commission of the offence. The main limitation to this approach is that while the courts can still enhance an offender's penalty, they would only be able to do so within the range of the basic offence. This is because new sentencing maxima could not practically be set for *all* criminal offences on the statute books. This is not so problematic in Scotland because many offences there are common law and the sheriff courts have wide sentencing powers.

Nevertheless, it may not be possible for all jurisdictions to enact either substantive hate crime offences or legislation that provides for aggravation to any basic offence in law. There is also the additional problem that in some jurisdictions the prosecution cannot add alternative charges to the indictment. This means that where a substantive hate crime offence is not proved in court, an alternative verdict for the basic offence cannot be found. Where substantive offences are either not possible or practical, the use of sentence enhancement provisions will be the preferred method to legislate against anti-LGBT hate crime.¹¹⁹ These laws are still an important mechanism through which the hate element of a criminal offence can be recognised by the state and where sanctions and other measures can then be applied in order to address the causes and consequences of anti-LGBT prejudice in society. If this model is adopted the legislation should:

1. Make the sentence enhancement mandatory at sentencing
2. Provide that the judge must state openly in court that the penalty has been enhanced due to anti-LGBT prejudice
3. Provide that an official record of the hate element be added to the offender's criminal record and a marker placed on the recording system to enable data monitoring.

Such provisions will limit the court's discretion, thereby reducing opportunities for the hate element to be filtered out of the justice process.

Jurisdictions considering either substantive (hybrid) offences or sentence enhancement legislation should endeavour to ensure that these laws are supported by policy and guidance documents that require law enforcement agencies and prosecution services to investigate and collate evidence of the hate element for presentation before the court. In order to support the application of hate crime laws, in practice, it may also be necessary to create a policy against the use of plea (charge) bargaining. For example, in England and Wales the Crown Prosecution Service has an explicit policy "not to accept pleas to lesser offences, or a lesser basis of plea, or omit or minimise admissible evidence of racial or religious aggravation for the sake of expediency." (CPS, nd). Research indicates that this policy is mostly strictly adhered to (Walters et al., 2017).

¹¹⁹ Such laws can also be used in addition to supporting substantive hate crime offences, such as in the UK.

4.3 What model of hate crime legislation should be adopted?

As this report has illustrated, there are two main legal models that legislators can use when legislating against anti-LGBT hate crime: the animus model and the group selection model. Some jurisdictions use a mix of these models.

The animus model of hate crime legislation is perhaps the most cogent in terms of reflecting the nature of hate crime as intended expressions of prejudice or identity-based hostility. The use of words such as hate, prejudice, bias, or hostility within legislation ensures that the state is clear about what social mischief they are seeking to prevent. It also provides for fair labelling. That is to say, only offenders who have acted in hate or prejudice should be labelled as “haters”, “homophobes” etc. Yet this approach can be limiting. Most prominent is the common criticism that proving hate or prejudice in court can be difficult. This is especially the case where the offender is “motivated” by prejudice but does not reveal their hostility or prejudice through words/slurs when committing the offence.

An alternative approach, therefore, is to use the group selection model, which is typically worded to include crimes that are committed “by reason of” or “because of” a victim’s identity characteristic/s. There is no specific requirement within the model for the offender to be motivated by hate or prejudice or to have demonstrated such animosities during the commission of the offence. Such an approach can be criticised as it may include some crimes where a victim is selected because of their identity but not because the offender actively dislikes their identity (e.g. the offender may think that older gay men will carry more money and therefore are targeted for greater financial gain). Conversely, the group selection model can help to ensure that crimes that are targeted at victims because they are perceived to be innately vulnerable or an “easy target” may fall within the ambit of hate crime laws. Many advocates of hate crime law believe that it is important to include such victims as although they are not “hated” by the offender, the perpetrator is still treating them as being less worthy of social respect because of their identity. The offender’s decision to target the victim in this way helps to sustain their social position of marginalisation. In other words, selecting some victims by reason of their identity is not only discriminatory but is a form of prejudice.

We therefore recommend that legislatures consider primarily an animus model of legislation (legal tests are considered below) but that, when reviewing the types of hate crimes that occur in their jurisdiction, they should also consider the potential utility of adding a group selection model within the law to ensure that a broader range of prejudice-based conduct is covered (see proposed legal test for group selection below). Legislators should note that the models are not mutually exclusive, and can be used side by side within a framework of law (see below).

4.3.1 What legal test should be adopted within the animus model?

When enacting new animus-based legislation the legislator will need to consider the following:

1. The type of mental element (mens rea) required to prove the animus (e.g. motivation)
2. Whether it matters or not that other motivations have partly caused the offence (e.g. does the animus need to be the sole motivation or part of the motivation)?
3. Whether animus can be proved through the conduct element of the crime (actus reus) (e.g. a demonstration of animus during the commission of the offence)
4. The words that will be used in the legislation to enable courts to assess whether animus is an element of the offence (e.g. prejudice, bias, hostility etc.)
5. How will LGBT be defined in law?

4.3.2 A subjective or objective test?

The test to be applied by the courts is an important decision to make when legislating against anti-LGBT hate crime as it will directly affect the number of cases likely to be investigated, prosecuted and convicted. Case law analysis carried out for this report revealed that the motivation test is highly problematic in practice, resulting in fewer prosecutions and convictions. One English judge has explained that “[t]he search for a specific motive can be elusive and complex. That is why the establishment of criminal liability does not generally require it.”¹²⁰ Our case law analysis also suggests that jurisdictions (including Canada, Cyprus, Malta, NSW and Northern Territory in Australia) which include a test of motivation only within their legislative framework have very few successful prosecutions for hate crime. This was illustrated, for example, in the Australian (NSW) case of Ross where despite horrific abuse and then the murder of an infant that involved angry racist slurs being expressed towards the victim during the commission of the offence, it was still considered by the court not to be “motivated” by racial prejudice.

“[t]he search for a specific motive can be elusive and complex. That is why the establishment of criminal liability does not generally require it.”

¹²⁰ *DPP v Green* [2004] EWHC 1225 (Admin) [24].

The apparent lack of application of motivation tests is additionally backed further by research in England and Wales which found that the motivation part of the test in English law is very rarely used, with some hate crime coordinators for entire areas of the country and some judges stating they had never come across cases which apply the test (Walters, et al., 2017: 116). This was explained as being the result of motivation being too difficult to prove beyond reasonable doubt.

