



**Law
Commission**
Reforming the law

Hate Crime: Should the Current Offences be Extended?



Law Commission

Hate Crime: Should the Current Offences be Extended?

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The Law Commission

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HATE CRIME: SHOULD THE CURRENT OFFENCES BE EXTENDED?

Presented to Parliament by the Lord Chancellor and Secretary of
State for Justice
by Command of Her Majesty

May 2014

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THE LAW COMMISSION

HATE CRIME: SHOULD THE CURRENT OFFENCES BE EXTENDED?

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THE LAW COMMISSION

HATE CRIME: SHOULD THE CURRENT OFFENCES BE EXTENDED?

To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

- 1.1 This project was referred to us by the Ministry of Justice. We published the Consultation Paper ("CP") on 27 June 2013.¹ The consultation closed on 27 September 2013.

PROJECT BACKGROUND

- 1.2 The Government's Hate Crime Action Plan was published in March 2012. It describes the following as "core principles" underlying the Government's approach to hate crime:

- (1) preventing hate crime – by challenging the attitudes that underpin it, and early intervention to prevent it escalating;
- (2) increasing reporting and access to support – by building victim confidence and supporting local partnerships;
- (3) improving the operational response to hate crimes – by better identifying and managing cases, and dealing effectively with offenders.²

- 1.3 Police, prosecution and other agencies currently record as a "hate crime" any offence perceived to be motivated by hostility or prejudice based on any of the following five "protected characteristics": race, religion, sexual orientation, disability and transgender identity.³ However, existing criminal offences dealing specifically with hate crime do not cover hostility or hatred in respect of all five of these characteristics. This project has considered whether the hate crime offences should cover all five characteristics.

¹ Hate Crime: The case for extending the existing offences (2013), Consultation Paper No 213, available at http://lawcommission.justice.gov.uk/consultations/hate_crime.htm.

² HM Government, *Challenge it, Report it, Stop it: The Government's plan to tackle hate crime* (March 2012) para 1.19. The Action Plan contains a number of action points on the criminal justice response to hate crime at para 4.7. The plan, and a progress report published on 1 May 2014, are available at <https://www.gov.uk/government/publications/hate-crime-action-plan-challenge-it-report-it-stop-it> (last visited 15 May 2014).

³ Or based on a person's *perceived* race, religion, sexual orientation, disability or transgender identity. See, eg, Crown Prosecution Service, *Hate Crime and Crimes Against Older People Report, 2011-2012* (October 2012) p 8, available at http://www.cps.gov.uk/data/hate_crime/index.html (last visited 15 May 2014).

- 1.4 Certain offences listed in the Crime and Disorder Act 1998 (“CDA 1998”) can be racially or religiously aggravated if the defendant, in committing such an offence, demonstrates, or was motivated by, hostility on the grounds of race or religion. The aggravated offences provide for higher maximum sentences, together with a stigmatising “label”, for example, “racially aggravated criminal damage”.
- 1.5 An entirely separate set of offences contained in the Public Order Act 1986 (“POA 1986”) prohibits a range of conduct *intended or likely* to stir up hatred on grounds of race, or *intended* to stir up hatred on grounds of religion or sexual orientation.
- 1.6 In addition to these offences, a statutory sentencing regime applies in the hate crime context. Under the Criminal Justice Act 2003 (“CJA 2003”), in any offence other than one prosecuted as an aggravated offence, the sentencing court must treat hostility as an aggravating factor in sentencing the offender. The court must be satisfied that the offender demonstrated or was motivated by hostility. Significantly, the enhanced sentencing provisions apply to all five protected characteristics.⁴ The maximum sentence that can be imposed for any offence under the enhanced sentencing regime cannot exceed the maximum available for that offence.⁵
- 1.7 In this project, our terms of reference were to look at:
- (a) extending the aggravated offences in the Crime and Disorder Act 1998 to include where hostility is demonstrated⁶ towards people on the grounds of disability, sexual orientation or gender⁷ identity;
 - (b) the case for extending the stirring up of hatred offences under POA 1986 to include stirring up of hatred on the grounds of disability or gender identity.
- 1.8 Our focus was solely to examine extension of the two existing statutory regimes so that all five characteristics were protected by both types of offence. It was not within our terms of reference to examine the rationale for the two sets of existing offences.⁸ Nor could we consider whether they should be extended to include characteristics other than those specified under (a) and (b) above. We did not

⁴ CJA 2003, s 145 deals with racial and religious hostility and CJA 2003, s 146 deals with hostility on grounds of sexual orientation, transgender identity and disability.

⁵ Unlike the aggravated offences, which have higher maximum sentences than the corresponding offences in their non-aggravated form. However, this difference may not be as significant as it appears because the number of cases in which sentences for aggravated offences exceed the maximum allowed for the corresponding underlying offence is extremely small. See Chapter 4 below, para 4.36 and following, and para 4.116.

⁶ We have interpreted these terms of reference as requiring review of both limbs of s 28(1) CDA 1998 – namely demonstration of, and motivation by, hostility (these are explained in Chapter 2 below from para 2.8).

⁷ It was subsequently confirmed that this was intended to mean transgender identity.

⁸ The separate paper by Dr J Stanton-Ife published online with the CP considered the underlying arguments legitimising criminalisation in the context of hate crime, with a specific focus on the proposed extensions under review in this project: http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf.

examine whether the existing offences should be retained in their current form, amended or repealed.

THE CONSULTATION PAPER

Enhanced sentencing: an adequate response?

- 1.9 Chapter 3 of the CP examined the case for extending the current aggravated offences to address hostility based on disability, sexual orientation and transgender identity.
- 1.10 Given that the enhanced sentencing system:
- (1) already applies to hostility-based offending on grounds of disability, sexual orientation and transgender identity; and
 - (2) has a hostility test identical to that in the aggravated offences,

it was necessary to analyse its current operation and to assess whether it already provided an adequate response in practice, or could do so with any necessary reform. We addressed this before going on to consider whether the aggravated offences should be extended.

- 1.11 In discussions with stakeholders before we published the CP, the issue raised most frequently was the perceived failure of the enhanced sentencing system to recognise aggravation by hostility due to sexual orientation, transgender identity or disability in many cases where it was or appeared to be present. NGOs and individuals with experience of hate crime and its prosecution complained of failures to investigate allegations of hostility and to ensure evidence of hostility was put before the court and taken into account at sentencing.⁹ The clear message was that enhanced sentencing was a potentially powerful weapon in the fight against hate crime, but was being under-used as a result of these failures.
- 1.12 Stakeholders also told us there was no data by which to assess the number of cases in which enhanced sentencing had been applied, or with what result. The numbers of aggravated offences, by contrast, are reported on annually.¹⁰
- 1.13 In view of these concerns, in the CP we asked whether the sentencing system could be reformed to provide an adequate response to crimes involving hostility based on transgender identity, sexual orientation and disability.¹¹ We saw advantages in such an approach: clarity, simplicity and flexibility of process.¹² We also noted the symbolic and communicative power of enhanced sentencing, in

⁹ In relation to disability hate crime, many of these perceptions were endorsed by a Criminal Justice Joint Inspection report produced in March 2013 by HM CPS Inspectorate, HM Inspectorate of Constabulary and HM Inspectorate of Probation entitled *Living in a Different World*, available at <http://www.hmic.gov.uk/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf> (last visited 15 May 2014).

¹⁰ In the Impact Assessment published online with this report, we set out the statistical data available in relation to the number of cases prosecuted as aggravated offences under CDA 1998, and the number of sentences handed down for such cases. The statistics are published by the Ministry of Justice and the Crown Prosecution Service.

¹¹ CP paras 3.46 to 3.53.

¹² CP paras 3.20 to 3.25.

that the system requires the judge to declare in open court that the sentence has been increased because hostility based on the relevant personal characteristic has made the offence more serious.¹³

- 1.14 We also explained in the CP that the fact that an enhanced sentence has been imposed to reflect aggravation by hostility does not routinely appear on the offender's criminal record on the Police National Computer ("PNC").¹⁴ By contrast, when a person has been convicted of an aggravated offence, the aggravated nature of the offending does appear, because "racially [or religiously] aggravated" is part of the name of the offence. Agencies across the criminal justice system which rely on the PNC therefore do not have access to information on the application of enhanced sentencing. Several agencies might benefit from such information, including the police, courts, probation service and prison service. Similarly, a criminal records check by an employer will not disclose the fact that an offender has a previous record of hostility-aggravated offending, if that aggravation was addressed through enhanced sentencing.
- 1.15 Our analysis of the respective benefits of enhanced sentencing and aggravated offences led us to the provisional conclusion that enhanced sentencing could provide an adequate response if it was properly applied and if its use was recorded.¹⁵ We made two provisional proposals designed to bring this about:
- (1) a new Sentencing Council Guideline dealing with hostility;¹⁶ and
 - (2) the recording of the use of enhanced sentencing on the Police National Computer (PNC).¹⁷

The aggravated offences: the case for extension

- 1.16 In the CP we then examined the case for extending the aggravated offences to include hostility on grounds of sexual orientation, disability or transgender identity. We examined whether offences in this form would effectively deal with the kinds of hostility-based offending currently experienced by LGB,¹⁸ transgender and disabled people.¹⁹ We examined whether other offences might already address this offending.²⁰ We asked whether extended aggravated offences offered benefits that enhanced sentencing could not, in terms of: the higher maximum sentences available;²¹ the "label" reflecting the "aggravated" or more serious nature of this criminality;²² and any additional deterrent effects

¹³ CP paras 3.30 and 3.31, 3.73 to 3.74.

¹⁴ CP para 3.33.

¹⁵ CP para 3.45: Provisional Proposal 1.

¹⁶ CP paras 3.46 to 3.51 and Provisional Proposal 2.

¹⁷ CP paras 3.52 and 3.53.

¹⁸ Lesbian, gay or bisexual.

¹⁹ CP paras 3.57 to 3.59.

²⁰ CP paras 3.60 to 3.62.

²¹ CP paras 3.26 to 3.28.

²² CP paras 3.29 to 3.32.

attributable to the higher sentences available or to the “aggravated” label and the extra stigma it carries.²³

1.17 We offered two reform options:

Option 1: the reforms to enhanced sentencing as described above.²⁴
We provisionally proposed that these reforms would produce a system capable of providing an adequate response.

Alternatively, or in addition, to sentencing reform:

Option 2: extending the aggravated offences.²⁵

1.18 Consultees were asked whether they considered that Option 1 alone could provide an adequate solution to the problem of hostility-based crime against those with any of the three protected characteristics. They were then asked whether they thought that aggravated offences were necessary, either instead of or in addition to such reforms (Option 2). We summarise the responses to these questions below.²⁶

The stirring up offences: the case for extension

1.19 In Chapter 4 of the CP we analysed the case for extending the stirring up offences. These currently cover hatred on the grounds of race, religion and sexual orientation. We examined whether they should be extended to cover hatred on the grounds of disability and transgender identity. In our initial discussions with stakeholders, the need for new stirring up offences did not emerge as a central issue. More emphasis was placed on the need to tackle negative media reporting on disability and transgender issues and to respond more effectively to harassment and abuse, including where these are committed online (for example via social media networks, in forums, and in the reader comments sections of newspaper websites).

1.20 We first considered the case in principle for extending the stirring up offences to include disability and transgender identity.²⁷ We looked at whether existing criminal offences and initiatives short of criminalisation already dealt with the conduct that new stirring up offences would address. We explored whether, in view of the symbolic value of criminalisation, new stirring up offences would more effectively express the criminal law’s denunciation of the wrongdoing. We asked what impact criminalisation would have on other rights and freedoms, particularly the right to freedom of expression.²⁸ Concerns about this were at the forefront of

²³ CP paras 3.68 to 3.70.

²⁴ Para 1.15 above.

²⁵ CP para 3.76: Proposal 5.

²⁶ Paras 1.26 to 1.35. Chapter 4 below deals with these questions in full.

²⁷ CP paras 4.14 to 4.63.

²⁸ Appendix A to the CP contained a more detailed analysis of the interface between article 10 of the European Convention on Human Rights and the offences under consideration in this project.

the debates on whether the original racial hatred offences in POA 1986 should be extended to cover hatred on grounds of religion and sexual orientation.²⁹

- 1.21 The CP expressed the provisional view that there was a case in principle for extending the stirring up offences to include the stirring up of hatred on grounds of disability and transgender identity.³⁰ We acknowledged a considerable degree of overlap between the types of conduct caught by existing criminal offences and that which would fall within any new stirring up offences. However, we identified a unique, specific type of wrongdoing that would not be covered by the existing law: the spreading of hatred against a group (in this case, disabled or transgender people), either intentionally or where that is likely in all the circumstances. New stirring up offences would capture that.
- 1.22 Having identified this theoretical “gap” in the current criminal law, we then asked whether consultees considered that there was any practical need for the offences to be extended to cover it and, if so, why.

THE CONSULTATION PROCESS

- 1.23 Before publishing the CP, we reviewed the available statistical data and reports on hate crime based on the three relevant characteristics. We also conducted preliminary fact-finding discussions with organisations with relevant expertise.³¹ During work on the CP, we continued meeting our core stakeholders and members of the advisory groups we had established (academic, government, and analysts groups).
- 1.24 During the consultation period, we gave presentations about our CP at 12 events in England, Wales and Scotland, most of them convened for that purpose. We also held a symposium on 17 September 2013 at Queen Mary University of London, with 18 expert speakers from a range of NGOs, academia, criminal justice agencies and legal practice. At this event, the matters raised in each of the chapters of the CP were debated by the speakers before an audience of around 100 NGO representatives, judges, solicitors, barristers, academics, and Government officials.

THE RESPONSE TO THE CONSULTATION

- 1.25 We received 157 written responses to the CP.³² They came from NGOs representing a broad spectrum of interests, criminal justice agencies, members of the judiciary and the magistracy, legal practitioners and their professional

²⁹ These debates were detailed separately in Appendix B to the CP, which dealt with the legislative history of all three regimes.

³⁰ CP para 4.63.

³¹ CP paras 1.26 and 1.42.

³² Not all written responses dealt with all of the proposals and questions in the CP. Appendix A at the end of this report lists all consultees. In addition an Analysis of Responses document is published online with this report. It can be accessed here: http://lawcommission.justice.gov.uk/areas/hate_crime.htm.

associations, academics and several individuals, some who are themselves victims of hate crime.³³

Aggravated offences and enhanced sentencing reform

- 1.26 There was near unanimous support for our two sentencing reform proposals. Most consultees believed the reforms would be capable of producing a sentencing system that could provide an adequate response to hostility-based offending in relation to disability, sexual orientation and transgender identity. Most consultees considered that these reforms should be implemented in any event, whether aggravated offences were also extended or not.
- 1.27 Consultees considered that new guidance from the Sentencing Council would help improve both professional understanding of the system and its consistent application. Several commented on the need for clearer guidance on the approach to sentencing in hate crime cases.
- 1.28 Consultees also believed that the proposal to extend PNC recording was necessary to protect and safeguard people with whom the offender may come into contact in the future. It would also provide a fuller offender history, which could assist the criminal justice service in addressing repeat offending, tailoring rehabilitation programmes, and ensuring that sentencing took full account of previous histories of hostility-based offending.
- 1.29 However, a substantial majority of consultees, many with experience and influence in the criminal justice system, considered that the aggravated offences should also be extended.³⁴
- 1.30 The reason most commonly given was a perceived inequality in the current system and the need to send a clear message that hostility-based offending is taken equally seriously, whichever of the five protected characteristics the hostility relates to. Indeed, some consultees in favour of extension indicated that they would also accept repeal of the existing aggravated offences as a way of removing this unacceptable disparity of treatment.
- 1.31 Other arguments advanced by consultees in favour of extending the aggravated offences included:
- (1) the symbolic, communicative and deterrent effects of enacting and prosecuting offences carrying an “aggravated” label and of the higher maximum sentences available;
 - (2) the possibility that extending the offences would increase public awareness of hate crime, improve confidence in the criminal justice response to hate crime and lead to higher levels of reporting;

³³ 8 consultees chose to respond to alternative questions we provided in easy-read format: http://lawcommission.justice.gov.uk/docs/cp213_Hate_Crime_consultation_EasyRead.pdf. The Analysis of Responses sets out these questions and summarises the responses made using this format.

³⁴ They included several police forces, HM CPS Inspectorate, the Crown Prosecution Service, NGOs including the Equality and Human Rights Commission, Victim Support, Stonewall, several disability charities and some academics.

- (3) the possibility that extending the aggravated offences would improve investigative and prosecution approaches;
 - (4) the need for the higher maximum sentences available under aggravated offences;
 - (5) the availability of a challenge to unduly lenient sentences which would automatically follow if aggravated offences were created; and
 - (6) the benefits of the alleged hostility element being subject to jury determination at trial rather than as a matter of sentencing alone.
- 1.32 Arguments against extending the aggravated offences were made by a minority of consultees, albeit most of them professionals with direct experience of their prosecution or having made in-depth studies of their application.³⁵ Forceful points were made about the risks inherent in extending the offences in their current form, as a result of flaws and complexities in their operation.³⁶
- 1.33 Reservations were also expressed about simply grafting onto three distinct personal characteristics a set of offences designed two decades ago to address racial hostility.
- 1.34 Of all the arguments in favour of extension, we found the argument based on a need for parity or equality of treatment the most compelling. Disability, transgender identity and sexual orientation have been selected by Parliament as protected characteristics in the enhanced sentencing regime under CJA 2003.³⁷ That sentencing regime was introduced (in respect of racial hostility) as part of the same legislative package that brought in the aggravated offences.³⁸ It was later extended to religion, disability, sexual orientation and transgender identity. Accordingly, considerations of equal treatment would require there to be good, principled reasons for not also including these protected characteristics in the aggravated offences regime. We see no such compelling reasons of principle, based on our investigations and the consultation responses.
- 1.35 Nonetheless, strong reservations were expressed about extending the aggravated offences in their current form. This presented us with a difficult decision. Should we recommend:
- (1) reform of the enhanced sentencing regime alone, despite the fact that this would leave in place a disparity of treatment between protected characteristics, for which there was no obvious justification; or

³⁵ Those against extension included the Senior Judiciary, the Council of HM Circuit Judges, the Law Society's Criminal Law Committee, the Bar Council, the Criminal Bar Association, practitioners and some academics.

³⁶ These include the complexity of the offences, practical difficulties in their prosecution, and the limited number of offences that can be aggravated, which may not be the right ones (particularly for the three additional characteristics). These issues are discussed in detail in Chapter 4 below, from para 4.157.

³⁷ These characteristics are also recognised by criminal justice agencies for other hate crime purposes, namely monitoring, reporting and recording.

³⁸ Under the CDA 1998, although later re-enacted and now found in the CJA 2003.

- (2) sentencing reform plus extension of the current form of aggravated offences, despite the serious concerns raised by consultees about the form and operation of these offences and their suitability to address offending based on hostility due to disability, sexual orientation and transgender identity?

The need for a wider review

- 1.36 Numerous consultees commented that the terms of reference for this project were unduly narrow. They suggested that a wider scope would have been preferable, to ensure both that deficiencies in the current system of aggravated offences could be addressed and that proper account was taken of differences between the types of hate crime affecting disabled, LGB and transgender people. Some pointed to the “one-sided” nature of a project that only considers extension and not repeal.³⁹ Others wanted a deeper analysis of the justification of hate crime legislation and of the principles by which personal characteristics are selected for protection.
- 1.37 If, as several consultees have argued,⁴⁰ the present aggravated offences are unduly complex and are not working satisfactorily, this brings into doubt whether the offences in their current form should be extended to any further personal characteristics. Those problems need to be investigated and addressed before any extension.
- 1.38 Furthermore, the list of offences that are capable of being aggravated under the CDA 1998 may require review, because it may not include all the offences necessary for tackling hate crime relating specifically to disability, sexual orientation and transgender identity. For example, the proportion of reported hate crimes involving financial and sexual offences is higher for LGB, transgender or disabled hate crime than for racial and religious hate crime;⁴¹ it might be necessary to create aggravated forms of those offences if the CDA regime is extended. This was an additional reason some consultees considered it preferable to conduct a review of the adequacy of aggravated offences to address disability, LGB and transgender hate crime before extending the offences.
- 1.39 Such a review would also enable policy makers and practitioners to consider more deeply whether other characteristics ought to be covered by hate crime legislation and on what principles this should be decided. For example, gender and age have been put forward as potential characteristics for inclusion, as have membership of alternative sub-cultures and working in the armed forces.

³⁹ Mr I Hare, Dr F Stark, Mr J Troke. Other consultees noted in their responses that repeal of the aggravated offences would address the current inequality or disparity of treatment as between protected characteristics, resulting in all being covered by the same regime, enhanced sentencing. See below, Chapter 4 from para 4.57 and Chapter 5 from para 5.49.

⁴⁰ These consultees included the Senior Judiciary, the Council of HM Circuit Judges, the Society of Legal Scholars and Prof R Taylor.

⁴¹ This is discussed below from para 4.186.

Stirring up offences: the responses

- 1.40 The majority of consultees agreed that there was a case in principle to extend the stirring up offences. Most did not provide reasons but, of those who did, the reason most commonly given was that the same characteristics should be protected in the same way by all hate crime legislation. Another commonly given reason was that the offences would deal with serious wrongdoing against disabled and transgender people that the current law and sentencing model were inadequate to address.
- 1.41 As for the consultees who disagreed that there was a case in principle, their main concerns related to:
- (1) the degree to which the offences would unduly infringe freedom of expression and inhibit discussion of disability and transgender issues and of social attitudes or practices relevant to them;
 - (2) the offences being unnecessary in practice due to:
 - (a) a lack of evidence that the conduct they would address was sufficiently widespread;
 - (b) the conduct in question in fact being covered by existing offences and other non-criminal measures.
- 1.42 Most consultees argued that there was a practical need for the offences. Two main reasons were given: first, that conduct intended or likely to stir up hatred on grounds of transgender identity or disability is, in fact, frequent; and secondly, conversely, that known examples of such conduct are few but that this is due to the under-reporting of such conduct or, more generally, of hate crime against disabled and transgender people. Some consultees gave examples of material, speech or conduct that they considered proved the practical need for new offences.
- 1.43 The consultees arguing against there being any practical need for extension referred to the lack of clear evidence of conduct that would not be dealt with adequately under the existing law. A further point was made that new offences would, in any event, be unlikely to serve any purpose in combating or prosecuting the enormous increase in social media and internet-based abuse and hate speech. In relation to this material, it was argued that more would be gained by improving the monitoring and control of such material on the internet.

SUMMARY OF OUR RECOMMENDATIONS

Enhanced sentencing

- 1.44 In our view, most if not all of the benefits that might flow from the extension of aggravated offences could flow from the properly applied and accurately recorded use of the enhanced sentencing system.
- 1.45 The statutory sentencing regime reflects the will of Parliament to single out hostility as an aggravating factor and for judges to sentence hostility-based offending more severely. Published sentencing remarks are capable of conveying the state's and society's condemnation of hate crime and of recognising the

severe harm it causes to victims and wider communities. In practice, it is very rare in an aggravated offence case for a judge to use the range of sentences beyond the maximum available had the case not been hostility-based. There is no evidence to suggest the case would differ as regards disability, transgender identity or sexual orientation.

- 1.46 However, the current under-use of enhanced sentencing has a potential adverse effect on community confidence and victim satisfaction. This may be contributing to the under-reporting of hate crime. We therefore make two recommendations to improve the operation of the enhanced sentencing scheme. We recommend that these be implemented whether or not aggravated offences are also extended.

Guidance on sentencing for hostility

- 1.47 New guidance from the Sentencing Council would increase the likelihood that hostility-related issues will be raised in appropriate cases and that judges would apply the system and sentence accordingly, thereby addressing concerns that section 146 of the CJA 2003 has not been “embedded” in the sentencing process. It would enhance consistency in sentencing for crimes involving hostility based on disability, transgender identity or sexual orientation. It would also provide an opportunity for much-needed clarification about the correct sentencing approach in all cases where hostility is an aggravating factor.
- 1.48 We therefore recommend that the Sentencing Council issue guidance on the approach to sentencing hostility-based offending, both under the existing aggravated offences in the Crime and Disorder Act 1998 and in accordance with sections 145 and 146 of the Criminal Justice Act 2003. The form and content of any guidance will be a matter for the Sentencing Council.

Recording use of enhanced sentencing on the Police National Computer

- 1.49 An offender’s record ought to show the application of enhanced sentencing under the CJA 2003, just as it would show convictions for racially or religiously aggravated offences under the CDA 1998.
- 1.50 This would assist sentencing courts by providing a full picture of the punishment merited for subsequent offending, the danger posed by the offender to the public or sections of it, and the likely response to rehabilitation. Giving the prison and probation services access to more accurate information about offenders’ records where hostility aggravation findings have been made should enable them to tailor rehabilitation and education programmes. This could have the further benefit of reducing hostility-based offending.
- 1.51 Public protection considerations also require an offender’s history of hostility-based offending to be available, including for criminal records checks. The central purpose of the vetting scheme provided by the Disclosure and Barring Service is to ensure that employment decisions, particularly those relevant to posts working with vulnerable groups, are made with all the necessary information about the applicant’s criminal record.
- 1.52 We therefore recommend that use of the enhanced sentencing provisions in sections 145 or 146 of the Criminal Justice Act 2003 should always be recorded on the Police National Computer (PNC) and reflected on the offender’s record.

The aggravated offences: the need for a full-scale review

- 1.53 Despite our view that a reformed scheme of enhanced sentencing could provide an effective response to hate crime, we share the view expressed by most consultees that it is undesirable for the aggravated offences not to apply equally to hostility based on race, religion, transgender identity, sexual orientation and disability. It sends the wrong message about the seriousness with which such offending is taken and the severity of its impact, if offences attaching a specific aggravated label and a potentially higher sentence only exist in relation to two of the five statutorily protected hate crime characteristics.
- 1.54 The disparity and inequality inherent in the current regime would have been a sufficiently compelling argument for us to recommend the immediate extension of the offences, were it not for the serious concerns consultees have raised about flaws and complexities in the current aggravated offences. These may be causing aggravated offence prosecutions to fail. Unnecessary complexities may also be compromising the operation of enhanced sentencing, because of their common features and due to confusion over their inter-relationship.
- 1.55 In addition to concerns about the current aggravated offences, some fundamental questions have been raised by consultees about the principled basis for creating aggravated offences and for selecting characteristics for protection. We believe that these questions also require deeper consideration as part of a wider review, prior to any decision to extend the current offences. An informed and balanced decision on the case for extending this legislation must also necessarily consider the theoretical arguments against the offences and the case for their abolition.
- 1.56 We have therefore concluded that the interests of justice in effectively responding to hate crime across all the protected characteristics would be better served by conducting the full-scale review that we recommend. This should take place before any decision is taken as to whether to extend the aggravated offences. Extending prior to such review would, in our view, represent a less valuable reform option and one that would have limited benefits for victims of hate crime and some potential adverse consequences.
- 1.57 If the aggravated offences are not working effectively, or if they are ill-suited in their current form to tackle crime based on hostility on grounds of disability, sexual orientation or transgender identity, then extension would risk being largely symbolic. The new offences would have little practical value. Worse still, they may result in hostility aggravation not being addressed at all in the final outcome of cases, despite those cases having been reported and prosecuted as “hate crimes”.
- 1.58 If the current aggravated offences are not working, this wastes resources and results in poor outcomes for victims. It sends the wrong message to potential hate crime perpetrators, offenders and wider society about the seriousness with which the law takes hate crime.

- 1.59 Racial and religious hate crime represents around 85% of all reported hate crime in the UK.⁴² To ensure hate crime based on those characteristics is also addressed effectively, it is important to ensure any failings in the current model of aggravated offences and enhanced sentencing are addressed.
- 1.60 Finally it is necessary for clear principles to be established for the selection of characteristics that ought to be protected under the hate crime regime.
- 1.61 Therefore, in relation to the aggravated offences, our principal recommendation is for a full-scale review of the operation of the aggravated offences and of the enhanced sentencing system. Such a review should examine all the available data to establish whether such offences and sentencing provisions should be retained, amended, extended or repealed, what characteristics need to be protected, and the basis on which characteristics should be selected.⁴³
- 1.62 In recommending a full review, we have sought to ensure that the best overall criminal justice response is made to hate crime and that the best possible outcome is achieved for victims who suffer crime based on hostility towards a protected characteristic. The review we recommend would provide an opportunity for Government and the criminal justice agencies to assess, in light of the responses to this consultation, how well the current regime is serving its purpose for all the existing characteristics that the legal system serves to protect.

The aggravated offences: an alternative approach

- 1.63 An in-depth review of the aggravated offences and sentencing regime will take time and resources if it is to serve any useful purpose. We appreciate that without Government support and the necessary resources, a review of sufficient scope will not take place.
- 1.64 If our recommendation for a wider review is not supported by Government, we recommend in the alternative that the aggravated offences be extended to disability, sexual orientation and transgender identity, in order to bring about equality of treatment across the five statutorily recognised hate crime characteristics. We recommend that, in all three cases, the definitions of these characteristics follow those already employed in the enhanced sentencing system.⁴⁴ As we make clear, we consider extension prior to the wider review we recommend in Chapter 4 to be a less valuable reform option.

The stirring up offences

- 1.65 We conclude that there would be a justification in principle for creating new offences of stirring up hatred on grounds of disability or transgender identity, provided that a practical need could be shown for doing so.

⁴² Home Office, Ministry of Justice and Office of National Statistics (2013), *An Overview of Hate Crime in England and Wales*, Table 3. Available from: <https://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales> (last visited 26 March 2014).

⁴³ In Chapter 5 we list the difficulties with the aggravated offences that a full scale review could consider from para 5.15, and deeper questions of principle from para 5.36. We summarise all of the questions we think the review could usefully consider at para 5.90.

⁴⁴ Definitions for any new offences, and some other related matters, are considered in Chapter 6 below.

