

Sentencing for offences motivated by hatred or prejudice

July 2009

A. Introduction

Scope of this advice

- A.1 The Attorney-General has sought advice from the Sentencing Advisory Council as to how the *Sentencing Act 1991* (Vic) ('the Victorian Act') could be amended so that where an offence is motivated by hate or prejudice against a particular group (for example, based on their race, religion, ethnicity, disability or sexual orientation) this motivation is taken into account as an aggravating circumstance at the time of sentencing.
- A.2 The Council has not been asked to advise on the merit of amending the Victorian Act but rather the form of such an amendment. The Council has confined its advice to this question.
- A.3 The Attorney-General asked the Council to provide its advice by 3 July 2009. Although this timeframe has not enabled the Council to consult the community on the issues raised, the Council has carefully considered the issues raised by this reference. In formulating its advice, the Council has also had regard to the Victorian *Charter of Human Rights and Responsibilities*.¹

Context

- A.4 Where the victim of an offence has been intentionally selected by an offender partly or entirely because of the offender's hatred or prejudice towards the victim based on the victim's identity, the harm caused is serious, significant and far-reaching. A recent Canadian prosecutorial guideline on hate crimes identified the following broad harms caused by offences in this context:
- *Impact on the Individual:* Hate crimes have a tremendous impact on the individuals who are victimized. In addition to the psychological and emotional harm caused by hate crime, and its repercussions on the identity and feelings of self-worth of the victim, the degree of violence involved in hate-motivated offences is often more extreme than in non-hate crimes.
 - *Impact on the Target Group:* Hate crime makes all members of the target group feel vulnerable to victimization and thereby has a general terrorizing effect on the entire group to which the victim belongs.

¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

- *Impact on Other Vulnerable Groups*: Hate crimes have a negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate motivation is based on an ideology or doctrine that covers a number of the groups that live within the community.
- *Impact on the Community as a Whole*: This, perhaps, is the greatest evil of hate crime. In a multicultural society like Canada, which celebrates diversity and encourages all groups to live together in harmony and equality, hate crime is a negation of the fundamental values of Canada.²

A.5 These observations are equally relevant to the perpetration of such offences in Victoria.

Existing offences

A.6 Victoria already has criminal laws that prohibit violence, offensive language and racial or religious vilification.

A.7 The *Crimes Act 1958* (Vic) contains numerous offences against the person, from assault and intentionally causing serious injury to murder. These offences apply regardless of whether or not the offence was motivated by hatred or prejudice. However, there are examples of cases in which courts have found such offences to be more serious because they were motivated by hatred or prejudice.³

A.8 Section 17 of the *Summary Offences Act 1966* (Vic) prohibits a person from using 'threatening, abusive or insulting words' and 'behaving in an offensive or insulting manner' in or near a public place.

A.9 The *Racial and Religious Tolerance Act 2001* (Vic) prohibits the vilification of persons on the ground of race or religious belief or activity. Sections 24 and 25 of the Act create the offences of 'serious racial vilification' and 'serious religious vilification'. Each attracts a maximum penalty of 6 months' imprisonment or 60 penalty units, or both. In the four years up until 31 March 2009, no one was sentenced in Victoria for an offence under sections 24 or 25 of this Act.⁴

A.10 The *Racial and Religious Tolerance Act 2001* (Vic) also provides a complaints and conciliation scheme through the Victorian Equal Opportunity and Human Rights Commission. Of 2168 complaints to the Commission in 2007/08, 191 related to race, 52 to racial vilification, 70 to religious belief or activity and 61 to religious vilification. The highest number of claims made in that year related to impairment (481 complaints).⁵

A.11 Aside from examples such as racial and religious vilification laws, hate and prejudice-based offences are not specifically singled out in criminal law. Instead, offenders who are so motivated are likely to be charged with more general offences (such as assault or robbery). The Victorian Act requires

² Manitoba Department of Justice [Canada], *Guideline No 2:HAT:1 Policy Directive: 'Hate Motivated Crime'* (June 2008). <www.gov.mb.ca/justice/prosecutions/policy/pdf/hate_crimes.pdf> at 16 June 2009. See further [G1]–[G10].

³ See further [B.3]–[B.5].

⁴ Courtlink unpublished data.

⁵ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2007/2008* (2008), 11.

courts to take into account aggravating and mitigating circumstances.⁶ While this provides scope for courts to find an offence to be aggravated by hate or prejudice-based motivation,⁷ there is no express provision in the Victorian Act that requires courts to take this into account.

- A.12 The Attorney-General seeks advice as to how the Victorian Act can be amended to ensure that the offender's motivation in these types of case is taken into account as an aggravating factor in sentencing.

A new statutory aggravating factor

- A.13 The Council was asked to have particular regard to the approach adopted in the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the 1999 NSW Act').

- A.14 Section 21A of the 1999 NSW Act provides that, in determining the appropriate sentence for an offence, the court must take into account the aggravating factors listed in the section if they are relevant and known to the court. The list of aggravating factors in section 21A(2) includes that:

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).⁸

- A.15 The Council has considered this approach in forming its advice. It has also examined the approach adopted in other jurisdictions as well as in the Victorian equal opportunity legislation.

- A.16 Having reviewed a variety of approaches as well as the available literature and evidence, the Council recommends that a new sentencing factor should be added to section 5(2)^B of the Victorian Act to the effect that in sentencing an offender a court must have regard to whether the offence was motivated (wholly or partially)^D by hatred for or prejudice against a group of people with common characteristics^E with which the victim was associated or with which the offender believed the victim was associated.^F

- A.17 While the precise wording and location of the amendment are matters for Parliamentary Counsel, the Council suggests that an appropriate location for this sentencing factor would be immediately after section 5(2)(d) of the Victorian Act.

- A.18 The reasons for the Council's recommendation are discussed under the following headings:

- B. Location of the new provision.
- C. Onus and standard of proof.
- D. Motivation.
- E. Hatred for or prejudice against a group.
- F. Membership of or association with the group.
- G. Effect of a new aggravating factor.

⁶ *Sentencing Act 1991* (Vic) s 5(2)(g). See further [B.3]–[B.7].

⁷ See for example [B.3]–[B.5] below.

⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

B. Location of the new provision

Existing sentencing factors in Victoria

- B.1 The factors that a court must take into account in sentencing an offender are set out in section 5(2) of the Victorian Act as follows:
- (a) the maximum penalty prescribed for the offence;
 - (b) current sentencing practices;
 - (c) the nature and gravity of the offence;
 - (d) the offender's culpability and degree of responsibility for the offence;
 - (daa) the impact of the offence on any victim of the offence;
 - (da) the personal circumstances of any victim of the offence;
 - (db) any injury, loss or damage resulting directly from the offence;
 - (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
 - (f) the offender's previous character; and
 - (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.
- B.2 It is clear from subsection (g) that the list of factors in section 5(2) is not intended to be exhaustive and provides scope for the courts to develop the law about the aggravating and mitigating factors that must be taken into account in sentencing an offender.
- B.3 Numerous aggravating and mitigating factors have been identified at common law. In relation to racial motivation, the Victorian Court of Appeal has held that an offence can be aggravated because it was motivated by the offender's hatred or prejudice towards the victim. For example, in *R v Palmer*,⁹ the offender was convicted of unlawful and dangerous act manslaughter after he and others killed a Samoan man in a racially motivated attack. Prior to assaulting him causing his death, the offenders had racially abused the victim and some Samoan people who were with him. The offender, who was 18 years old at the time of the offence, was sentenced to six years' imprisonment with a non-parole period of four years. In dismissing his appeal against sentence, Justice Callaway pointed to factors that aggravated the offence or pointed to its seriousness, including that:
- racial violence, of which this was an example, is a serious threat to the maintenance of a safe and decent society. It matters not from which ethnic group it proceeds. Like armed robbery and drug trafficking, it will often call for condign punishment.¹⁰

⁹ *R v Palmer* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996). See also *R v Chong* [2008] VSCA 119 (Unreported, Neave and Kellam JJA and Osborn AJA, 26 June 2008), [29] (Kellam JA).

¹⁰ *R v Palmer* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996), 11 (Callaway JA).

B.4 Justice Charles affirmed Justice Callaway's comments about racial violence and 'the response which the courts should make to those who engage in it', adding that '[a] particularly bad aspect of this case was the racist nature of the attack on the victim and those who were with him'.¹¹

B.5 The Victorian Supreme Court has recently affirmed the significance of racial motivation in *R v OJS*,¹² a case involving manslaughter committed by a 15 year old juvenile. The court sentenced the offender to a youth attendance order. The victim was a 21 year old student from China. The sentencing judge noted:

Finally, because of the background of your victim, I should record that I am well satisfied on the evidence that Mr Han's ethnic origins did not play any part whatsoever in your decision to attack him. Indeed, the group of friends, with which you were associating on the night in question, included at least two persons of Asian origin. Both your mother and your grandfather expressed unreserved confidence to me that you are not at all racist. If I had been satisfied that Mr Han's background played any part in your decision to attack him, then I would have had no hesitation in imposing an immediate custodial sentence on you.¹³

B.6 Hate or prejudice-based motivation is also relevant to the gravity of a particular offence and the offender's culpability for its commission.¹⁴

B.7 Even where aggravating or mitigating factors exist at common law, there are past examples in Victoria of common law factors being codified and introduced into section 5(2) to draw them more sharply into focus. For example, the common law requirement that sentencing courts take into account the impact of the offence on the victim of an offence was inserted into section 5(2) of the Victorian Act by section 3 of the *Sentencing (Further Amendment) Act 2005* (Vic). In the second reading speech, the Attorney-General explained the reason for formalising the common law sentencing factor in the Victorian Act as follows:

In order to emphasise the relevant impact on a victim, this bill will introduce an express requirement into section 5(2) that courts must have regard to the impact of the offence on the victim when making sentencing decisions. The purpose of this amendment is not to fetter judicial discretion. Rather, this will reinforce the longstanding position that it has always been relevant for a sentencer to have regard to the impact of an offence on the victim.¹⁵

The approach in other jurisdictions

B.8 Other jurisdictions, such as New South Wales and New Zealand, are more explicit in the way that they deal with aggravating and mitigating factors in their sentencing legislation.

B.9 The New South Wales legislation was changed in 2002 by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) ('the 2002 NSW Act') as part of a suite of changes to sentencing law. One of the principal objects of the 2002 NSW Act was to 'establish a

¹¹ *R v Palmer* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996), 12 (Charles JA).

¹² *R v OJS* [2009] VSC 265 (Unreported, Kaye J, 30 June 2009).

¹³ *Ibid*, [35].

¹⁴ See further [G.1]–[G.10].

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 March 2005, 433 (Rob Hulls, Attorney-General).

scheme of standard minimum sentencing for a number of serious offences'.¹⁶ Under the new NSW scheme, a court must apply the standard minimum non-parole period for a relevant offence unless there are reasons for setting a longer or shorter non-parole period, having regard to the aggravating and mitigating factors listed in section 21A.

B.10 The 2002 NSW Act replaced section 21A in the 1999 NSW Act with a new section 21A that sets out specific aggravating and mitigating circumstances that a court must take into account in determining the appropriate sentence for an offence, if those circumstances are relevant and known to the court.

B.11 The new section 21A applies to sentencing for all offences, not just those that are subject to the proposed standard non-parole period.¹⁷ The list of aggravating factors in section 21A(2) includes the fact that:

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).¹⁸

B.12 New Zealand, like New South Wales, provides separate lists of aggravating and mitigating factors in the relevant legislation. Section 9(1) of the *Sentencing Act 2002* (NZ) provides that in sentencing an offender the court must take into account the aggravating factors set out in that section to the extent that they are applicable in the case. The aggravating factors listed include:

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.¹⁹

B.13 The Northern Territory provision is closer in structure to section 5(2) of the Victorian Act. Section 5 of the *Sentencing Act 1995* (NT) ('the NT Act') sets out sentencing guidelines. Section 5(2) sets out the sentencing factors to which a court must have regard in sentencing an offender. Like the Victorian provision, section 5(2) of the NT Act includes as a sentencing factor 'the presence of any aggravating or mitigating factor concerning the offender'.²⁰

B.14 Unlike the current approach in Victoria, the NT Act contains examples of aggravating factors in a separate provision which was a later addition to the Act. Section 6A of the NT Act provides that without limiting section 5(2)(f), any of a number of specified circumstances in relation to the commission of an offence may be regarded as an aggravating factor for that section. One of the specified aggravating factors is that 'the offence was motivated by hate against a group of people'. The term 'a group of people' is not defined in the Act.²¹

¹⁶ Explanatory Note, Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002.