An objective test (i.e. one that is based on evidence of the defendant's actions and not on what they intended, e.g. a demonstration of hostility), such as that provided in England and Wales, Guernsey, Isle of Man, Northern Ireland, and Scotland, results in many more prosecutions resulting in conviction.

The breadth of the English and Welsh test is illustrated by statistics from England and Wales where over 11,000 sexual orientation hate crimes were officially recorded between 2017 and 2018, resulting in 1,436 completed prosecutions, with 781 cases ending in a conviction where the hate crime sentence enhancement was applied (see Figure 2 above). Few other jurisdictions within the Commonwealth provide data on prosecutions and convictions so it is not possible to provide any direct comparisons. However, it can be instructive to compare recorded hate crimes in the UK with other similar Commonwealth countries that apply a motivation test. For example, the police recorded 195 anti-LGBT hate crimes (combining both gender identity and sexual orientation hate crimes) in Canada in 2017 (OSCE, nd).¹²¹ This amounts to just 1.5% of the total number of anti-LGBT crimes recorded in England and Wales (13,289) for the same year, despite Canada's population being greater than 50% of the size of the UK.¹²²

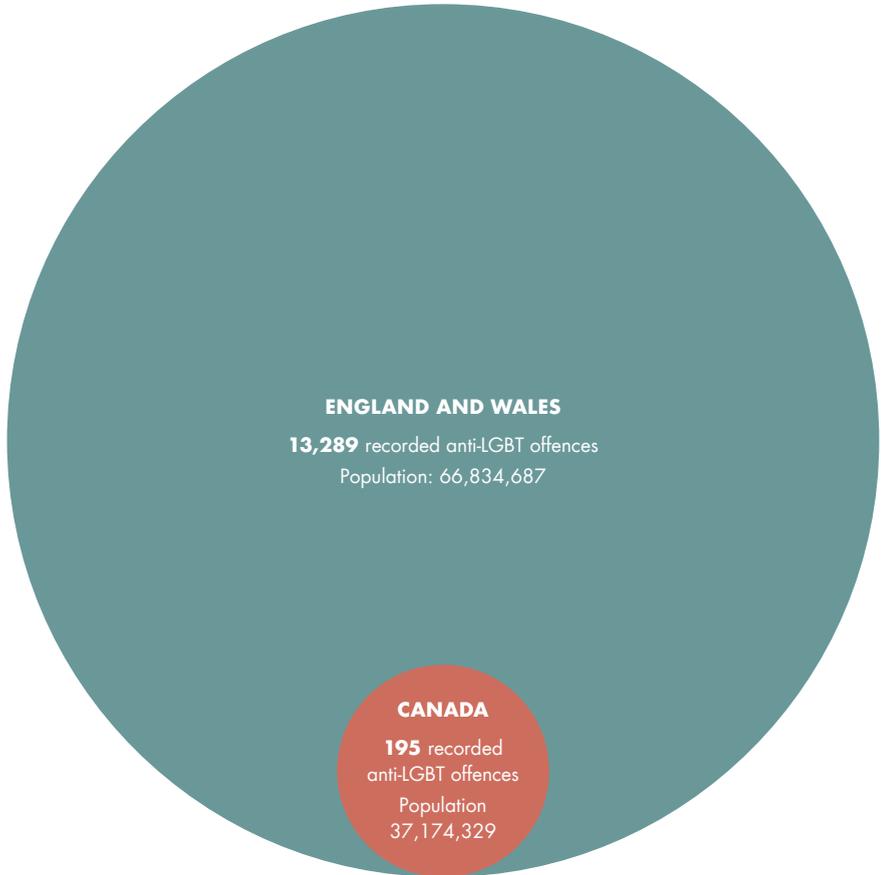
One of the main criticisms of legislation that includes an objective test is that it is likely to capture expressions of hostility that are directed towards LGBT people that are tangentially causal to the offence. Some hostilities can be expressed in the heat of the moment during the commission of the offence, often said out of frustration or anger. Some judges have questioned whether these incidents are really "hate crimes" at all (Walters et al., 2017). However, it is our belief that demonstrations of hostility, even when expressed out of anger or frustration, will still represent a conscious attempt to subjugate the victim's LGBT identity. As long as the offender is aware that their expression of hostility demeans the victim because of their perceived LGBT identity, then it should be considered as a constituent element of the crime – one which is likely to cause heightened harms to victims and communities (as evidenced above).

As such, we recommend that an objective test that is linked to the conduct element of the criminal offence be used when legislating against hate crime (e.g. "demonstration of hostility/prejudice"). In order to avoid the over-criminalisation of offenders who are genuinely unaware that their conduct or words evince identity-based hostility, it may be helpful for legislators to provide an explanatory note stating that while the test should include "outward manifestations" of prejudice, in some cases the prosecutions may need to show that the offender was at least "aware" that their demonstration of hostility would be considered by other right-minded individuals to be an expression of prejudice.

¹²¹ <http://hatecrime.osce.org/canada>

¹²² *Ibid.* Of course, recording practices and training can also impact on the number of "hate crimes" recorded within any given jurisdiction. However, it is likely that the official definition of hate crime will have a significant impact on this total number.

FIGURE 3. Numbers of anti-LGBT offences recorded in England and Wales and Canada



'We recommend that an objective test that is linked to the conduct element of the criminal offence be used when legislating against hate crime (e.g. "demonstration of hostility/prejudice").'

Where legislators still wish to include a motivation-based test within law, we recommend that it should include “part” as well as “sole” motivation. Additional wording such as that found in English law which states that it is “immaterial ... whether or not the offender’s hostility is also based, to any extent, on any other factor” (CDA, s 28) will help to avoid the dismissal of hate crimes that involve multiple motivations. .

‘Where legislators still wish to include a motivation-based test within law, we recommend that it should include “part” as well as “sole” motivation.’

4.3.3 Wording identity-based prejudice in law

Whether a subjective or objective test is implemented, the legislator will need to determine what word/s will be used to describe the hate element of a criminal offence. We note in section 3.3 that the word “hate” used in jurisdictions such as Malta and Australia’s Northern Territory is such a strong emotion to prove in court and that very few cases are successfully prosecuted. We do not believe that this wording reflects the wide range of prejudice-based offending that should be captured within hate crime legislation. What words, then, are most easily understood as evidencing an expression of bias, animus or prejudice towards LGBT people?