- 1.66 Unsurprisingly, given how rarely the existing stirring up offences are prosecuted or reported on in the media, there is widespread misunderstanding about the conduct that new stirring up offences could be used to prosecute. Of the examples provided to us by consultees, while many could satisfy the requirements of existing offences such as harassment and the use of threatening, abusive or insulting language, there was little, if any, evidence of conduct that would clearly satisfy the very different elements of the stirring up offences.
- 1.67 We have no doubt that the examples consultees provided to illustrate a practical need to extend the offences would be seen as highly offensive by most people. However, they do not amount to clear evidence of the widespread existence of conduct intended or likely to stir up hatred on grounds of transgender identity or disability. Most of the examples would be capable of being prosecuted (and adequately sentenced) under the existing law.
- 1.68 We also conclude that, if new offences of stirring up hatred on the grounds of disability and transgender identity were created, there would be very few successful prosecutions. We base this on the following considerations:
- (1) There are very few prosecutions for the existing offences of stirring up hatred.⁴⁵
 - (2) The type of hate speech typically found in relation to disability and transgender identity is unlikely to satisfy the requirements for a stirring up offence. Commonly it amounts to (often highly offensive) statements of opinion that are intended to provoke comment or debate and are not clearly intended or likely to cause others to hate disabled or transgender people.
 - (3) Many of the examples brought to our attention would be covered by other offences.
 - (4) Therefore, there would be still fewer successful prosecutions for the new stirring up offences than there are now for the existing ones.

Accordingly, the deterrent and communicative effects of the new offences and any other impacts as to reporting of hate crime would be very limited indeed.

- 1.69 We therefore recommend that the offences are not extended.
- 1.70 In reaching this conclusion we do not overlook the scale of hostility, abuse and prejudice that exist against disabled and transgender people, or the extent of the criminal behaviour motivated by, or involving demonstration of, hostility towards disabled or transgender people. We recognise that this is a serious social problem requiring a strong and coordinated response from the criminal justice system. However, we are not satisfied that the high requirements of proof set by the stirring up offences would be met by the speech and conduct concerned.

⁴⁵ CP para 4.8: between 2008 and 2012, only 113 charges of stirring up racial hatred and 21 charges of stirring up hatred on the ground of religion or sexual orientation reached a first hearing in a magistrates' court. We contrasted this with over 75,000 charges for the aggravated offences over the same period.

THE STRUCTURE OF THIS REPORT

- 1.71 In Chapter 2, we summarise the current law relevant to this project. First we discuss the racially and religiously aggravated offences; then the offences relating to the stirring up hatred on grounds of race, religion and sexual orientation; and, finally, the enhanced sentencing provisions, which apply to all five characteristics.
- 1.72 In Chapter 3, we analyse the consultation responses to our two proposed reforms to the enhanced sentencing system, before recommending their implementation irrespective of any decision to extend the aggravated offences.
- 1.73 Chapter 4 analyses the responses on whether the aggravated offences should be extended, first addressing the arguments in favour and then those against. We explain that the argument most commonly advanced by those in favour of extension was the need for equality or parity of treatment for all existing hate crime characteristics. As to the case against extension, we set out a number of serious concerns raised by consultees about the complex structure and operation of aggravated offences. We conclude this chapter by summarising the points consultees made in relation to the offences which, in our view, require a wider review before any decision is made to extend the offences.
- 1.74 In Chapter 5, we explain our view that what is required is a wider review of the use of the substantive criminal law to deal with hate crime than our terms of reference allowed. We set out in general terms what such a review might address. We conclude with our recommendation for a wider review.
- 1.75 In Chapter 6 we report on consultees' responses to the questions and proposals in the CP about the definitions of disability, sexual orientation and transgender identity that should be used if the offences are extended. We also consider their responses regarding potential difficulties in applying the aggravated offences in their current form to these additional characteristics. In view of our alternative recommendation that, if no wider review is carried out, the offences should be extended, we then make recommendations on these points.
- 1.76 Chapter 7 analyses the responses given by consultees about whether there is a case in principle for extending the stirring up offences to cover hatred on grounds of disability and transgender identity. In particular it addresses the argument most commonly advanced, that parity or equality principles require the same offences to extend to all protected hate crime characteristics. We then analyse the answers given about whether there is a practical need for the offences to be extended.
- 1.77 Chapter 8 brings together all the report's recommendations.

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- 1.79 We would also like to thank the following for sharing with us their views on hate crime law and its application: Professor Peter Alldridge, Dr Chara Bakalis, Ms Bobbie Cheema QC, Mr Ivan Hare, Professor Eric Heinze, Dr Gail Mason, Professor Leslie Moran, Professor Gavin Phillipson, Professor Richard Taylor and Dr Mark Walters.

CHAPTER 2

CURRENT LAW

INTRODUCTION

2.1 In this chapter, we outline the relevant aspects of the law on hate crime.¹ There are three distinct sets of provisions:

- (1) Aggravated offences under the Crime and Disorder Act 1998 (“CDA”), which deal with offences involving racial or religious hostility;²
- (2) Offences of stirring up hatred under the Public Order Act 1986 (“POA”), which apply to conduct intended, or likely, to stir up hatred based on race, religion and sexual orientation;³ and
- (3) Enhanced sentencing provisions under the Criminal Justice Act 2003 (“CJA”), which apply to hostility on the grounds of race, religion, sexual orientation, disability or transgender identity.⁴

THE AGGRAVATED OFFENCES

2.2 The CDA creates separate racially or religiously aggravated versions of certain “basic” criminal offences.⁵ These aggravated offences have higher maximum sentences than their basic equivalents.

2.3 Section 28(1) of the CDA provides that an offence is racially or religiously aggravated 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 the victim’s membership (or presumed membership) of a racial or religious group; or
- (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

The offences which can be aggravated

2.4 The offences which have aggravated versions in the CDA are:

¹ A more detailed outline of the current law can be found in Chapter 2 of the CP. See also Appendix A to the CP, which discussed hate crime and freedom of expression under the European Convention, Appendix B which covered the history of hate crime legislation, and the paper by Dr John Stanton-Ife on the legal theory underpinning hate crime legislation. All are available on our website: <http://lawcommission.justice.gov.uk/areas/hate-crime.htm>.

² CDA, ss 29 to 32.

³ POA, ss 18 to 23 and ss 29B to 29G. Discussed from para 2.33 below.

⁴ CJA, ss 145 and 146 (and Sch 21 in relation to minimum tariffs in sentences for murder). Discussed from para 2.57 below.

⁵ Aggravated offences were first introduced in respect of racial hostility by the CDA, ss 28 to 32. Religiously aggravated offences were added to the CDA by the Anti-terrorism, Crime and Security Act 2001, s 39.

- (1) malicious wounding or inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861;⁶
- (2) assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861;⁷
- (3) common assault;⁸
- (4) destroying or damaging property contrary to section 1(1) of the Criminal Damage Act 1971;⁹
- (5) threatening, abusive or insulting conduct intended, or likely, to provoke violence or cause fear of violence contrary to section 4 of the POA;¹⁰
- (6) threatening, abusive or insulting conduct intentionally causing harassment, alarm or distress contrary to section 4A of the POA;¹¹
- (7) threatening or abusive conduct likely to cause harassment, alarm or distress contrary to section 5 of the POA;¹²
- (8) harassment and stalking contrary to sections 2 and 2A of the Protection from Harassment Act 1997;¹³ and
- (9) putting people in fear of violence, and stalking involving fear of violence, serious alarm or distress contrary to sections 4 and 4A of the Protection from Harassment Act 1997.¹⁴

2.5 These offences were selected because they were regarded as the most likely offences to involve racial hostility.¹⁵ When the aggravated offences were made applicable to religious hostility no amendment was made to the list. If racial or religious hostility is established in any offence not on this list, the hostility is dealt with at the sentencing stage under section 145 of the CJA.¹⁶

⁶ CDA s 29(1)(a).

⁷ CDA, s 29 (1)(b).

⁸ CDA, s 29(1)(c).

⁹ CDA, s 30(1).

¹⁰ CDA, s 31(1)(a).

¹¹ CDA, s 31(1)(b).

¹² CDA, s 31(1)(c). Previously, conduct could also be “insulting”, as under ss 4 and 4A, but this word was removed from s 5 by the Crime and Courts Act 2013, s 57 with effect from 1 February 2014.

¹³ CDA, s 32(1)(a).

¹⁴ CDA, s 32(1)(b).

¹⁵ The selection of the basic offences is discussed in detail below in Chapter 5, from para 5.28. Offences which carry a maximum sentence of life imprisonment were omitted because no higher penalty is possible (although this overlooks other possible advantages of aggravated offences, such as fair labelling, communicative and symbolic effects and deterrence, which we discuss further in Chapter 4 from paras 4.65, 4.77, and 4.89 respectively).

¹⁶ Or, in the case of murder, under Sch 21 of the CJA. See para 2.91 and following, below.

- 2.6 The prosecution must prove not only that the underlying or “basic” offence was committed, but also that in committing it the defendant demonstrated, or was motivated by, hostility. If the prosecution fails to prove the aggravated element, it is open to the Crown Court (but not a magistrates’ court) to return an alternative verdict of guilty of the non-aggravated form of the offence.¹⁷

Hostility

- 2.7 “Hostility” is not defined in the CDA and there is no standard legal definition. The ordinary dictionary definition of “hostile” includes being “unfriendly”, “adverse” or “antagonistic”. It may also include spite, contempt or dislike.¹⁸ Ultimately, it will be a matter for the tribunal of fact to decide whether a defendant has demonstrated, or been motivated by, hostility.

The two limbs of hostility

- 2.8 An offence is aggravated if it falls within either of the two limbs of the test set out in sub-sections 28(1)(a) and (b) of the CDA.¹⁹ Under limb (a), the prosecution must prove the demonstration of hostility, but no subjective intent or motivation is required: it is an objective test. Limb (b), on the other hand, requires proof of the defendant’s subjective motivation for committing the offence.²⁰ The prosecution should make clear on which of the two limbs it is relying.²¹ If evidence is available to support both limbs, the prosecution is free to rely on both.²²
- 2.9 This two-pronged hostility test can cause confusion as to which limb is at issue. For example in *SH*, the Court of Appeal criticised the trial court for focusing on the defendant’s *motivation* for calling a Nigerian a “black monkey”, despite this being a clear case of *demonstration* of hostility.²³

¹⁷ As explained in greater detail at para 2.26 below.

¹⁸ For instance see Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 15 May 2014). Contrast E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002) p 14, which suggests that a jury would probably accept that, while it is clearly less strong a word than “hatred”, “hostility” must imply a degree of animosity, rather than “mere prejudice.”

¹⁹ Those sub-sections are quoted in full at para 2.3 above.

²⁰ *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] and [20].

²¹ *Dykes* [2008] EWHC 2775 (Admin), (2009) 173 *Justice of the Peace* 88 at [20] by Calvert Smith J.

²² *Jones* [2010] EWHC 523 (Admin), [2011] 1 WLR 833 at [17] by Ouseley J; *G* [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313 at [15] by May LJ.

²³ [2010] EWCA Crim 1931, [2011] 1 Cr App R 14. See also CP paras 2.12 and 2.24 to 2.25.

Limb (a): “Demonstrates hostility”

What constitutes a demonstration of hostility?

- 2.10 The demonstration of hostility will tend to involve words²⁴ or gestures, but may be manifested in other ways, for example, by wearing insignia such as a swastika or singing certain songs.²⁵
- 2.11 Whether hostility was demonstrated is a wholly objective question.²⁶ The victim’s perception of, or reaction to, the incident is not relevant. Also immaterial is the fact that the defendant’s frame of mind was such that, while committing the offence, he or she would have used abusive terms towards *any* person by reference to other personal characteristics.²⁷ The objective nature of section 28(1)(a) means that the motivation for the offence is irrelevant to the question of whether hostility has been demonstrated.²⁸
- 2.12 Whether hostility was demonstrated will be a question of fact for the tribunal to decide in light of all the circumstances.²⁹ In *Pal*, Simon Brown LJ stated that the use of racially abusive insults will ordinarily be sufficient to prove demonstration of racial hostility.³⁰

When must hostility be demonstrated?

- 2.13 Hostility must be demonstrated either at the time of committing the offence or immediately before or immediately after doing so.³¹ In *Babbs*,³² the Court of Appeal held that immediacy is established by showing a connection between the demonstration of hostility and the substantive offence. In that case, “the words used by the appellant were ... capable of colouring the behaviour of the appellant throughout the subsequent events” which occurred some 15 minutes later.³³ The

²⁴ See *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar); *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb).

²⁵ *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [13] by Baroness Hale. Note that it is also an offence, under Football (Offences) Act 1991, s 3(1), to “engage or take part in chanting of an indecent or racist nature at a designated football match”.

²⁶ Eg *Green* [2004] EWHC 1225 (Admin), *The Times* 7 July 2004; *Jones* [2010] EWHC 523 (Admin), [2011] WLR 833.

²⁷ *Woods* [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan) at [10] and [13].

²⁸ Eg *Woods* [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan): the defendant’s assault was motivated by the victim’s refusal to admit his friend into a nightclub, but because he had called the victim a “black bastard” prior to the assault, there had been a demonstration of hostility.

²⁹ *Johnson* [2008] EWHC 509 (Admin), *The Times* 9 Apr 2008 at [11]; *SH* [2010] EWCA Crim 1931, [2011] 1 Cr App R 14 at [31].

³⁰ *Pal* [2000] Criminal Law Review 756 at [16].

³¹ CDA, s 28(1)(a); *Parry* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec) at [19].

³² [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct).

³³ *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8]. Contrast *Parry* [2004] EWHC 3112 (Admin), [2004] All ER (D) 335 (Dec): there was no sufficient connection as the defendant had gone inside after causing criminal damage to a neighbour’s home and used the relevant words when the police called to ask whether he was responsible some 20 minutes later.

question for the jury was whether or not the words used had so affected the subsequent behaviour.³⁴

Presumed membership and membership by association

- 2.14 Section 28(1)(a) refers explicitly to “hostility based on the victim’s membership (or presumed³⁵ membership)” of a racial or religious group. Thus, a slur based on a mistaken view about the victim’s racial or religious group will be caught.³⁶ Section 28(2) provides that “membership of a racial or religious group includes association with members of that group”. “Association” may be interpreted quite broadly. It includes association through marriage, but also association through socialising.³⁷
- 2.15 Hostility can be demonstrated by the defendant towards someone of the defendant’s own racial or religious group.³⁸

Limb (b): “Motivated by hostility”

What constitutes motivation?

- 2.16 Section 28(1)(b) turns on the defendant’s subjective motivation. The section requires the defendant to have been “motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group”. The hostility does not need to be the sole or even the main motivation for committing the basic offence; but if it has not in any way been the motivation, there is no aggravation.³⁹

How is motivation proved?

- 2.17 Section 28(1)(b) simply requires that the offence be motivated, in whole or in part, by hostility. Proof of motivation may therefore come from evidence relating to previous conduct or associations,⁴⁰ provided that the prosecution can establish relevance and admissibility. The applicable CPS guidance states:

³⁴ *Babbs* [2007] EWCA Crim 2737, [2007] All ER (D) 383 (Oct) at [8].

³⁵ Presumed by the offender: CDA, s 28(2).

³⁶ See *Rogers* [2007] UKHL 8, [2007] 2 AC 62. See also *D* [2005] EWCA Crim 889, [2005] 1 WLR 2810; *Kendall v South East Essex Magistrates’ Court* [2008] EWHC 1848 (Admin), [2008] All ER (D) 356 (Jun).

³⁷ Eg if one white person were to say to another, having assaulted him, “you nigger lover” upon seeing the victim rejoin a group of black friends at the bar: *DPP v Pal* [2000] Criminal Law Review 756 at [13] by Simon Brown LJ.

³⁸ Although doing so is unusual, and hence it may be more difficult to prove that the hostility was racial or religious in nature (and not based on something else, for instance the victim’s disagreeable behaviour). See *White* [2001] EWCA Crim 216, [2001] 1 WLR 1352 at [20] by Pill LJ.

³⁹ *Howard* [2008] EWHC 608 (Admin), [2008] All ER (D) 88 (Feb). See CP para 2.28.

⁴⁰ *G v DPP* [2004] EWHC 183 (Admin), (2004) 168 *Justice of the Peace* 313 at [14]. The evidence adduced to establish motivation will often involve the kind of demonstration of hostility captured by s 28(1)(a). See *Taylor v DPP* [2006] EWHC 1202 (Admin), (2006) 170 *Justice of the Peace* 485.

In some cases, background evidence could well be important if relevant to establish motive, for example, evidence of membership of, or association with, a racist group, or evidence of expressed racist views in the past might, depending on the facts, be admissible in evidence.⁴¹

- 2.18 It is difficult to prove motivation, perhaps more difficult than proving that a defendant intended a certain result or was reckless as to the consequences of particular conduct. In practice, cases are more commonly brought under the “demonstration” limb.⁴²

Need a victim experience the hostility which motivated the defendant?

- 2.19 Section 28(1)(b) is solely concerned with the defendant’s subjective motivation for committing the offence. It is irrelevant that any hostility may have been towards a racial or religious group other than the victim’s: indeed in the case of public order offences there may be no specific victim.⁴³

Matters common to limbs (a) and (b)

Hostility based on other factors

- 2.20 Section 28(3) provides that it is immaterial for offences under either limb (a) or (b) that the offender’s hostility is also based “to any extent” on any other factor.
- 2.21 This provision has mainly been used in the context of demonstrations of hostility, to clarify that it is irrelevant if the hostility was not solely based on the victim’s race or religion, but also on some other reason.⁴⁴ Often, a factor other than the victim’s race or religion will have been the initial trigger for the offence: for example, the victim parking in the defendant’s space,⁴⁵ the desire to avoid arrest,⁴⁶ hostility towards some other group such as parking attendants⁴⁷ or a dispute over payment for food.⁴⁸ This does not matter if racial or religious hostility was then demonstrated in the course of committing the offence.

Meaning of “racial group”

- 2.22 “Racial group” is defined in section 28(4) of the CDA as “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or

⁴¹ Crown Prosecution Service Legal Guidance *Racist and Religious Crime*, http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/ (last visited 15 May 2014).

⁴² E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002) p 13.

⁴³ *Taylor v DPP* [2006] EWHC 1202 (Admin), (2006) 170 *Justice of the Peace* 485. See CP para 2.34.

⁴⁴ Note that for the demonstration limb of the offence, the hostility in question must be directed at the *victim’s* race or religion (or presumed race or religion), whereas the motivation limb simply covers hostility towards members of a particular racial or religious group generally.

⁴⁵ *McFarlane* [2002] EWHC 485 (Admin), [2002] All ER (D) 78 (Mar).

⁴⁶ *Green* [2004] EWHC 1225 (Admin), *The Times* 7 Jul 2004.

⁴⁷ *Johnson* [2008] EWHC 509 (Admin), *The Times* 9 Apr 2008.

⁴⁸ *M* [2004] EWHC 1453, [2004] 1 WLR 2758.

national origins”.⁴⁹ Words are to be construed as generally used in the jurisdiction of England and Wales; in ordinary speech, “African” would be understood to mean black people.⁵⁰ The Court of Appeal has said that it is for the jury to decide whether the use of a particular term is a demonstration of hostility.⁵¹

- 2.23 In *Rogers*,⁵² the House of Lords adopted a flexible and non-technical approach to the definition, such that it encompasses terms of exclusion, such as “foreigners”. Baroness Hale held that a flexible approach to interpretation was consistent with the underlying policy aims of the statute:

The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as “other”... This is just as true if the group is defined exclusively as it is if it is defined inclusively.⁵³

Meaning of “religious group”

- 2.24 “Religious group” is defined in section 28(5) of the 1998 Act as a “group of persons defined by reference to religious belief or lack of religious belief”. Hostility towards a group defined by non-religious beliefs or philosophies (for example, vegetarianism) would therefore be excluded.⁵⁴ Whether a cult or similar group is captured will depend on whether their beliefs are religious in nature; for different purposes, the Supreme Court has recently defined religion as:

a spiritual or non-secular belief system... which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives... [it] may not involve belief in a supreme being, but it does involve a belief that there is more to

⁴⁹ This definition is derived from that used in the Race Relations Act 1976 and is also used for the purposes of the stirring up offences: Sir Anthony Hooper and D Ormerod (eds), *Blackstone’s Criminal Practice* (2014) (“Blackstone’s”) para B11.150. Jews, Sikhs (*Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 2 WLR 620), Romany gypsies (*Commission for Racial Equality v Dutton* [1989] QB 783, [1989] 2 WLR 17), and Irish Travellers (*O’Leary v Punch Retail* (unreported, 29 Aug 2000) as cited in Blackstone’s para B11.151) are recognised racial groups based on their ethnic origins.

⁵⁰ *White* [2001] EWCA Crim 216, [2001] 1 WLR 1352.

⁵¹ *A-G’s Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

⁵² *Rogers* [2007] UKHL 8, [2007] 2 AC 62. “Foreigners” had also been held as capable, depending on context, of demonstrating racial hostility by the Divisional Court in *M* [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758; likewise with “immigrant”, ie non-British, by the Court of Appeal in *A-G’s Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810.

⁵³ *Rogers* [2007] UKHL 8, [2007] 2 AC 62 at [12] by Baroness Hale.

⁵⁴ N Addison *Religious Discrimination and Hatred Law* (2007) p 126. Contrast the Equality Act 2010 regime, which includes within its protection “religion or belief” (the latter including any religious or philosophical belief) or lack thereof (s 10).

be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science.⁵⁵

- 2.25 The inclusion of groups defined by a lack of religious beliefs means that if, for example, the offender assaults the victim because the victim rejects all religious belief, the offender would be guilty of a religiously aggravated offence.⁵⁶ By analogy with the interpretation of "racial group", it seems that terms of exclusion, such as "gentile", will suffice.

Alternative verdicts and alternative charges

- 2.26 If the racially or religiously aggravated element of the offence is not proved, it is open to the Crown Court to return an alternative verdict for the non-aggravated version of the offence.⁵⁷ However there is no such power in the magistrates' courts, with the result that even if the evidence would suggest that the defendant had committed the non-aggravated form of the offence the defendant must be acquitted unless aggravation has also been proved. For this reason, the CPS recommends that, for racial and religious hate crime, prosecutors consider charging both the non-aggravated and the aggravated versions of the offence.⁵⁸
- 2.27 It has been suggested that the approach of charging both offences may lead to "plea bargains" whereby the aggravated charge is dropped in exchange for a guilty plea to the non-aggravated form of the offence, with the result that the hostility element goes unrecognised.⁵⁹ CPS policy is not to accept pleas to lesser offences for reasons of expediency, and only to do so where the seriousness of the offending, and aggravating features, can adequately be reflected in the sentence.⁶⁰ Nevertheless, some consultees raised concerns in this area.⁶¹

⁵⁵ *R (Hodkin) v Registrar General of Marriages* [2013] UKSC 77, [2014] 2 WLR 23 at [57] by Lord Toulson. The question was whether Scientology was a religion, and so its churches entitled to be registered as places of worship and used for the holding of marriages. The Court answered in the affirmative, overturning *Registrar General ex parte Segerdal* [1970] 2 QB 697, [1970] 3 WLR 479, which had placed emphasis on the need for religious belief to involve worship of a deity.

⁵⁶ Blackstone's para B11.152.

⁵⁷ On account of the Criminal Law Act 1967, s 6(3), the Criminal Justice Act 1988, s 40, and CDA, ss 31(6) and 32(5).

⁵⁸ Crown Prosecution Service Legal Guidance, *Racist and Religious Crime*, http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a15 (last visited 15 May 2014).

⁵⁹ This concern was raised at the time the offences were introduced, and some evidence for it was found: E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, 2002) ch 6. See also para 2.64 and following, below, regarding the interaction of s 145 with the aggravated offences.

⁶⁰ Crown Prosecution Service Legal Guidance, *Racist and Religious Crime*, http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a18 (last visited 15 May 2014).

⁶¹ See Chapter 4, para 4.177 and following.

- 2.28 A defendant, who, on the same set of facts, is charged with an aggravated offence and, alternatively, the non-aggravated form of the offence, cannot be convicted of both offences.⁶²

Sentencing

- 2.29 The maximum custodial penalties for the offences that can be aggravated (and the maximum fine in the case of the aggravated version of the offence under section 5 of POA) are set out in the table below.

Section No	Offence	Max Penalty Non-aggravated	Max Penalty Aggravated
OAPA, s 20	Malicious wounding/grievous bodily harm	5 years	7 years
OAPA, s 47	Actual bodily harm	5 years	7 years
CJ, s 39 ⁶³	Common assault	6 months	2 years
CDG, s 1	Criminal damage	10 years	14 years
POA, s 4	Fear or provocation of violence	6 months	2 years
POA, s 4A	Intentional harassment, alarm or distress	6 months	2 years
POA, s 5	Harassment, alarm or distress	£1,000 fine	£2,500 fine
PHA, s 2	Harassment	6 months	2 years
PHA, s 2A	Stalking	6 months	2 years
PHA, s 4	Putting people in fear of violence	5 years	7 years
PHA, s 4A	Stalking involving fear of violence or serious alarm or distress	5 years	7 years
Key OAPA: Offences Against the Person Act 1861 CJ: Criminal Justice Act 1988 CDG: Criminal Damage Act 1971 POA: Public Order Act 1986 PHA: Protection from Harassment Act 1997			

- 2.30 In 2000, the Sentencing Advisory Panel issued guidance on sentencing for the racially aggravated offences, which stated that there should be a two-stage approach.⁶⁴ The sentencer should first determine what the sentence would have been for the basic offence (and should state this), before adjusting upward to take account of the aggravation. In some cases this could result in the sentence

⁶² *R (Dyer) v Watford Magistrates' Court* [2013] EWHC 547 (Admin), (2013) 177 *Justice of the Peace* 265.

⁶³ The common law offence of assault has been held to be a statutory offence since the enactment of Criminal Justice Act 1988, s 39 but CDA, s 29(1)(c), creating the aggravated offence, simply refers to "common assault" and not to any statutory provision.

⁶⁴ Sentencing Advisory Panel, *Advice to the Court of Appeal – 4: Racially Aggravated Offences* (2000) ("SAP guidelines"). See also the more recent Sentencing Council, *Assault – Definitive Guideline* (2011), which at pp 9, 15 and 25 states that the two-stage approach should be applied to three offences under CDA, s 29.

crossing the custody threshold.⁶⁵ The guidance sets out a number of factors which indicate either a higher or lower level of racial aggravation in the circumstances.⁶⁶

- 2.31 These recommendations have largely been put into practice by the Court of Appeal.⁶⁷ The court has, however, rejected the Panel's suggestion that the part of the sentence addressing the aggravated element should be expressed as a percentage of the basic sentence. Instead it has held that the court must "reach the appropriate total sentence, having regard to the circumstances of the particular case".⁶⁸ Later cases have suggested that a two-stage approach to sentencing may not be appropriate where the racial or religious aggravation is in reality the essence of the offence.⁶⁹ There is case law to the effect that the amount by which the sentence can be increased is limited by reference to the difference between the maximum offence for the non-aggravated and aggravated offences.⁷⁰
- 2.32 The Attorney General has the power to refer a Crown Court sentence which appears to be unduly lenient for review by the Court of Appeal,⁷¹ if the offence in question is triable only on indictment,⁷² or appears on a limited list of either-way offences.⁷³ This list includes all of the aggravated offences, which can therefore be reviewed by the Court of Appeal if they were sentenced in the Crown Court.⁷⁴ However, the list does not include any of the non-aggravated offences. Since none of these offences are indictable only, there can be no challenge for undue leniency, even in cases where hostility has been established under section 145 or 146 of the CJA.⁷⁵

⁶⁵ SAP guidelines para 36.

⁶⁶ SAP guidelines para 41; for example, the aggravating element being planned or intended to humiliate or offend the victim; the offence being part of a pattern of offending; the particular vulnerability of the victim; the prolonged or repeated nature of the aggravated elements. It is not relevant whether the case was one of demonstration or motivation for these purposes.

⁶⁷ *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 is the leading case.

⁶⁸ *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [64].

⁶⁹ Eg *Bailey* [2011] EWCA Crim 1979: racist comments were spray painted onto a vehicle: this was not criminal damage plus an element of racial aggravation – it was racist abuse committed by way of criminal damage, and a two-stage approach would be inappropriate.

⁷⁰ Eg *Reil* [2006] EWCA Crim 3141 at [12], in relation to assault occasioning actual bodily harm: since the basic maximum is 5 years and the aggravated 7, the increase was limited to 2 years. However, the SAP guidelines say at paras 19 to 23 that the differential increases in the maximum penalties, as set by Parliament, carry no special significance.

⁷¹ Criminal Justice Act 1988, ss 35 and 36. The Court of Appeal may substitute a different sentence (higher or lower).

⁷² Ie, triable only by a jury in the Crown Court, and not summarily in the magistrates' court.

⁷³ Ie, triable either in the Crown Court or the magistrates' court.

⁷⁴ Criminal Justice Act 1988 (Review of Sentencing) Order 2006, sch 1.

⁷⁵ Which we discuss in detail from para 2.57 below. See further in Chapter 4 below from para 4.131 and Chapter 5 from para 5.79.

THE STIRRING UP OFFENCES

- 2.33 The stirring up offences were introduced by the POA to combat certain forms of threatening, abusive or insulting conduct that are intended or likely to stir up racial hatred. Similar offences covering religious hatred and hatred on the grounds of sexual orientation were added to the POA more recently, taking effect from 2007 and 2010 respectively.⁷⁶
- 2.34 It is important to note that the stirring up offences represent an entirely separate regime from the aggravated offences. The aggravated offences provided for a set of pre-existing criminal offences to be sentenced more severely if committed in circumstances of racial or religious hostility. By contrast, the stirring up offences created a new set of offences criminalising conduct that may not otherwise be unlawful.
- 2.35 In relation to all three characteristics, six types of conduct are covered. These range from using words and behaviour in person to displaying and publishing images and written material, as well as covering recordings, broadcasts and theatrical productions.
- 2.36 The various offences are quite complex in structure. We examined them in considerable detail in the CP.⁷⁷ In this chapter, we summarise the details that we consider most important to the question of whether the offences should be extended to cover hatred based on disability and transgender identity.