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813-5819 (Bob Debus, Attorney General).

¹⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

¹⁹ *Sentencing Act 2002* (NZ) s 9(1)(h).

²⁰ *Sentencing Act 1995* (NT) s 5(2)(f).

²¹ *Sentencing Act 1995* (NT) s 6A(e).

- B.15 Section 6A was introduced by the *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT) which was intended to ‘specifically target low, mid and high level criminal gang activity’:²²

The *Sentencing Act* will also be amended to provide for a non-exhaustive list of aggravating circumstances relating to gang activity that may be considered in sentencing. These aggravating factors will include but are not limited to whether the offender committed the offence while accompanied by others, whether the offender was armed, and whether the offence involved violence or the threat of violence. Importantly, this bill will also amend the *Sentencing Act* to require the court when sentencing an offender to take into account any harm done to the community as a whole as a result of the offending behaviour.²³

- B.16 A number of other jurisdictions have some form of statutory aggravating factor for crimes that are motivated in some way by the offender’s hatred or prejudice towards the victim. In addition to the examples provided above, similar provisions can be found in the United Kingdom, Canada, France, Germany, Italy, Austria, Belgium, Finland, Portugal, Spain, Sweden and Switzerland.²⁴ All of these provisions apply to offences caused or motivated by the victim’s race but they vary in terms of the other categories of identity-based motivation that are expressly covered in the legislation. Some apply to particular offences (usually violent offences), others apply more broadly. In the United States, most states have some form of aggravating factor based on hatred or prejudice.²⁵ The New York State hate crimes provision is accompanied by a legislative finding about the harms caused by hate crimes in that state.²⁶

- B.17 The introduction of hate or prejudice-based motivation as an aggravating factor in sentencing legislation was recommended by the New York and Washington D.C. based international human rights organisation Human Rights First in its 2008 report on hate crimes in Europe and North America. The report set out a ten-point plan for governments to combat offences motivated by hatred or prejudice (see further Appendix 1). Recommendation 2 provided:

Recognizing the particular harm caused by violent hate crimes, governments should enact laws that establish specific offenses or *provide enhanced penalties* for violent crimes committed because of the victim’s race, religion, ethnicity, sexual orientation, gender, gender identity, mental and physical disabilities, or other similar status.²⁷

²² Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2006 (Dr Peter Toyne, Attorney-General).

²³ Ibid.

²⁴ Michael McClintock, *Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America* (Human Rights First, 2005) 36–37 (Austria), 39–41 (Belgium), 42–44 (Canada), 46 (Finland), 46–54 (France), 54–56 (Germany), 59–60 (Italy), 66 (Portugal), 76–77 (Spain), 77 (Switzerland), 77–78 (Sweden) and 80–83 (UK).

²⁵ Ibid 83. For more information about the provisions in New York State and Maine, see [D.11]–[D.12], [G.8]–[G.9] and Appendix 2.

²⁶ See further [G.8].

²⁷ Human Rights First, *2008 Hate Crime Survey* (2008) 7 (emphasis added).

B.18 This recommendation is consistent with the position advocated by a number of key European institutions. In 2003, the European Commission Against Racism and Intolerance recommended that Member States legislate to provide that racist motivation constitutes an aggravating circumstance of an offence.²⁸ More recently, the Council of the European Union adopted a Framework Decision requiring Members States to:

take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of penalties.²⁹

The Council's view

B.19 The Council considers that the optimal way to achieve the objectives set out in the request from the Attorney-General is to introduce a new statutory aggravating factor into section 5(2) of the Victorian Act.

B.20 The Victorian Act does not currently separate sentencing factors into those that are aggravating and those that are mitigating, but rather leaves it to the court to determine what factors are relevant in a particular case and how they should be treated. Whether a sentencing factor will be treated as aggravating or mitigating depends on the circumstances of a particular case.³⁰ The Council is of the view that there is no reason to depart from this approach by including separate sections containing aggravating and mitigating factors.

B.21 Therefore, the Council believes that the most appropriate way to amend the Victorian Act is to add an additional sentencing factor to section 5(2) rather than amending the Act by adding a separate section relating to specific aggravating factors.

B.22 The Victorian Act provides scope for courts to identify and develop at common law relevant sentencing factors.³¹ However, the existence of a sentencing factor at common law does not preclude its specific inclusion by Parliament into section 5(2). Adding a particular factor to section 5(2) can make it clear to the community Parliament's considered view of that factor.

²⁸ European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No 7: National legislation to combat racism and racial discrimination* (2003), recommendation 21. See also Human Rights First, above n 27, 171.

²⁹ The Council of the European Union, *Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law* [2008] OJ L 328/57, art 4.

³⁰ *R v Storey* [1998] 1 VR 359.

³¹ *Sentencing Act 1991* (Vic) s 5(2)(g).

C. Onus and standard of proof

- C.1 A threshold issue that will shape the articulation of the sentencing factor is the question of who will have the onus of proving that an offender was motivated by hatred or prejudice and the standard of proof that is required.
- C.2 The sentencing judge is required to determine the facts that will form the basis of sentence. There is no general requirement that the sentencing judge must sentence an offender on a view of the facts most favourable to the offender.³² The law governing aggravating and mitigating factors in sentencing in Victoria is set out in *R v Storey*.³³ A specially convened Full Bench of the Victorian Court of Appeal held that aggravating factors (factors adverse to the offender) must be established by the prosecution beyond reasonable doubt.³⁴ Where aggravating factors are not established beyond reasonable doubt the sentencing judge must determine an outcome on the basis that those aggravating factors are not present.³⁵
- C.3 Whether a particular fact is mitigating or aggravating ultimately depends on the use to be made of that fact by the sentencing judge:
- The test is not what tag can or should be applied to any particular fact but what use the judge proposes to make of the fact in relation to the offender. If it is a use adverse to the interests of the offender then proof beyond reasonable doubt is required; if it is a use in favour of the offender then proof on the balance of probabilities will suffice.³⁶
- C.4 The onus and standard of proof are important considerations in identifying the scope of the aggravating factor. For example, it is likely to be easier to prove beyond reasonable doubt *what* an offender physically said and did than to prove *why* he or she acted in that way, particularly if there may have been several different motives for his or her actions. It may be harder to prove beyond reasonable doubt that the *primary* motivation for an offence was hatred and prejudice even though there is ample evidence to establish that hatred and prejudice formed part of the offender's motivation (for example where the victim of a robbery is selected because of the offender's perception that he or she will be an 'easy target' based on the offender's prejudiced assumptions about an identifying characteristic of the victim such as race or sexual orientation).