‘The word “hate” used in jurisdictions such as Malta and Australia’s Northern Territory is such a strong emotion to prove in court and that very few cases are successfully prosecuted. We do not believe that this wording reflects the wide range of prejudice-based offending that should be captured within hate crime legislation.’

Some jurisdictions (e.g. England and Wales) have used the term “hostility”. It is clear from the case law in England and Wales that the threshold created by the option of “demonstrated hostility” encompasses a broad range of everyday expressions of prejudice. Indeed, the Crown Prosecution Service guidance on hate crime notes that the word hostility should be given a literal definition and include “ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike” (CPS, nd). One issue noted by the Law Society in Scotland in their response to recommendations made by Lord Bracadale to adopt the word “hostility” in Scots law (thereby replacing the current words “malice” and “ill-will”) was that a literal interpretation of this word that includes “unfriendliness” is too broad, and may not align with the policy aim of combating prejudice-based offending in society (Law Society of Scotland, 2017).

Alternative words to hostility that have been used by other jurisdictions include “bias” (e.g. Canada), prejudice (e.g. Canada, Australia (NSW/Victoria), Cyprus and South Africa (draft legislation) and intolerance (e.g. South Africa (draft legislation)). Each of these words is likely to cover a similar meaning to that provided by the CPS on “hostility” in England and Wales. Ultimately, the most suitable wording may depend on what works best in a “literal” sense in any given Commonwealth jurisdiction. Explanatory notes outlining the breadth of the definition of such words will assist the courts in making decisions about the hate element of a crime.

TABLE 7. Words in legislation to describe the “hate element” in Commonwealth jurisdictions

Hostility	Prejudice	Hate/Hatred	Bias	Intolerance	Malice and ill will
England & Wales Falklands Gibraltar Guernsey Isle of Man Northern Ireland New Zealand Pitcairn Islands Samoa	Canada Cyprus Australia (Victoria & NSW) Northern Cyprus Scotland South Africa (draft legislation)	Canada Malta Australia (NSW, Victoria & Northern Territory) Northern Cyprus	Canada	South Africa (draft legislation)	Scotland

‘The most suitable wording may depend on what works best in a “literal” sense in any given Commonwealth jurisdiction. Explanatory notes outlining the breadth of the definition of such words will assist the courts in making decisions about the hate element of a crime.’

4.4 How should LGBT be defined in hate crime legislation?

Any new legislation should make specific reference to protecting LGBT people. Terms such as “sexual orientation”, “gender identity” and “transgender” should be used within the legislation. Definitions of these characteristics should also be included. Where possible a broad and non-technical interpretation of these terms should be provided to ensure inclusivity.

The English provisions that protect against “transgender identity” hostility are defined narrowly, as “being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment” (CJA 2003, s 146). Such a definition does not reflect current understandings of transgender identity, especially relating to those who present themselves or identify differently from the cultural gender expectations of the sex assigned to them at birth, but who are not, or do not wish to, undergo physical surgery or medical treatments.

‘Terms such as “sexual orientation”, “gender identity” and “transgender” should be used within the legislation.’

Scots law provides for a much more inclusive definition stating that transgender identity is defined as meaning “(a) transvestism, transsexualism, intersexuality or having changed gender via the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity.”¹²³ This more inclusive definition ensures that all transgender, gender non-conforming and/or non-binary people who experienced prejudice towards their perceived gender identity will be protected under hate crime laws. We therefore recommend that similar language be used in future legislation protecting against transgender and gender identity-based hate crime. We recommend also that victims who are targeted because of prejudice evinced towards the victim’s *association* with transgender people be included in law (as is typically the case with laws that protect other group characteristics).

In relation to sexual orientation, the English courts have again interpreted this characteristic narrowly, stating that it covers a person’s sexual orientation towards persons of the “same sex, the opposite sex or both” (*R v B*¹²⁴). This is commonly understood to refer to “lesbian, gay, bisexual and heterosexual people.” (CPS nd).¹²⁵ However, it is not clear whether this includes sexual orientations (or sexual identities) such as pansexuality¹²⁶, polysexual,¹²⁷ or whether it applies to people who identify as asexual.¹²⁸

¹²³ Offences [Aggravation by Prejudice] (Scotland) Act 2009, s.2(8)
<https://www.legislation.gov.uk/asp/2009/8/section/2>. Intersex conditions should however be classified separately.

¹²⁴ *R v B* [2013] EWCA Crim 291.

¹²⁵ CPS, *Homophobic, Biphobic and Transphobic Hate Crime - Prosecution Guidance*.

¹²⁶ A sexual or romantic attraction towards people regardless of their sex, gender, or gender identity.

¹²⁷ A sexual attraction to multiple, but not all, genders or gender identities.

¹²⁸ A lack of sexual attraction to others, but possible romantic attraction.

Again, we recommend a more inclusive definition be used to reflect the fact that sexual orientation can occur on a continuum. This may, for example, involve defining sexual orientation as any sexual and/or romantic attraction/s, regardless of sex, gender or gender identity. As with anti-transgender hate crimes, the law should also extend to cover victims who are targeted because of prejudice evinced towards their association with people of a certain sexual orientation (see, for example, Northern Ireland).

LGBT characteristics should not be left to be covered by an open-ended list of characteristics, such as laws that include “similar factors” (Canada¹²⁹) within the law. As we have seen in section 3.3.2, open-ended lists of characteristics can lead to confusion, and as in the Australian context an unfortunate conflation of sexual orientation with other conditions (characteristics) such as paedophilia (e.g. *Robinson*).¹³⁰ This has the effect of undermining the potency of the label hate crime. Defining LGBT within the law is especially important where legislators enact substantive offences, as specific crimes must be clear and the labelling of such offences precise.

4.5 Legislating for group selection

Finally, as we have recommended above, legislators should consider including a group selection model as part of their legal test for hate crime. Some jurisdictions have used phrases such as “by reason of” or “because of”. For example, the Criminal Code of the US state of Virginia (§ 18.2-57) states that “[a]ny person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor, and if the person intentionally selects the person against whom a simple assault is committed because of his race, religious conviction, color or national origin...”