Conduct covered by the offences

- 2.37 The offences based on stirring up racial hatred apply where a person engages in certain forms of threatening, abusive or insulting conduct and either their intention was thereby to stir up racial hatred or, having regard to all the circumstances, racial hatred was likely to be stirred up thereby. The offences do not criminalise conduct expressing hostility or hatred towards specific individuals. Rather, they address conduct intended or likely to cause others to hate entire national or ethnic groups. They do not require proof that hatred has in fact been stirred up, merely that it was either intended or likely to be stirred up.
- 2.38 The forms of conduct caught by the offences are:
- (1) using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting;⁷⁸
 - (2) publishing or distributing written material which is threatening, abusive or insulting;⁷⁹

⁷⁶ The religious offences were added by the Racial and Religious Hatred Act 2006 and the sexual orientation offences by the Criminal Justice and Immigration Act 2008. They were commenced in October 2007 (SI 2007 No 2490) and March 2010 (SI 2010 No 712) respectively. Appendix B to the CP examines the history of hate crime legislation.

⁷⁷ CP paras 2.51 to 2.128.

⁷⁸ Section 18. The equivalent offence for religion or sexual orientation is at s 29B.

⁷⁹ Section 19. The equivalent offence for religion or sexual orientation is at s 29C.

- (3) presenting or directing the public performance of a play involving the use of threatening, abusive or insulting words or behaviour;⁸⁰
- (4) distributing, showing or playing a recording of visual images or sounds which are threatening, abusive or insulting;⁸¹
- (5) providing a programme service, or producing or directing a programme, where the programme involves threatening, abusive or insulting visual images or sounds, or using the offending words or behaviour therein;⁸² or
- (6) possessing written material, or a recording of visual images or sounds, which is threatening, abusive or insulting, with a view to it being displayed, published, distributed, shown, played or included in a cable programme service.⁸³

2.39 The offences added in 2007 and 2010 to address the stirring up of hatred on the basis of religion and sexual orientation cover similar forms of conduct, but have some key differences from the offences relating to racial hatred, making the later offences narrower in scope:

- (1) the words or conduct must be threatening (not merely abusive or insulting);
- (2) there must have been an intention to stir up hatred (a likelihood that it might be stirred up is not enough); and
- (3) there are express provisions protecting freedom of expression covering, for example, criticism of religious beliefs or sexual conduct.

Definitions

Meaning of “hatred”

2.40 Hatred is not defined in the Act, and can be taken to bear its ordinary meaning. It is generally accepted that “hatred” is a stronger term than “hostility”.⁸⁴

2.41 The CPS guidance on the stirring up hatred provisions states:⁸⁵

⁸⁰ Section 20. The equivalent offence for religion or sexual orientation is at s 29D.

⁸¹ Section 21. The equivalent offence for religion or sexual orientation is at s 29E.

⁸² Section 22. The equivalent offence for religion or sexual orientation is at s 29F.

⁸³ Section 23. The equivalent offence for religion or sexual orientation is at s 29G.

⁸⁴ See, for example, R Card, *Public Order Law* (2000) p 186, pointing out that the offences would have been easier to prove if only hostility or ill-will had been intended, that hatred, at a minimum, connotes “intense dislike, enmity or animosity” and that the act of stirring up hatred is “a much stronger thing than simply bringing into ridicule or contempt, or causing ill-will or bringing into distaste..”

⁸⁵ Crown Prosecution Service, *Racist and Religious Crime – CPS prosecution policy*, <http://www.cps.gov.uk/publications/prosecution/rpbcbook.html> (last visited 15 May 2014). Similarly, Ministry of Justice Circular 2010/05, *Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (2010) para 12 states that “Hatred is a very strong emotion. Conduct or material which only stirs up ridicule or dislike, or which simply causes offence, would not meet that threshold.”

Hatred is a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.

- 2.42 The hatred must be directed at a group, not merely an individual.

Meaning of “racial hatred”

- 2.43 Racial hatred is defined for the purposes of the stirring up offences to mean hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.⁸⁶ This is the same definition as is used for the aggravated offences, albeit that “hostility” is in place of “hatred”. We discussed the courts’ broad interpretation of what language is racial in nature above.⁸⁷

Meaning of “religious hatred”

- 2.44 “Religious hatred” is likewise defined in the same way for the stirring up as for the aggravated offences: hatred against a group of persons defined by reference to religious belief or lack of religious belief.⁸⁸ We discuss this definition in more detail at paragraph 2.24 above, noting that whether a belief is “religious” in nature will be for the courts to consider. In the context of stirring up, it is useful to consider the views of the Home Office at the time the religious stirring up offences were created.⁸⁹

Meaning of “hatred on the grounds of sexual orientation”

- 2.45 “Hatred on the grounds of sexual orientation” is defined as “hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)”.⁹⁰

Protection of freedom of expression

Religious belief

- 2.46 There is a wide protection for comment, criticism and debate on religious beliefs and practices, including comic treatment amounting to ridicule:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.⁹¹

⁸⁶ POA, s 17.

⁸⁷ Paras 2.22 and following, above.

⁸⁸ POA, s 29A.

⁸⁹ See CP para 2.110.

⁹⁰ POA, s 29AB.

⁹¹ POA, s 29J.

- 2.47 It is difficult to assess the practical effect of this provision.⁹² There are no reported cases interpreting it, and prosecutions under the religious hatred provisions are rare. In the CP, we noted that it may be difficult, for example, to draw the line between criticism of a belief system and attacks on its adherents. We also noted arguments that the religious offences are unworkable due to this provision (in combination with the requirement that material be “threatening” rather than “threatening, abusive or insulting”).⁹³

Sexual conduct or practice

- 2.48 There is similarly wide protection for the criticism of sexual conduct or practice, and of same sex marriage, in section 29JA:

(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.⁹⁴

- 2.49 As with religious hatred, in the absence of appellate judicial interpretation it is hard to assess the scope of this free speech provision.⁹⁵ We noted in the CP that it did not avail the defendants in the single successful prosecution for stirring up hatred on grounds of sexual orientation.⁹⁶

Procedural matters

Jurisdiction

- 2.50 Cases involving activity over the internet may cause jurisdictional difficulties, with the stirring up offences as with other criminal offences. The principle adopted by the Court of Appeal is that where a substantial measure of the conduct constituting a crime takes place in England and Wales, the English and Welsh courts have jurisdiction (unless comity requires otherwise). It is clear that mere

⁹² We discuss its interaction with the ECHR in Appendix A to the CP (which discusses hate crime and the ECHR) at para A.91.

⁹³ CP paras 2.117 to 2.121. The narrowness of the religious offences may explain why a man arrested at an EDL rally for showing a tattoo of a mosque being bombed was charged under the racial hatred rather than the religious hatred provisions: see <http://www.bbc.co.uk/news/uk-england-23517893> (last visited 15 May 2014).

⁹⁴ POA, s 29JA. Subsection (2) was added by Marriage (Same Sex Couples) Act 2013, Sch 7, part 2, para 28 and commenced by SI 2014 No 93 on 13 March 2014.

⁹⁵ CP para 2.124.

⁹⁶ CP para 2.124. See sentencing remarks of HHJ Burgess in *Ali, Javed and Ahmed* (unreported, 10 Feb 2012), <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf> (last visited 15 May 2014). The leaflets distributed by the defendants showed a mannequin hanging from a hangman’s noose and referred to the death sentence as “the only way that the immoral crime [of homosexuality] can be erased from corrupting society.” It is noteworthy that the prosecution relied on evidence from four homosexual men who said they had felt threatened by the leaflets.

use of a foreign web server to upload content prepared in England and Wales, and intended for a domestic audience, is not enough to prevent prosecution here.⁹⁷ However the case law does not resolve the position regarding material intended or likely to incite racial hatred in England and Wales but created elsewhere.⁹⁸ For present purposes we have assumed that if the publication had been written or uploaded here, there would be enough connection to this jurisdiction, but not if the material was written and uploaded overseas and was merely made accessible to individuals in England or Wales.

Social Media

- 2.51 The growth of new media such as email and social media gives rise to other difficulties for offences that may be committed online. Email would appear to be analogous to private correspondence, while posts on social networking sites such as Facebook and Twitter may be to the world at large or to a limited number of “friends” or “followers”. Whether, for the purposes of the publication and possession stirring up offences, a communication was to the public or to a section of it would have to be decided on a case-by-case basis; there is no definition of how large an audience must be to constitute a “section” of the public.⁹⁹

CPS GUIDELINES

- 2.52 We noted in the CP that the Director of Public Prosecutions has issued guidelines for cases in which a prosecutor is considering bringing a prosecution for a communication via social media.¹⁰⁰ These guidelines are also relevant to the aggravated offences and to offences such as section 1 of the Communications Act 1988 and section 127 of the Malicious Communications Act 2003 to which section 145 or 146 sentence enhancements may be applied.¹⁰¹
- 2.53 The guidelines provide that communications involving credible threats or harassment, or breaching court orders, will be prosecuted robustly; specific reference is made to the aggravated offences and to sections 145 and 146 of the

⁹⁷ *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 at [32] by Scott Baker LJ: the website was hosted by a server in California, use of which was “a mere stage in the transmission of the material.”

⁹⁸ See our discussion of this issue in *Contempt of Court (1): Juror Misconduct and Internet Publications* (2013) Law Com No 340, paras 2.206 to 2.216 and 3.87.

⁹⁹ *Sheppard* [2010] EWCA Crim 65, [2010] 1 WLR 2779 held that publication on the internet meets the requirement that publication be to the public or a section of the public if it is generally accessible or available to, placed before, or offered to the public (but contrast *Britton* [1967] 2 QB 51, [1967] 2 WLR 537). In *Chambers* [2012] EWHC 2157 (Admin), in deciding whether a tweet is a message sent via a public communications network for the purposes of s 127 Communications Act 2003, it was noted that a tweet is not limited to one’s followers but rather is accessible to all internet users ([2012] EWHC 2157 (Admin) at [22] and [24] by Lord Judge CJ). However Facebook posts may, using privacy settings, be limited to a narrow group of people. See Law Com No 340, para 2.33 and Chapter 2 generally for a further discussion of this issue.

¹⁰⁰ CP paras 4.31 to 4.33. They can be found at: https://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/ (last visited 15 May 2014).

¹⁰¹ The guidelines followed a number of controversies about social media prosecutions, for example *Chambers* [2012] EWHC 2157 (Admin).

CJA.¹⁰² Conduct falling outside that will be subject to a high threshold and “in many cases a prosecution is unlikely to be in the public interest”;¹⁰³ in general, the conduct should be more than offensive, rude, unfashionable, distasteful or painful.¹⁰⁴ While caution is urged in using Public Order Act offences for online communications, the guidelines note that in some cases the stirring up offences may be relevant and should be used,¹⁰⁵ and state that, where there is a specific victim, a hate crime element may influence the public interest test.¹⁰⁶

- 2.54 In media reports regarding an increase in the number of reports of anti-Muslim hate crime in 2014, there was criticism that the guidelines have led to the toleration of online hate crime that ought to be prosecuted.¹⁰⁷

Attorney General’s consent

- 2.55 For all the stirring up offences, the consent of the Attorney General is needed to bring a prosecution.¹⁰⁸ The Attorney General applies the ordinary principles of sufficiency of evidence and public interest (which will already have been considered by the CPS) and acts independently of Government.¹⁰⁹ A former Attorney General has described the consent requirement as “an important filter” against vexatious and unmeritorious cases and has said that in considering whether to consent, the Attorney General is “required as a public authority to act in accordance with the Human Rights Act and with Convention rights”.¹¹⁰

Penalties

- 2.56 The penalties are the same for all six forms of the offences, and across the three forms of hatred. Upon conviction on indictment, the maximum is seven years’ imprisonment or a fine, or both; upon summary conviction, imprisonment for a

¹⁰² CPS Guidelines (fn 100 above), paras 15 to 28 (reference to CDA/CJA at para 18).

¹⁰³ CPS Guidelines (fn 100 above), Part (4).

¹⁰⁴ CPS Guidelines (fn 100 above), para 41.

¹⁰⁵ CPS Guidelines (fn 100 above), para 49.

¹⁰⁶ CPS Guidelines (fn 100 above), para 45.

¹⁰⁷ See, for example, the *Guardian*, 27 December 2013, quoting the director of the NGO Faith Matters: “[the CPS] raised the bar of prosecution significantly. Now, unless there is a direct threat to somebody on Twitter or Facebook, the CPS will not prosecute. The CPS is just plainly out of sync with reality.” Available from: <http://www.theguardian.com/society/2013/dec/27/uk-anti-muslim-hate-crime-soars> (last visited 20 February 2014).

¹⁰⁸ POA, ss 27(1) and 29L..

¹⁰⁹ Attorney General’s Office, *Protocol Between the Attorney General and the Prosecuting Departments* (July 2009) section 4a, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15197/Protocol_between_the_Attorney_General_and_the_Prosecuting_Departments.pdf (last visited 15 May 2014).

¹¹⁰ Evidence given by the then Attorney General, Lord Goldsmith QC, to the Select Committee on Religious Offences on 16 January 2003, at paras 641 and 651.

term not exceeding six months, a fine not exceeding the statutory maximum, or both.¹¹¹

ENHANCED SENTENCING PROVISIONS

Introduction

- 2.57 In this section we summarise the law in relation to enhanced sentencing for offences aggravated by hostility, under sections 145 and 146 of the Criminal Justice Act 2003 ("CJA"). As we explain, section 145 requires racial and religious hostility to be taken into account at the sentencing stage for all criminal offences other than those charged as aggravated offences. Section 146 requires the sentencing court to take into account hostility based on disability, sexual orientation, and transgender identity in any offence.
- 2.58 The enhanced sentencing rules contained in sections 145 and 146 of the CJA form part of the general sentencing regime in Part 12 of that Act. The CJA provides that when sentencing, the courts must have regard to the five fundamental purposes of sentencing:¹¹²
- (1) the punishment of offenders;
 - (2) the reduction of crime (including its reduction by deterrence);
 - (3) the reform and rehabilitation of offenders;
 - (4) the protection of the public; and
 - (5) the making of reparation by offenders to persons affected by their offence.
- 2.59 In assessing the seriousness of offences, the court must have regard to the culpability of the offender and to the harm caused by (as well as harm intended or foreseeable as following from) the offence.¹¹³ Courts are assisted in this by sentencing guidelines, which since 2010 have been issued by the Sentencing Council,¹¹⁴ and which all courts are required to follow.¹¹⁵ A number of offences

¹¹¹ POA, ss 27 (race) and 29L(3) (religion/sexual orientation). Note that the CJA, s 282 extends the power of magistrates' courts to sentence for some offences from six months to 12 months, but it is not yet in force.

¹¹² CJA, s 142(1). Different rules apply to offenders under 18 at time of conviction. See generally Sentencing Guidelines Council, *Overarching Principles: Sentencing Youths* (2009), http://sentencingcouncil.judiciary.gov.uk/docs/web_overarching_principles_sentencing_youths.pdf (last visited 15 May 2014).

¹¹³ CJA, s 143(1).

¹¹⁴ In 2010 the Sentencing Council replaced the previous Sentencing Guidelines Council, which had the same function.

¹¹⁵ Unless it is contrary to the interests of justice to do so: Coroners and Justice Act 2009, s 125(1). Guidelines may be general in nature, or limited to particular offences, categories of offence, or offender: Coroners and Justice Act 2009, s 120(2). Sentencing Guidelines Council guidelines are treated as guidelines of the Sentencing Council for the purposes of the Coroners and Justice Act 2009, s 125 and therefore must also be followed: Coroners and Justice Act 2009 (Commencement No 4, Transitional and Saving Provisions) Order 2010, SI 2010/816, art 7; Coroners and Justice Act 2009, sch 22, part 4, para 28(2).

have specific guidelines tailored to them; for other offences, there is a general seriousness guideline.¹¹⁶

- 2.60 The CJA specifically requires certain aggravating factors, if present, to be taken into account in assessing seriousness. These include hostility on the basis of race or religion (section 145) and on the basis of sexual orientation, disability, or transgender identity (section 146).¹¹⁷ Sentencing guidelines set out these “statutory aggravating factors”, as well as “general aggravating factors”, to which the court must have regard in considering all the circumstances of the offence.¹¹⁸
- 2.61 The CJA aggravating factors (whether statutory or general) operate to guide sentencers as to where a sentence should fall within the range for the relevant offence. They cannot operate to raise a sentence above the available maximum prescribed by the substantive offence provision. As we have explained, this sets enhanced sentencing apart from aggravated offences, which carry higher maximum sentences.¹¹⁹
- 2.62 The court has a duty to “state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence”.¹²⁰

Section 145: racial or religious aggravation

- 2.63 Section 145 of the CJA provides that:

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

¹¹⁶ Sentencing Guidelines Council, *Overarching Principles: Seriousness* (2004). There are specific guidelines for assault, sexual offences, theft and many others. All of the guidelines can be found at <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> (last visited 15 May). Guidelines relevant to the magistrates’ courts are consolidated into a single document, the Magistrates’ Court Sentencing Guidelines, which also contain explanatory notes on a wide range of matters: available from http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_Update9_October_2012.pdf (last visited 15 May 2014).

¹¹⁷ There are two other statutory aggravating factors: that the offender committed the offence while on bail, and that the offender has previous convictions: CJA, s 143(2) and (3).

¹¹⁸ CJA, s 156(1) provides that courts must consider all mitigating and aggravating factors when imposing community sentences and discretionary custodial sentences. The CJA does not list these further factors; this is left to the Sentencing Council (which lists the most relevant possible factors in its guidelines) and the court. Some general aggravating factors of relevance in the hate crime context are considered at para 2.96 below. We also consider the CJA’s separate provisions relating to setting the minimum tariff in sentences for murder where hostility is established, at para 2.91 and following, below.

¹¹⁹ As set out at para 2.29 above.

¹²⁰ CJA, s 174(2). This provision was substituted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 64, effective from 3 December 2012. In addition, the Criminal Practice Directions state that where an offender has pleaded guilty, prior to sentencing the prosecution should state the facts of the offence in open court, in order to make the press and public aware of them ([2013] EWCA Crim 1631, CPD Sentencing D.1).

(2) If the offence was racially or religiously aggravated, the court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

(3) Section 28 of the Crime and Disorder Act 1998 (meaning of “racially or religiously aggravated”) applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.¹²¹

- 2.64 Section 145 cannot be used to enhance a sentence where the offender was acquitted of an aggravated offence but convicted of the corresponding non-aggravated offence.¹²² This would offend against the general principle that it is wrong for an offender to be sentenced on the basis that they were guilty of an offence for which they were acquitted.
- 2.65 It is less clear whether the effect of section 145(1) is that enhanced sentencing can be applied in cases where a defendant convicted of one of the non-aggravated offences could have been, but was not, charged with the corresponding aggravated offence.
- 2.66 There is a general principle that offenders should not be sentenced as if they were guilty of offences of which they have not been convicted. For example, a judge sentencing for unlawful intercourse with a minor cannot treat lack of consent as an aggravating factor; the offender was not convicted of rape, and the jury did not consider whether there was consent.¹²³ In *Clark*, the Court of Appeal held that it is permissible for the judge to interpret the verdict of the jury and to pass sentence based “on his view of the gravity of the ingredients of the offence of which the jury have convicted (even if some of these ingredients were capable of being free-standing criminal offences)”. However the judge cannot sentence a defendant on the basis that “unproved, separate and distinct offences ‘aggravate’ the offence of which he is convicted”.¹²⁴
- 2.67 There is no clear dividing line to help ascertain what falls on the right or wrong side of the formulation in *Clark*. As to what would be permissible, the Court of Appeal has given the example of taking excessive speed or the consumption of alcohol into account when sentencing for dangerous driving (*Clark*);¹²⁵ it has also found the principle not to have been infringed where injury caused in the course of an affray was taken into account even though no offence against the person

¹²¹ Section 145 has been in force since April 2005: SI 2005 No 950.

¹²² *McGillivray* [2005] EWCA Crim 604, [2005] 2 Cr App R (S) 60; *Kentsch* [2005] EWCA Crim 2851.

¹²³ *Druce* (1993) 14 Cr App R (S) 691, [1993] Crim LR 469 and *Davies* [1998] 1 Cr App R (S) 380. For further case law on this principle, see *Current Sentencing Practice* (Release 80, November 2013), L2-1A. There is a narrow exception where the aggravating feature in question was relevant to the charge, specifically considered by the jury and not inconsistent with their verdict: *Khan* [2010] 1 Cr App R (S) 1.

¹²⁴ *Clark* [1996] 2 Cr App R(S) 351, 356 by Henry LJ. In that case, the issue was that the judge had sentenced on the basis that the defendant had sexually assaulted the victim many times, but he had only been convicted of one assault

¹²⁵ *Clark* [1996] 2 Cr App R(S) 351, 356 by Henry LJ.

was charged.¹²⁶ Furthermore, a recent draft Sentencing Council guideline on theft proposes that where a theft involves the threat or use of force this would be a factor indicating greater culpability, attracting a higher starting point, even though this would in many cases amount to the offence of robbery.¹²⁷

- 2.68 It may be argued that it would be contrary to the general principle referred to above if a court sentencing an offender for (say) malicious wounding¹²⁸ were to apply section 145, because to do so would be to sentence him or her as if convicted of the separate and more serious offence of racially aggravated malicious wounding. If the prosecution believes racial or religious hostility was present, they should charge the aggravated offence, if necessary adding it to the indictment during the course of the trial if the evidence in support only emerges at that stage. Practitioner guidance, the Magistrates' Court Sentencing Guidelines (MCSG), and CPS guidance endorse this view and present the two schemes as effectively mutually exclusive.¹²⁹
- 2.69 Nevertheless, the authorities leave room for an opposing interpretation, whereby enhanced sentencing could apply even in a case where an aggravated offence was available but not charged. The wording of section 145 is mandatory. It states that racial or religious aggravation *must* be taken into account in sentencing for *any offence* other than the aggravated offences. If Parliament did not wish aggravation to be taken into account for offences in particular circumstances it could have made this explicit. By enacting section 145 in such broad terms, it has indicated that it does not consider racial or religious aggravation to be an issue that, as a matter of principle, must always go to the jury. Although the defendant loses the opportunity to have a jury decide the aggravation issue if section 145 rather than the aggravated offence is used to reflect the hostility aggravation, the higher maximum sentence offered by the aggravated offence will not be available.
- 2.70 In *O'Callaghan*,¹³⁰ the only case in which the issue has come before the Court of Appeal specifically in the racial aggravation context, the Court appeared to approve of the view in *Clark* as to where the line should be drawn. However, the Court decided that it was unnecessary for it to resolve the question of principle and instead set aside the section 145 uplift by the sentencing judge, on the basis that the defendant had not been given adequate notice that the issue would be

¹²⁶ *Cooke* (1987) 9 Cr App R (S) 116. See also *Khan* [2009] EWCA Crim 389, [2010] 1 Cr App R (S) 1 at [9], which referred to the common practice of treating damage to property as an aggravating factor in sentencing for burglary, even if criminal damage was not charged. Gross J in *O'Callaghan* (fn 131 below, at [15]) gave the example of a case of actual bodily harm where the injuries could have supported a more serious charge.

¹²⁷ *Theft Offences Guideline: Consultation*, p30. Available from http://sentencingcouncil.judiciary.gov.uk/docs/Final_Sentencing_Council_Theft_Consultation_web.pdf (last visited 15 May 2014).

¹²⁸ Contrary to s 20 Offences Against the Person Act 1861.

¹²⁹ Blackstone's, para E1.16; Anthony and Berryman's (2013) para B5.2B; CPS Legal Guidance, *Racist and Religious Crime*, available from: http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a19 (last visited 15 May 2014); Sentencing Council, *Magistrates' Court Sentencing Guidelines*, Explanatory Material, p178.

¹³⁰ *O'Callaghan* [2005] EWCA Crim 317, [2005] 2 Cr App R (S) 514.

raised and thus did not have a fair chance to contest it.¹³¹ There should be a *Newton* hearing or, at the very least, plain and adequate notice that a sentence on that basis is being considered. Nevertheless, the MCSG refer to *O'Callaghan* to support the principle that the two systems are wholly mutually exclusive.¹³²

Section 146: aggravation related to disability, sexual orientation or transgender identity

2.71 Unlike section 145, section 146 does not make express reference to the aggravated offences in the CDA, but it creates an almost identical scheme. It provides:

(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

(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, or

(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

¹³¹ *O'Callaghan* [2005] EWCA Crim 317, [2005] 2 Cr App R (S) 514 at [18] by Gross J. The trial judge had indicated that the 18-month sentence would have been 15 months without the racial element.

¹³² The MSCG say that in such cases, sentencers “should *not normally* treat an offence as racially or religiously aggravated [our emphasis]”: p 178. The CPS, for their part, base their conclusion on *Druce* and *Davies* (fn 123 above). For a discussion of this issue, which concludes there is no barrier to using s 145 in this situation, see Prof R Taylor, “The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?” (2014) 13 *Contemporary Issues in Law* 76.

(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.

HOSTILITY

- 2.72 Section 146(2)(a) and (b) mirror the hostility test laid down by the aggravated offences, so the case law on these elements of the aggravated offences will also be relevant in interpreting section 146.
- 2.73 CPS guidance on disability hate crime notes that motive can be difficult to prove, making it likely that section 146 will be more widely used in relation to demonstrations of hostility than in relation to hostile motivation.¹³³

MEANING OF DISABILITY IN THIS CONTEXT

- 2.74 "Disability" is defined in section 146(5) of the CJA as "any physical or mental impairment". CPS guidance notes that medical confirmation is not required to put a prosecutor on notice that a person might have a disability and might have been targeted because of it. It further notes that disabilities may be obvious or hidden and therefore prosecutors should fully explore the circumstances surrounding an offence.¹³⁴

The distinction between vulnerability and hostility in the context of disability hate crime

- 2.75 It is important to distinguish between offending driven by hostility based on the characteristic of disability, which is covered by section 146, and a crime committed against a person with a disability because of their apparent vulnerability to crime, which is not. A disabled person may be targeted because, in a particular situation, their disability appears to make them an easier target, and less able to resist. While this is capable of being treated as an aggravating factor under different provisions,¹³⁵ it is important not to confuse the hostility-based scheme laid down by section 146 with other sentencing guidance.
- 2.76 CPS guidance on this distinction gives the example of the theft of a wallet from a blind person, and notes that:

¹³³ Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/ (last visited 15 May 2014).

¹³⁴ Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, fn 133 above.

¹³⁵ *Bridge* [2012] EWCA Crim 2270. See also para 2.98 below.

if there is no demonstration of hostility... or any evidence that the crime was motivated by hostility based on disability, the offender is simply likely to have been preying on the victim's perceived vulnerability.¹³⁶

- 2.77 The guidance also notes that hostility and vulnerability may not be mutually exclusive.¹³⁷ As with the aggravated offences, it is irrelevant to the demonstration or motivation by hostility, that any other motivating factor was present:¹³⁸ therefore, for example, a thief who targets a blind person as an easy target but also calls him a "blind so and so" would be caught.
- 2.78 The distinction may sometimes be difficult to draw. In particular, cases may be reported and recorded as "disability hate crime"¹³⁹ when in fact there is no evidence of hostility, but when other general aggravating factors may apply (for example, the deliberate targeting of a vulnerable person, or the abuse of a position of power or trust).¹⁴⁰

MEANING OF SEXUAL ORIENTATION IN THIS CONTEXT

- 2.79 Section 146 does not define sexual orientation. However, in *B*, the Court of Appeal considered that "sexual orientation" refers to orientation towards people of the same sex, the opposite sex, or both; it will not encompass preferences for particular acts, or asexual people.¹⁴¹

¹³⁶ Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/#a30 (last visited 6 May 2014). The guidance emphasises that disabled people should not be characterised as vulnerable per se, but "it is the particular *situation* in which they may find themselves and which is then exploited that makes them vulnerable to be targeted for some types of criminal offences." Eg, a wheelchair user may be an easier target for theft of a handbag, but not for online fraud.

¹³⁷ Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/#a31 (last visited 6 May 2014).

¹³⁸ See discussion above at paras 2.20 and 2.21.

¹³⁹ As we explain in the CP at paras 1.11 to 1.13, the operational definition of hate crime used by the police and CPS for recording purposes is wider than that used in the CDA and CJA.

¹⁴⁰ We discuss general aggravating factors at para 2.96 below. A recent example is the sentence imposed for the murder of Bijan Ebrahimi, which the Disability Hate Crime Network asked the Attorney General to refer to the Court of Appeal under the undue leniency procedure, on the basis that hostility based on disability should have been taken into account (as per Sch 21 CJA). Mr Ebrahimi was autistic and had been abused by neighbours who had, among other things, called him a "paedophile". However the Attorney General did not regard this as evidence of hostility, and noted that other aggravating factors, such as bullying and victimisation, had been taken into account by the judge. One of the Network's co-ordinators has published the Attorney General's response here: <http://katharinequarmby.wordpress.com/2014/01/06/attorney-generals-letter-to-disability-hate-crime-network-re-bijan-ebrahimi-case/> (last visited 15 May 2014).

¹⁴¹ [2013] EWCA Crim 291. We discuss this in greater detail in the CP, paras 2.115 to 2.117 and 3.112 to 3.115.

MEANING OF TRANSGENDER IDENTITY IN THIS CONTEXT

- 2.80 Section 146(6) of the CJA provides that “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”.¹⁴²
- 2.81 This definition is not exhaustive. As we noted in the CP, section 146 therefore does not necessarily exclude hostility against, for example, transvestites.¹⁴³

PRESUMED MEMBERSHIP AND MEMBERSHIP BY ASSOCIATION

- 2.82 Section 146 provides that it is sufficient for hostility to be demonstrated towards the victim based on their “presumed membership” of one of the listed groups, and accordingly the case law on presumed membership discussed in relation to the aggravated offences is relevant here;¹⁴⁴ Conversely, as we noted in the CP, if an offender is unaware of the person’s status, but uses abusive language related to it (for instance a term relating to sexual orientation), it will be difficult to establish that there was hostility *based on* the person’s presumed status.¹⁴⁵
- 2.83 Section 145 of the CJA expressly incorporates the definitions of racial and religious hostility used for the racially and religiously aggravated offences, which are contained in section 28(2) of the CDA. Section 28(2) provides that “membership” of a group includes membership by association.¹⁴⁶ Section 145 must therefore be seen as similarly defining “membership” as including membership by association. By contrast, section 146 defines hostility afresh (albeit in almost identical terms to the CDA), and does not expressly say that “membership” includes membership by association.¹⁴⁷ However section 146 otherwise mirrors section 145.¹⁴⁸

¹⁴² Contrast s 7 of the Equality Act 2010, which provides: “(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.”