³² *R v De Simoni* (1981) 147 CLR 383, 392; *R v Mokbel* [2006] VSC 119 (Unreported, Gillard J, 31 March 2006), [24].

³³ [1998] 1 VR 359.

³⁴ *Ibid* 371.

³⁵ *R v Anderson* (1993) 177 CLR 520, 536 (Deane, Toohey and Gaudron JJ). See further Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford University Press, 1999), [2.304].

³⁶ *R v Storey* [1998] 1 VR 359, 371.

D. Motivation

- D.1 The aggravating factor provided in section 21A of the 1999 NSW Act applies where 'the offence was *motivated* by hatred ... or prejudice'. The Canadian provision uses similar wording, providing that it is an aggravating factor if 'the offence was motivated by bias, prejudice or hate'.³⁷
- D.2 Hatred and prejudice can arise in different circumstances during the commission of an offence. They can be the only motivation for an offence from start to finish. This is illustrated in Case Study 1.

Case Study 1

Anna is catching a train late at night with her female partner. She gets off the train one stop before her partner is due to get off. A group of people have watched her and her partner on the train. Witnesses overhear them talk about getting off the train and 'teaching her a lesson'. They follow her off the train and physically assault her. While they are assaulting her they call her derogatory names that relate to her sexuality.

- D.3 In Case Study 1, the offence is clearly motivated by hatred and / or prejudice towards Anna on the basis of her sexual orientation.
- D.4 Hatred and prejudice can *partially* motivate an offence that is also being committed for other reasons (for example to unlawfully obtain property). This is illustrated in Case Studies 2–3.

Case Study 2

Anna is catching a train late at night with her female partner. She gets off the train one stop before her partner is due to get off. A group of people have watched her and her partner on the train. They have been looking around the train for someone that they might be able to rob. They saw Anna talking to someone on an expensive looking phone. They also saw some \$50 notes in her wallet when she opened it to put her ticket away. As Anna gets up to get off at her stop they notice that the railway platform is deserted. They decide to follow her off the train to rob her. They catch up with her at the path behind the station, surround her and demand her wallet and phone. She initially refuses to hand them over. They physically assault her, drag her to the ground and take her phone and wallet by force. While they are assaulting and robbing her they verbally abuse her about her sexuality and say derogatory things about her and her partner.

- D.5 In Case Study 2, although the primary motivation of the offence is theft, the offence as a whole against this particular victim is partially motivated by the offenders' hatred and / or prejudice. The motivation is part of the overall course of offending against Anna. In this case the offence should be aggravated by the fact that the offenders were partially motivated by hatred and / or prejudice in the commission of the offence. This made what they did to Anna more serious.

³⁷ *Criminal Code*, RSC 1985, c 46, s 718.2(a)(i).

Case Study 3

Jo lives in Australia but was born overseas. He grew up in a culture in which women dress and behave conservatively. He is convicted of raping a young woman. In his record of interview he discloses that he decided to rape the victim because she is 'Western' and he believes that 'all Western women are sexually promiscuous'.

- D.6 In Case Study 3, the offender has selected the victim of his offence because of his prejudice towards her based on her race, nationality and culture and his perception of her characteristics as part of this group. This is a partial motivation of his offending and should aggravate the offence that he has committed.
- D.7 Whether they totally or partially motivate an offence, hatred and prejudice increase the offender's culpability and compound the harms caused to the victim, the target group, other vulnerable groups and the broader community.
- D.8 The New Zealand aggravating factor applies where the offence was committed 'partly or wholly because of' the offender's hostility.³⁸ This appears to be broader than the approach in New South Wales and the Northern Territory. The Council supports this broader approach.
- D.9 Similarly, the United States Federal Sentencing Guidelines provide for a sentence to be increased where it is established beyond reasonable doubt:
- that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.³⁹
- D.10 This factor focuses on the selection of the victim of the offence based on the victim's identity. This could also be categorised as a partial motivation for the offence.
- D.11 The Maine Criminal Code also focuses on the selection by the offender:
- of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person or of the owner or occupant of that property.⁴⁰
- D.12 Similarly, the hate crimes provision in New York state provides that:
1. A person commits a hate crime when he or she commits a specified offense and either:
 - (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or
 - (b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.⁴¹

³⁸ *Sentencing Act 2002* (NZ) s 9(1)(h).

³⁹ United States Sentencing Commission [USSC], *Guidelines Manual*, §3A1.1 (November 2008).

⁴⁰ ME REV STAT ANN tit 17-A §1151(8)(B)(2008).

⁴¹ NY [Penal] LAW (Consol) § 485.05.

- D.13 The Council is of the opinion that the new statutory aggravating factor should apply in cases where the offence was partially motivated by hatred or prejudice, including in circumstances where the person selects the victim of the offence because of hatred of or prejudice against the victim on the basis of the victim's identity. Case studies 1–3 above all describe conduct that the Council considers should be included by the concept of 'partial motivation' in the aggravating factor.

E. Hatred for or prejudice against a group

- E.1 There are many types of hatred and prejudice—not just racial and religious—that may motivate an offence, for example hatred or prejudice based on the victim's sexuality or the victim's impairment. In addition, an offence may be motivated by more than one form of prejudice or hatred (for example, based on a person's race and sexual orientation).
- E.2 The question is whether categories of hatred or discrimination should be specifically referred to in the legislation by way of examples of 'groups' to which the legislation applies.
- E.3 The table in Appendix 2 provides examples of some of the attributes that have been singled out in similar aggravating factors in other jurisdictions and notes which of these are also attributes that have been identified in Victoria's *Equal Opportunity Act 1995* ('EOA') or in recommendation 2 of the 2008 Hate Crime Survey (see further Appendix 2).
- E.4 The Council takes the view that courts are best placed to identify and develop the groups to which the aggravating factors should apply on a case by case basis. For this reason, the legislation should not contain a list of groups (whether exhaustive or inclusive) but leave it to the courts to develop the law on a case by case basis. This is the approach that has been taken in the Northern Territory provision.⁴²

⁴² See [B.13]–[B.15] above.