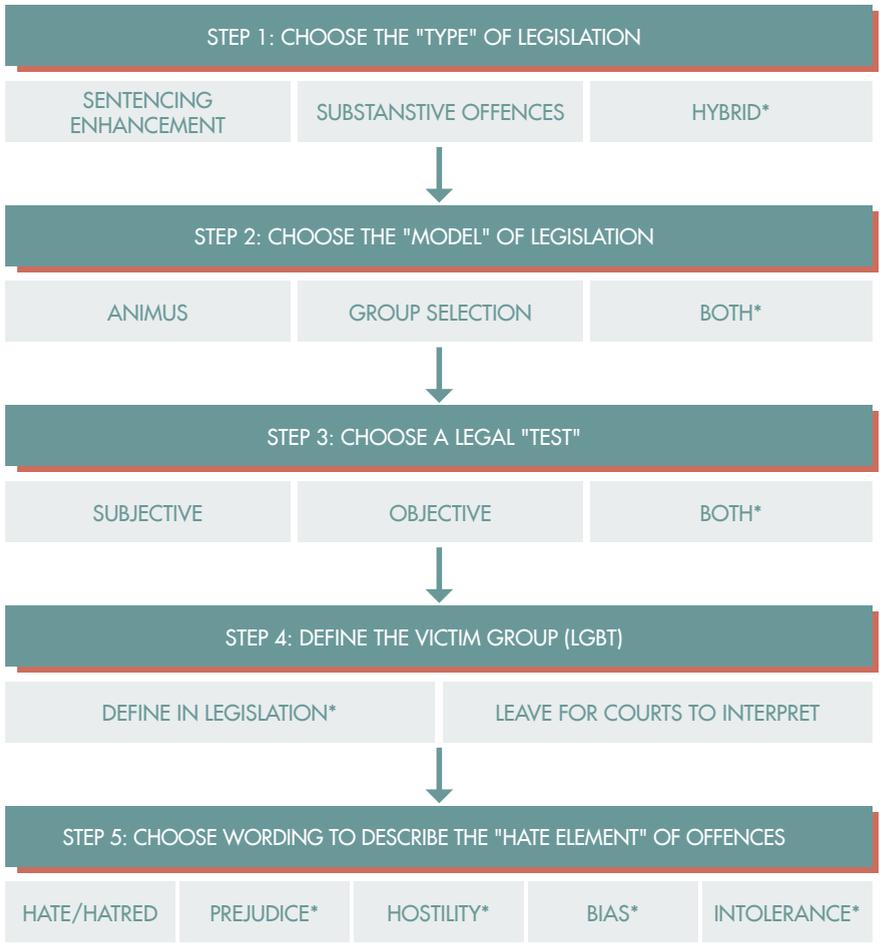
We recommend that legislators consider including such a provision in order to cover hate crimes that occur because of negative stereotypes and beliefs held about certain groups (including LGBT people). However, we acknowledge that such a test can be overly broad. Careful consideration is therefore required before utilising this model of hate crime legislation. We recommend that where this model is implemented, the legislation should be supplemented with an explanatory note that states that the selection of the victim’s identity must be a significant and substantial reason for why they were victimised. The test should not cover cases where the victim’s identity is tangential or coincidental to the main cause of the crime. The courts may need to ask questions such as “was the victim abused because of who they are?” This will help to protect against over-criminalisation where a victim is targeted opportunistically (based partly on the identity) in order to make a financial gain (for example), compared with cases where the victim is purposefully targeted because they are seen as less worthy of respect because of their identity, or because they are perceived to be innately vulnerable because of their identity (as against being vulnerable because of a situation or set of circumstances).

‘The courts may need to ask questions such as
“was the victim abused because of who they are?”’

¹²⁹ NB though that Canada does also specifically refer to sexual orientation in their code.

¹³⁰ *Dunn v R* [2007] NSWCCA 312.

FIGURE 4. Steps to legislating to address anti-LGBT hate crime



* Asterisks denote the authors' recommendations

Conclusion

Hate crime legislation, particularly models that enact substantive (hybrid) offences, which is backed by policy guidance and training, can make a dramatic difference to how criminal justice systems tackle hate crime against LGBT people. It is most effective when coupled with equality for LGBT people across civil and criminal law, but can nonetheless provide enhanced protection in countries which have not yet decriminalised consensual same-sex intimacy between adults and the expression of gender identity, or have not provided equality across the board for these groups. The creation of hate crime legislation is a symbolic declaration of the rights of all to freedom from violence and abuse, and sends a message that is both educative and deterrent. It has also proved, when supported throughout the criminal justice system, to have been an effective basis for recording, measuring and monitoring hate in society.

'The creation of hate crime legislation is a symbolic declaration of the rights of all to freedom from violence and abuse, and sends a message that is both educative and deterrent.'

Many states have existing hate-related laws and anti-discrimination articles in their constitutions that can provide a domestic context for protecting the right of LGBT people to effective protection against hate crime. These have often been set out in a context of domestic human rights interpretation in the higher courts, and should be made part of the dialogue around introducing new legislation. Also, some countries have distinctive forms of law such as customary dispute resolution. Samoa demonstrates that the two can co-exist, but again care must be taken to ensure that hate crime legislation is not imposed without consultation and dialogue. Furthermore, as we saw in jurisdictions such as NSW and in the early days of the English and Welsh legislation, the variation in judicial interpretations points to the need for either appeal decisions to clarify the law, or (preferably) justice system training. We reiterate that any hate crime law may be ineffective unless backed by policy guidance and training.

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Annex A: Texts of Hate Crime Laws

AFRICA

South Africa: (draft) hybrid – SOGI

(DRAFT) PREVENTION AND COMBATING OF HATE SPEECH BILL ¹³¹

Definitions

1. In this Act, unless the context indicates otherwise—
... “victim” means a person, including a juristic person, or group of persons, against whom an offence referred to in section 3 or 4 has been committed.

Offence of hate crime

3. (1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person’s prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim’s association with, or support for, a group of persons who share the said characteristics:

- ... (h) gender or gender identity;
- ... (q) sexual orientation.

(2) Any person who commits a hate crime is guilty of an offence and liable on conviction to a sentence as contemplated in section 6(1).