¹⁴³ See discussion in Chapter 6 below, from para 6.73 and CP paras 3.127 to 3.135.

¹⁴⁴ See para 2.14 above. See also *English v Thomas Sanderson Blinds* [2008] EWCA Civ 1421, [2009] 2 All ER 468, an employment case which involved the taunting of an individual for being homosexual when he was in fact heterosexual. The Court of Appeal interpreted the definition of sexual orientation contained in the relevant discrimination provisions as covering not only actual but perceived sexual orientation.

¹⁴⁵ However it may be possible to establish motivation by hostility towards that characteristic generally. CP paras 3.119 and 3.120 (in the sexual orientation context).

¹⁴⁶ We discuss membership by association in that context at para 2.14 above.

¹⁴⁷ Therefore there is no clear inclusion of, for example, those who socialise with, or provide services for, people with any of the three characteristics, or those who are carers for disabled people. There is no evidence in parliamentary records to indicate why this is the case, and whether the omission of equivalent provisions in s 146 was deliberate. However, some situations involving such individuals will be covered, because the motivation limb of the hostility test in s 146(2)(b) captures offending motivated by hostility towards members of the protected group generally, regardless of whether the actual victim was a member of that group. The difference relates to cases where only demonstration of hostility is at issue.

¹⁴⁸ We return to this issue in Chapter 6 (at para 6.35 and following).

The approach to sentencing under sections 145 and 146

- 2.84 The level of increase in sentence where hostility is proved will depend on the circumstances of the case.¹⁴⁹ Guidance from the CPS, and explanatory material in the Magistrates' Court Sentencing Guidelines, suggest that the approach adopted by the Court of Appeal in *Kelly*, partially endorsing the Sentencing Advisory Panel's guidance on racially aggravated offences,¹⁵⁰ also applies for the purposes of sections 145 and 146 of the CJA.¹⁵¹
- 2.85 Following that guidance, the extent to which the sentence is increased under sections 145 and 146 will depend on the seriousness of the aggravation, to which in turn the offender's intention and the impact of the conduct are relevant.¹⁵²
- 2.86 With regard to the offender's intention, factors increasing aggravation may include: that the hostility element was planned; the offence was part of a pattern of offending; the offender was a member of, or associated with, a group promoting hostility based on the protected characteristic in question; or the incident was deliberately set up to be offensive or humiliating to the victim or to the group of which the victim is a member.¹⁵³
- 2.87 With regard to the impact of the conduct, factors indicating a high level of aggravation could include: that the offence was committed in the victim's home; the victim was providing a service to the public; the timing or location of the offence was calculated to maximise the harm or distress it caused; the expressions of hostility were repeated or prolonged; the offence caused fear and distress throughout a local community or more widely;¹⁵⁴ or the offence caused particular distress to the victim and/or the victim's family.¹⁵⁵

¹⁴⁹ *Saunders* [2000] 1 Cr App R 458, 2 Cr App R (S) 71, where the Court of Appeal at [12] distinguished another case of racially aggravated assault, *Clarke* (1992) 13 Cr App R (S) 640.

¹⁵⁰ *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73. Discussed at para 2.31 above with regard to the aggravated offences. The guidance related to the aggravated offences and also to CDA, s 82 (which provided for racial aggravation to increase sentence for offences other than the aggravated offences, and was repealed and re-enacted in CJA s 145).

¹⁵¹ Crown Prosecution Service Legal Guidance, *Racist and Religious Crime* (fn 129 above) and *Disability Hate Crime* (fn 133 above); Sentencing Council, *Magistrates' Court Sentencing Guidelines* (fn 116 above) p178. See also Anthony and Berryman's (2013), para B5.2B.

¹⁵² Anthony and Berryman's (2013), para B5.2B.

¹⁵³ *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65]. See also *Re A-G's Reference (No 92 of 2003)* [2004] EWCA Crim 924, *The Times* 21 Apr 2004 at [17] and following.

¹⁵⁴ See also *Saunders* [2000] 1 Cr App R 458, 2 Cr App R (S) 71 at [18]: "the same offensive remark is likely to attract a heavier penalty if uttered in a crowded church, mosque or synagogue than if uttered in an empty public house" by Rose LJ. In the recent unreported case of *Ferrar* (18 February 2013), concerning the placing of a pig's head outside a community centre used by Muslims, Temperley DJ noted that "what [the defendant] did was intimidatory and would only serve to inflame an already tense and volatile situation;" the effect was to prompt alarm, fear and insecurity to spread through the community and beyond. See <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/liam-ferrar-sentencing-remarks-18022013.pdf> (last visited 15 May 2014).

¹⁵⁵ *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [65]. Many of these factors are set out in the earlier Court of Appeal's decision in *Saunders* [2000] 1 Cr App R 458 at [18].

- 2.88 The aggravation may be regarded as less serious if the hostility element was limited in scope or duration; if the offence was not motivated by hostility; or if the element of hostility or abuse was minor or incidental.¹⁵⁶

PROOF OF AGGRAVATING FACTOR(S) IN SENTENCING

- 2.89 If the offender wishes to challenge the allegation that hostility was present and that the sentence should be enhanced in accordance with section 145 or 146, the prosecution will have to adduce sufficient evidence to prove the hostility before the court decides on sentence. This usually takes place in a procedure known as a *Newton* hearing and will be determined without a jury.¹⁵⁷ This procedure may apply if the offender pleaded guilty, or was found guilty but evidence supporting hostility was not adduced at trial.¹⁵⁸ At such hearings, the judge acts as finder of fact, and the prosecution must prove its version of events beyond reasonable doubt.¹⁵⁹ Guidance states that the prosecution should call witnesses on the hostility issue, rather than relying on written statements.¹⁶⁰ The procedure aims to ensure that the sentence reflects the seriousness of the offending behaviour, and to do justice to the offender by ensuring any increase is based on evidence tested to the criminal standard.¹⁶¹
- 2.90 If the issues raised in the *Newton* hearing are resolved against the offender, credit for pleading guilty may be reduced, but only exceptionally would this credit be wholly dissipated.¹⁶²

Determination of minimum term in a mandatory life sentence

- 2.91 We now summarise the separate sentencing scheme in respect of murder,¹⁶³ which carries a mandatory life sentence, and explain how it deals with murders committed in circumstances of hostility.
- 2.92 Except in cases where the offender is to receive a “whole life order”, the court must specify the minimum term (or “tariff”) that the offender must serve before being considered for release on licence. The approach is similar to that under

¹⁵⁶ *Kelly* [2001] EWCA Crim 170, [2001] 2 Cr App R (S) 73 at [66].

¹⁵⁷ In accordance with the rules laid down by the Court of Appeal in *Newton* (1983) 77 Cr App R 13, (1982) 4 Cr App R (S) 388. This procedure is used in situations where a factual issue serious enough to have a substantial bearing on sentence has not been resolved by the jury or by an agreement between the defence and prosecution accepted by the judge.

¹⁵⁸ *Cairns* [2013] EWCA Crim 467, 2013 WL 1563025 by Leveson LJ at [9], citing as an example *Finch* (1993) 14 Cr App R (S) 226, [1992] Crim LR 901.

¹⁵⁹ *Ahmed* (1985) 80 Cr App R 295, (1984) 6 Cr App R (S) 391. Both parties are given the opportunity to call such evidence as they wish and to cross-examine witnesses called by the other side: see *McGrath* (1983) 5 Cr App R (S) 460, 463.

¹⁶⁰ CPS Legal Guidance, *Newton Hearings*, available from http://www.cps.gov.uk/legal/l_to_o/newton_hearings/ (last visited 15 May 2014). The importance of this is illustrated by the case of *Sheard* [2013] EWCA Crim 1161, which we discuss below in Chapter 4 at para 4.118.

¹⁶¹ *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [2], by Judge LJ.

¹⁶² See Judge LJ in *Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13 at [11]; relevant factors will include a lack of genuine remorse or insight into the consequences of the offence.

¹⁶³ Set out in CJA, Sch 21.

sections 145 and 146. The court first selects a starting point, based on the overall seriousness of the offence. It then adjusts the tariff up or down from that point, based on other aggravating or mitigating factors.¹⁶⁴ The starting points are a whole life order, 30 years, 25 years, and 15 years.¹⁶⁵ The court has a duty to state in open court and in ordinary language its reasons for arriving at the minimum term,¹⁶⁶ including which starting point is selected and why.¹⁶⁷ However the court is not bound to follow the statutory guidance and may depart from it if appropriate,¹⁶⁸ although it must state its reasons for doing so.¹⁶⁹

Starting points

- 2.93 For offenders aged 18 years or over, where the offence is not so serious as to warrant a whole life order¹⁷⁰ but the seriousness of the offence is “particularly high”, the appropriate starting point is 30 years.¹⁷¹ The schedule provides that the fact that a murder is racially or religiously aggravated,¹⁷² or aggravated on the basis of sexual orientation, disability or transgender identity, normally indicates “particularly high” seriousness.¹⁷³ In deciding whether these factors are present, the court must apply the criminal standard of proof.¹⁷⁴

Aggravating factors

- 2.94 After choosing a starting point, the court should take into account any aggravating factors, including hostility based on race, religion, sexual orientation, disability or transgender identity, to the extent that it has not already allowed for them in its choice of starting point.¹⁷⁵

¹⁶⁴ As well as the effects of the defendant’s previous convictions, any plea of guilty and whether the offence was committed on bail.

¹⁶⁵ CJA, Sch 21, paras 4, 5, 5A and 6. For offenders under the age of 18, the starting point in all cases is 12 years: CJA, Sch 21, para 7.

¹⁶⁶ CJA, s 174.

¹⁶⁷ CJA, s 270.

¹⁶⁸ *Sullivan* [2004] EWCA Crim 1762, [2005] 1 Cr App R 3 at [11]. See also *Last* [2005] EWCA Crim 106, [2005] 2 Cr App R (S) 64 at [16].

¹⁶⁹ CJA, s 270(2)(b).

¹⁷⁰ Under CJA, Sch 21, para 4.

¹⁷¹ CJA, Sch 21, para 5(1). In *West* [2007] EWCA Crim 701, [2007] All ER (D) 346 (Feb), the Court of Appeal emphasised that each case will depend on its own facts.

¹⁷² The meaning of “racially or religiously aggravated” is to be taken from CDA, s 28: see CJA, Sch 21, para 2.

¹⁷³ CJA, Sch 21, para 5(2)(g). Disability and transgender identity were added by LASPO 2012, s 65(9), effective from 3 December 2012. The meaning of aggravation on grounds of sexual orientation, disability or transgender identity is to be taken from CJA, s 146: CJA, Sch 21, para 3.

¹⁷⁴ *Davies* [2008] EWCA Crim 1055, [2009] 1 Cr App R (S) 15 at [14] by Lord Phillips CJ: “The distinction between the factors that call for a 30 year starting point and those that call for a 15-year starting point is no less significant than that which has to be considered by a jury when distinguishing between alternative offences It would be anomalous if the same standard of proof did not apply in each case.”

¹⁷⁵ CJA, Sch 21, paras 8, 10 and 5(2)(g).

- 2.95 Accordingly, depending on the circumstances, hostility against a protected group may either determine the starting point, or be an aggravating factor increasing the tariff from the starting point. The Court of Appeal in *Blue*¹⁷⁶ held that the trial judge was entitled to find a racial element to an offence despite stating that he would not rely on racial aggravation so as to justify a “huge leap” from a 15-year to a 30-year starting point.

General aggravating factors under the CJA

- 2.96 We noted above that, in addition to the statutory requirement in sections 145 and 146 that hostility be treated as an aggravating factor, the courts are required to take other general aggravating factors into account.¹⁷⁷ Sentencing guidelines, which the court must follow unless it is contrary to the interests of justice to do so, include several general aggravating factors that may be of relevance in the hate crime context.

Sentencing guidelines

- 2.97 The sentencing guideline *Overarching Principles: Seriousness*¹⁷⁸ sets out a non-exhaustive list of the most important general aggravating features.¹⁷⁹ These are split into factors which indicate higher culpability and those which indicate a more than usually serious degree of harm. Many of these factors are mirrored in sentencing guidelines which apply to specific groups of offences.¹⁸⁰ The judge must of course observe the maximum sentence for the offence.
- 2.98 Factors indicating higher culpability which may be of potential relevance to hate crime include:
- (1) that the offence was motivated by hostility towards a minority group, or a member or members of it;¹⁸¹
 - (2) that a vulnerable victim was deliberately targeted;¹⁸²
 - (3) that there was an abuse of power or abuse of a position of trust.¹⁸³

¹⁷⁶ [2008] EWCA Crim 769, [2009] 1 Cr App R (S) 2.

¹⁷⁷ Paras 2.86 and 2.87 above. Again, the *Newton* hearing procedure described at para 2.89 above will be relevant if the defence disputes the aggravating factor.

¹⁷⁸ Issued in 2004 by the predecessor of the Sentencing Council, the Sentencing Guidelines Council, http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf (last visited 15 May 2014).

¹⁷⁹ Sentencing Guidelines Council, *Overarching Principles: Seriousness*, para 1.21.

¹⁸⁰ See, in particular, the guidelines on Assault (2011); Burglary Offences (2012); Dangerous Dogs Offences (2012); and Sexual Offences (2014), available from <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>.

¹⁸¹ See, eg, *Killeen* [2009] EWCA Crim 711. The judgment in this case is relatively brief. It refers to “members of the travelling community” and states that “the offence was clearly motivated by hostility towards a minority group.” We noted above at fn 49 that “racial group” includes Irish Travellers, and it is not clear whether this is a case in which CJA, s 145 could have been applied.

¹⁸² See, eg, *Maleya* [2012] EWCA Crim 2100.

¹⁸³ See, eg, *Khan* [2011] EWCA Crim 2782.

- 2.99 A factor in the sentencing guideline indicating a more than usually serious degree of harm is that the victim is “particularly vulnerable”.¹⁸⁴

Enhanced sentencing and criminal records

- 2.100 In the CP, we noted that when a sentence is enhanced under section 145 or 146, this is not automatically recorded on the Police National Computer (“PNC”) and therefore does not usually show on the offender’s criminal record.¹⁸⁵ We provisionally proposed that this information should be recorded on the PNC. This would place findings of hostility under sections 145 and 146 on a closer footing with convictions for aggravated offences, with significant potential benefits for public protection and the criminal justice system.¹⁸⁶
- 2.101 In this section we will set out in detail the legal and practical framework around recording of convictions on the PNC and the uses and disclosure of criminal records. We describe the steps that would be necessary to implement our recommendation. We also consider the data protection and Article 8 ECHR implications.¹⁸⁷ There are two distinct processes to consider:
- (1) the process of recording the application of section 145 and 146 on the PNC, where it can be accessed by the police and other criminal justice agencies; and
 - (2) the disclosure of information on the PNC regarding the application of section 145 and 146, to employers and others via criminal records checks.

Recording on the PNC

- 2.102 The PNC is a national database of information available to police and law enforcement agencies, which holds details of people who are, or have been, of interest to UK law enforcement agencies. It includes details of people with firearms certificates, who are disqualified from driving, are wanted or missing, who are subject to certain court orders, and who have convictions for certain

¹⁸⁴ The *Overarching Principles: Seriousness* guideline does not define vulnerability in the context of aggravating factors, but in setting out general points relating to culpability refers to vulnerability by reason of “old age or youth, disability or by virtue of the job [the victim does]”: see para 1.17 of the guideline. Sentencing Guidelines Council, *Overarching Principles: Domestic Violence* (Dec 2006) notes that “cultural, religious, financial or any other reasons” may make some victims of domestic violence more vulnerable than others: see para 3.7. Relevant cases include *De Weever* [2009] EWCA Crim 803, [2010] 1 Cr App R (S) 3, where the court distinguished between vulnerability and factors which make the victim an “easy target” and *Saw* [2009] EWCA Crim 1, [2009] 2 All ER 1138, where the aggravating factor was held to apply to the burglary of an 89 year old incapacitated man living alone. We noted in the CP, at paras 2.149 and 3.105 to 3.110, the distinction between vulnerability and hostility in the context of disability hate crime.

¹⁸⁵ CP, para 3.33.

¹⁸⁶ CP, paras 3.52 and 3.53.

¹⁸⁷ As we discuss at paras 3.90 to 3.105 of Chapter 3 below, we have decided to adopt this proposal from the CP as one of the recommendations in this Report.

criminal offences.¹⁸⁸ The purpose of the PNC has been described as “the maintenance of a complete record of convictions, subject to certain defined limitations, for the assistance both of the police itself and of other agencies which legitimately require that information”.¹⁸⁹ It therefore effectively operates as the national criminal records database.¹⁹⁰

LEGAL BASIS OF THE PNC

- 2.103 The Police and Criminal Evidence Act 1984 grants a power to record individuals’ convictions. It provides at section 27 that “the Secretary of State may by regulations make provision for recording in national police records convictions for such offences as are specified in the regulations.” The relevant regulations specify that the recordable offences are any imprisonable offence, together with around 52 other non-imprisonable offences listed in a Schedule.¹⁹¹ It should be noted that section 27 does not confer a specific power to record information about the sentence or other disposal of the case when the conviction is recorded.
- 2.104 Naturally, where section 145 or 146 has been applied to a conviction for a non-recordable offence, this cannot be recorded on the PNC, since the offence itself cannot be recorded. Most other offences that are commonly associated with hate crime are either imprisonable or included in the list, and thus the application of section 145 and 146 could be recorded in respect of them.¹⁹² However a possible exception to this is the unlawful disclosure of personal data under 55(1) of the Data Protection Act 1988. Two consultees said they have seen cases where individuals’ AIDS or HIV-positive status, sexual orientation or gender identity have been disclosed, in circumstances of hostility on the basis of disability, sexual orientation or transgender identity.¹⁹³
- 2.105 It is noteworthy that the list of recordable non-imprisonable offences includes the offence under section 5 of the Public Order Act 1986, but not its aggravated equivalent. This may be the result of an oversight.

RECORDING OF CONVICTIONS

- 2.106 The recording of all information on the PNC is subject to the PNC Code of Practice (“the PNC Code”),¹⁹⁴ which contains general principles and standards

¹⁸⁸ Home Office Guidance on the PNC, version 5, valid from 23 January 2014, available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275136/PNC.pdf (last visited 13 March 2014). These categories of person have “nominal records” (ie a single, unique record on which all such information pertaining to a person of interest is held) on the “Names” database of the PNC. Separate databases on the PNC hold details of registered motor vehicles, stolen and found property, and driving licence holders.

¹⁸⁹ *Chief Constable of Humberside and Others v Information Commissioner* [2009] EWCA Civ 1079, [2010] WLR 1136 at [54] by Carnwath LJ, as he then was.

¹⁹⁰ PNC Code of Practice, para 27.

¹⁹¹ National Police Records (Recordable Offences) Regulations 2000 (SI 2000 No 1139), reg 3 and Schedule 1.

¹⁹² Eg, Communications Act 2003, s 127 and Malicious Communications Act 1988, s 1 are both imprisonable; Football (Offences) Act 1991, s 3 (indecent or racist chanting) is in the Schedule.

¹⁹³ Galop and the National AIDS Trust.

¹⁹⁴ A statutory code of practice issued under s 39A Police Act 1996.

relating to quality of data and timeliness of inputs.¹⁹⁵ The PNC Manual, issued subject to the Code, sets out more detailed instructions as to how information, including conviction information, is to be recorded.¹⁹⁶

- 2.107 The procedure for recording convictions and sentences on the PNC differs, depending on whether the case was tried by magistrates or in the Crown Court.
- 2.108 Following a Crown Court hearing, details of the outcome are sent electronically by the court to the police force responsible for the area in which the court is located, as well as any other force which has registered its interest in the case. Police officers who have received training in the recording of court results then input the information into the PNC.¹⁹⁷ The PNC Manual states that these details must be entered onto the PNC within seven days of receipt from the court.¹⁹⁸ Disposal is recorded by selecting one of a large number of alphanumeric “disposal codes”, each of which denotes a different type of disposal, such as: custodial sentence; fine; drug or alcohol treatment order; and sexual offences prevention order. Numerous “qualifier codes” are also available to record additional detail about the disposal.¹⁹⁹ For instance, there are qualifier codes to indicate that imprisonment is suspended, concurrent or consecutive, or that a drug or alcohol treatment order is residential or non-residential.²⁰⁰
- 2.109 We understand that PNC qualifier codes are available in respect of aggravation based on hostility on the grounds of race, religion, sexual orientation or disability (but not, as yet, transgender identity). However, at present these are not generally used and further steps would be necessary to ensure their consistent use in all cases where sentences have been enhanced.
- 2.110 For cases in the magistrates’ courts, the result of the case is recorded by the clerk on the magistrates’ courts’ computer system, Libra, using that system’s result codes. The information is then transferred from that system to the PNC via an interface known as Bichard 7.²⁰¹ Although Libra has its own result codes which

¹⁹⁵ See, for example, the PNC Code at paras 8, 18, 25 to 29 and 34. It also describes responsibilities, auditing and training in relation to use of the PNC.

¹⁹⁶ Instructions on entering information relating to charges, court hearings and convictions is contained in Chapter 12 of the latest edition of the Manual (March 2012).

¹⁹⁷ PNC Manual, Ch 12, para 1.2, and information provided by Home Office officials with responsibility for the PNC. Most forces have a central bureau responsible for entering Crown Court results onto the PNC. Consequently, recording of the outcome of a case will not generally be undertaken by an officer who had any prior involvement (and who is therefore unlikely to be aware of whether the case had been flagged as hate crime).

¹⁹⁸ PNC Manual, ch 12 section 23.

¹⁹⁹ The disposal codes and qualifiers also allow the recording of matters which are “disposals” in the sense of the outcome of a particular hearing, rather than in the sense of a sentence following conviction: for instance a court adjournment, a *nolle prosequi* or order to lie on file, or bail conditions pending the next hearing.

²⁰⁰ PNC Manual, ch 12, section 23; PNC Data Definitions document (a Home Office/police document which lists for PNC users the available disposal and qualifier codes).

²⁰¹ So called because it was introduced to implement recommendation 7 of the Bichard report into the Soham murders (Bichard Inquiry Report, House of Commons HC653 (2004)), which recommended that to ensure criminal records are promptly updated, the courts and Home Office should be made responsible for entering court results onto the PNC.

allow findings of hostility for each of the five strands to be recorded, again, further steps would be necessary to ensure full and consistent recording of all such data.

ACCESS

- 2.111 Certain bodies that need to see individuals' criminal records in order to perform their functions are granted limited access to the PNC for that purpose. These include HM Courts Service, the CPS, the probation service, the prison service and the Disclosure and Barring Service (DBS).²⁰²
- 2.112 As mentioned above, the PNC effectively operates as the national criminal records database. Consequently, conviction information that is not recorded on the PNC is not systematically available to those bodies when carrying out their work. This means that, for instance, a court passing sentence or hearing an application to adduce evidence of bad character may not be aware that section 145 or 146 was applied in respect of one of the offender's previous convictions.

LEGAL CHALLENGES

- 2.113 Challenges to the retention of conviction-related information on the PNC on grounds of breach of the Data Protection Act 1998²⁰³ and on Article 8 grounds have been unsuccessful. The courts have taken the view that it would be unsatisfactory if the police were prevented from retaining a complete record of a person's interactions with the police, both for their own purposes and to assist other public bodies with a legitimate interest in the information.²⁰⁴

Disclosing findings of hostility on criminal records checks

THE LEGAL FRAMEWORK FOR CRIMINAL RECORDS CHECKS

- 2.114 Part V of the Police Act 1997 sets out the system of criminal records checks in the United Kingdom. Checks are carried out by the DBS using its limited access to the PNC.²⁰⁵ A person may only obtain a check in respect of their own criminal record; it is not possible to check another person's criminal record without their

²⁰² PNC Manual, Ch 12, sections 2.1 and 2.2.

²⁰³ The Data Protection Act 1998 prohibits personal data from being held longer than necessary, or in greater than the necessary detail, relative to the purpose for which it is kept: Sch 1, principles 5 and 3 respectively.

²⁰⁴ See for example *Chief Constable of Humberside and Others v Information Commissioner* [2009] EWCA Civ 1079, [2010] WLR 1136; *R (C) v Commissioner of Police of the Metropolis* [2012] EWHC 1681 (Admin), [2012] 1 WLR 3007 at [61]. See also the recent Court of Appeal decision in *R (TD) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 585 (on appeal from [2013] EWHC 2231; retention of the details of unfounded rape allegations for 100 years was not an unlawful interference with Article 8 rights, as the information might have utility in the event similar allegations were made in the future). The Law Commission has issued a consultation paper on the subject of data sharing between public bodies (Law Commission Consultation Paper No 214), available from: <http://lawcommission.justice.gov.uk/consultations/data-sharing.htm>.

²⁰⁵ In England and Wales. Checks are provided in Northern Ireland by Access NI and in Scotland by Disclosure Scotland.

consent.²⁰⁶ Three levels of check are available: criminal conviction certificates (“CCCs”); criminal records certificates (“CRCs”); and enhanced criminal records certificates (“ECRCs”).²⁰⁷

- 2.115 The three levels of check differ both in the amount of information they reveal, and in the purposes for which they can be obtained. CCCs include only unspent convictions²⁰⁸ and are available on demand to any person, with no limitation as to purpose.²⁰⁹ CRCs include both spent and unspent convictions and cautions, and they are available only in connection with certain forms of activity (such as work with children and entry into the legal profession).²¹⁰ ECRCs contain the same information as CRCs, as well as any other information held at police force level (such as intelligence, acquittals or allegations) that the chief officer of that force considers ought to be included.²¹¹ These are limited to an even narrower range of activities, mainly those involving unsupervised contact with children or vulnerable people.²¹² As a safeguard against employers or others requesting these more invasive checks from applicants for roles that are not eligible, CRCs and ECRCs are not available directly to individuals; the application must be made through a person registered with the DBS, who must certify the purpose of the check.²¹³

²⁰⁶ Employers generally provide the application form to their employees or prospective employees, and send the completed applications to the DBS on their behalf. (This will always be the case for CRCs and ECRCs owing to the limitations on those forms of check: see below.) Since 2013, the check is sent directly to the employee or prospective employee, rather than to the employer (a change introduced by the Protection of Freedoms Act 2012, s 79, and commenced on 17 June 2013 by SI 2013 No 1180).

²⁰⁷ Police Act 1997, ss 112, 113A and 113B respectively. Section 112 has only just been commenced in England and Wales (with effect from 10 March 2014, by the Police Act 1997 (Commencement No 12) (England and Wales) Order 2014, SI 2014 No 237). Prior to this, persons in England and Wales could obtain CCCs via Disclosure Scotland, who will continue to provide this service in respect of England and Wales on behalf of the DBS (Explanatory Memorandum to the Police Act 1997 (Criminal Records) (Amendment) Regulations 2014, [4.1]).

²⁰⁸ That is, convictions that have not become spent due to the passage of time, in accordance with the Rehabilitation of Offenders Act 1974.

²⁰⁹ Police Act 1997, s 112(1) to (3).

²¹⁰ Namely roles, offices, professions, types of work (which may be voluntary) and other activities which have been exempted from the effect of the Rehabilitation of Offenders Act 1974 by statutory instrument (the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975 No 1023, Schedule 1, Parts 1 and 2). A list of exempt activities is available here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260319/DBS_guide_to_eligibility_v2.2.pdf (last visited 15 May 2014).

²¹¹ Police Act 1997, s 113B (3) and (4).

²¹² Police Act 1997, s 113B (2)(b). The various Police Act Regulations set out the rules for eligibility for ECRCs and are complex. No full list is available. Broadly speaking, they are available for roles involving unsupervised contact with children and vulnerable adults: DBS Guidance for Employers, <https://www.gov.uk/db-check-requests-guidance-for-employers>.

²¹³ Police Act 1997, ss 113A(2) and (2A), 113B(2) and (2A), and 120. Larger employers and voluntary organisations may register directly. Smaller bodies and self-employed individuals must go through a registered umbrella body, such as a local authority or one of the private companies and charities that provide DBS checking services (a directory of such bodies is at: <https://db-check-requests-guidance-for-employers>). (last visited 15 May 2014)).

- 2.116 The conviction details that appear on all three kinds of certificate are prescribed by regulation.²¹⁴ At present the prescribed details are the date, court, offence, and the method of disposal for the offence.²¹⁵ Only the bare details of disposal are given, for instance “Fine £100” and “Conditional Discharge 18 Months”.²¹⁶ On CCCs, any ancillary order made will also appear;²¹⁷ for CRCs and ECRCs, provision has only been made for a limited class of ancillary order.²¹⁸ Application of section 145 or 146 is unlikely to be interpreted as part of the “method of disposal”, because it relates to the manner the sentence was arrived at rather than being a form of disposal in itself. Consequently, our proposal would require the regulations to be amended, to bring the application of section 145 or 146 within the “prescribed details” that appear on certificates.

CRIMINAL RECORDS CHECKS AND ARTICLE 8 ECHR

- 2.117 The courts have recognised that anything other than a blank certificate may prevent individuals from gaining any employment in their chosen field and any disclosure may therefore interfere with their Article 8 rights.²¹⁹ There have been successful Article 8 challenges both in respect of the general policy of including all convictions (including spent ones) on CRCs and ECRCs and the inclusion of particular items of non-conviction information on individual applicants’ ECRCs.
- 2.118 In the case of *L*,²²⁰ the applicant had applied for a role supervising children at break times. Her ECRC disclosed that her son had been placed on the child protection register for neglect, and included details of the alleged neglect, allegations that she had not cooperated with social services, and the fact that the son had subsequently been convicted of robbery. The Supreme Court held that when considering whether to include non-conviction information on an ECRC, the police must balance the need to protect vulnerable groups with the impact on the applicant. The most important factors to consider in this balance are: whether the

²¹⁴ Pursuant to a power in the Police Act 1997, s 125.