F. Membership of or association with the group

Membership of the group

- F.1 The Northern Territory provision simply provides that it is an aggravating factor where 'the offence was motivated by hate against a group of people'.⁴³ The provision does not specify what the victim's relationship to the group must be for the provision to take effect. The term 'a group of people' is not defined in the Act.
- F.2 In contrast, the New South Wales and New Zealand provisions are limited to situations where the offender believes that the victim *belongs* to the group of people. An issue with this wording is that it might exclude cases that should properly be classed as crimes motivated by hatred or prejudice.
- F.3 There are a number of situations in which the victim of an offence may not 'belong' to the group that is hated or the subject of prejudice, but the offence can still be properly classified as one that is motivated by hatred or prejudice.
- F.4 For example, the following offences could be classified as hate or prejudice-based offences:
- Where the victim belongs to or shares the personal characteristics of a particular group.

Case Study 4

Alex is a Chinese person who is travelling by train. The offenders surround Alex and start taunting him, using racist and derogatory language and throw his bag onto the ground. The situation escalates and the offenders physically assault Alex. They are convicted of assaulting Alex and causing damage to his property. The offence should be aggravated by the fact that they were motivated by hatred and / or prejudice.

- Where the victim is not a member of the particular group but came to the rescue of someone of the particular group who was being assaulted, verbally abused or harassed and was consequently offended against.

Case Study 5

Alex is a Chinese person who is travelling by train. The offenders surround Alex and start taunting him, using racist and derogatory language and throw his bag onto the ground. Chris witnesses this and tells the people to stop their behaviour. One of the offenders punches Chris and the others throw Chris's bag off the train. The offenders are charged with assault and causing damage to property. The offence should be aggravated by the fact that they were motivated by hatred and / or prejudice.

⁴³ *Sentencing Act 1995* (NT) s 6A(e).

- Where the victim is an advocate for a group.

Case Study 6

Max is a civil rights campaigner, particularly for asylum seekers from North Africa. Max is not of African descent. Max speaks at a conference aimed at increasing awareness of the problems faced by North African migrants to Australia, calling for greater support and understanding. The offenders, who are opposed to Max's views, follow Max from the lecture and physically assault him, taunting him about his work campaigning for African migrants. They are convicted of assaulting Max. The offence should be aggravated by the fact that they were motivated by hatred and / or prejudice.

- Where the victim's employment relates to a group.

Case Study 7

Max is employed as a mental health worker at a small organisation. The offenders follow Max from work and physically assault him, taunting him about his work. They are convicted of assaulting Max. The offence should be aggravated by the fact that they were motivated by hatred and / or prejudice.

- Where the victim is related to or is a friend of a member of a group.

Case Study 8

Craig and Jane are a married couple who are walking home hand in hand. They are with Craig's brother John and John's male partner Michael. John and Michael are walking with their arms around each other. The offenders follow them, shouting taunts at John and Michael about their sexuality. Craig, Jane, John and Michael start to run away. They are chased by the offenders. All of the group manage to get away except for Craig and Jane. The offenders realise that they are not gay but physically assault and verbally abuse them because they were with two gay people. The offenders are convicted of assaulting Craig and Jane. The offence should be aggravated by the fact that they were motivated by hatred and / or prejudice.

Association

- F.5 Useful guidance can be found in the *Equal Opportunity Act 1995* (Vic) which prohibits discrimination on the basis of the specified attributes of the victim, including 'personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the [specified] attributes'.⁴⁴
- F.6 This broader approach is consistent with the approach in the Northern Territory⁴⁵ and with the approach in the United States Guideline which provides an aggravating factor where it is established beyond reasonable doubt 'that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the *actual or perceived* ... [identifying characteristic] of *any person*'.⁴⁶ The use of the words 'any person' rather than a reference to the victim suggests that the aggravating factor is broader in scope than the factors in the New South Wales and New Zealand legislation.

⁴⁴ *Equal Opportunity Act 1995* (Vic), s 6(m).

⁴⁵ See [B.13]–[B.15] above.

⁴⁶ USSC (2008), above n 39, §3A1.1 (emphasis added).

F.7 As discussed above, the Council is of the view that the new aggravating factor should not specify the groups that are included; it should instead be left to the courts to develop the law in this area. However, the Council is of the opinion that the scope of the provision should be broader than those in New South Wales and New Zealand in that it should extend to offences committed against people because of their *association with* a particular group.

Offender's belief

F.8 There may be situations where an offence is partially or wholly motivated by the offender's belief that the victim belongs to or is associated with a particular group, but that belief is mistaken. For example in *R v Palmer*,⁴⁷ the offender was convicted of unlawful and dangerous act manslaughter after killing a Samoan man in a racially motivated attack. The court found that the offence was motivated by the offender's hatred of Maori people and that he had mistakenly believed that the victim was Maori.

F.9 The Council does not see that there is any distinction between offences based on the offender's mistaken belief about the victim's identity and is of the opinion that the aggravating factor should apply equally in these cases.

F.10 This is consistent with the approach taken in the provisions in New South Wales and New Zealand (both of which apply where the offender *believed* that the victim belonged to the particular group).⁴⁸ Similarly, the aggravating factor that is contained in the United States Guideline applies where the victim or property was selected by the offender because of the '*actual or perceived ... [identifying characteristic] of any person*'.⁴⁹

The Council's view

F.11 The Council is of the view that the new statutory aggravating factor should apply in the following types of case:

- Where the victim belongs to or shares the personal characteristics of a particular group.
- Where the victim is not a member of the particular group but came to the rescue of someone of the particular group who was being assaulted, verbally abused or harassed and was consequently offended against.
- Where the victim is an advocate for a group.
- Where the victim is related to or is a friend of a member of a group.
- Where the offender believes that the victim is associated with the group.

⁴⁷ *R v Palmer* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996).

⁴⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 2002* (NZ) s 9(1)(h).

⁴⁹ USSC (2008), above n 39, §3A1.1 (emphasis added).