(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her

Penalties or orders

6. (1) Subject to subsection (2), any person who is convicted of an offence referred to in section 3 is liable, on conviction, to any of the following forms of penalties which the court sentencing the person considers appropriate and which is within that court’s penal jurisdiction:

- (a) Imprisonment, periodical imprisonment, declaration as an habitual criminal, committal to any institution established by law, a fine, correctional supervision or imprisonment from which a person may be placed under correction supervision, as contemplated in section 276 of the Criminal Procedure Act; or
- (b) postponement or suspension of the sentence or a caution or reprimand, as contemplated in section 297 of the Criminal Procedure Act.

(2) If a person is convicted of an offence referred to in section 3, the court that imposes the sentence must—

- (a) if section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), is not applicable; and
- (b) in the case of—
 - (i) damage to, the loss of, or the destruction of, property or the loss of money;
 - (ii) physical, or other injury; or

¹³¹ Prevention and Combating of Hate Speech Bill
<http://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf>

(iii) loss of income or support, suffered by the victim as a result of the commission of the offence, regard the fact that the person has been convicted of a hate crime as an aggravating circumstance.

(3) Any person who is convicted of an offence referred to in section 4 is liable, in the case of—

- (a) a first conviction, to a fine or to imprisonment for a period not exceeding three years, or to both a fine and such imprisonment; and
- (b) any subsequent conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

CARIBBEAN AND AMERICAS

Canada: substantive offence – SOGI; sentence enhancement – SOGI and open-ended

CRIMINAL CODE ¹³²

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor

...

shall be deemed to be aggravating circumstances ...

Canada also has a substantive aggravated offence of mischief relating to religious property, educational institutions, etc., similarly based on evidence of the offence being motivated by bias, prejudice or hate on a closed list of grounds which include sexual orientation and gender identity. The sentence mandates imprisonment (specifying a maximum term but not a minimum).¹³³

¹³² Criminal Code (R.S.C., 1985, c. C-46)
<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-718.2.html>

¹³³ Criminal Code RSC 1985, c C-46, s 430(4.1)
<https://www.canlii.org/en/ca/laws/astat/sc-2017-c-23/latest/sc-2017-c-23.html>

Mischief relating to religious property, educational institutions, etc.

(4.1) Everyone who commits mischief in relation to property described in any of paragraphs (4.101)(a) to (d), if the commission of the mischief is motivated by bias, prejudice or hate based on ... sexual orientation, gender identity or expression ...

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Definition of property

(4.101) For the purposes of subsection (4.1), property means

- (a) a building or structure, or part of a building or structure, that is primarily used for religious worship — including a church, mosque, synagogue or temple —, an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery;
- (b) a building or structure, or part of a building or structure, that is primarily used by an identifiable group as defined in subsection 318(4) as an educational institution — including a school, daycare centre, college or university —, or an object associated with that institution located in or on the grounds of such a building or structure;
- (c) a building or structure, or part of a building or structure, that is primarily used by an identifiable group as defined in subsection 318(4) for administrative, social, cultural or sports activities or events — including a town hall, community centre, playground or arena —, or an object associated with such an activity or event located in or on the grounds of such a building or structure; or
- (d) a building or structure, or part of a building or structure, that is primarily used by an identifiable group as defined in subsection 318(4) as a residence for seniors or an object associated with that residence located in or on the grounds of such a building or structure.

Falkland Islands: sentence enhancement – SO

478. Determining the seriousness of an offence

(7) If the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (8) the court must —

- (a) treat the fact that the offence was committed in any of those circumstances as an aggravating factor; and
- (b) state in open court that the offence was committed in such circumstances.

(8) Those circumstances are —

¹³⁴ Criminal Code (R.S.C., 1985, c. C-46)
<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-718.2.html>

¹³⁵ Criminal Procedure and Evidence Ordinance 2014 (No. 12 of 2014), s 478(8)
<https://legislation.gov.fk/view/html/inforce/2018-08-22/fiord-2014-12>

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on —
 (i) the sexual orientation (or presumed sexual orientation) of the victim; or
 (ii) a disability (or presumed disability) of the victim; or
(b) that the offence is motivated (wholly or partly) by hostility towards persons —
 (i) who are of a particular sexual orientation; or
 (ii) who have a disability or a particular disability,
whether or not the offender’s hostility is also based, to any extent, on any other factor.

ASIA

No Commonwealth states in Asia have hate crimes legislation on sexual orientation or gender identity.

EUROPE

Cyprus: optional sentence enhancement – SOGI

CRIMINAL CODE ¹³⁶

Article 35A

The Court, in the context of the exercise of its powers when imposing the penalty, may take into account as an aggravating factor the motivation of prejudice against a group of persons or a member of such a group of persons on the basis of race, colour, national or ethnic origin, religion or other belief, descent, sexual orientation or gender identity.

England & Wales: sentence enhancement – SOGI

CRIMINAL JUSTICE ACT 2003 ¹³⁷

146 Increase in sentences for aggravation related to disability, sexual orientation or transgender identity

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

¹³⁶ Criminal Code (amended 2017), Article 35A
<https://www.legislationline.org/documents/id/21393>

¹³⁷ Criminal Justice Act 2003 <https://www.legislation.gov.uk/ukpga/2003/44/section/146>

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
 - (ii) a disability (or presumed disability) of the victim, or
 - (iii) the victim being (or being presumed to be) transgender, or
 - (b) that the offence is motivated (wholly or partly)—
 - (i) by hostility towards persons who are of a particular sexual orientation,
 - (ii) by hostility towards persons who have a disability or a particular disability, or
 - (iii) by hostility towards persons who are transgender.
- (3) The court—
- (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
 - (b) must state in open court that the offence was committed in such circumstances.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
- (5) In this section “disability” means any physical or mental impairment.
- (6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

The court must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and state so in open court. It is immaterial whether the offender’s hostility is also based, to any extent, on any other factor.¹³⁸

Gibraltar: substantive offences and sentence enhancement – SO

Gibraltar has substantive hate crime offences of aggravated assault, criminal damage, public order and harassment.