²¹⁵ Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002 No 233), regs 4B (CCCs) and 5 (CRCs and ECRCs). However reg 5 refers to the relevant provisions of the Police Act prior to their repeal and replacement with the current ss 113A and 113B (by the Serious Organised Crime and Police Act 2005). On a literal reading of the Regulations this could imply that no information at all can appear on CRCs and ECRCs. However s 17(2) of the Interpretation Act 1978 provides that where enactments are repealed and re-enacted, with or without modification, references to the repealed provisions are to be treated as references to the new provisions.

²¹⁶ See this example basic disclosure from Disclosure Scotland:
http://www.disclosureScotland.co.uk/disclosureinformation/documents/Samplecert-BPAD-Guidance_000.pdf (last visited 15 May 2014).

²¹⁷ Such as a sexual offences prevention order. Police Act 1997 (Criminal Records) Regulations 2002 SI 2002 No 233, reg 4B(1)(d).

²¹⁸ Police Act 1997 (Criminal Records) Regulations 2002 SI 2002 No 233, reg 5(a)(iv). The ancillary orders are those made under Part 2 of the Criminal Justice and Court Services Act 2000 (which relate to disqualification from working with children).

²¹⁹ *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 4 AC 410: non-conviction information on an ECRC may be a “killer blow” to someone’s employment prospects (at [75], by Lord Neuburger). Quoted with approval regarding conviction information *R (T) v Chief Constable of the Greater Manchester Police* [2013] EWCA Civ 25, 1 WLR 2515 from [46]. See also *MM v United Kingdom* (Application No 24029/07), 13 November 2012.

²²⁰ *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3.

information is reliable and relates to recent matters; its seriousness; and the degree to which it is connected to the employment in question.²²¹ Applying this test, the Court upheld the disclosure. Other disclosures that have been upheld following the decision in *L* include the fact that a taxi driver was accused but acquitted of rape²²² and allegations that a teacher had used force against a pupil, which had previously been rejected by an employment tribunal.²²³

- 2.119 Similar logic to that applied by the Supreme Court in *L* was adopted by the Court of Appeal in *T*, when it found that the automatic inclusion of all conviction information, even very old or minor matters, rendered the entire CRC/ECRC scheme incompatible with Article 8.²²⁴ The decisive factor was that the scheme did not seek to control disclosure of information according to its relevance for the purpose of “enabling employers to assess the suitability of an individual for a particular kind of work”; relevance depends on seriousness, the age of the offender, the sentence or other manner of disposal, the time that has elapsed, subsequent re-offending and the nature of the work.²²⁵

FILTERING SYSTEM

- 2.120 Although the Government has appealed the decision in *T*,²²⁶ it has since introduced a filtering process,²²⁷ whereby a conviction does not appear on a CRC or ECRC if it is the person’s only conviction, the sentence imposed was non-custodial and the conviction is more than 11 years old.²²⁸ However, there is a list of offences which will never be filtered: they include murder, assault occasioning

²²¹ *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3 at [81], by Lord Neuberger.

²²² *R (AR) v Chief Constable of Greater Manchester* [2013] EWHC 2721 (Admin).

²²³ *R (W) v Chief Constable of Warwickshire* [2012] EWHC 406 (Admin).

²²⁴ *R (T) v Chief Constable of the Greater Manchester Police* [2013] EWCA Civ 25, [2013] 1 WLR 2515.

²²⁵ *R (T) v Chief Constable of the Greater Manchester Police* [2013] EWCA Civ 25, [2013] 1 WLR 2515, [38].

²²⁶ The appeal was heard by the Supreme Court in December 2013 but the judgment has yet to be handed down.

²²⁷ Such a process had been proposed in 2011 following an independent review of the criminal records scheme commissioned by the Home Office. This review, conducted by Ms Sunita Mason, was referred to by the Court of Appeal in its judgment in *T*. The report is available at <https://www.gov.uk/government/publications/criminal-records-regime-review-phase-one> and <https://www.gov.uk/government/publications/criminal-records-regime-review-phase-two> (last visited 15 May 2014).

²²⁸ Police Act 1997, s 113A(6D) and (6E) (as amended by the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013, SI 2013/1200, arts 3 and 4). The period is 6 years for cautions, and 5.5 and 2 years respectively for convictions and cautions imposed when a person was under 18. This contrasts with the Rehabilitation of Offenders Act 1974 regime, under s 5(2) of which, following recent changes, the rehabilitation period is from 2 to 7 years depending on length of custodial sentence (for sentences longer than 4 years, the conviction is never spent); cautions are spent immediately. Details on rehabilitation periods for all the various types of disposal can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf (last visited 15 May 2014).

actual bodily harm and most sexual offences. The list does not include common assault or harassment. All the racially and religiously aggravated offences under the CDA other than the offences under section 5 of the Public Order Act 1986 and sections 2 and 2A of the Protection from Harassment Act 1997 appear on the list and will therefore never be filtered.²²⁹

²²⁹ The offences are listed in the Police Act 1997 (as amended), s 113(6D), which mainly directs towards lists contained in other legislation. A consolidated list can be found here: <https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check> (last visited 15 May 2014).

CHAPTER 3

THE ENHANCED SENTENCING SYSTEM

INTRODUCTION

- 3.1 In Chapter 3 of the CP, we examined the case for extending the current aggravated offences. We began with an analysis of the current enhanced sentencing system provided by sections 145 and 146 of the Criminal Justice Act 2003 (“CJA”) and how the existence of this system might impact on the case for and against extending the aggravated offences. Given that the enhanced sentencing regime:

- (1) already applies to hostility-based offending on grounds of disability, sexual orientation and transgender identity and
- (2) has a hostility test identical to that in the aggravated offences,

it was important to analyse its current operation, in order to assess whether it already provided the necessary response in practice, or could do so if reformed.

- 3.2 Before publishing our CP we had fact-finding discussions with a broad range of stakeholders. We also examined their reports and research on hate crime.¹ Throughout this work, the issue stakeholders raised most frequently was the perceived failure of the operation of the enhanced sentencing system in cases where there was evidence that hostility on the basis of sexual orientation, transgender identity or disability was present. In particular, the view of many NGOs and individuals we spoke to was that sentences for hostility-based offending were unduly lenient because of a failure by criminal justice agencies to investigate allegations of hostility and ensure evidence of hostility was put before the court and taken into account at sentencing.² This resulted in under-use of the enhanced sentencing system.

- 3.3 In the CP we asked whether certain reforms could produce an enhanced sentencing system that could provide an adequate response to crimes where hostility based on transgender identity, sexual orientation or disability was an aggravating factor. We asked whether this would make it unnecessary to extend the aggravated offences. We set out the potential advantages of an approach based solely on enhanced sentencing for these three characteristics and compared it to the current system for race and religion, which involves both enhanced sentencing and aggravated offences.

- (1) By section 146, sentence enhancement is possible for any offence. In contrast, if the aggravated offences were extended to include disability,

¹ As explained further in the CP at paras 1.26 and 1.27; see also the Analysis of Responses from para 1.1, available at http://lawcommission.justice.gov.uk/areas/hate_crime.htm.

² In relation to disability hate crime, many of these perceptions were endorsed in *Living In A Different World: Joint Review of Disability Hate Crime* (March 2013), a Criminal Justice Joint Inspection report produced by HM CPS Inspectorate, HM Inspectorate of Constabulary and HM Inspectorate of Probation, available from: <http://www.hmic.gov.uk/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf> (last visited 15 May 2014).

sexual orientation and transgender identity only the eleven offences listed in the CDA³ could be aggravated ones.

- (2) Clarity and simplicity in charging would be retained because prosecutors would not have to decide (as they do in cases of racial or religious hostility) whether to charge an offender for the aggravated offence or the basic offence.
- (3) The maximum penalties available under an enhanced sentencing regime would, in the overwhelming majority of cases, be adequate to deal with the offending. It is very rare for the sentence imposed for an aggravated offence to exceed that which could be passed for the corresponding non-aggravated offence.⁴
- (4) Because under sections 145 and 146 the judge is obliged to declare in open court that the sentence includes an uplift for hostility, there is an element of stigma and negative publicity which can attach to the offending.

3.4 Our analysis led us to the provisional conclusion that an enhanced sentencing regime could provide an adequate response to criminal conduct involving hostility on the grounds of disability, sexual orientation and transgender identity. That was subject to the provisions in section 146 being properly applied and producing an adequate record of the hostility element of the wrongdoing. We made two provisional proposals designed to bring this about:

- (1) a new Sentencing Council Guideline dealing with hostility; and
- (2) the recording of the use of enhanced sentencing on the Police National Computer (PNC).

3.5 In this chapter, we start by summarising the problems that consultees identified in the current operation of enhanced sentencing. We then analyse the consultation responses to our two provisional proposals and make our recommendations in relation to each. Finally we address the other sentencing-related questions we asked in the CP:

- (1) Would the proposed sentencing reforms address the shortcomings identified in the CP?⁵
- (2) If so, should they be implemented regardless of any extension of aggravated offences?⁶

³ See Chapter 2 above at para 2.4.

⁴ See Chapter 4 below from para 4.122.

⁵ At paras 3.106 to 3.126 below.

⁶ At paras 3.127 and 3.128 below.

- (3) Do consultees agree that enhanced sentencing, if properly applied and adequately recorded, could provide an adequate response to hostility-based offences on the grounds of disability, sexual orientation and transgender identity?⁷

PROBLEMS WITH THE CURRENT USE OF ENHANCED SENTENCING

- 3.6 The following specific problems were highlighted by consultees.

Failure to identify and investigate hostility early enough

- 3.7 Several consultees remarked that with an approach based on sentencing only (ie without aggravated offences) there is no hostility element to the offence that needs to be proved to secure conviction. The evidence of hostility will be used only at the sentencing hearing. As a result, the police do not always actively seek evidence of hostility during investigations. One police force accepted that investigating for hostility “is not done routinely” and that there is insufficient understanding by police and prosecutors of the need to investigate for hostility.⁸ Devon and Cornwall Police said: “The enhanced sentencing provisions are often not in the mindset of police officers at the outset of investigation and therefore associated evidence is not available to apply at the time of sentencing.” Mencap made the same point.
- 3.8 This can mean that hostility reported by the disabled, LGB or transgender complainant is treated as a secondary issue, if it is investigated further at all.⁹ The consultees making this point included several with expertise in supporting hate crime victims.¹⁰
- 3.9 Her Majesty’s Crown Prosecution Service Inspectorate referred to their report on disability hate crime, *Living in a Different World*.¹¹ This had reported that inspectors had found a “lack of awareness by police, CPS and probation staff of the operation of enhanced sentencing”, which led to “poor application of section 146”. Several other consultees endorsed the findings in this report in their responses and made similar points.¹²

⁷ At paras 3.129 to 3.130 below.

⁸ Hertfordshire Constabulary.

⁹ Greater Manchester Police, Kent Police. Hertfordshire Constabulary acknowledged that investigating for hostility “is not done routinely”. Stay Safe East said this was often due to time and resource pressures.

¹⁰ The Lesbian and Gay Foundation. Mencap, Stay Safe East and Dr M Walters made a similar point.

¹¹ Criminal Justice Joint Inspection Report (2013): see fn 2 above.

¹² Jane Healy, Derbyshire Police, Black Crown Prosecutors Association and the National LGB&T Partnership.

- 3.10 Based on its research from a three-year study on disability hate crime and harassment, the Equality and Human Rights Commission (“EHRC”)¹³ also considered that “knowledge and application of section 146 of the Criminal Justice Act 2003 is weak and under-utilised”.
- 3.11 Teesside and Hartlepool Magistrates considered that “section 146 is only considered in exceptional cases and it would appear it is not embedded in the sentencing process”.

Inconsistent sentencing practice; problems with *Newton* hearings

- 3.12 Some consultees commented that determining hostility purely as part of the sentencing exercise (as distinct from it being an element of the offence) introduced an unacceptable degree of judicial discretion and a risk of inconsistent application of enhanced sentencing.¹⁴
- 3.13 The court is under a duty to apply sections 145 and 146 where hostility is proved. Despite that, many consultees felt that, in practice, the approach of sentencers in cases where hostility is shown based on one of the relevant characteristics is “discretionary” and “subjective”, leading to inconsistent outcomes. This was seen as having an adverse effect on community confidence and victim satisfaction.
- 3.14 Some organisations expressed concerns about *Newton* hearings (the procedural mechanism commonly used for disputed allegations of fact, including those about hostility, to be heard by the judge for sentencing purposes).¹⁵ They considered this process was sometimes less thorough than if the allegations of hostility were being examined at a trial. This could result in unfairness to victims if aggravating factors are not fully taken into account at sentence. For others the problem with the *Newton* hearing was its potential unfairness to the defendant. Defendants will usually have a fuller opportunity to challenge allegations of hostility where they feature as part of the evidence of the offence at trial than where they are only dealt with after trial at a sentencing hearing.¹⁶

¹³ Equality and Human Rights Commission Inquiry Report, *Hidden in Plain Sight* (2011), available from <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/> (last visited 15 May 2014) and the follow-up report, *Out in the Open: A Manifesto for Change* (2012) available from <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/out-in-the-open-manifesto-for-change/> (last visited 15 May 2014).

¹⁴ Stop Hate UK, Victim Support, Jane Healy, the ACPO LGBT Portfolio, the Lesbian and Gay Foundation, Leicestershire Police, Cheshire Constabulary, British Transport Police. As we discuss later, at para 3.34 and following, we consider that a Sentencing Council guideline would go some way to meeting that concern, bringing greater consistency to the process.

¹⁵ The legal and procedural framework for these hearings was set out in the CP (paras 2.166 to 2.168) and is also discussed in Chapter 2 above (paras 2.89 and 2.90).

¹⁶ In the first category were Stop Hate UK; and in the latter, the Society of Legal Scholars. With regard to this second point we noted in Chapter 2 above at para 2.90 that defendants can lose some of the credit for their guilty plea if the *Newton* hearing goes against them, which may deter them from contesting an allegation of hostility.

- 3.15 By contrast, the Senior Judiciary¹⁷ saw nothing inherently objectionable about judges deciding issues of fact that had a bearing on sentence, including at *Newton* hearings. They described this as “fundamental to the criminal justice system”. As they pointed out, judges commonly decide factual issues that make a far more substantial difference to sentence than whether hostility was present for purposes of sections 145 and 146.¹⁸ The Senior Judiciary did, however, favour a new Sentencing Council guideline on hostility-related aggravation, as did magistrates and practitioners as well as many NGOs.¹⁹

Unduly lenient sentences

- 3.16 The EHRC, Victim Support and other key stakeholders pointed to what they considered unduly lenient sentences imposed in cases prosecuted as hate crimes, even when enhanced sentencing had been applied.
- 3.17 Two consultees²⁰ referred to the fact that any sentence passed for an aggravated offence falls within the system enabling sentences to be referred to the Court of Appeal as unduly lenient,²¹ but where enhanced sentencing has or should have been used, there is no automatic undue leniency appeal. Diverse Cymru called for all enhanced sentencing cases to be treated in the same way in this regard. We return to this point in Chapters 4 and 5.²²

PROVISIONAL PROPOSAL: A SENTENCING COUNCIL GUIDELINE ON HOSTILITY

The CP

- 3.18 We asked whether consultees agreed with our provisional proposal that a new guideline from the Sentencing Council should be produced dealing with hostility under sections 145 and 146 of the CJA.²³
- 3.19 We pointed out the following potential advantages of such a guideline:
- (1) It will increase the likelihood that hostility-related issues will be raised in appropriate cases. It is incumbent on the prosecution advocates to draw

¹⁷ The Council of HM Circuit Judges endorsed the response of the Senior Judiciary.

¹⁸ They gave the examples of drug trafficking and murder: in the latter case, they pointed out, a judge may have to decide, sitting alone without the jury, whether the starting point should be 30 years rather than 15 because a murder was aggravated by reason of hostility based on one of the five hate crime characteristics referred to in CJA, Schedule 21. (These provisions were discussed in Chapter 2 above, paras 2.91 to 2.95.)

¹⁹ Para 3.20 and following, below.

²⁰ Diverse Cymru; Equality and Human Rights Commission.

²¹ The legislation relating to the undue leniency reference system was explained in Chapter 2 above at para 2.32.

²² From paras 4.131 to 5.79.

²³ CP Proposal 2, para 3.51.

relevant guidelines from the Sentencing Council to the judge's attention.²⁴

- (2) It will increase the likelihood that judges would apply the section and sentence accordingly, thereby addressing concerns that section 146 has not been “embedded” in the sentencing process.²⁵
- (3) It will enhance consistency in sentencing for crimes involving hostility based on disability, transgender identity or sexual orientation.
- (4) It will lead to better monitoring and recording of the application of sections 145 and 146, thus providing more robust statistical data.
- (5) These factors may also increase the likelihood of the police gathering information relating to section 146.

Consultation responses

- 3.20 100 consultees responded to this provisional proposal. 76 agreed with it without expressing any particular caveat or concern.²⁶ A further 22 consultees, while agreeing, sounded a note of caution as to how much a guideline might achieve, particularly without active monitoring and evaluation and better statistics. As we discuss below, consultees highlighted several potential benefits of a guideline²⁷ as well as making comments on its possible scope and form. Support for the proposal was expressed by several police forces, the Equality and Human Rights Commission, Stop Hate UK and Stonewall, among other consultees.
- 3.21 Two consultees, both members of the public, rejected the proposal. One would prefer to see the emphasis on “restorative justice and funding for education around the issues of equality, community healing” rather than on systems designed to lengthen prison sentences.²⁸ The other considers all hate crime legislation to be disproportionate and misguided.²⁹

²⁴ Criminal Procedure Rules, Rule 37.10(3)(d): the prosecutor must “where it is likely to assist the court, identify any other matter relevant to sentence... including any sentencing guidelines, or guideline cases.” As discussed in Chapter 2 from para 2.59, under the Coroners and Justice Act 2009, s 125(1), when sentencing for an offence committed on or after 6 April 2010, a court must follow any relevant sentencing guidelines unless it is “contrary to the interests of justice to do so.” When sentencing for an offence committed before 6 April 2010, the court must only “have regard” to any relevant sentencing guidelines: see <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm> (last visited 15 May 2013).

²⁵ This was one of the concerns expressed by HM CPS Inspectorate in the report on disability hate crime, *Living in a Different World* (see fn 2 above) and it was endorsed in some of the consultation responses discussed at paras 3.12 to 3.15 above.

²⁶ Our alternative easy-read question form put the question in this way: “Do we need clearer and stronger rules to help courts use enhanced sentences?” All 8 of the groups or individuals who replied said “Yes”. The reasons they gave included consistency, fairness, transparency and the importance of conveying a clear message through the sentencing process.

²⁷ Some referred specifically to – and endorsed – the reasons we set out in the CP (para 3.50) for proposing a guideline, summarised above at para 3.19(1) to (5).

²⁸ Ms U Solari.

²⁹ Mr J Troke.

Greater use of enhanced sentencing; more consistency

3.22 The Crown Prosecution Service commented that a guideline “would help ensure a proper application of the uplift principles by sentencers and a more consistent approach”. This view was echoed by Baljit Ubhey OBE.³⁰ Ms Ubhey said that a guideline “would make a big difference in terms of proper application of the uplift principles and a more consistent approach”.³¹

3.23 Victim Support said:

Guidelines for sections 145 and 146 are essential to improving usage by sentencers and improving consistency across the different offences. It is important for victims who have suffered a hate crime to have this recognised in court, and thus reducing their feelings of marginalisation from the process.

3.24 The Society of Legal Scholars said that “not only will this enable sentencing judges to make fairer and more consistent decisions, it will also serve to highlight the need for these aggravating factors to be emphasised by prosecutors at the sentencing stage”.

The scope of such a guideline

3.25 Professor Richard Taylor saw merit in a new guideline dealing not only with hostility but also with certain other aggravating factors of potential relevance to hate crime. Specifically, he referred to the existing sentencing guideline, *Overarching Principles: Seriousness* (“the *Seriousness* guideline”).³² As we explained in the CP,³³ this guideline lists the following three factors as indicating higher culpability:

- (1) motivation by hostility towards a minority group, or a member or members of it;
- (2) a vulnerable victim was deliberately targeted; or
- (3) there was an abuse of power or of a position of trust.

3.26 Clearly these three factors are of potential value in cases flagged as “hate crime” where sections 145 and 146 of the CJA do not apply. This could arise because there is no evidence of hostility as such, or because the victim was targeted by reason of hostility towards a characteristic not among the five that are protected under the enhanced sentencing provisions.

³⁰ Chief Crown Prosecutor, national CPS hate crime champion and head of CPS London.

³¹ This comment was made by Ms Ubhey in a presentation at our symposium on 17 September 2014.

³² Sentencing Guidelines Council (2004), *Overarching Principles: Seriousness*. There are specific guidelines for assault, sexual offences, theft and many others. All the guidelines can be found at <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> (last visited 15 May 2014).

³³ CP para 2.179.

The form of such a guideline

- 3.27 Sentencing guidelines can either be issued in the form of “thematic” guidelines, such as those dealing with youth offending or domestic violence, or be “offence-specific”, dealing with particular offence types such as burglary or assault.³⁴ Our provisional proposal envisaged a single thematic guideline applicable to any offence involving an assessment of hostility under section 145 or 146, rather than a series of offence-specific guidelines each of which included reference to hostility. (In the CP we did not seek comment on this issue specifically.) As we explain later, there are advantages and disadvantages in either approach.
- 3.28 Some consultees commented on the form that any guideline might take, though clearly the content and form of any guideline would be a matter for the Sentencing Council.
- 3.29 The Senior Judiciary considered that a thematic guideline would be “highly desirable” despite the fact that offence-specific Sentencing Council guidelines relating to some offences already referred to hostility as an aggravating factor. They considered that it would be “helpful to gather together and expound the relevant principles in a single guideline”. This view was shared by the Council of Her Majesty’s Circuit Judges and the Law Society’s Criminal Law Committee.
- 3.30 The Bar Council and the Criminal Bar Association considered that the Sentencing Council should issue a thematic guideline “with minimal delay” adding:
- The alternative is that lawyers and judges (and the increasing number of self-represented defendants) have to wait for a guideline decision by the Court of Appeal. That would depend on the court receiving an appropriate case, which may not happen for a long time, if at all, and such a case may not cover the range as effectively as a Definitive Guideline by the Sentencing Council.³⁵
- 3.31 The Justices’ Clerks Society noted that, although existing guidelines make some reference to hostility as an aggravating factor, “a more comprehensive new guide would be appropriate and welcome”.³⁶
- 3.32 The Magistrates’ Association saw a thematic, hostility-related guideline as “a stop-gap measure until hostility can be embedded as an aggravating factor into all new sentencing guidelines”. They pointed out that the new format of guidelines is generally offence-specific, with the advantage of sentencers only having to refer to one document for sentencing purposes. They noted that some offence-

³⁴ The Coroners and Justice Act 2009 provides at s 120(2): “A sentencing guideline may be general in nature or limited to a particular offence, particular category of offence, or particular category of offender.”

³⁵ These consultees, while favouring a thematic or “definitive” guideline, also noted the alternative possibility of incorporating the relevant guidance into offence-specific guidelines.

³⁶ They referred specifically to the *Seriousness* guideline, which is discussed at paras 2.96 to 2.99 and para 3.25 above, and to the Magistrates’ Court Sentencing Guidelines, referred to in Chapter 2 at paras 2.68, 2.70 and 2.84.

specific guidelines already refer to hostility based on sexual orientation or disability as factors indicating higher culpability.³⁷

- 3.33 The Sentencing Council itself expressed a preference for incorporating the guidance into offence-specific guidelines.

Discussion

- 3.34 We are struck by the strong support for this provisional proposal from consultees who work in the criminal justice system and have experience of hate crime prosecutions. We agree with them that new guidance for sentencers could improve the use and impact of the enhanced sentencing regime and clear up areas of confusion that have been identified in its application. This should result in better outcomes for victims of all hostility-based crime, not only in relation to the characteristics of transgender identity, disability and sexual orientation, but also those of race and religion.
- 3.35 Having analysed the consultation responses relating both to enhanced sentencing and to aggravated offences, we take the view that the guidance should be broader in one respect than was envisaged by our provisional proposal. We consider that it should deal not only with hostility under sections 145 and 146 of the CJA, but also with the sentencing approach to be taken in aggravated offences under the CDA.³⁸
- 3.36 This could help to address some of the inherent complexities in the current system applicable to racial and religious hostility-based offending. These relate both to how and when a sentence can be uplifted under section 145 and the precise inter-relationship between the aggravated offences and enhanced sentencing.³⁹ The combined system would be replicated if the offences were extended in their current form. Clarification of the relevant provisions and the general principles applicable to their interpretation would be beneficial.⁴⁰
- 3.37 We address below the way existing sentencing guidance deals with hostility before setting out the matters which, based on the consultation responses, we consider could benefit from further clarification.

³⁷ For instance the *Assault: Definitive Guideline* (2011), which covers various assault offences from common assault up to grievous bodily harm with intent. Available from: http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf (last visited 15 May 2014).

³⁸ As we pointed out in the CP at paras 2.48 and 2.49, there is scope for clarification of the approach sentencers should adopt when arriving at the appropriate uplift in aggravated offence cases.

³⁹ See Chapter 2 above at paras 2.65 to 2.70, Chapter 4 below from para 4.168, and Chapter 5 at para 5.17.

⁴⁰ As discussed in Chapter 2, there is room for more than one view as to the degree to which the aggravated offences and enhanced sentencing systems are “mutually exclusive”: see paras 2.65 to 2.70 above.

Existing guidance

- 3.38 Some of the existing offence-specific guidelines make reference to hostility.⁴¹ However, the references they contain are brief and do not convey the complexity of the statutory hostility test and the approach to be taken in the sentencing exercise.⁴²
- 3.39 Also relevant in the sentencing of hate crime are: the thematic *Seriousness* guideline issued in 2004 by the Sentencing Guidelines Council (“SGC”);⁴³ and the guidance on sentencing for racially and religiously aggravated offences issued in 2000 by the Sentencing Advisory Panel (“SAP”).⁴⁴
- 3.40 There are as yet no offence-specific guidelines for most of the eleven offences capable of being charged as aggravated under the Crime and Disorder Act 1998 (“CDA”). Of the three categories of aggravated offence that are prosecuted most frequently (namely the three public order offences, common assault, and criminal damage⁴⁵), there is currently a definitive guideline only in respect of assault. Public order, assault and criminal damage offences are also the most commonly used to prosecute hate crime affecting the other three protected characteristics: sexual orientation, transgender identity and disability.⁴⁶
- 3.41 For much of the sentencing work done in the context of hate crime, therefore, courts will need to refer to the SGC or SAP guidance until such time as new, offence-specific guidelines are issued for each of these offence categories.

⁴¹ These are *Assault* (2011); *Burglary Offences* (2012); *Dangerous Dogs* (2012); and *Sexual Offences* (2014), all available from: <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> (last visited 24 March 2014).

⁴² This is not surprising since the guidelines were not intended to provide comprehensive guidance on these matters. However, none of the existing guidance makes specific reference either to CDA, s 28(1), which sets out the hostility test, or to CJA, ss 145 or 146, which expressly refer to the hostility test contained in s 28(1) (although the Magistrates’ Court Sentencing Guideline does paraphrase s 28 and reproduce the relevant text in respect of s 146 only, without comment on the importance of the distinction, in its additional explanatory material at p 178). Accordingly the sentencer could overlook the complex and specific requirements as to hostility, the dual test for proving it, or that in the case of “motivation” hostility towards to relevant characteristic need not have been D’s only or even principal motivation to commit the offence.

⁴³ See para 3.25 and fn 32 above; Chapter 2 above at para 2.59 and paras 2.96 to 2.99; and paras 2.130 and 2.178 to 2.180 of the CP.

⁴⁴ As explained in Chapter 2 at para 2.84 and in the CP at para 2.161 and fn 237, this guidance also applies to the sentencing approach under CJA, ss 145 and 146.

⁴⁵ The aggravated offences are set out in Chapter 2 above at para 2.4.

⁴⁶ See for example annual hate crime reports published by the CPS for 2011-12 and 2012-13 (available from http://www.cps.gov.uk/data/hate_crime/index.html, last visited 15 May 2014), and *An Overview of Hate Crime in England and Wales* (December 2013), published by the Home Office, the Ministry of Justice and the Office of National Statistics (available from <https://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales>, last visited 15 May 2014). We analyse the key data in these reports in Appendix B (the Impact Assessment). The guideline on assault (fn 41 above) has not been updated to reflect the addition of transgender identity to s 146 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Matters requiring clarification

- 3.42 A number of consultees have referred to the relationship between the aggravated offences and section 145.⁴⁷ There is confusion about whether the two systems are entirely mutually exclusive. In other words, if someone convicted of a non-aggravated offence could have been, but was not, charged with an aggravated form of that offence, is it nevertheless possible to have regard to the offender's hostility as an aggravating factor in sentencing?⁴⁸
- 3.43 New guidelines would provide:
- (1) an opportunity to clarify the position on the mutual exclusivity issue discussed above. Section 145 has no effect if the offender has been acquitted of the aggravated offence charged, but convicted of the corresponding non-aggravated offence. While the Sentencing Council cannot resolve this legal uncertainty, a guideline would point sentencers to the relevant principles as laid down in existing case law, namely that at the very least, D must be given adequate notice that section 145 may be applied and have an opportunity to contest the prosecution's evidence of hostility, if necessary at a *Newton* hearing;⁴⁹
 - (2) an opportunity to clarify the position in relation to sentencing for the aggravated offences. In particular, it would be desirable to address the decisions of the Court of Appeal in cases such as *Kelly*,⁵⁰ which reject some aspects of the SAP guidance; and
 - (3) all the relevant detail on the scope of the statutory powers including:
 - (a) the requirements as to hostility, demonstration and motivation; and
 - (b) references to, and definitions of, all five of the protected characteristics.⁵¹

Benefits of a thematic guideline

- 3.44 A new thematic guideline would, in a single document, provide a clear explanation of the sentencing approach in relation to all offences and all five "protected" hate crime characteristics. To replicate such material in every

⁴⁷ Including the Senior Judiciary and the Council of HM Circuit Judges.