G. Effect of a new aggravating factor

Increased offence seriousness

- G.1 The fact that an offender was motivated by hatred or prejudice increases the seriousness of the offence that he or she has committed, as compared to similar offences that were not so motivated. The seriousness will be further compounded where the offender has committed the offence with other people.
- G.2 The seriousness of a particular offence can be measured by the following two components:
1. The gravity of the offence, that is, the harm caused or risked by the offender's act (or omission).
 2. The offender's culpability and degree of responsibility for the offence.⁵⁰
- G.3 Culpability, or blameworthiness, reflects the extent to which an offender should be held accountable for his or her actions by assessing the offender's intention, awareness and motivation in committing the crime.⁵¹
- G.4 In a number of recent decisions, the European Court of Human Rights has emphasised the importance of identifying whether violent offences were motivated by hatred or prejudice:
- when investigating violent incidents ..., State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.⁵²
- G.5 Where it is established that an offender was motivated (wholly or partially) by hatred or prejudice, it is likely that the sentencing court will find that both the harm caused by the offender and the degree of the offender's culpability are greater than if the offence had not been motivated in this way.
- G.6 This is consistent with the analysis in Fox and Freiberg that:
- in a multicultural society, the deliberate selection of any minority group for attack in order to undermine their sense of security and confidence in their lawful place in the community is a matter that aggravates the gravity of any crime committed with this motive.⁵³

⁵⁰ Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214.

⁵¹ Sentencing Task Force, Victoria, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (1989) (written for the Task Force by Richard Fox and Arie Freiberg), 60; Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993), 29.

⁵² *Secic v Croatia*, no. 40116/02, § 66 [2007] ECHR 1159, in which the court reiterated its position as set out in *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, [2005] ECHR 465. See also *Angelova and Iliev v Bulgaria*, no. 55523/00, §§ 115-117, 26 July 2007.

⁵³ Richard Fox and Arie Freiberg, above n 35 (1999), [3.628].

G.7 Similarly, the authors of the *Victorian Sentencing Manual* observe that offenders who are motivated by anti-social attitudes (in particular, offences motivated by hatred on the basis of race or sexuality) are treated by courts as having a high degree of moral culpability.⁵⁴

G.8 In the United States, a number of aggravating factor provisions explicitly recognise the harms caused by such offences. The New York State hate crimes provision is accompanied by a legislative finding about the harms caused by hate crimes in that state:

The legislature finds and determines as follows: criminal acts involving violence, intimidation and destruction of property based upon bias and prejudice have become more prevalent in New York state in recent years. The intolerable truth is that in these crimes, commonly and justly referred to as 'hate crimes', victims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes. In a democratic society, citizens cannot be required to approve of the beliefs and practices of others, but must never commit criminal acts on account of them. Current law does not adequately recognize the harm to public order and individual safety that hate crimes cause. Therefore, our laws must be strengthened to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence. Accordingly, the legislature finds and declares that hate crimes should be prosecuted and punished with appropriate severity.⁵⁵

G.9 The Maine Criminal Code also recognises the relevance of hate or prejudice-based motivation to the gravity of the offence by providing that one of the purposes of the general sentencing provisions in Part 3 of the Code is:

To permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:

- A. The age of the victim; and
- B. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person or of the owner or occupant of that property.⁵⁶

G.10 This view is shared by Human Rights First in its *2008 Hate Crime Survey*:

While governments have an obligation to combat all crime, the hate crime concept is a simple acknowledgement of the greater seriousness of crimes motivated by racial, religious or other prejudice and hatred that harms whole communities. Hate crime legislation signals a society's commitment to combat violent discrimination and gives force to this by providing for more severe penalties.⁵⁷

⁵⁴ Judicial College of Victoria, *Victorian Sentencing Manual* (2009) [9.9.3.7] <<http://www.justice.vic.gov.au/emanuals/VSM/default.htm>> at 3 June 2009.

⁵⁵ NY [Penal] LAW (Consol) § 485.00. See further [D.12].

⁵⁶ ME REV STAT ANN. tit 17-A, §1151(8)(B)(2008).

⁵⁷ Human Rights First, above n 27, 169.

Purposes of sentencing

- G.11 The sentencing factors that are present in a particular case will influence the court's decision about what the purpose or purposes of the sentence handed down in the case should be. Section 5(1) of the Victorian Act sets out the only purposes for which a sentence can be imposed in Victoria:
- just punishment;
 - deterrence;
 - rehabilitation;
 - to manifest the denunciation by the court of the type of conduct in which the offender engaged; and
 - community protection.
- G.12 Sentencing is an important communicative exercise. The Victorian Act permits a court to express the public denunciation of an offender for committing any offence, including one that is motivated by hatred or prejudice. By denouncing the offender's actions through the sentence imposed, the court acknowledges the wrongfulness of the offender's actions and seeks to encourage a sense of responsibility in the offender for the harm caused. Giving a particular factor express statutory recognition alongside the other factors and circumstances set out in section 5(2) could serve an important symbolic function by making its presence clear, accessible and transparent to victims, offenders and the broader community.
- G.13 The Victorian Act also provides scope to punish the offender by expressly mandating courts to take account of hate-based or prejudicial motivation, and to use the sentence to deter the offender and others from committing such offences in the future. Where a crime is motivated by hatred or prejudice, specific and general deterrence should generally be a key purpose of the sentence imposed. However, the efficacy of general deterrence in relation to some groups in the community, including those at whom provisions of these kind are directed, is open to question.
- G.14 Nonetheless, crime and specifically violence prevention measures require a range of responses including innovative social policy measures and community education programs which actively challenge such prejudice. These programs should always be coupled with legal sanctions against those who choose to perpetrate crimes motivated by hatred and prejudice. Sentencing policy has an important part to play in such prevention and a new statutory aggravating factor is a critical element in a continuum of measures that will be necessary to address the problem. By adding a specific sentencing factor which takes account of an offender's prejudicial motivation, those whose responsibility it is to provide community education programs may be able to more confidently communicate the community's intolerance of such offences and thus maximise the effectiveness other non-legal measures designed to eliminate prejudice and hatred in Victoria.