CRIMES ACT 2011¹³⁹

Meaning of “aggravated by reason of sexual orientation”

112C.(1) An offence is aggravated by reason of sexual orientation for the purposes of this Part if—

- (a) at the time of committing the basic offence, or immediately before or afterwards, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a sexually orientated group; or
 - (b) the offence is motivated (wholly or partly) by hostility towards members of a sexually orientated group based on their membership of that group.
- (2) For purposes of subsection (1)—
- (a)—
 - “basic offence” means an offence mentioned in any of sections 113C(1), 114C(1), 115C(1) and 116C(1);
 - “membership”, in relation to a sexually orientated group, includes association with

¹³⁸ Section 146(3) and (4).

¹³⁹ Crimes Act 2011, as amended by the Criminal Justice (Amendment) Act 2013, Part 7, ss. 113C, 114C, 115C, 116C <http://www.gibraltarlaws.gov.gi/articles/2011-23o.pdf>

- members of that group; “presumed” means presumed by the offender;
- “sexually orientated group” means a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both) ;
- (b) it is immaterial whether or not the offender’s hostility is also based, to any extent, on–
 - (i) the fact or presumption that any person or group of persons belongs to any racial group, religious group, disability group or age group, or
 - (ii) any other factor not mentioned in that paragraph.

Increase in sentences for racial, religious, disability or age aggravation or aggravation related to sexual orientation

117A.(1) This section applies where the court is considering the seriousness of an offence other than one under sections 113 to 116D of this Act.

- (2) If the offence was racially, religiously, disability or age aggravated or aggravated by reason of sexual orientation, the court – (a) must treat that fact as an aggravating factor; and (b) must state in open court that the offence was so aggravated.

Guernsey: sentence enhancement (murder only) – SO

THE CRIMINAL JUSTICE (MINIMUM TERMS FOR SENTENCES OF LIFE IMPRISONMENT) (BAILWICK OF GUERNSEY) LAW, 2011¹⁴⁰

Starting point for particularly serious cases.

- 3. (1) The appropriate starting point in relation to an offender who is sentenced to a mandatory sentence of life imprisonment for an offence shall be the period of 30 years if – ...
 - (c) the court considers that –
 - (i) the offence, or
 - (ii) the combination of the offence and any other offence committed by him which is associated with that offence, is particularly serious.
- (2) Without limiting the generality of subsection (1), cases that would normally be considered as particularly serious include the following –
 - ... (h) murder which is aggravated by sexual orientation or disability

Meaning of "murder which is aggravated by sexual orientation or disability".

- 13. (1) For the purposes of section 3, a murder is aggravated by sexual orientation or disability if –
 - (a) at the time of, or immediately before or after, committing the murder, the offender demonstrates towards the victim of the offence hostility based on –
 - (i) the sexual orientation (or presumed sexual orientation) of the victim, or
 - (ii) a disability (or presumed disability) of the victim, or

¹⁴⁰ The Criminal Justice (Minimum Terms for Sentences of Life Imprisonment) (Bailiwick of Guernsey) Law, 2011, ss 3 and 13 <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=115514&p=0>

- (b) the offence is motivated wholly or partly –
 - (i) by hostility towards persons who are of a particular sexual orientation, or
 - (ii) by hostility towards persons who have a disability or a particular disability.
- (2) In this section –
 - “disability” means any physical or mental impairment,
 - “presumed” means presumed by the offender, and
 - “sexual orientation” of a person includes whether the person engages in prostitution.

Isle of Man: sentence enhancement (persons in custody only) – SO

CUSTODY RULES 2015¹⁴¹

52A Increase in punishment for offences aggravated by hostility

- (1) This rule applies where the governor or an adjudicator is considering the appropriate punishment for an offence against discipline.
- (2) If the offence was aggravated by hostility, the governor or that adjudicator –
 - (a) must treat that fact as an aggravating factor (that is to say, a factor that increases the punishment that is imposed); and
 - (b) must state and record that the offence was so aggravated.
- (3) For the purposes of this rule an offence is aggravated by hostility if –
 - (a) at the time of committing the offence, or immediately before doing so, the offender demonstrates towards the victim of the offence hostility based on –
 - [...]
 - (iii) the victim’s membership (or presumed membership) of a sexual orientation group
 - ...
 - (b) the offence is motivated (wholly or partly) by hostility towards –
 - ...
 - (iii) members of a sexual orientation group based on their membership of that group
 - ...
- (4) It is immaterial for the purposes of sub-paragraph (a) or (b) or paragraph (3) whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that sub-paragraph.
- (5) In this rule –
 - ...
 - “membership”, in relation to a racial, religious or sexual orientation group, includes association with members of that group;
 - “presumed” means presumed by the offender; and
 - ...
 - “sexual orientation group” means a group of persons defined by reference to sexual orientation.

¹⁴¹ Custody Rules 2015, rule 52A
<https://www.gov.im/media/1357754/custody-rules-2015-consolidated-as-of-1-july-2017.pdf>

A “sexual orientation group” means a group of persons defined by reference to sexual orientation. The governor or adjudicator must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and state and record that the offence was so aggravated. It is immaterial whether the offender’s hostility is also based, to any extent, on any other factor.

Malta: substantive offence and sentence enhancement – SOGI

Malta has several hate crime provisions that tackle LGBT victimisation. It has a general sentence enhancement provision:

MALTESE CRIMINAL CODE¹⁴²

General provision applicable to offences which are racially aggravated or motivated by xenophobia or homophobia

Article 83B. The punishment established for any offence¹⁴³ shall be increased by one to two degrees when the offence is aggravated or motivated, wholly or in part by hatred against a person or a group, on the grounds of gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion within the meaning of sub-articles (3) to (6), both inclusive, of article 222A:

Provided that the provisions of this article shall not apply where an aggravation of punishment in respect of the motives mentioned in this article is already provided for under this Code or any other law.

It also has specific sentence enhancement provisions for certain offences. The punishments for the offences of bodily harm, threats, private violence and harassment, and crimes against public safety and injury to property, must be increased by one to two degrees when offence is aggravated or motivated on the grounds of (among other things) gender identity and sexual orientation.¹⁴⁴ Further definition is provided in Article 222A.

ARTICLE 222A.

...

(2) The punishments established in the foregoing provisions of this sub-title shall also be increased by one to two degrees when the offence is aggravated or motivated on the grounds of gender, gender identity, sexual orientation ...