⁴⁸ This point was discussed in Chapter 2 above, paras 2.65 to 2.70.

⁴⁹ See Chapter 2 above, para 2.70. As we pointed out there, the Magistrates' Court Sentencing Guidelines already say that section 145 should not normally be applied where an aggravated offence was available, but a guideline could set out the situation in greater detail for both magistrates' courts and the Crown Court.

⁵⁰ [2001] EWCA Crim 170, [2001], 2 Cr App R (S) 73. This and the SAP guidance are discussed in more detail in the CP at paras 2.48 to 2.49 and are also discussed in Chapter 2 above at paras 2.84 to 2.88.

⁵¹ None of the existing guidelines provide definitions of the relevant characteristics to assist the sentencer in knowing, for example, whether "sexual orientation" includes or does not include bisexuality or asexuality, or whether "transgender" includes transvestism. Most of the offence-specific guidelines do not refer to transgender identity, despite this characteristic having been added to the scope of CJA, s 146 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

offence-specific guideline would take time, as each guideline would have to be issued or revised within the Sentencing Council's already busy schedule of work. Until that process was complete, judges would be reliant on the SAP and SGC guidelines for many of the most commonly prosecuted offences in which hostility based on one of the five characteristics is a factor.

- 3.45 The inclusion of hostility in each offence-specific guideline, if dealt with in detail, may also distract the sentencer from the offence-related detail the guideline is intended to cover.
- 3.46 Although consistency and clarity in sentencing might be achieved equally by integrating hostility within the offence-specific guidelines, this may lack the potency of a single appropriately titled guideline. Such a guideline would send a clear signal that the criminal justice system treats hate crime seriously. This could help to enhance confidence in the sentencing system and encourage the reporting of hate crime. Dealing with hostility in offence-specific guidelines may be less effective in achieving these goals. The hostility factor would be just one of a list of aggravating factors in a lengthy document focused not on hate crime but the relevant offence category. For members of the public affected by hate crime, the sentencing approach would remain unclear.
- 3.47 For these reasons, we consider on balance that a thematic guideline dealing with all aspects of sentencing for hostility-based offending would have substantial advantages in comparison with expanding, updating and reproducing the guidance in offence-specific guidelines.

Recommendation

- 3.48 In responding to our CP, consultees stressed that the perception of the current ineffectiveness of sections 145 and 146 was having an adverse effect on community confidence and victim satisfaction. They saw this as potentially contributing to the under-reporting of hate crime. While hostility factors are already referred to in some offence-specific guidelines, the references do not convey the complexity of the provisions or of the sentencing exercise.
- 3.49 **We therefore recommend that the Sentencing Council issue guidance on the approach to sentencing hostility-based offending, both for the existing aggravated offences in the Crime and Disorder Act 1998 and in accordance with sections 145 and 146 of the Criminal Justice Act 2003.**
- 3.50 The form and content of any guidance will be a matter for the Sentencing Council. We hope that the views and practical insights provided by many of our consultees will prove useful to the Council.
- 3.51 **In line with the clear preference of most consultees,⁵² we recommend that this reform be implemented whether or not the current racially and religiously aggravated offences are extended to address hostility based on**

⁵² Consultees were asked whether our two proposed sentencing reforms were likely to address the shortcomings in the use of enhanced sentencing and, if so, whether they should be implemented regardless of whether aggravated offences were also extended. A substantial majority responded "yes" to both questions. See further at paras 3.106 and 3.128 below and Chapter 4 from paras 4.12 (arguments in favour of extension) and 4.194 (arguments against).

transgender identity, sexual orientation or disability. Simple revisions to the guideline could be made if aggravated offences were to be extended in the future.

PROVISIONAL PROPOSAL: THE USE OF ENHANCED SENTENCING SHOULD BE RECORDED ON THE POLICE NATIONAL COMPUTER

The CP

- 3.52 We explained in the CP that the fact that an offender has had an enhanced sentence imposed to reflect the hostility element to the offending is not routinely entered on his or her criminal record on the Police National Computer (“PNC”).⁵³ By contrast, when a person has been convicted of an aggravated offence that fact does appear on the PNC.
- 3.53 As a result, agencies across the criminal justice system only have access to information on the aggravated nature of offending in relation to convictions for aggravated offences, but not convictions where hostility was established at the sentencing determination. Several agencies might benefit from such information, including the police, courts, probation service and prison service. All of these rely on the PNC as a source of information about offenders’ previous convictions and the sentences and other disposal orders made in relation to them.⁵⁴
- 3.54 To give an example, a court sentencing an offender for an assault against a disabled person might decide to apply an uplift under the enhanced sentencing regime on the ground that the offence was aggravated by hostility towards the victim’s disability. However the court would be unaware that the offender’s previous convictions for assault were also aggravated by hostility on grounds of disability. If known to the court, this could be an important factor in deciding what uplift to apply in the instant case.
- 3.55 A further consequence in such a case will be that subsequent checks of this offender’s criminal record via the Disclosure and Barring Service (“DBS”) would not disclose the fact that the offender had a previous record of hostility-aggravated offending in relation to disabled people. By contrast, if the person had been convicted of previous racially or religiously aggravated assaults under the CDA, this information would not be on the PNC and therefore could not show up on the DBS criminal records check.⁵⁵

⁵³ See the CP at paras 3.33, 3.52 and 3.72. As we noted in Chapter 2 above, the PNC does contain some qualifiers to record such information, but they are not systematically used.

⁵⁴ The legal and operational framework for entering sentence and other disposal related information into the PNC is discussed in Chapter 2 above at paras 2.100 to 2.113. In brief, the relevant principles are contained in the PNC Code (a statutory code of practice issued under Police Act 1996, s 39A), while more detailed rules are contained in the PNC Manual (current version March 2012), issued in accordance with the Code. Reliance of the courts and other agencies on the PNC for criminal record information was examined in detail in the context of the PNC’s compliance with data protection and human rights law, in *Chief Constable of Humberside and Others v Information Commissioner* [2009] EWCA Civ 1079, [2010] WLR 1136.

⁵⁵ The DBS uses the PNC as the source for their criminal records checks: Chapter 2 paras 2.103 and 2.112 above, see also *Chief Constable of Humberside and Others v Information Commissioner* [2009] EWCA Civ 1079, [2010] WLR 1136.

- 3.56 In view of this unequal treatment of criminal records on the PNC in cases of hostility-based offending, we provisionally proposed⁵⁶ that where the enhanced sentencing provisions in section 145 or 146 are applied, this should be recorded on the PNC and thus reflected on the offender's criminal record. This could be done in the same way in which sentence length and other disposal information is currently recorded. It would require the sentencing court to send the information to the relevant police force or, in the case of the magistrates' courts, to record it on their own computer system. It would then be recorded onto the PNC by the relevant force or through the automatic interface between the PNC and the magistrates' courts' computer system (as is currently done for other disposal-related information).⁵⁷

Consultation responses

- 3.57 This proposal met with overwhelming support from consultees. 89 of the 97 consultees who addressed the question were in favour without reservation. A further five agreed but expressed minor caveats, mainly to the effect that it would not suffice on its own and other measures would be needed to ensure the system operated adequately or the overall response to hate crime affecting those with the relevant characteristics was sufficient.⁵⁸
- 3.58 All eight consultees who used the easy-read response form supported the proposal.⁵⁹

Arguments in favour

BETTER SAFEGUARDING

- 3.59 The correct designation and description of offending were seen as necessary to protect and safeguard people whom the offender may come into contact with in the future, for example, through employment. Stop Hate UK said:

Organisations that work with children and adults at risk and in need of safeguarding, such as Stop Hate UK, would also be served well by the introduction of this measure. If we were able to discover from a Disclosure and Barring Service check that someone had a previous conviction for an offence in which hostility based on one of the five monitored strands of Hate Crime was present, we may take the view that their appointment as a member of staff or volunteer would be

⁵⁶ Proposal 3 in the CP, at paras 3.52 and 3.53.

⁵⁷ See Chapter 2 above at paras 2.107 to 2.111. Permitting the DBS to include this information on criminal records certificates would require amendment of the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002 No 233).

⁵⁸ Galop, HM CPS Inspectorate and UNISON. Prof C Munthe expressed the caveat that such a system might amount to keeping a permanent register of a person's political or religious views. A similar concern was expressed by RadFem in relation to transgender criticism made from a feminist viewpoint. We do not share this concern, given that a criminal offence will have been committed in every case and the record would simply show what that offence was and that it was aggravated by hostility based on the relevant characteristic.

⁵⁹ Phrased in the easy-read form as: "Should police files and the person's files show when someone has been given an enhanced sentence?"

inappropriate. At present we would not know if a conviction for an offence was for one which was motivated by hostility.

3.60 Victim Support said:

Correct labelling on an offenders record is important to protecting victims in the future. While the label of hostility is not recorded, offenders of hate crimes could gain employment in public sectors dealing with these vulnerable groups, for example care homes for disabled people, or the voluntary sector, which rely on Disclosure and Barring Service to reveal this information.

3.61 CPS London Scrutiny and Involvement Panel and Diverse Cymru made similar points.

ACCURATE LABELLING

3.62 The Bar Council and Criminal Bar Association observed that “criminal law has a communicative and public function, which also serves to deter potential offenders”. They considered that accurate recording of wrongdoing gave practical effect to this principle.

3.63 Anna Scutt felt that more accurate labelling on the PNC would bring recording of hostility-based offending against disabled people into line with the racially and religiously aggravated offences. This was necessary to send a message that such offending was equally serious.

3.64 Full of Life - Supporting Families of Disabled Children said that the accurate labelling of an offender would help “the victim feel like justice has been served”.

3.65 Suzanna Hopwood and Michelle Ross (discussing transgender-related application of enhanced sentencing) were in favour of the proposal given the “very serious and damaging physical and psychological consequences for the victim”.⁶⁰

DETECTION, INVESTIGATION, CHARACTER, SENTENCING

3.66 Trans Media Watch referred to the problem of some individuals making repeated threats against transgender people. They noted the importance of ensuring the police are aware of an offender’s previous conviction history. Diverse Cymru similarly considered this could also assist in the identification of repeat offenders and lead to admissible evidence of hostility in future criminal proceedings.

3.67 Leicestershire Police and the ACPO LGBT Portfolio pointed out that the proposal would also benefit the criminal justice system in its response to racial and religiously aggravated crime. They observed:

As there are limited aggravated offences, the recording of when section 145 is applied would provide a fuller offender history which could assist the criminal justice service in addressing repeat offending.

⁶⁰ These consultees also pointed to the importance of ensuring the offender had been fairly convicted and sentenced.

- 3.68 The Bar Council and the Criminal Bar Association said the proposal would lead to better information for sentencing courts about previous convictions where the same aggravating factors had been present. They added that the PNC record would carry further benefits:

[It would] enable the prosecution to take an informed view as to whether or not bail is opposed and, if so, on what grounds. It will assist remand courts with what, if any, conditions are required to meet objections to bail.

- 3.69 The Crown Prosecution Service said PNC recording “would be of benefit for future sentencers and for prosecutors in subsequent cases when considering such issues as bail and bad character applications”.⁶¹ Similarly the Magistrates’ Association pointed to the benefits for accurate sentencing of repeat offenders, as did a number of police forces, the National Black Crown Prosecution Association, the National LGB&T Partnership and Independent Academic Research Studies.

REHABILITATION AND RE-EDUCATION

- 3.70 Victim Support considered that “labelling the crime correctly on an offender’s record will ensure rehabilitation programmes are focused specifically to offenders of this particular crime”. Diverse Cymru said it could “enable more effective application of tailored rehabilitation and education programmes and restorative justice”. Jane Healy also considered this “an opportunity for identifying and establishing targeted rehabilitation programmes for these types of offenders”. Stonewall also saw this as an advantage of the proposal, as did Mencap and Stop Hate UK.
- 3.71 Workshop participants in discussions led by Independent Academic Research Studies felt that recording the hostility finding on an offender’s record “would help to change the attitudes of perpetrators by sending a message to them that they had hurt the victim for the rest of their life”.

BETTER DATA; IMPROVED INTER-AGENCY COOPERATION

- 3.72 Several consultees suggested that accurate recording of hate crime sentences on the PNC would produce better statistics and more reliable information for use by all CJS agencies. It would also enable agencies to monitor the effectiveness of such sentences and direct future initiatives to deal with hate crime in a targeted manner, tailored with respect to the different characteristics affected.
- 3.73 The CPS London Scrutiny and Involvement Panel felt that this proposal would help to show how effectively the current enhanced sentencing system was working and how often the provisions were being applied. Devon and Cornwall Police and the Hate Crime Lead at West Yorkshire Police raised similar points.
- 3.74 Stonewall said:

⁶¹ The CPS also sounded this note of caution: “However, we recognise that such a proposal has practical considerations (especially for the police) to ensure that all such sentences are properly recorded on PNC.” This point is further discussed from para 3.84 below.

Recording instances of the use of the section 146 uplift could also lead to improved transparency around the operation of enhanced sentencing, provided the data was effectively monitored and published. Where this identified successful use of enhanced sentencing over time, this could improve confidence amongst victims to report homophobic hate crimes in the future.⁶²

3.75 The advantages for inter-agency cooperation to tackle hate crime and its effects were also highlighted. HM CPS Inspectorate saw it as a key advantage that the PNC is “a medium that is readily accessible and commonly used by those involved in the criminal justice system, hence allowing all agencies to be better informed”. Disability Hate Crime Network and Disability Rights UK said they would welcome “a clear procedure for this information to be recorded and passed to other agencies” because currently “the vast majority of reports are often based mainly on information provided by the offender. Naturally offenders minimise the seriousness of their conduct and the vulnerability of the victim.”

3.76 Teesside and Hartlepool Magistrates made a similar point and noted that probation officers:

are disadvantaged when preparing [pre-sentence reports] by inadequate information from the police and CPS which forces them to rely on the overtly biased version of events provided by the offender. Systems must ... provide probation staff with full information to enable them to present the court with an informed, detailed and impartial set of facts which lead to a balanced proposal for the court.

3.77 This was echoed by the EHRC.⁶³ Referring to their report, *Hidden in Plain Sight*,⁶⁴ they said:

Recording is a significant issue examined throughout the Commission’s inquiry and recommendations. We support the collection and, where appropriate, sharing of data between authorities. [This would] assist police to undertake better preventative action. It will also increase the recognition of section 146 of the Criminal Justice Act 2003 within criminal justice agencies.

Arguments against

3.78 Four consultees rejected the proposal on grounds of principle.

⁶² Stonewall added that their latest report, *Homophobic Hate Crime: the Gay British Crime Survey 2013* (2013), available from: http://www.stonewall.org.uk/documents/hate_crime.pdf (last visited 15 May 2014), based on a poll of over 2,500 lesbian, gay and bisexual adults, found that under-reporting of homophobic hate crime continues to be a significant problem. The research found that “more than three quarters of lesbian, gay and bisexual victims of homophobic hate crime don’t report their experiences to the police and two thirds don’t report them to anyone.”

⁶³ A similar point was made by the Bar Council and the Criminal Bar Association (joint response), Stop Hate UK, and the Royal College of Nursing.

⁶⁴ Equality and Human Rights Commission Inquiry Report, *Hidden in Plain Sight* (2011) (see fn 13 above).

- 3.79 John Troke considered enhanced sentencing in itself to be disproportionate and therefore rejected the proposal.
- 3.80 Christian Concern and the Christian Legal Centre⁶⁵ said there was not enough evidence to prove that enhanced sentencing is currently under-used and under-recorded.⁶⁶ They argued that this measure would blur the lines between aggravated offences and enhanced sentencing, putting the latter on a par with the former without Parliament having decided to do so. They were also concerned that there would be pressure to record other aggravating factors in a similar way.
- 3.81 The Society of Legal Scholars also rejected the proposal. They were concerned that the finding of hostility under section 145 or 146 is made by the judge alone, usually at a *Newton* hearing after the main trial.⁶⁷ They also argued that hostility can be found where the defendant merely used the wrong language in the heat of the moment and was not truly a bigoted person (though they noted that this applies to the aggravated offences too).⁶⁸ They considered that it was unfair that such behaviour should be a matter that was noted on an offender's criminal record.

Caveats

- 3.82 Dr Dimopoulos was in favour of the proposal because it would “send out a message that hate crime is taken very seriously and that the stigma of hate crime offending will follow those convicted of it”. However, he was also concerned about over-stigmatisation. He suggested “it might be worthwhile to consider automatically expunging the hate crime offender stigma from the criminal record after a period of time during which the ex-offender has not been involved in hate crime incidents.”⁶⁹
- 3.83 The issue of stigmatisation was also raised by Professor Moran, who did not expressly reject the proposal but who was concerned that “changing the recording practices on the Police National Computer may do little to enhance detection of future offences yet do much to further divide individuals and communities”. Professor Moran was of the view that PNC recording should only be pursued “if there is clear evidence that it will enhance delivery of improved criminal justice services to individuals and communities”.

⁶⁵ These consultees made a joint response.

⁶⁶ These consultees also considered it would be preferable for the CPS when reporting on hate crime figures to “reflect what the criminal law states constitutes an offence rather than applying the CPS's own criteria.” This refers to the point discussed at CP paras 1.11 to 1.13 and 3.25, explaining that the CPS and other agencies use a wider definition of hate crime than that which would tie in precisely with the scope of the aggravated offences or enhanced sentencing provisions.

⁶⁷ See Chapter 4 from para 4.148, where we discuss the SLS's argument that it is unfair for a judge rather than a jury to decide the hostility issue. We discussed procedural safeguards and guidance relating to *Newton* hearings in Chapter 2 above at paras 2.89 and 2.90.

⁶⁸ The proposed wider review of the aggravated offences could consider whether this is a significant problem.

⁶⁹ We outline the circumstances under which criminal records are filtered from CRCs and ECRCs in Chapter 2 above at para 2.120. CCCs will not disclose details of a conviction after it has become spent: Chapter 2 para 2.115.

Practical matters

- 3.84 The Senior Judiciary, while agreeing with the proposal, considered that its implementation “might prove difficult in practice” due to the “limitations and shortcomings of the current regime for recording details of offences”. They said that, assuming the court record is the source of information input to the PNC:

It ought (in theory at least) to be possible to record the fact that, in passing sentence, the judge has applied section 145 or 146 and has found the offence aggravated in a specified manner. Presumably what is required is a computer tick box so that the court clerk who draws up the order records the finding of aggravation as part of the sentence itself. We do not underestimate the logistical difficulty of implementing such a proposal, or its cost implications, but we consider it to be essential.

- 3.85 The Justices’ Clerks Society noted that the current system for recording disposal-related matters is undermined by “the weaknesses of IT systems to capture the necessary data”. They suggested implementation of our proposal would be aided if the police, when charging, had to identify whether they believed the case was one to which enhanced sentencing might apply. This indication would be shown on the court file. The court clerk, when creating the record after the case has concluded, would be prompted to record whether or not a finding of aggravation was made and section 145 or 146 applied.

- 3.86 In a joint response, the Bar Council and the Criminal Bar Association agreed that a record of the sentencer’s finding of aggravation would need to be made by the judge or magistrate, or the court clerk.⁷⁰ In addition,

a statement by the prosecutor and an adequate record of an allegation of the aggravating features will need to be made at the earliest opportunity: invariably, the first court appearance. Criminal practitioners may be sceptical about the feasibility of creating an accurate and seamless record between the court clerk and the police, given the all too familiar administrative problems that are encountered every day.

- 3.87 The Council of HM Circuit Judges were in favour but had “grave doubts whether it will actually work. Our experience when it comes to details of previous offences is that if available they are usually fairly scant and do not record where there has been a basis of plea which may be of importance.”

- 3.88 Professor Taylor said he backed the proposal but considered it was important that “it is made clear that the Newton Hearing or other form of determination of the grounds of aggravation requires that the tribunal is satisfied of the grounds of aggravation to the criminal standard of proof”.

⁷⁰ These consultees also proposed inserting into the statutory provisions a requirement that the sentencing court “adequately record on the court record, which must be communicated to the police so as to be recorded on the Police National Computer, that the offence was committed in such circumstances.” In relation to this proposal, we consider that express statutory provision is not necessary assuming court officials receive appropriate training on recording findings under ss 145 and 146 onto court systems: see paras 3.101 to 3.103 below.

- 3.89 Dr Stark pointed to the importance of ensuring that the information held on the PNC record makes it clear, including to laypersons, that enhanced sentencing has been applied on the basis of aggravation due to hostility on the relevant ground, rather than simply saying “section 146 applied”.

Discussion

- 3.90 We agree with consultees regarding the potential benefits of PNC recording. Public protection and fair labelling⁷¹ considerations require an offender’s history of hostility-based offending to be available.
- 3.91 Sentencing courts need a full picture of the punishment merited, the danger posed by the offender to the public or sections of it, and the likely response to rehabilitation. Courts and prosecutors also need accurate information on the antecedents for the purpose of bail applications and to assess the defendant’s character.
- 3.92 Giving the prison and probation services access to accurate information about offenders’ records where hostility aggravation findings have been made should enable them to tailor rehabilitation and education programmes. This could have the further benefit of reducing hostility-based offending.
- 3.93 It is clear that making sentence enhancement data accessible to the DBS would also be valuable. The central purpose of its vetting scheme is to ensure that employment decisions, particularly those relevant to posts working with vulnerable groups, are made with all the necessary information about the applicant’s criminal record. Information that a sentence has been enhanced due to hostility based on a relevant characteristic could be highly relevant to employment that might involve contact with disabled, LBG or transgender people, or with children, older people or others with high support needs.
- 3.94 It is undesirable that these advantages are available in respect of racial or religiously aggravated offending where this is prosecuted under the CDA, but not in respect of offending aggravated by hostility based on disability, sexual orientation or transgender identity, which can only be recognised through the use of section 146 of the CJA.

Response to counter-arguments

- 3.95 We have considered the arguments advanced against the proposal.⁷²
- 3.96 Clearly, if sentencing decisions under sections 145 and 146 of the CJA were specifically recorded on the PNC, the manner in which they are recorded, retained and shared would resemble in key respects the current treatment of information about convictions for aggravated offences. Some consultees have

⁷¹ As we discussed in the CP (paras 3.29 to 3.32 and 3.71 to 3.74) and as set out in more detail later (Chapter 4, from para 4.139) there are several aspects to the requirement of fair labelling: the accurate description of offences; ensuring that offenders, victims, criminal justice agencies and the wider public are all accurately informed of the nature of the wrongdoing and its consequences. In terms of probation services and the need for public protection and effective rehabilitation, accurate labelling of offending has important benefits, as many consultees expressly recognised.

⁷² Outlined at paras 3.78 to 3.81 above.

objected, arguing that these are two distinct systems that should not be harmonised in this way.

- 3.97 In our view, however, it is the similarities in the aim and effect of the two sets of provisions that merit their similar treatment in PNC recording. In relation both to the aggravated offences and enhanced sentencing, Parliament has decided that a person convicted of a criminal offence aggravated by hostility towards the relevant protected characteristic may receive a higher sentence as a result of that aggravation. The aggravated sentences and the current enhanced sentencing regime were originally enacted as a complementary system under the CDA to give effect to that decision by Parliament. Therefore, the regime as a whole reflects the will of Parliament. The legislation placed the enhanced sentencing regime (which had formerly been expressed in sentencing guidance)⁷³ on a statutory footing and made its use obligatory when a sentencing court was satisfied as to hostility as an aggravating factor.⁷⁴
- 3.98 Furthermore, Parliament has given substantial discretion to the Home Secretary and the police authorities to determine what information relating to criminal offences is recorded on the PNC.⁷⁵ Information relating to convictions is input to the PNC under powers granted by section 27 of the Police and Criminal Evidence Act 1984. All data retention is subject to the principles and safeguards in the Data Protection Act 1988 and Article 8 of the European Convention on Human Rights.⁷⁶
- 3.99 In our view, there is a sufficiently strong connection between the objectives of the aggravated offences system and those of the enhanced sentencing regime to justify placing them on the same footing as regards PNC records of their application.
- 3.100 As to the objection made by the Society of Legal Scholars, we note that hostility must be proved to the criminal standard for both aggravated offences and enhanced sentencing. In either case, the defendant has the opportunity to challenge the allegation of hostility.⁷⁷ It appears illogical to argue that one should be recorded and one not.

⁷³ As explained at para B.262 of Appendix B to the CP on the history of hate crime legislation, prior to the CDA the courts had already acknowledged racial aggravation as an aggravating factor in sentencing.

⁷⁴ The enhanced sentencing provisions were originally contained in the CDA as s 82. This was later re-enacted as CJA, s 145. See Appendix B to the CP at para B.263.

⁷⁵ As we explain in Chapter 2 above at para 2.103.

⁷⁶ See Chapter 2 above, para 2.114 and fn 112. Detailed provision is made for the recording of information on the PNC, both by the statutory code of practice laying down general principles for its use (the PNC Code of Practice) and by way of rules contained in the PNC Manual: both are discussed in fn 54 above and in Chapter 2 at para 2.106.

⁷⁷ As we pointed out in the CP (paras 2.168), Chapter 2 above (para 2.90) and in Chapter 4 below at para 4.150 however, there may be cases where a defendant wishing to challenge hostility allegations at the *Newton* hearing will risk loss of credit for a guilty plea should the challenge fail.

Practical matters

- 3.101 It would be vital to ensure that recording of the application of sections 145 and 146 took place in an accurate, consistent and systematic way, in the interests both of fairness to defendants and reliability of data. As we noted in Chapter 2 above,⁷⁸ qualifier codes are currently available on the PNC to denote findings of hostility based on all of the protected characteristics other than transgender identity. However, these are not being systematically or consistently used to record the application of sections 145 and 146.
- 3.102 Effective implementation of our recommendation would require the input of relevant bodies (including HM Courts and Tribunals Service, the police and those in the Home Office and Ministry of Justice with oversight of PNC matters). This would ensure that necessary technical changes to the relevant court and PNC operating systems were made to facilitate accurate recording and onward transfer of data, at each stage of the process.⁷⁹ Training would also be necessary to ensure that the facility to record was understood by court clerks and police and applied in every case in which hostility had been found.⁸⁰
- 3.103 It is important to note that the PNC currently has no search functionality to permit the extraction of data about the number of cases in which particular sentence qualifiers have been applied. The PNC database should therefore not be seen as a source of information about the number or type of cases in which findings of hostility had been made, as some consultees suggested would be useful.

Recommendation

- 3.104 **We recommend that use of the enhanced sentencing provisions in section 145 or 146 of the Criminal Justice Act 2003 should always be recorded on the Police National Computer (PNC) and reflected on the offender's record.**
- 3.105 In line with the clear preference of most consultees,⁸¹ we recommend that this reform be implemented whether or not aggravated offences are also extended.

FURTHER SENTENCING QUESTIONS PUT TO CONSULTEEES

Would the proposed sentencing reforms address the shortcomings identified in the CP?⁸²

- 3.106 As explained at the start of this chapter, before the CP was published several stakeholders raised concerns with us about the enhanced sentencing system

⁷⁸ See paras 2.108 and 2.109 above.

⁷⁹ This might involve, for example, minor changes to Libra, Bichard 7 and the PNC (for example, to add a PNC qualifier code for transgender identity related hostility, and to update Bichard 7 so that all hostility findings recorded on Libra are transferred to the PNC).

⁸⁰ This might be assisted by additional IT measures, such as making it compulsory to indicate whether s145 or 146 was applied, or by providing a means to "flag" a case before it reaches court as potentially leading to a hostility finding, to prompt the clerk recording the result to indicate whether s145 or 146 was applied.

⁸¹ See further at paras 3.127 and 3.128 below.

⁸² Question 1 of the CP (at para 3.54) asked: "Do consultees consider that proposals 2 and 3, if implemented, would adequately address the problems identified above in relation to (a) the under-use of section 146 and (b) the inadequate recording of the nature of the offender's wrongdoing? If not, why not?"

being under-used and the fact that it appeared not to have been fully “embedded” into the sentencing process.⁸³ Furthermore, unlike the aggravated offences, the use of enhanced sentencing was not recorded on an offender’s record on the PNC and there was no reliable statistical data about the application of enhanced sentencing. Our two sentencing related proposals were designed to improve the use and recording of enhanced sentencing.

3.107 After setting out those proposals, we asked consultees whether they believed that they would address the problems identified in the use and recording of enhanced sentencing. Of the 94 consultees who responded to this question, 44 answered in the affirmative, without adding any concerns or caveats.

3.108 Several of the consultees who agreed considered that, to be effective in achieving their aims, the sentencing reforms would need to be accompanied by clear guidance to the police, with training on hate crime, how to recognise and record it and on the importance of gathering hostility evidence.⁸⁴ Stonewall said that without effective record-keeping and monitoring, the measures would not be capable of achieving their aims in full.

Concerns and caveats

3.109 The 27 consultees who expressed doubts or were uncertain (but did not answer “no”)⁸⁵ raised numerous points.

ONLY IF AGGRAVATED OFFENCES ALSO EXTENDED

3.110 Many consultees doubted whether these reforms would be sufficient to deal with problems in the enhanced sentencing system unless the aggravated offences were also extended.⁸⁶ (For other consultees this was a reason to answer in the negative.⁸⁷)

CULTURAL CHANGE ALSO NEEDED

3.111 The Lesbian & Gay Foundation felt that while these reforms “could be a solution to the problem of under-use of section 146 they amount to a small set of changes and are therefore unlikely to shift the culture of such large organisations.”⁸⁸ Primary legislation specific to the needs of the people affected by this legislation is required.” UNISON said they were “far from confident they will be adequate to fully tackle the issues”.

3.112 HM CPS Inspectorate said the sentencing reforms, while potentially assisting, “are unlikely in themselves to address some of the key causes of concern, such as improving social attitudes and increasing awareness levels amongst the public and police about disability hate crime”.

⁸³ See also CP paras 3.35 to 3.37.

⁸⁴ West Midlands Police, Brandon Trust, Linkage Community Trust and Full of Life.

⁸⁵ Reasons given by those who answered “no” are set out separately from para 3.124 below. (A further 62 consultees did not answer the question.)