Children and young people

- G.15 Offences that are motivated by hatred or prejudice will sometimes be committed by young offenders. Some of these offenders will be old enough to be dealt with in adult courts and will be sentenced according to the principles set out in the Victorian Act. Others will fall within the jurisdiction of the Children's Court and their sentences will be imposed taking into account the purposes of sentencing in that jurisdiction.
- G.16 The Children's Court has jurisdiction if the defendant was under 18 years old at the time of the alleged commission of an offence, and is under 19 years old at the time when proceedings are commenced.⁵⁸
- G.17 The Criminal Division of the Children's Court may deal with all charges except for charges for a range of homicide and homicide-related offences.⁵⁹
- G.18 Section 4 of the Victorian Act provides that that Act applies 'to all courts except the Children's Court'.⁶⁰ Children sentenced in the Children's Court are sentenced under the provisions of the *Children, Youth and Families Act 2005* (Vic) ('the Children, Youth and Families Act').
- G.19 The approach to sentencing in the Children's Court is different to that in adult courts, recognising that young people should be treated differently to adults. This distinction was explained in the Victorian Court of Appeal by Justice Vincent in *R v Evans*.⁶¹

An elaborate system has been developed to deal with the problem of offending by children and young persons in our community, with a separate court, separate detention facilities, supervision systems and so forth. ... Underlying this system is the attribution of considerable significance to the generally accepted immaturity of the young people who appear before the Children's Court and the need, in the interests of the community and the young persons concerned, to endeavour to divert them from engagement in anti-social conduct at that early stage of their lives. These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals.⁶²

- G.20 Section 362 of the Children, Youth and Families Act sets out the matters that the Children's Court must take into account in sentencing children, as follows:
- the need to strengthen and preserve the relationship between the child and the child's family;
 - the desirability of allowing the child to live at home;
 - the desirability of allowing the child's education, training or employment to continue without interruption or disturbance;

⁵⁸ *Children, Youth and Families Act 2005* (Vic) ss 3 (definition of 'child') and 516 (jurisdiction of Criminal Division).

⁵⁹ *Children, Youth and Families Act 2005* (Vic) s 516(1)(b) excludes from the jurisdiction of the Children's Court charges for murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death.

⁶⁰ *Sentencing Act 1991* (Vic) s 4.

⁶¹ [2003] VSCA 223 (Unreported, Ormiston, Batt and Vincent JJA, 19 December 2003).

⁶² *Ibid*, [44].

- the need to minimise the stigma to the child resulting from a court determination;
- the suitability of the sentence to the child;
- if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for his or her unlawful action;
- if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.

G.21 While these purposes are quite different to those set out in section 5(1) of the Victorian Act, there is some overlap. Each of the first five factors listed above can be seen as reflecting the purpose stated in section 5(1)(c) of the Victorian Act of establishing conditions within which the rehabilitation of the offender may be facilitated. However, an important difference is that the purpose in section 5(1)(c) is just one of five purposes for which a sentence may be imposed, whereas the first five factors in section 362 of the Children Youth and Families Act are matters that the Children’s Court must take into account. The last two factors listed above can be seen to reflect to a degree the purposes in section 5(1)(b), (d) and (e) of specific deterrence, denunciation and community protection.

G.22 Although the Children Youth and Families Act specifies purposes that have some similarity to those in section 5(1) of the Victorian Act, it does not specify any factors corresponding to the factors set out in section 5(2) of the Victorian Act. In particular, it does not refer to factors such as the nature and gravity of the offence, the offender’s culpability and degree of responsibility for the offence or the presence of any aggravating or mitigating factor concerning the offender.

G.23 The interaction between the matters listed in section 362 of the Children, Youth and Families Act and general sentencing principles has been explained by Justice Vincent:

Whilst broadly speaking, normal sentencing principles can be said to remain applicable when dealing with youthful offenders, as a matter of law and practice it is recognised that the respective weight to be given to relevant factors will vary. In addition the *Children and Young Persons Act 1989* (Vic) sets out a number of matters to which a sentence in the Children’s Court must have regard and which differ in kind and emphasis from roughly similar provisions in the *Sentencing Act 1991* (Vic).⁶³

G.24 Therefore, although the Children’s Court is not compelled to take into account the sentencing factors set out in section 5(2), it is open to the Court to draw on these and common law sentencing principles when deciding the weight to be given to the matters that are set out in the Children, Youth and Families Act.

G.25 This means that, if section 5(2) of the Victorian Act were to be amended to specify that a court must have regard to whether an offence was motivated (wholly or partially) by hatred for or prejudice against a group of people, the *requirement* would not apply to the Children’s Court because of section 4 of the Victorian Act, but it would be open to the court to consider the factor alongside other general sentencing principles, provided it does so in light of the matters set out in section 362 of the Children, Youth and Families Act.

⁶³ *R v Evans* [2003] VSCA 223 (Unreported, Ormiston, Batt and Vincent JJA, 19 December 2003), [44]. While Justice Vincent was referring to provisions of the *Children and Young Persons Act 1989* (Vic), those provisions do not differ materially from the provisions currently in section 362 of the *Children, Youth and Families Act 2005* (Vic).

- G.26 In providing its advice on how section 5(2) of the Victorian Act could be amended, the Council has not examined the merits of making such an amendment (see further [A.1]–[A.3]). With regard to the Children’s Court, the Council notes that considerations about the merits of amending the Children Youth and Families Act would be different to those regarding the amendment to the Victorian Act, and would need careful consideration.
- G.27 As noted above and as recognised in the Victorian Court of Appeal by Justice Vincent in *R v Evans*,⁶⁴ the Children’s Court was established and has evolved in a different policy context to the adult courts. The matters that are to be taken into account in the Children’s Court reflect the different context and purpose of sentencing in that jurisdiction. In addition, Australia is a party to the United Nations Convention on the Rights of the Child. Article 40(1) of the Convention recognises:
- the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.
- G.28 Any amendments to Part 5.3 of the Children Youth and Families Act regarding sentencing in the Children’s Court would require an examination of the obligations under that Convention.
- G.29 Within the scope of this advice, the Council has not had sufficient opportunity to examine those obligations. In the absence of such an examination, and in the absence of evidence that the Children’s Court is not having regard to hatred or prejudice against a group as a partial or full motivation for an offence, the Council does not recommend any amendment to the Children, Youth and Families Act.

H. The Council’s advice and recommendations

- H.1 For the reasons outlined in this advice, the Council considers that the optimal way to achieve the objectives set out in the request from the Attorney-General is to introduce a new statutory aggravating factor into the Victorian Act, to make it clear that offences that are motivated by hatred or prejudice are particularly serious and cause great harm to individuals, to the targeted groups and to the broader community.
- H.2 Where an offence is so motivated (wholly or partially), courts will be required to take this into account and will be able to impose more severe sentences as a result. In addition to punishing an offender sentences can serve to denounce the offender’s conduct and possibly deter other would be offenders from committing crimes that are motivated by hatred or prejudice.
- H.3 To maximise the deterrent effect of sentences in such cases, it is crucial that in any public statement about such offences, it is made clear that crimes that are motivated by hatred or prejudice will not be tolerated by the community.