¹⁴² Maltese Criminal Code, as amended 2018, Article 83B (provision added in 2012: see sidenote) <http://www.justiceservices.gov.mt/downloaddocument.aspx?app=lom&itemid=8574>

¹⁴³ Certain hate speech offences are excluded as they themselves make separate provide for this aggravation: see Articles 82A and 82C, as below.

¹⁴⁴ Articles 222A(2), 251D and 325A.

(3) An offence is aggravated or motivated on grounds of gender, gender identity, sexual orientation ... if:

(a) at the time of committing the offence, or immediately before or after the commission of the offence, the offender demonstrates towards the victim of the offence hostility, aversion or contempt based on the victim's membership (or presumed membership) of a group, denoting a particular gender, gender identity, sexual orientation ... or

(b) the offence is motivated, wholly or partly, by hostility, aversion or contempt towards members of a group as referred to in paragraph (a).

(4) In sub-article (3)(a):

"membership", in relation to a group, includes association with members of that group;

"presumed" means presumed by the offender.

(5) It is immaterial for the purposes of sub-article (3)(a) or (b) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that those paragraphs.

...

(7) The punishment prescribed for any of the crimes referred to in the preceding articles of this sub-title shall be increased by one to two degrees in the applicable cases referred to in article 202,¹⁴⁵ provided that where an aggravation of punishment in respect of the circumstances mentioned in this article is already provided for under this Code or any other law, the higher punishment may be applied.

Northern Cyprus: substantive offences – SOGI

NORTHERN CYPRUS, CRIMINAL CODE AS AMENDED, SECTIONS 151, 152, 171, 172 AND 174¹⁴⁶

151. Sexual harassment

(1) Whoever harasses or disturbs a person by sexual behaviour, writing, words, voice recording or video image, e-mail, telephone, telephone message or by a similar method or activity, without physical contact, has committed a misdemeanour, and in case of conviction, shall be sentenced to imprisonment of up to one year or a fine or both penalties

(2) Whoever commits the offence in paragraph (1) above;

(a) by abusing the authority of his/her public duty or service relationship; or

(b) against his/her spouse, lover (partner), former spouse or former lover (partner); or

(c) against his/her child, grandchild, mother, father, sibling, grandfather, grandmother;

or

(d) against a person under the age of 18 or a mentally disabled person; or

(e) with other persons; or

(f) against a person who is under his/her responsibility of protection or care; or

(g) as a result of his/her hatred or prejudice against the victim's sex, sexual orientation or gender identity

¹⁴⁵ Section 202 deals with other types of aggravating circumstance.

¹⁴⁶ Available at <http://www.cm.gov.nc.tr/Yasalarr>

has committed a misdemeanour, and if convicted, shall be sentenced to imprisonment of up to two years or a fine or both penalties.

However, if the perpetrator of the crime in paragraph (1) above is under the age of 18, in the cases referred to in this paragraph, he/she shall be punished by a sentence of paragraph (a).

152. Sexual assault

(1) Whoever engages in sexual behaviour and deliberate physical contact with a person, without the consent of that person, has committed a misdemeanour, and in case of conviction, shall be punished with imprisonment of up to three years.

(2) Whoever commits the offence in paragraph (1) above;

(a) By abusing the authority of his/her public duty or service relationship; or

(b) Against his/her spouse, lover (partner), former spouse or former lover (partner); or

(c) Whether or not biologically related, against his/her child, grandchild, mother, father, sibling, grandfather, grandmother; or

(d) Against a person who is above the age of 16 and under the age of 18 or a mentally disabled person; or

(e) By using weapons or physical violence or with other persons; or

(f) Through threat; or

(g) Against a person who is under his/her responsibility of protection or care; or

(h) As a result of his/her hatred or prejudice against the victim's sexual orientation, gender identity or sex

has committed a felony, and if convicted, shall be sentenced to imprisonment of up to four years.

171. Defamation on the ground of sex, sexual orientation or gender identity

(1) If the offence set out in Article 194 of this law [i.e. defamatory publication] is committed against a person due to their sex and/or sexual orientation and/or gender identity, or when the offence is committed for the purpose of promoting hatred and humiliation against people of that sex and/or sexual orientation and/or gender identity, a misdemeanour is committed.

(2) If the act in paragraph (1) above is carried out by means of social media, including press, broadcasting or internet media, a felony is committed and the offender shall be sentenced to four years imprisonment and a fine if convicted.

172. Psychological or economic abuse with a prejudice or hate motivation

Whoever engages in psychological or economic abuse because of prejudice or hatred against the victim's sex and/or sexual orientation and/or gender identity commits a misdemeanour.

174. Discrimination in the provision of a public service benefit

A civil servant providing a public service who discriminates against a public beneficiary because of his/her sex, sexual orientation or gender identity commits a misdemeanour.

Northern Ireland: sentence enhancement – SO

THE CRIMINAL JUSTICE (NO. 2) (NORTHERN IRELAND) ORDER 2004¹⁴⁷

Increase in sentence for offences aggravated by hostility

2. — (1) This Article applies where a court is considering the seriousness of an offence.
- (2) If the offence was aggravated by hostility, the court—
- (a) shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and
 - (b) shall state in open court that the offence was so aggravated.
- (3) For the purposes of this Article an offence is aggravated by hostility if—
- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on—
 - ...
 - (iii) the victim's membership (or presumed membership) of a sexual orientation group;
 - ...
 - (b) the offence is motivated (wholly or partly) by hostility towards—
 - ...
 - (iii) members of a sexual orientation group based on their membership of that group;
 - ...
- (4) It is immaterial for the purposes of sub-paragraph (a) or (b) of paragraph (3) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that sub-paragraph.
- (5) In this Article—
- ...
 - “membership”, in relation to a racial, religious or sexual orientation group, includes association with members of that group;
 - “presumed” means presumed by the offender ...

Scotland: hybrid – SOGI

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) ACT 2009¹⁴⁸

2 Prejudice relating to sexual orientation or transgender identity

- (1) This subsection applies where it is—
- (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to sexual orientation or transgender identity, and
 - (b) proved that the offence is so aggravated.