⁸⁶ Disability Hate Crime Network, Disability Rights UK and the National LGB&T Partnership.

⁸⁷ Para 3.126 below.

⁸⁸ We take this to mean police forces, the CPS, and the judiciary and magistracy.

- 3.113 Some consultees saw the problems with enhanced sentencing as being due to wider cultural failings embedded in the criminal justice system which, in their view, was still subject to the “institutional discrimination” highlighted in the Macpherson Report.⁸⁹

MORE TRAINING NEEDED

- 3.114 CPS North Wales Local Scrutiny & Involvement Panel believed that the reforms would address the under-use of enhanced sentencing, if “accompanied by training programmes for criminal justice professionals in particular the judiciary and magistracy”.
- 3.115 Devon and Cornwall Police thought that PNC recording was likely to have positive impact on the under-use of section 146 and the inadequate recording of the nature of the offender's wrongdoing. However, overall they considered it is:

unlikely that amended sentencing guidance would address the lack of awareness of sections 145 and 146, or deal with the mindset of the investigator. Evidence from [Devon and Cornwall] suggests [section] 146 is certainly under-used.

TOO EARLY TO KNOW

- 3.116 GIRES considered it was “too early to comment on the use of section 146 in respect of trans victims as [section 146 CJA] was only extended to cover transphobic offences in December 2012”, although the reforms would be “steps in the right direction”.
- 3.117 The Learning Disability Partnership and the TUC also felt it was impossible to know the answer to this question based on currently available information about enhanced sentencing and its application.

CRIMINAL JUSTICE INFORMATION SHARING MUST ALSO IMPROVE

- 3.118 Derbyshire Police considered there was also a need for “proper information transfer between CJS agencies and better inter-agency cooperation”.
- 3.119 Stay Safe East considered that for the reforms to be fully effective there would also need to be “proactive responses by a range of agencies, correct identification of hate crimes through constant review of cases, hate crime scrutiny panels at local level ... and of course wider public outreach and education”.
- 3.120 National Aids Trust said the reforms “would go a long way to improving the effectiveness of the enhanced sentencing regime” but they, too, considered wider improvements were needed across the CJS agencies in order for them to render enhanced sentencing fully effective.⁹⁰
- 3.121 For the Justices’ Clerks Society, the success of these reforms would depend on whether a sufficiently “robust mechanism is found, [for] recording the nature of the offender's wrongdoing” and the use of the sentence uplift.

⁸⁹ For example Prof L Moran (referring to *The Stephen Lawrence Inquiry: report of an inquiry by Sir William Macpherson of Cluny* (1999) Cm 4262-I.)

⁹⁰ These are set out in Part 3: Other Comments in the Analysis of Responses.

- 3.122 A further important matter was raised by the Justices' Clerks Society based on its discussions with several magistrates who have experience of hate crime cases.⁹¹ They told us that the information contained in the "abbreviated file" normally used at sentencing hearings in the magistrates' courts following a guilty plea is rarely detailed enough for hostility allegations under sections 145 or 146 CJA to withstand a challenge.⁹² They noted that defendants who plead guilty to hate crime offences frequently contest hostility for sentencing purposes. This could be contributing to the current under-use of the enhanced sentencing scheme. Around 90% of hate crime cases are tried in the magistrates' courts.⁹³ CPS figures show that an increasing number of defendants in cases flagged as hate crimes plead guilty.⁹⁴

MONITORING NEEDED

- 3.123 Victim Support were concerned that there would still be a risk that hostility allegations would not be fully pursued at sentencing in cases where a defendant indicated willingness to plead guilty to the relevant offence but not to accept the presence of hostility as an aggravating factor for sentencing. The risk of the application of section 146 being bargained away in the interests of saving time or resources was still a concern. Victim Support said careful monitoring would be needed to ensure this did not happen.⁹⁵ They also felt that while these reforms could result in increased use of enhanced sentencing, "the time and cost pressures of bringing on separate Newton hearings could still result in plea bargaining out the hostility element before sentencing". They urged that monitoring be put in place to ensure *Newton* hearings were dealt with effectively and hostility allegations could be aired properly.

Reforms would not be enough to resolve under-use and lack of reporting of enhanced sentencing

- 3.124 23 consultees considered that these reforms would not be sufficient to resolve the problems with enhanced sentencing. Of those who answered in the negative, several pointed to additional measures they saw as necessary to deal with problems with enhanced sentencing.⁹⁶

⁹¹ This point was made at our Symposium in September 2013 by Graham Hooper, the President of the Justices' Clerks' Society.

⁹² An abbreviated prosecution file of evidence is one which relies primarily on a police summary of the evidence, and/or some particularly key items of evidence, rather than containing full copies of all the evidence available in the case (eg verbatim interview transcripts, statements from all witnesses, forensic reports, copies of CCTV footage, etc). It is used in cases that are likely to be disposed of with a guilty plea, to save police time in preparing items that will not be necessary for proceedings. See for example *Archbold: Criminal Pleading, Evidence and Practice* (2014), para 15-176.

⁹³ See fn 152 in Chapter 4 below.

⁹⁴ CPS, *Hate crime and crimes against older people report 2012-13*, pp 5 and 6. Available from http://www.cps.gov.uk/data/hate_crime/index.html (last visited 14 May 2014).

⁹⁵ We return to this issue in Chapters 4 from para 4.164 and Chapter 5 from para 5.21.

⁹⁶ Several other consultees raised the need for additional measures to reinforce and raise the profile of enhanced sentencing and these are discussed further in Part 3: Other Comments in the Analysis of Responses.

3.125 The argument advanced by most of those taking this position was that it was also necessary to extend the aggravated offences.⁹⁷ While this might not have any direct effect on the problems that our reforms were designed to deal with (namely, the under-use of the provisions and the absence of any system by which to record their application) some consultees said they considered there would be an indirect benefit.⁹⁸

3.126 Other arguments included the following:

- (1) more monitoring and better data are needed on the application of enhanced sentencing;⁹⁹ and
- (2) more training of police, barristers and sentencers is needed, not only on enhanced sentencing, but also on how those with the relevant characteristics experience hate crime and the justice system.¹⁰⁰

If so, should they be implemented regardless of any extension of aggravated offences?¹⁰¹

3.127 We then asked in the CP whether, if consultees thought they would be likely to achieve their stated aims, the reforms should be implemented in any event.

3.128 Of the 87 consultees who responded to this question, 60 answered in the affirmative.¹⁰² The main reasons given by those who favoured implementation of sentencing reforms in any event were the following:

- (1) Under the present system, not all offences are capable of being prosecuted as aggravated, only a set list of eleven. Therefore any reforms to the sentencing system and recording practices will be of benefit in relation to cases where the offence does not exist in an aggravated form.¹⁰³

⁹⁷ Pembrokeshire People First, the Equality and Human Rights Commission, Independent Academic Research Studies, Jane Healy, CPS London Scrutiny and Involvement Panel, Carole Gerada, Seamus Taylor CBE, Suzanna Hopwood and Michelle Ross all made this argument.

⁹⁸ As Stop Hate UK put it, aggravated offences would “have a knock-on effect on the use of section 146 by elevating its status and promoting the use and proper application of it, as well as creating recognition of the meaning of a conviction for an offence to which section 146 has been applied.”

⁹⁹ Mr J Starbuck, the Equality and Human Rights Commission, the Discrimination Law Association, the Metropolitan Police.

¹⁰⁰ The Metropolitan Police, Respond, Action Disability Kensington & Chelsea, the Royal College of Psychiatrists and Hate Free Norfolk.

¹⁰¹ Proposal 4, at para 3.55 of the CP: “If consultees consider that proposals 2 and 3 are likely to be effective in achieving their stated aims, these reforms to the enhanced sentencing provisions should be implemented regardless of whether the aggravated offences are extended to include disability, sexual orientation and transgender identity. Do consultees agree? If not, why not?”

¹⁰² 34 of these had agreed with the question on whether the reforms were “likely to be effective in achieving their stated aims”, 11 had been unsure and 11 had answered that they were unlikely to be effective.

¹⁰³ Leicestershire Police, CPS London Scrutiny and Involvement Panel.

- (2) The combined system of sentencing and aggravated offences causes confusion and this should not be replicated for the three additional characteristics.¹⁰⁴
- (3) The maximum sentences in place for the basic offences are in practice sufficient.¹⁰⁵

Do consultees agree that enhanced sentencing, if properly applied and adequately recorded, could provide an adequate response?

- 3.129 Finally, we asked in the CP whether the enhanced sentencing system, if properly applied and adequately recorded, could provide an adequate response to hostility-based offending in relation to sexual orientation, transgender identity and disability.¹⁰⁶
- 3.130 116 consultees responded to this question. 54 answered “yes”; and a further 18 agreed, but with caveats. The caveats were often to the effect that, in theory, a reformed sentencing system could provide a satisfactory response but, in practice, the consultees were not convinced that it could.
- 3.131 As the majority of the reasoning on either side of the argument relates to whether aggravated offences should also be extended, we analyse the responses to this question in more detail in the next chapter.¹⁰⁷

¹⁰⁴ South Yorkshire Police and Prof R Taylor.

¹⁰⁵ South Yorkshire Police.

¹⁰⁶ Proposal 1, at para 3.45 of the CP: “We consider that the enhanced sentencing regime under the CJA 2003 could provide an adequate response to hostility-based offences on the grounds of disability, sexual orientation and transgender identity, if the provisions were properly applied and resulted in an adequate record of the offender’s wrongdoing. Do consultees agree? If not, why not?”

¹⁰⁷ From para 4.194.

CHAPTER 4

THE AGGRAVATED OFFENCES

THE CP

- 4.1 As we explained in Chapter 2, the aggravated offences are contained in sections 28 to 32 of the Crime and Disorder Act 1998 (“CDA”).¹ They currently apply to offences involving hostility on grounds of race and religion. Our terms of reference required us to examine whether they should be extended to apply to hostility on grounds of sexual orientation, disability or transgender identity.
- 4.2 In Chapter 3 of the CP, we examined the case for extending the current aggravated offences. In particular, we examined whether:
- (1) extending the existing aggravated offences would provide an effective response to hostility-based offending against individuals with any of the three characteristics, in view of the nature and prevalence of that offending;²
 - (2) other criminal offences and initiatives short of criminalisation already provided sufficient protection in the cases that the aggravated offences would capture;
 - (3) other non-aggravated criminal offences already addressed the harms suffered by victims;
 - (4) other offences and initiatives would be sufficient to encourage the reporting of hate crime;
 - (5) new aggravated offences might have a greater deterrent effect than applying reformed enhanced sentencing to the existing non aggravated offences;
 - (6) extended aggravated offences were necessary to provide a “label” that adequately reflected the criminality of hostility-based offending on the basis of disability, sexual orientation and transgender identity; and
 - (7) there was any risk that the extended aggravated offences would be ineffective.
- 4.3 Our analysis led us to offer two reform options. As Option 1 we made provisional proposals for improving the use and the recording of enhanced sentencing. We provisionally proposed that these reforms would produce an enhanced sentencing system capable of providing an adequate response to hostility

¹ See Chapter 2 above from para 2.2, and the CP from para 2.5.

² Here we noted that a significant proportion of hostility-based crime against disabled people may not be captured by new aggravated offences since many of the offences recorded as having been committed in circumstances of hostility towards them are not capable of being aggravated under the CDA 1998. CP, paras 3.8 to 3.17 and 3.58 to 3.59.

offending based on these characteristics.³ As Option 2, we made provisional proposals for extending the aggravated offences – “**alternatively, or in addition to, sentencing reform**”.

- 4.4 Consultees were asked whether they considered that Option 1 alone would provide an adequate solution to the problem of hostility-based crime against those with any of the three protected characteristics. Consultees were then asked whether they thought that aggravated offences were necessary, either instead of or in addition to such reforms (Option 2). In this chapter we analyse the responses to Option 2, beginning with an overview of consultation responses.

CONSULTATION RESPONSES: OVERVIEW

- 4.5 A majority of consultees (72 out of the 116 who responded on this) considered that the enhanced sentencing regime (if reformed as we provisionally proposed) could provide an adequate response to hostility-based offending against people with any of the three characteristics. However, an even greater number agreed that aggravated offences should also be extended (115 out of the 134 who responded on this).
- 4.6 39 of the consultees who agreed that sentencing reform alone could be an adequate response, also agreed with our provisional proposal⁴ under Option 2, that sentencing reforms would not be adequate and that aggravated offences should also be extended.⁵
- 4.7 We suspect that the reason these consultees agreed with both proposals is that they wanted to endorse all reforms that could strengthen the protection for people with the protected characteristics. As a result, they were not concerned by the inconsistency inherent in their responses.⁶ The decision to support both proposals may also reflect the difficulty some consultees expressed in deciding

³ Proposal 1 (CP, para 3.45): “We consider that the enhanced sentencing regime under the CJA 2003 could provide an adequate response to hostility-based offences on the grounds of disability, sexual orientation and transgender identity, if the provisions were properly applied and resulted in an adequate record of the offender’s wrongdoing. Do consultees agree? If not, why not?” The responses to this provisional proposal were analysed in Chapter 3.

⁴ Proposal 5 (CP, para 3.76): “If proposals 2 and 3 [our two sentencing reforms] are regarded as inadequate, we consider that an alternative solution would be the extension of the aggravated offences to include disability, sexual orientation and transgender identity. These offences would only apply where the perpetrator of a non-aggravated offence demonstrated, or was motivated by, hostility on the grounds of disability, sexual orientation or transgender identity. Do consultees consider that the aggravated offences ought to be extended?”

⁵ The consultees who agreed with both proposals included the Crown Prosecution Service, the Police Federation of England & Wales, the Police Superintendents Association of England & Wales, Disability Rights UK, Disability Hate Crime Network, the Grip Project, Hampshire Constabulary, Stonewall, West Midlands Police, Surrey Police and the Royal College of Nursing as well as several other groups and individual consultees.

⁶ As explained above in Chapter 1 (from para 1.11) and Chapter 3 (from para 3.7), dissatisfaction has been expressed by consultees and others about some aspects of the criminal justice response to hate crime affecting all three of the protected characteristics under consideration.

which reforms would be most effective, without reliable information on how enhanced sentencing is operating.⁷

- 4.8 It is also possible that some of the consultees who supported both proposals shared the view expressed by the Crown Prosecution Service (CPS) (among others) about differential treatment of the statutorily recognised hate crime characteristics. Their view was that it is wrong for the criminal justice system to provide different protection against hostility-based crime for race and religion than for disability, transgender and sexual orientation. This is unfair and sends the wrong message about the seriousness with which all hate crime should be viewed.⁸
- 4.9 Some consultees may also have endorsed both proposals from a desire to see the widest reform possible in an attempt to boost public confidence and increase the reporting of hate crime. This was a further reason given by the CPS.⁹
- 4.10 Overall, 44 consultees responded that a reformed regime of enhanced sentencing alone would not be capable of providing an adequate response.¹⁰ Of these, two were against enhanced sentencing in principle;¹¹ others believed that different measures (outside the scope of the current project) were needed in addition to a reformed sentencing system. The majority considered that it was also necessary to extend the aggravated offences.
- 4.11 In what follows we analyse the responses, beginning with those in favour of extending the current form of aggravated offences to cover hostility based on disability, sexual orientation and transgender identity.¹² We then address the arguments advanced by those against extension.¹³ Finally, we consider consultees' arguments that before any decision is taken on extending offences there should be a wider review of the criminal justice system's response to hate crime and of the effectiveness and legitimacy of the current aggravated offences. As we conclude at the end of this chapter, while we remain of the view that there is a case in principle for extending the aggravated offences, it would be preferable not to extend them in their current form without first conducting a wider review.

⁷ Several consultees made the point in their responses that there was insufficient evidence of the adequacy of the existing sentencing regime for them to know whether a reformed sentencing system alone could provide an adequate response. This point was made by: the National Black Crown Prosecution Association, Stonewall, North Yorkshire Police, the Equality and Human Rights Commission, Diverse Cymru, Barnsley LGBT Forum, Action Disability Kensington and Chelsea, Practitioner Alliance for Safeguarding Adults and Worcestershire Safeguarding Adults Board.

⁸ See from para 4.14 below.

⁹ See from para 4.101.

¹⁰ The 8 responses to the alternative easy-read question also said no, because aggravated offences also needed to be extended: for equality reasons, to ensure long enough sentences would be available, and to send a message that hate crime is treated equally seriously, whichever protected characteristic is involved.

¹¹ Mr J Troke, because he considers all hate crime legislation to be disproportionate and misguided; and Ms U Solari because she would prefer to see more emphasis on restorative justice and community-based systems.

¹² From para 4.12 below.

¹³ From para 4.157 below.

(A) CONSULTATION RESPONSES ARGUING IN FAVOUR OF EXTENDING THE CURRENT AGGRAVATED OFFENCES

4.12 A number of arguments were advanced by consultees in favour of extending the aggravated offences in their current form, to address hostility-based offending on grounds of sexual orientation, transgender identity and disability. These focused on the following areas:

- (1) the need for the criminal justice system to treat the five protected hate crime characteristics equally;
- (2) the symbolic effects of enacting offences carrying an “aggravated” label and having higher maximum sentences available;
- (3) the communicative effects of prosecuting such offences;
- (4) the potential deterrent effects of extending the aggravated offences;
- (5) whether extending the aggravated offences would increase public awareness of hate crime, improve confidence in the criminal justice response to hate crime and lead to higher levels of reporting;
- (6) whether the aggravated offences would improve investigative and prosecution approaches;
- (7) the higher maximum sentences available under aggravated offences are needed in practice, albeit rarely;
- (8) the availability of a challenge to unduly lenient sentences;¹⁴
- (9) the ability of aggravated offences to provide a sufficient response in comparison with enhanced sentencing; and
- (10) the benefits of a trial of the hostility element.

4.13 We discuss each of these issues in turn in the following section, first examining consultees’ arguments in favour of extending the current offences, then any counter-arguments advanced by other consultees, followed in each case by our own observations and conclusions.

(1) The need for the criminal law to treat the five protected hate crime characteristics equally

4.14 Of all the reasons given by consultees in favour of extension, the one advanced by the largest number was a perceived inequality in the current system. Race and religion are protected by aggravated offences whereas the other three characteristics are protected only by enhanced sentencing under section 146 CJA. Consultees argued that this inequality must be remedied by extending the aggravated offences. They further argued that this was necessary in order to send a clear message that hostility-based offending is taken equally seriously,

¹⁴ As we explained in the CP (paras 2.50 and 3.42 to 3.44) and Chapter 2 above (para 2.32) unduly lenient sentence challenges are, in theory, available for any sentence passed for any of the aggravated offences, but not for any of the corresponding non-aggravated offences (regardless of whether or not section 145 or 146 of the CJA has been applied).

whichever of the five protected characteristics the hostility relates to. The different aspects of these arguments are set out below.

Current system “discriminatory”

- 4.15 Many consultees felt that merely reforming the sentencing regime rather than creating new aggravated offences in respect of disability, sexual orientation and transgender identity would perpetuate an unacceptable disparity and inequality in the legal response to hate crime. The aggravated offences applicable to race and religion allow for higher sentences than the enhanced sentencing regime does for cases of hostility based on disability transgender and sexual orientation. In this way, the aggravated offences give express recognition to the additional seriousness and blameworthiness of hostility-based offending. Aggravated offences also give appropriate recognition to the ordeal of victims of hate crime based on one of the protected characteristics.
- 4.16 It was argued that leaving this disparity in place would send a message to hate crime victims, offenders and wider society that crimes based on racial or religious hostility are regarded as more serious than crimes based on hostility due to disability, transgender identity or sexual orientation.¹⁵
- 4.17 Some consultees suggested that the problem of unequal treatment could also be resolved by abolishing the existing aggravated offences.¹⁶

Equality Act principles and the public sector duty

- 4.18 Some consultees argued that the Equality Act 2010 (“Equality Act”) requires all five protected characteristics to be treated in the same way in the hate crime legislation.¹⁷ Noting that sexual orientation, transgender identity and disability are all protected characteristics under the Equality Act, some organisations described the current system as discriminatory and amounting to a “two-tier” system which implied a “hierarchy of victims” (phrases used by, for example, Galop, Leicester Hate Crime Project and Independent Academic Research Studies).¹⁸
- 4.19 The SLS said it was necessary to ask why race and religion should be treated differently from the other three characteristics. They considered that for these purposes “a good starting point is to consider developments in equality legislation

¹⁵ Consultees backing extension of the offences on these grounds included: the Equality and Human Rights Commission, the Equality and Diversity Forum, Victim Support, Dr M Walters, National Aids Trust, Mencap, Scope, Stop Hate UK, Galop, the CPS, ACPO LGBT Portfolio and several police forces.

¹⁶ Those making this point included consultees in favour, in principle, of extending the aggravated offences, as well as those preferring a pure sentencing approach. They included: the Justices’ Clerks Society, South Yorkshire Police, Galop, Prof L Moran, Stop Hate UK, the Society of Legal Scholars and Prof R Taylor. We return to this point in Chapter 5 from para 5.49.

¹⁷ ACPO LGBT Portfolio, Lesbian and Gay Foundation, Prof L Moran, Cheshire Constabulary, Leicestershire Police.

¹⁸ Other consultees who saw the current system as unequal, discriminatory or imbalanced included: Stay Safe East, Hertfordshire Constabulary, Pembrokeshire People First, PA Funnell, Merseyside Police, the Metropolitan Police, Devon and Cornwall Police, Disability First, Cheshire Constabulary, ACPO LGBT Portfolio, Lesbian and Gay Foundation, Learning Disability Partnership, A Scutt, Respond, People First, Mencap, Hertfordshire Constabulary, Leicestershire Police, Bromley Experts by Experience and Inclusion London.

where equal protection is given to race, religion, sexual orientation, disability and transgender identity under the Equality Act 2010”.

- 4.20 Several other consultees calling for extension on equality grounds referred to section 149 of the Equality Act. This requires a public authority,¹⁹ in exercising its functions, to have due regard to the need to:

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

- 4.21 The “relevant protected characteristics” for the purposes of (b) and (c) above are: age, disability, gender reassignment,²⁰ pregnancy and maternity, race, religion and belief, sex and sexual orientation. This is a subset of the “protected characteristics” set out in section 4 of the Equality Act 2010, in that it excludes marriage and civil partnership.

- 4.22 Two police force consultees agreed that an enhanced sentencing regime alone could provide an adequate response, but said this would leave in place a disparity that “would not assist public bodies in achieving [the goals discussed in section 149 (b) and (c) of the Equality Act]”.²¹

Other equality-related arguments

- 4.23 Consultees advanced several other arguments regarding the need for equal treatment of protected characteristics, in support of their view that the current offences should be extended. These are discussed below.

UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES

- 4.24 Stop Hate UK referred to the obligations on states arising from the UN Convention on the Rights of Persons with Disabilities (“CRPD”).²² Stop Hate UK

¹⁹ The Law Commission, though not a “public authority” under the Equality Act 2010, is required by section 149(2) to have regard to the relevant matters when performing its public functions.

²⁰ Defined in the Equality Act 2010 as where a person is “proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”: s 7(1). Furthermore, a “reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment”: s 7(2).

²¹ Cheshire Constabulary and Leicestershire Police.

²² The UK ratified the CRPD on 8 June 2009: the Equality and Human Rights Commission monitors compliance with the duties of the CRPD. Its website contains relevant guidance and other materials: <http://www.equalityhumanrights.com/human-rights/our-human-rights-work/international-framework/un-convention-on-the-rights-of-persons-with-disabilities/> (last visited 15 May 2014).

argued that Articles 5.1, 5.2,²³ 16.1 and 16.2²⁴ obliged the state to take the necessary measures to “guarantee disabled people equal and effective legal protection against discrimination [including] the discrimination manifested by hate crime”. They considered that “a disability aggravated offence amounts to an appropriate and effective legislative measure for tackling this form of hate crime”.

- 4.25 Dr Dimopoulos also referred to the CRPD provisions and argued that these (in particular Article 16) made the case for extending legislation stronger for disability than that for sexual orientation or transgender identity in that they made express reference to the requirement to take the necessary measures (including legislative measures) to prosecute cases of violence, exploitation and abuse against people with disabilities.²⁵

PREJUDICE, PERSECUTION AND OPPRESSION

- 4.26 Dr Walters argued that hate crime legislation represented “recognition of the history of prejudice-based victimisation that certain groups have had to endure and that the state is willing to do something about it”. States had a duty to protect individuals vulnerable to victimisation and abuse, particularly when they belong to a minority that has itself been oppressed by the state.²⁶

DISCRIMINATION: RESPECT FOR DIVERSITY

- 4.27 Some consultees described hate crime legislation as deriving principally from a need to tackle discrimination and prejudice, including in the form of hate crime. This meant ensuring equivalent protection to all who were vulnerable to discrimination and prejudice.²⁷ Accordingly, the current disparity was unacceptable and the aggravated offences should be extended to address it.
- 4.28 The Equality and Diversity Forum argued for extension of the aggravated offences on the grounds of discrimination and the equal right to dignity and

²³ Art 5 is titled “Equality and Discrimination.” Art 5.1 provides: “States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.” Art 5.2 provides: “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

²⁴ Art 16 is titled “Freedom from exploitation, violence and abuse.” Art 16.1 provides: “States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. Art 16.5 provides: “States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”

²⁵ Dr Dimopoulos was nonetheless in favour of extension for all three characteristics, not only disability. Scope also referred to the CRPD provisions.

²⁶ Referring to the work of A Harel and G Parchomovsky, “On Hate and Equality” (1999) 109 *Yale Law Journal* 507.

²⁷ National Aids Trust, Stop Hate UK, Leonard Cheshire Disability. The Federation of Muslim Organisations referred to the need for equal treatment for those “vulnerable to discrimination and persecution”.

respect for diversity and difference, particularly for those at risk of discrimination.²⁸

CONSISTENCY AND SIMPLICITY

- 4.29 The Justices' Clerks Society said that, since Parliament had already taken the decision to include all five characteristics within the statutory sentencing regime, the same five should be equally protected by the aggravated offences.²⁹
- 4.30 It was also argued that extending the offences would be simpler for victims and professionals to understand.³⁰ It would "provide police with clearer powers to deal with such incidents"³¹ and "enable a clearer understanding of the law and its application by professionals across the Criminal Justice System... in addition to aiding the public understanding of hate crime, which is currently lacking".³²

Counter-arguments

- 4.31 Some consultees did not see inequality in the current system as a problem in itself. The Senior Judiciary said that the current system presented "a certain illogicality"; however, this was a product of the piecemeal introduction of different provisions. This view was shared by the Council of HM Circuit Judges. Equality considerations did not feature in the responses of the Law Society, Bar Council, Criminal Bar Association, London Criminal Courts Solicitors Association or Teesside and Hartlepool Magistrates.
- 4.32 Others considered that better use of enhanced sentencing, as we provisionally proposed, could address the problem of inequality. At a meeting of the Government's Independent Advisory Group on hate crime,³³ Mr Iqbal Bhana (Deputy Chair) said that while, in principle, there should be no distinction between the regime applicable to race and religion and that applicable to the other three characteristics, equality of treatment was, in practice, capable of being produced by the better application of enhanced sentencing.
- 4.33 Participants in the Birkbeck Gender and Sexuality Group forum³⁴ said during workshop discussions that it was wrong to suggest that simply "equalising and neatening" the current offences would be a good answer to the problem of hate

²⁸ The National AIDS trust also argued the point in this way.

²⁹ Greater Manchester Police, Dr Walters, and Diverse Cymru made the same point.

³⁰ Merseyside Police, Cleveland Police, Diverse Cymru.

³¹ British Transport Police.

³² Diverse Cymru.

³³ This was convened to discuss the CP and its provisional proposals. It took place on 30 July 2013.

³⁴ This group convened a meeting to discuss the CP and its provisional proposals on 8 August 2013. The meeting was attended by around 30 people working in academia and in NGOs working in justice, human rights, LGB&T and disability rights.

crime. This approach risked “making bad law worse” if the offences were not in fact fulfilling their purpose.³⁵

Discussion

Is there a justifiable basis for disparity of legislative treatment?

- 4.34 The racially aggravated offences and the enhanced sentencing provisions were originally enacted as part of the same legislative package under the CDA. Section 145 CJA (originally enacted as section 82 of the CDA) states that enhanced sentencing applies “where a court is considering the seriousness of an offence other than one under sections 29 to 32 of [the CDA]”. When religious hostility was added, the enhanced sentencing provision in the CDA was also amended to refer to religious hostility.³⁶
- 4.35 However, when the additional characteristics of disability, sexual orientation and, most recently, transgender identity were brought into the enhanced sentencing regime, there was no debate in Parliament or more widely about extending the aggravated offences beyond race and religion. On the contrary, the Government’s stated preference when the characteristics of sexual orientation and disability were brought into the enhanced sentencing regime was against extending the aggravated offences as well. Two reasons were given: first, this model of offences was “created specifically for a set purpose” and could not simply be carried over to other characteristics. Secondly, the Government considered that, in practice, the maximum sentences available for the non-aggravated forms of the offences would be sufficient.³⁷
- 4.36 As to the adequacy of the sentencing model offered by section 146 CJA, there is unfortunately a dearth of statistical evidence relating to sentences passed in cases of offending involving hostility based on transgender identity, sexual orientation and disability. It is therefore not possible to compare the average sentences passed for the aggravated offences with those passed for the corresponding non-aggravated offences in cases where section 146 has been (or should have been) applied.³⁸

³⁵ Members of this discussion group had deeper questions over whether the aggravated offences, with their higher maximum sentences, were the right approach to tackling hate crime at all: see Chapter 5 below, from para 5.56.

³⁶ These provisions were later re-enacted as s 145 CJA, as explained in more detail in Appendix B to the CP on the history of hate crime legislation, at para B.50 and following. Available at: http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_appendix-b.pdf

³⁷ As explained by Baroness Scotland, who said that the Government had decided to extend the enhanced sentencing regime to disability and sexual orientation hostility, but not to create new aggravated offences on these grounds because, in practice, the maximum sentences available were sufficiently high: *Hansard* (HL) Deb 5 Nov 2003 vol 654, col 819.