⁶⁴ [2003] VSCA 223 (Unreported, Ormiston, Batt and Vincent JJA, 19 December 2003).

H.4 The Council recommends as follows.

Recommendations	
1.	Section 5(2) of the <i>Sentencing Act 1991</i> (Vic) should be amended to provide that in sentencing an offender a court must have regard to whether the offence was motivated (wholly or partially) 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.
2.	The term ‘wholly or partially motivated’ in recommendation 1 is intended to apply to situations including: <ul style="list-style-type: none">• where the primary motivation for the offence was hatred or prejudice.• where the victim was selected or targeted by the offender because of the offender’s hatred or prejudice.• where the offender’s conduct during the offence indicated that part of the motivation for the offence was the offender’s hatred or prejudice towards the victim because of the victim’s identity.
3.	The term ‘associated’ in recommendation 1 is intended to apply to situations including: <ul style="list-style-type: none">• where the victim is a member of the particular group.• where the victim is not a member of the particular group but came to the rescue of someone of the particular group and was consequently offended against.• where the victim is an advocate for a group.• where the victim is a family member or friend of a member of the group.
4.	This sentencing factor should be located immediately after section 5(2)(d) of the <i>Sentencing Act 1991</i> (Vic) to reflect its relevance to the gravity of an offence and the offender’s culpability.
5.	The absence of the sentencing factor described in recommendation 1 should not constitute a mitigating factor. That is, nothing in the wording of the new provision should suggest that where the offence is <u>not</u> motivated (wholly or partially) by hatred or prejudice the absence of such motivation is a mitigating factor.

Appendix 1: Human Rights First: Ten-Point Plan for Combating Hate Crimes

In its 2008 survey on hate crimes in Europe and North America, Human Rights First developed the following ‘ten-point plan’ for governments to strengthen their response to hate crimes:⁶⁵

1. Acknowledge and condemn violent hate crimes whenever they occur.

Senior government leaders should send immediate, strong, public, and consistent messages that violent crimes which appear to be motivated by prejudice and intolerance will be investigated thoroughly and prosecuted to the full extent of the law.

2. Enact laws that expressly address hate crimes.

Recognizing the particular harm caused by violent hate crimes, governments should enact laws that establish specific offenses or provide enhanced penalties for violent crimes committed because of the victim’s race, religion, ethnicity, sexual orientation, gender, gender identity, mental and physical disabilities, or other similar status.

3. Strengthen enforcement and prosecute offenders.

Governments should ensure that those responsible for hate crimes are held accountable under the law, that the enforcement of hate crime laws is a priority for the criminal justice system, and that the record of their enforcement is well documented and publicized.

4. Provide adequate instructions and resources to law enforcement bodies.

Governments should ensure that police and investigators—as the first responders in cases of violent crime—are specifically instructed and have the necessary procedures, resources and training to identify, investigate and register bias motives before the courts, and that prosecutors have been trained to bring evidence of bias motivations and apply the legal measures required to prosecute hate crimes.

5. Undertake parliamentary, interagency or other special inquiries into the problem of hate crimes.

Such public, official inquiries should encourage public debate, investigate ways to better respond to hate crimes, and seek creative ways to address the roots of intolerance and discrimination through education and other means.

6. Monitor and report on hate crimes.

Governments should maintain official systems of monitoring and public reporting to provide accurate data for informed policy decisions to combat violent hate crimes. Such systems should include anonymous and disaggregated information on bias motivations and/or victim groups, and should monitor incidents and offenses, as well as prosecutions. Governments should consider establishing third party complaint procedures to encourage greater reporting of hate crimes and conducting periodic hate crime victimization surveys to monitor underreporting by victims and underrecording by police.

⁶⁵ Human Rights First, above n 27, 7–8.

7. Create and strengthen antidiscrimination bodies.

Official antidiscrimination and human rights bodies should have the authority to address hate crimes through monitoring, reporting, and assistance to victims.

8. Reach out to community groups.

Governments should conduct outreach and education efforts to communities and civil society groups to reduce fear and assist victims, advance police-community relations, encourage improved reporting of hate crimes to the police and improve the quality of data collection by law enforcement bodies.

9. Speak out against official intolerance and bigotry.

Freedom of speech allows considerable latitude for offensive and hateful speech, but public figures should be held to a higher standard. Members of parliament and local government leaders should be held politically accountable for bigoted words that encourage discrimination and violence and create a climate of fear for minorities.

10. Encourage international cooperation on hate crimes.

Governments should support and strengthen the mandates of intergovernmental organizations that are addressing discrimination—like the Organization for Security and Cooperation in Europe, the European Commission against Racism and Intolerance, and the Fundamental Rights Agency—including by encouraging such organizations to raise the capacity of and train police, prosecutors, and judges, as well as other official bodies and civil society groups to combat violent hate crimes. Governments should also provide a detailed accounting on the incidence and nature of hate crimes to these bodies in accordance with relevant commitments.

Appendix 2: Examples of ‘groups’

The following table provides examples of some of the attributes that have been singled out in similar aggravating factors in other jurisdictions and notes which of these are also attributes that have been identified in Victoria’s *Equal Opportunity Act 1995* (‘EOA’) or in recommendation 2 of the 2008 Hate Crime Survey (HCS).

	NSW	NZ	NY ⁶⁶	ME ⁶⁷	Can	HCS	EOA ⁶⁸
Race	✓	✓	✓	✓	✓	✓	✓
Colour		✓	✓	✓	✓		✓
Religion	✓	✓	✓	✓	✓	✓	✓
Nationality		✓	✓	✓	✓		✓
Ancestry				✓			✓
Ethnicity	✓		✓		✓	✓	✓
Language	✓				✓		
Impairment ⁶⁹	✓	✓	✓	✓	✓	✓	✓
Sexual orientation	✓	✓	✓	✓	✓	✓	✓
Gender identity		✓				✓	✓
Gender			✓		✓	✓	✓
Age	✓	✓			✓		✓
Homelessness				✓			

⁶⁶ The reference to NY in this column is to Article 485 of the New York State Penal Law.

⁶⁷ Maine Criminal Code, USA (ME REV STAT ANN tit 17-A, §1151(8)(B)(2008)).

⁶⁸ *Equal Opportunity Act 1995* (Vic) ss 4, 6.

⁶⁹ This table includes as ‘impairment’ categories such as ‘disability’ or ‘mental illness’.