¹⁴⁷ The Criminal Justice (No. 2) (Northern Ireland) Order 2004, 2004 No. 1991 (N.I. 15)
<http://www.legislation.gov.uk/nisi/2004/1991/article/2>

¹⁴⁸ Offences (Aggravation by Prejudice) (Scotland) Act 2009
<https://www.legislation.gov.uk/asp/2009/8/section/2>

- (2) An offence is aggravated by prejudice relating to sexual orientation or transgender identity if—
- (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to—
 - (i) the sexual orientation (or presumed sexual orientation) of the victim, or
 - (ii) the transgender identity (or presumed transgender identity) of the victim, or
 - (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have—
 - (i) a particular sexual orientation, or
 - (ii) a transgender identity or a particular transgender identity.
- (3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.
- (4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to sexual orientation or transgender identity.
- (5) Where subsection (1) applies, the court must—
- (a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity,
 - (b) record the conviction in a way that shows that the offence is so aggravated,
 - (c) take the aggravation into account in determining the appropriate sentence, and
 - (d) state—
 - (i) 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, or
 - (ii) otherwise, the reasons for there being no such difference.
- (6) In subsection (2)(a), "presumed" means presumed by the offender.
- (7) In this section, reference to sexual orientation is reference to sexual orientation towards persons of the same sex or of the opposite sex or towards both.
- (8) In this section, reference to transgender identity is reference to—
- (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or
 - (b) any other gender identity that is not standard male or female gender identity.

PACIFIC

(Australia) New South Wales: sentence enhancement – SO and open-ended

CRIMES (SENTENCING PROCEDURE) ACT 1999¹⁴⁹

21A Aggravating, mitigating and other factors in sentencing

(2) Aggravating factors

...

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)

...

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

(Australia) Northern Territory: sentence enhancement – inclusive open-ended

SENTENCING ACT¹⁵⁰

5 Sentencing guidelines

(1) The only purposes for which sentences may be imposed on an offender are the following:

(2) ... (f) the presence of any aggravating or mitigating factor concerning the offender ...

6A Aggravating factors

Without limiting section 5(2)(f), any of the following circumstances in relation to the commission of an offence may be regarded as an aggravating factor for that section:

...

(e) the offence was motivated by hate against a group of people

¹⁴⁹ Crimes (Sentencing Procedure) Act 1999, No. 92, s 21A(2). Introduced after a series of offences that appeared to be racially-motivated

<https://www.legislation.nsw.gov.au/#/view/act/1999/92/part3/div1/sec21a>

¹⁵⁰ Sentencing Act 1995, s 6A. It was introduced by the Justice Legislation Amendment (Group Criminal Activities) Act 2006 (NT). The focus was group criminality.

<https://legislation.nt.gov.au/Legislation/SENTENCING-ACT>

(Australia) Victoria: sentence enhancement – inclusive open-ended

SENTENCING ACT 1991 ¹⁵¹

5 Sentencing guidelines

(2) In sentencing an offender a court must have regard to—

...

(daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated ...

New Zealand: sentence enhancement – SOGI

SENTENCING ACT 2002 ¹⁵²

9 Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

...

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

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic ...

Pitcairn Islands: sentence enhancement – SOGI and open-ended

SENTENCING ORDINANCE, 2010 REV ED ¹⁵³

Aggravating and mitigating factors

8. – (1) In sentencing or otherwise dealing with an offender, the Court must take into account the following aggravating factors to the extent that they are applicable in the case –

...

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

...

¹⁵¹ Sentencing Act 1991, s 5(2) [subsection daaa inserted in 2009]
http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/sa1991121/

¹⁵² Sentencing Act 2002, s 9(1)
<http://www.legislation.govt.nz/act/public/2002/0009/latest/DIM135342.html>

¹⁵³ Sentencing Ordinance, 2010 Rev Ed, s 8
http://www.paclii.org/pn/legis/hist_act/so2010re223/

- (4) Nothing in subsection (1) or subsection (2) –
- (a) prevents the Court from taking into account any other aggravating or mitigating factor that the Court thinks fit; or
- (a) implies that a factor referred to in those subsections must be given greater weight than any other factor that the Court might take into account.

Samoa: sentence enhancement – SOGI

SENTENCING ACT 2016¹⁵⁴

7. Aggravating and mitigating factors

– (1) In sentencing or otherwise dealing with a defendant, the court must take into account the following aggravating factors to the extent that they are applicable in the case:

...

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

(i) the hostility is because of the common characteristic; and

(ii) the defendant believed that the victim has that characteristic

...

(4) Nothing in subsection (1) or (2):

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

¹⁵⁴ Sentencing Act 2016, s 7(1)(h)
<http://www.palemene.ws/new/wp-content/uploads/01.Acts/Acts%202016/Sentencing-Act2016-Eng.pdf>

Annex B: Research Design

The research report is confined to laws that address hate crime, which is defined as any criminal offence with a bias element. This does not include hate speech offences, which are a separate category of offending, often involving a very different and complex assessment of human rights laws (specifically freedom of speech and rights to be free from targeted victimisation).

Literature review

The study starts with a review of current research studies and literature on hate crime law. There is extensive literature theorising the main aims and objectives of hate crime laws, and this is summarised in an accessible format at the start of the report. There is scant research on the actual application of hate crime laws, most of which has been conducted in the UK. This literature has been assessed and summarised in the report.

Secondary analysis of official data and crime survey data

The researchers have collated secondary data from the following sources where available: victimisation survey data; police recorded data; prosecution and court data. The report highlights the extent and frequency of anti-LGBT hate crimes in a sample of Commonwealth countries (where data is available via online resources).

Doctrinal analysis of legislation and case law

The report reviews the current body of laws and a sample of court judgments that have interpreted and applied hate crime legislation in a sample of Commonwealth countries. Searches were carried out on databases including national legislatures and courts services online; Westlaw; Lexis; WorldLII and CommonLII. This has enabled us to assess how laws are being interpreted and applied in practice. Here we have highlighted any limitations to certain models of law in respective jurisdictions. Case examples and summaries of judgments are outlined where appropriate.

Stakeholder mapping

Where information is not available online, we have attempted to contact relevant experts on LGBT rights in Commonwealth countries (specifically from the Global South) to locate any relevant laws and judgments.

Contacts were made via the International Network for Hate Studies, a global network that aims to bring together academics, policy makers and practitioners who work within the field of hate crime and hate speech.



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