³⁸ The key problem here is the lack of published data on the number of cases to which enhanced sentencing under s 146 CJA is applied. Further problems are that hostility-based offending affecting those with the relevant characteristics is under-reported; and that conversely the definition of “hate crime” in operation by the CPS, police forces and other agencies is wider in several respects than the scope of s 146. This makes even the available data on the types and volumes of hostility-based offending affecting LGB, T and disabled people difficult to measure with accuracy.

- 4.37 It is therefore impossible to test the assertion³⁹ that higher sentences were needed for racially and religiously aggravated offences but were not needed for offences driven by hostility against the other three characteristics. In any event, as we have pointed out elsewhere, sentences for racially and religiously aggravated offences in practice very rarely exceed the maximum available sentence for the corresponding non-aggravated offences.⁴⁰
- 4.38 We agree that if specific criminal offences are available for two of the five characteristics but not the other three, there should be good reasons of principle for the disparity. It is important to ask what, if any, justifiable basis exists for the distinction. Is the disparity causing a perception among disabled, LGB or transgender victims that “their” hate crime is being treated less seriously than racial or religious hate crime? Is the difference in legislation causing or contributing to an inequality in the criminal justice response to hate crime?
- 4.39 The limited statistical evidence available regarding the nature, seriousness or prevalence of hostility-based offending across the five relevant characteristics⁴¹ provides no equality-related reason to distinguish between the five characteristics.
- 4.40 In particular, the following are grounds for treating all five characteristics in the same way:
- (1) Enhanced sentencing under the CJA applies to all five characteristics. As is clear from the previous chapter, the two systems operate with the common goal of imposing higher sentences to mark out the gravity of offences where it can be shown that D was motivated by, or demonstrated, hostility.
 - (2) All five characteristics have for several years been treated as “protected characteristics” for the purposes of hate crime monitoring and reporting on a nation-wide level, by police forces and the CPS.
 - (3) Home Office and other official hate crime statistics are published annually and these refer to all five characteristics.⁴²
 - (4) According to official statistics, hostility-based offending is occurring in respect of all five characteristics. Indeed, the data indicate that there is three times more reported hate crime for the characteristic of sexual

³⁹ Discussed at paragraph 4.35 and fn 37 above.

⁴⁰ Ministry of Justice statistics are available to show average sentence lengths for aggravated offences and the equivalent non-aggravated offences. These were set out at Table 15 of the CP Impact Assessment (available from http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_appendix-c.pdf).

⁴¹ The evidence was analysed in the CP Impact Assessment at paras C.8, C.48 and C.57; an overview of the key data was given in the CP at paras 1.21 to 1.25, 3.7 and 3.13.

⁴² CPS statistics are available from: http://www.cps.gov.uk/data/hate_crime/index.html (last visited 15 May 2014). *An Overview of Hate Crime in England and Wales*, published jointly by the Home Office, Ministry of Justice and Office of National Statistics in December 2013 is available here: <https://www.gov.uk/government/publications/an-overview-of-hate-crime-in-england-and-wales> (last visited 15 May 2014).

orientation (for which there are no aggravated offences) than for that of religion (for which there are aggravated offences).⁴³

- (5) We have seen no evidence to suggest that the relative harm or culpability attributable to hate-offending on grounds of race or religion is greater than that based on sexual orientation, disability or transgender identity.⁴⁴

Convention on Rights of Persons with Disabilities

- 4.41 The CRPD provisions raised by some consultees do not impose on states any express duty to create criminal offences to prosecute disability-based hate crime. What they expressly require is for the state to ensure by the appropriate measures (including legislative, but also policy and other measures)⁴⁵ that violence, abuse and exploitation targeted at disabled people is investigated and prosecuted, and that there is no discrimination in that process. States must guarantee “equal protection and equal benefit of the law” for people with disabilities.
- 4.42 We do not consider that the CRPD requires the state to legislate to extend the aggravated offences to cover disability, provided that the state ensures the full and non-discriminatory application of existing criminal offences and the enhanced sentencing regime in cases of disability hate crime. The appropriate use of special measures and other adjustments, to provide the necessary support and protection to victims and witnesses in cases of disability (and other) hate crime is relevant in this context, as we discuss below.⁴⁶

SPECIAL MEASURES AND OTHER PROTECTIONS

- 4.43 There are several protections and other measures available to ensure that disabled, young, vulnerable or intimidated victims or witnesses are able to participate effectively in the criminal justice process. These help to ensure equal protection and equal benefit from the criminal law in the context of disability hate crime, as required under the CRPD.⁴⁷ The Court itself has a duty to ensure the

⁴³ *An Overview of Hate Crime in England and Wales* (fn 42 above), Table 3.

⁴⁴ *An Overview of Hate Crime in England and Wales* (fn 42 above), Figure 19 provides data on the emotional impact of hate crime, based on the results of the Crime Survey of England and Wales.

⁴⁵ The relevant Articles of the CRPD are set out in fns 23 and 24 above.

⁴⁶ See A Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2014), D14.1 to 48, setting out the detailed provisions on special measures, the procedure for their application and the range of measures available. The CPS website also contains legal and procedural guidance on special measures: http://www.cps.gov.uk/legal/s_to_u/special_measures/ (last visited 15 May 2014). The guidance states that victims who may need to be considered as vulnerable for special measures purposes include “victims of ... racially motivated crime and repeat victimisation”. A number of consultees used the “Other Comments” section of the CP response form to argue for greater use of the special measures regime in cases of hate crime affecting LGB and transgender people and those with disabilities. See Part 3: Other Comments in the Analysis of Responses.

⁴⁷ Such protections may also be relevant in hate crime affecting young, vulnerable or intimidated victims of homophobic or transphobic hate crime.

“early identification of the needs of witnesses”, as part of its overall case management obligation.⁴⁸

- 4.44 The Youth Justice and Criminal Evidence Act 1999 (“YJCEA”) introduced a range of measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. The measures are collectively known as “special measures” and are matters decided by the court, usually on application by advocates for the party or witness requiring the relevant measure. Provision is also made for evidence to be given by video recording.⁴⁹ Under Section 19(2) of the YJCEA, the court is required to consider which special measures will “maximise the quality of the evidence”. The measures should be tailored to the needs of individual witnesses. Available measures also include screens to shield a witness from the defendant, examination of witnesses through intermediaries, communication assistance at court or during investigations, and reporting restrictions.
- 4.45 The examples given by the YJCEA of “vulnerable” witnesses, to which these measures apply, are those under 18 and “any witness whose quality of evidence is likely to be diminished because they: are suffering from a mental disorder (as defined by the Mental Health Act); have a significant impairment of intelligence and social functioning; or have a physical disability or are suffering from a physical disorder”.⁵⁰ To establish whether a witness requires special measures on the ground of intimidation, the nature and circumstances of the alleged offence and the age and background of the witness are taken into account.⁵¹
- 4.46 The Criminal Practice Directions⁵² also make reference to vulnerable people and protections and adaptations that may be required when they are involved in court proceedings, whether as witnesses, victims or defendants.

EU DIRECTIVE ON VICTIMS OF CRIME (“VICTIMS’ DIRECTIVE”)

- 4.47 Of further relevance is the EU Directive on Victims of Crime adopted on 25 October 2012.⁵³ Member States are required to give effect to it as from 16 November 2015. The UK has opted into the Victims’ Directive.⁵⁴

⁴⁸ Criminal Procedure Rules 2013 (SI 2013 No 1554), rule 3.2.

⁴⁹ YJCEA, ss 16 to 33. Evidence can also be given by live link under separate provisions in the CJA 2003 (ss 51 and following).

⁵⁰ YJCEA, s 16.

⁵¹ Also relevant are the behaviour of the accused towards the witness and other relevant persons: see YJCEA, s 17(2) and (3).

⁵² Criminal Practice Directions [2013] EWCA Crim 1631 (3 October 2013) as amended by CPD Amendment No 1 [2013] EWCA Crim 2328. See sections 3D to 3G, dealing with protections for vulnerable people in the courts. The court must identify the needs of witnesses and others at the earliest possible stage and ensure that “every reasonable step” is taken to encourage attendance of witnesses. In addition, the Advocacy Training Council has developed toolkits to ensure vulnerable witnesses are questioned appropriately, which represent best practice: “Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants”, available from <http://www.advocacytrainingcouncil.org/images/word/raisingthebar.pdf> (last visited 15 May 2014). For the relevant procedure, see Criminal Procedure Rules 2013 (SI 2013 No. 1554), Part 29.

4.48 Article 22(1) of the Victims' Directive requires states to assess, in accordance with their own national procedures, whether the victim has particular protection needs and the extent to which they would benefit from special measures⁵⁵ during the proceedings due to their vulnerability to repeat victimisation, retaliation or intimidation.⁵⁶

4.49 The Directive makes express provision for victims of hate crime. Article 22(3) provides that in the context of the assessment of protection measures:

particular attention shall be paid to ... victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; [and] victims whose relationship to and dependence on the offender makes them particularly vulnerable. In this regard victims of ... gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime and victims with disabilities shall be duly considered.

4.50 The duties imposed by the Victims' Directive could extend to ensuring protection against hate crime based on characteristics other than those in existing hate crime legislation, for example, age, appearance or gender. However, the obligations imposed on states are focused on the steps to be taken to ensure that victims' interests are protected throughout the prosecution process: for example, by making provision for the victim's right to review a decision whether to prosecute.⁵⁷ The Directive places no obligation on states to enact specific hate crime offences or sentence enhancement laws. As the guidance on implementation notes:

[The Directive's] object is not to criminalise certain acts or behaviours in the Member States. Thus, whether the Directive will apply and define as a 'victim' a person who has been a victim of specific conducts depends on whether such acts are criminalised and prosecutable under national law.⁵⁸

⁵³ EU Directive on Victims of Crime 2012/29/EU, Official Journal L 315 of 14/11/2012 p 57, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF> (last visited 15 May 2014).

⁵⁴ See Ministry of Justice list of opt-in decisions, item 34: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278447/Opt-in_webpage_Feb_2014.pdf (last visited 15 May 2014). (See also press release prior to the passage of the Directive: <https://www.justice.gov.uk/news/press-releases/moj/pressrelease260811a>, last visited 15 May 2014.)

⁵⁵ These are set out in Articles 23 and 24 and in many respects resemble those already provided for under the YJCEA and outlined at para 4.44 above.

⁵⁶ These characteristics are similar to those covered by the current special measures regime in England and Wales: para 4.45 above.

⁵⁷ Art 11. See in this respect the victim's right of review system in place in England and Wales, http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/ (last visited 15 May 2014).

⁵⁸ European Commission Directorate-General for Justice, *Guidance document related to the transposition and implementation of Directive 2012/29/EU*, page 7. Available from: http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf (last visited 15 May 2014).

- 4.51 In terms of implementation, the new Ministry of Justice Code of Practice for Victims of Crime (the “Victims’ Code”) states that it implements relevant provisions of the Directive.⁵⁹ It contains provisions relating to most of the substantive measures of the Directive.⁶⁰

Equality Act 2010

- 4.52 In deciding whether the current aggravated offences should be extended to the additional three characteristics, we consider that only limited assistance is to be gained from the Equality Act. We agree that the Act may serve as a useful starting point in determining which characteristics should be selected for hate crime protection. However, other considerations apply than simply whether discrimination may occur in relation to that characteristic.⁶¹ In the next chapter, we consider the need to develop clearer principles for selecting characteristics for hate crime protection.⁶² Below, we consider the other equality-related aspects of the argument for extension, beginning with the public sector duty in the Equality Act.

THE EXTENT OF THE PUBLIC SECTOR DUTY

- 4.53 As to what the section 149 duty requires in this context, case law establishes that the duty is not to achieve the goals specified in section 149 (such as eliminating discrimination against the relevant characteristics) or even to take any particular steps to achieve them. The duty is to have due regard to the need to achieve them. As Elias LJ has emphasised, the issue is “whether as a matter of substance there has been compliance; it is not a tick-box exercise”.⁶³ Guidance explains that regard must be had to the relevant matters before any policy is adopted and, further, that the duty is a continuing one.⁶⁴ There must be a

⁵⁹ Ministry of Justice, *Code of Practice for Victims of Crime*, fn 1. Issued pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004, and in force since 10 December 2013. Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254459/code-of-practice-victims-of-crime.pdf (last visited 15 May 2014).

⁶⁰ Chapter 1 of the Victims’ Code makes provision for victims of crime including those eligible for “enhanced entitlements.” These include victims of hate crime (para 1.8), “persistently targeted” victims (para 1.9) and victims who are vulnerable or intimidated (para 1.10). The Code also contains an explanation of the Special Measures system and other aspects of the criminal justice process.

⁶¹ Such considerations include, for example, whether there are: frequent reports of targeted abuse, harassment or other forms of offending against those with the relevant characteristic; or a history of oppression, persecution, or discriminatory or unfair treatment including by public bodies, for example, bodies within the criminal justice system towards victims of offending with the relevant characteristic. See further the discussion in the paper by Dr J Stanton-Ife on the legal theory underpinning hate crime legislation which accompanied the CP, at paras 201 to 218. Available from: <http://lawcommission.justice.gov.uk/areas/hate-crime.htm>.

⁶² From para 5.60.

⁶³ *R (on the application of Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496, [2012] Eq LR 572 at [30].

⁶⁴ K Monaghan, *Monaghan on Equality Law* (2nd ed 2013) para 16.66. See also paras 11.41 – 11.43 of *Monaghan* regarding the scope of statutory exemptions to ss 29 and 149 of the Equality Act, in relation to the legislative functions of both houses of Parliament.

sufficient evidence base for the policy adopted and there must be engagement and public consultation.⁶⁵

- 4.54 Criminal justice agencies, including the police and CPS, have developed systems and guidance for ensuring that they comply with their obligation under section 149. For example, the CPS has issued an Equality and Diversity Policy.⁶⁶ This explains how the Code for Crown Prosecutors reflects, through its general principles, the need for the CPS to carry out its functions impartially. It states that for hate crime and violence against women, the CPS has developed specific prosecution policies designed to ensure the objective of equality is met.⁶⁷
- 4.55 However, we see the force of the argument that equal treatment in the legislation would contribute towards a clearer, less complex response to hate crime. To assist them in complying with their public sector equality duty, public authorities such as police forces need legislation in this area to be clear. The present system does not help in that regard, in that it treats some protected characteristics differently despite (1) all of them being protected for purposes of hostility-based offending (by the enhanced sentencing system) and (2) there being no obvious justification for the different legislative treatment.
- 4.56 Extending the aggravated offences to cover additional characteristics without regard to whether these offences would operate effectively as a response to hate crime affecting those with the relevant characteristics would produce formal equality but not necessarily lead to equality of treatment. Actual equality of treatment of victims of crime (particularly by the criminal justice system after a hate crime has been reported) is likely to be of more value to those affected by hate crime than mere formal equality. Equality of treatment in practice could only be achieved by: ensuring an equally thorough and robust approach to investigating and prosecuting hostility-based offending across all protected hate crime characteristics; and making the necessary adjustments to ensure that all victims are able to participate effectively and give the best evidence they can.

REPEAL TO ACHIEVE EQUALITY?

- 4.57 Some consultees (including NGOs that support victims of hate crime) suggested abolishing the aggravated offences in order to address the apparent inequality in the treatment of the five characteristics.⁶⁸ Galop were “open to the possibility of equalizing all hate crime sentencing up to the level of aggravated offences or

⁶⁵ Equality and Human Rights Commission, *The essential guide to the public sector equality duty*, vol 1 (2011), p10. Available from: http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf (last visited 15 May 2014).

⁶⁶ Crown Prosecution Service, *Equality and Diversity Statement*. Available from: http://www.cps.gov.uk/publications/equality/equality_policy_statement_may_2011.pdf (last visited 15 May 2014).

⁶⁷ The Code for Crown Prosecutors states (at para 4.12c) that prosecution will be more likely to be required, as being in the public interest, “if the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, gender, disability, age, religious belief, sexual orientation, or gender identity or the suspect demonstrated hostility towards the victim based on any of those characteristics”.

⁶⁸ These consultees included Prof R Taylor, Galop, the Justices’ Clerks Society and South Yorkshire Police. Other consultees alluding to this possibility while not directly endorsing it were: Prof L Moran, Stop Hate UK and the National Aids Trust.

down to the level of section 145/146". Professor Moran argued that if the enhanced sentencing system is capable of providing a sufficient response, the logical consequence is that the aggravated offences are "superfluous" and merely make the legislative response to hate crime unduly complex.

- 4.58 Stop Hate UK said that as long as the aggravated offences remained on the statute book they should apply equally to all five of the characteristics the state considers should be annually monitored for hate crime recording and reporting. The National Aids Trust made the same point.
- 4.59 At the heart of this repeal argument is whether in practical terms the aggravated offences do offer greater protection than an effective, reformed enhanced sentencing system. The key practical distinction between the aggravated offences and other hate crimes dealt with by enhanced sentencing lies in the higher potential sentences for aggravated offences.⁶⁹ However, as we explain elsewhere, sentences for aggravated offences are almost never higher than could have been imposed for the corresponding non-aggravated offence. If this were also the case as regards sentencing for future aggravated offences applying to disability, sexual orientation or transgender hostility, the creation of those new criminal offences would be a purely formal approach to creating equal treatment. In effect, for all practical purposes it would be an unnecessary and redundant measure. We return to this issue below at paragraph 4.114 and following.
- 4.60 However, there is a further aspect to the protection that aggravated offences may offer, beyond the higher potential sentences. An offender convicted of such an offence will have a criminal record showing this, and bear the stigma that such a conviction – with its racial or religious aggravation label – will carry. As we discuss in the next two sections, this "label" has communicative and symbolic effects that may not flow to the same degree from the application of enhanced sentencing. There may also be additional deterrence-related benefits. These aspects of the aggravated offences set them apart from enhanced sentencing. Unless there is some good reason (as to the nature of the offending, its seriousness, its prevalence or otherwise) for the law to provide the further protection that may derive from the "aggravated" label, in relation to racial and religious hostility only, it is unacceptable for the same system not to apply to all five characteristics.

Conclusion

- 4.61 The public should be able to have confidence that hate crime will be taken equally seriously and investigated and prosecuted equally robustly, whichever of the five characteristics is the object of hostility. It is undesirable for the current law to give the impression of a "hierarchy" of victims (the phrase used by some consultees). This impression could contribute to the problem of under-reporting of hate crime.
- 4.62 However, consultees clearly see other factors as contributing to low public confidence and under-reporting: failures to investigate allegations of hostility,

⁶⁹ As is suggested by the statements of Ministers both at the time the CDA offences were introduced, and when the decision was taken to bring disability and sexual orientation into the enhanced sentencing regime but not the aggravated offences regime: see para 4.35 and fn 37 above, and para 4.127 below.

failure to understand the particular challenges faced by transgender, disabled and LGB victims of hate crime and make necessary adjustments to investigation and court processes to take these into account; and the perception of light sentences.⁷⁰

- 4.63 In the context of a decision whether to extend the aggravated offences, the key equality-related question is whether (and, if so, how) any substantive inequality of outcome for LGB, transgender or disabled victims of hate crime results from the fact that aggravated offences apply to the characteristics of race and religion but not of disability, transgender identity or sexual orientation causes. Is the investigation, prosecution or sentencing of hate crime less effective *because of* the different legislative treatment?
- 4.64 If the disparity in legislative treatment is indeed causing or contributing to actual inequality of outcome for victims, this may well be the strongest argument for extension. However, it leaves open several other important equality-related questions: should other characteristics also be protected? If so, should they have the same, or some different, hate crime protection? And on what basis should any future characteristics be selected? We return to these questions in Chapter 5.⁷¹

(2) The symbolic effects of offences carrying an “aggravated” label and higher maximum sentences

- 4.65 In the CP⁷² we discussed the positive effects the creation of specific aggravated offences might have. In particular, we noted the symbolic effect of state denunciation of offending based on hostility due to transgender identity, disability or sexual orientation. New aggravated offences would convey the state’s desire to protect those vulnerable to such crimes and to punish those who commit them. We explained how the enactment of specific offences, with hostility expressly addressed in their “aggravated” label, and carrying higher maximum sentences, could be seen as giving recognition to the particular seriousness of hate crime, the greater culpability of its perpetrators and the greater harms it can cause.
- 4.66 We asked whether the particular features of the aggravated offences meant that they were uniquely able to symbolise this censure of the state and society in relation to offending based on hostility towards the relevant three characteristics. We also asked whether the aggravated offences fulfilled this symbolic function to a greater or lesser degree than the enhanced sentencing system, which already

⁷⁰ In relation to the protection of victims and witnesses, the consistent and transparent application of the Victims’ Code and more training for criminal justice professionals (for example, in disability) have been suggested: see Part 3: Other Comments in the Analysis of Responses for a fuller discussion of consultees’ concerns in these areas. In relation to sentencing, given that the enhanced sentencing regime is the only way that the law currently recognises the gravity and impact of hate crime affecting LGB, transgender and disabled people, we have recommended improvements to its application: see Chapter 3 above.

⁷¹ From para 5.60.

⁷² Paras 3.29 and 3.71 to 3.74.

applied to these characteristics, and whether the reforms we had proposed for that system would render it better able to perform this function.⁷³

- 4.67 Many consultees called for extension of the aggravated offences because, in their view, this was necessary in order to symbolise the state's express recognition of the ordeal suffered by victims, the greater harm caused and the higher level of culpability of hate crime affecting those with any of these three characteristics.⁷⁴
- 4.68 Dr Walters said the enactment of specific offences to address hate crime served an important symbolic function that could not be achieved by sentencing legislation. It did this by :

conveying social disapproval for hate-motivated offences to the wider community.⁷⁵ As such, the law contains a message to society that these conducts will not be tolerated by the state. The significance of symbolic denunciation is that it plays an important role in supporting positive social norms.

- 4.69 Diverse Cymru argued that the symbolic nature and stigma attached to the label of aggravated offences indicates that a modern, fair and just society considers offending involving the demonstration of, or motivation by, hostility to be "particularly indefensible".
- 4.70 Hertfordshire Constabulary considered that extension would "send out the right message to offenders and members of society with the protected characteristics". Essex Police argued that having specific offences based on the grounds of disability, sexual orientation or gender identity would demonstrate to the public the police's recognition of these forms of hate crime and "our commitment to deal with their complaints positively and robustly".

Counter-arguments

EXISTING SENTENCING POWERS ALREADY FULFIL THIS FUNCTION

- 4.71 Some consultees considered the best means of symbolising denunciation of the wrongdoing and the harm hate crime causes is to ensure that the right sentence is available to represent the nature and magnitude of the law-breaking in such cases. They argued that this is achieved through the existing sentencing powers, which already fulfil this function.⁷⁶
- 4.72 Consultees pointed out that the enhanced sentencing regime places a statutory obligation on judges to reflect the greater seriousness of harm and culpability in

⁷³ CP, paras 3.29 to 3.32.

⁷⁴ Dr M Walters, Scope, Mencap, Hertfordshire Constabulary, Diverse Cymru, Royal National Institute of Blind People and Guide Dogs for the Blind made points to this effect.

⁷⁵ Dr Walters here referred to A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007).

⁷⁶ The Council of HM Circuit Judges, the Senior Judiciary, Dr A Wilson, the Society of Legal Scholars and Mr T Devlin (a barrister who prosecutes and defends in hate crime cases). It was also argued by Christian Concern and the Christian Legal Centre that if enhanced sentencing was failing, then more should be done to educate judges and practitioners as to its appropriate use.

cases involving hostility based on one of the relevant characteristics. They also referred to judges' existing powers to enhance sentences in cases where an offence is aggravated by the deliberate targeting of a vulnerable person, or the abuse of power or trust.⁷⁷

SYMBOLIC VALUE WOULD BE UNDERMINED BY EXTENDING FLAWED OFFENCES

- 4.73 The Senior Judiciary were also concerned that extending aggravated offences could have adverse consequences, by "creating offences which are hard to prove and rarely used, ultimately undermining even their symbolic value".⁷⁸

Discussion

- 4.74 It is not possible to accurately predict what symbolic effects would result from any extension of the aggravated offences on grounds of transgender identity, sexual orientation and disability. It is equally impossible to predict whether the symbolic effect of creating new offences would be greater than that derived from other measures or initiatives taken by the state or the criminal justice system to convey condemnation of such conduct. Specifically labelled offences embodying denunciation of a particular aggravating factor may be an effective way to symbolise censure of such offending. Equally, the enactment of mandatory sentencing laws relating to hostility-based offending may also be seen as a symbol of the state's condemnation of hate crime.

- 4.75 Criminal offences should not, we consider, be created principally to fulfil a symbolic purpose if other approaches would be likely to have greater practical benefits. This is all the more so in view of practical and operational problems consultees have identified with the current offences. These problems, which we discuss in detail later,⁷⁹ include:

- (1) the unduly complex nature of the offences;
- (2) the difficulty of proving hostility to the criminal standard;
- (3) confusion over the interaction of aggravated offences with enhanced sentencing in cases where the aggravated offence could have been charged but was not; and
- (4) the risk that, due to lack of sufficient evidence or pressure to accept pleas to non-aggravated offences, charges of the aggravated form of those offences may be dropped or downgraded to secure a conviction.

- 4.76 These problems could result in hostility-related aggravating factors not being clearly reflected and addressed in the course of a prosecution, either in the offence for which the offender is convicted, or at the sentencing stage when the court decides what weight to give to factors that aggravate the seriousness of the

⁷⁷ Under the overarching *Seriousness* sentencing guideline (Sentencing Guidelines Council (2004), *Overarching principles: Seriousness*), available from: http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf (last visited 15 May 2014). See Chapter 3, para 3.25.

⁷⁸ The Law Society Criminal Committee made the same point.

⁷⁹ From para 4.159.

offence. This would diminish or negate the symbolic case for introducing new aggravated offences. This may mean that equal or greater benefits would flow from an improved application of section 146 CJA.

(3) The communicative effects of prosecuting such offences

- 4.77 In the CP we noted that a message is communicated by the specific “label” that attaches to the offence of “racially aggravated criminal damage”.⁸⁰ This label singles out the racial hostility, marking it out as something that makes the offence more serious. When a person is charged with, or convicted of such an offence, it communicates a clear message about the state’s condemnation of such offending. It stigmatises the offender over and above the stigma that would attach simply from a conviction for the corresponding non-aggravated offence.⁸¹
- 4.78 We also asked in the CP whether enhanced sentencing, involving the statement by the judge in open court that the sentence had been increased due to hostility, could have a similar communicative effect. We pointed to the further communicative effect created when sentencing remarks are reported in the media. We noted that the communicative value of the sentencing exercise depends on public understanding of this complex process.
- 4.79 Several consultees considered that the prosecution of aggravated offences had important communicative benefits. Mencap argued that prosecuting aggravated offences committed against people with disabilities would serve to communicate that disability hate crime is taken seriously by the criminal justice system.
- 4.80 Dr Walters doubted whether the same communicative effect resulting from prosecuting aggravated offences could be achieved by judges applying the enhanced sentencing system and communicating their reasons for sentences in court. He said this had less potency and “in most cases the message will be largely lost”.
- 4.81 Professor Moran made a similar point and argued for wider reporting of sentencing remarks in hate crime cases.⁸² Stay Safe East also complained that the application of enhanced sentencing “is rarely publicised in the media, thus missing the opportunity to put a clear message out about hate crime”.⁸³ Mencap noted that summaries of judges’ sentencing remarks should be available to the public as a matter of course, allowing them greater media coverage and giving the public a better understanding of how sentencing decisions are made.

⁸⁰ CP paras 3.29 to 3.32 and 3.71 to 3.74.

⁸¹ The separate (but in some ways closely connected) “fair labelling” aspects of the aggravated offences are discussed from para 4.139 below.

⁸² See also L Moran “Mass-mediated “open justice”: court and judicial reports in the Press in England and Wales” (2014) 34 *Legal Studies* 143, which discusses the representation of courts and the judiciary in press reports and analyses a sample of such reports on 16 February 2014.

⁸³ Prof S Whittle of the transgender campaign group Press for Change made the same point when speaking from the floor at the symposium on 17 September 2013. He added that the lack of coverage or publicity about sentence uplifts means “there is no real awareness of the sentence uplift... It’s not reported in the newspapers, ordinary people don’t know that it’s going to happen.”

Counter-arguments

SENTENCING COULD COMMUNICATE AS EFFECTIVELY

- 4.82 Dr Stanton-Ife⁸⁴ acknowledged the communicative purpose of criminalisation but considered that one of the strongest arguments against extending the aggravated offences was that “doing so would not promise greater communicative gains than would accrue from the sentencing system”. He felt that it was “too early to judge that sentencing is not a sufficient response”. Our proposed reforms to the sentencing system were, he considered, “the best means for declaring and communicating by means of the criminal law that we as a polity do not tolerate criminal conduct based on reasons of hostility towards disabled, gay, lesbian, bisexual and transgender persons”. He added: “While in general prison sentences are currently too high,⁸⁵ the more accurately they are labelled and the more informatively they are communicated to offenders, victims and the public in general, the better.”
- 4.83 The Senior Judiciary considered that, if applied properly, section 146 could have the same (or a stronger) communicative effect, noting that “reports of a judge’s comments made during sentencing are likely to convey the desired message at least as effectively, and perhaps even more effectively, than new aggravated offences”. The Council of HM Circuit Judges agreed.
- 4.84 These comments of course assume that sentencing remarks are in fact conveyed to defendants, victims and the wider public.⁸⁶ As noted above, several consultees said that more needed to be done in this regard. Baljit Ubhey, OBE, believed that published sentencing remarks were capable of expressing the clear message that hate crime is not tolerated, but that more could be done to ensure that they fulfilled this function.⁸⁷ Ms Ubhey noted that the CPS had made progress in this area by reporting in more detail about hate crime prosecutions and their sentencing, but the courts had a bigger part to play in making sure that their sentencing remarks in hate crime cases give sufficient emphasis to the hostility finding.
- 4.85 Several other consultees argued that the existing sentencing powers were capable of communicating the severity of hate crime and its impact on victims and the wider communities they belong to.⁸⁸

Discussion

- 4.86 As is the case in relation to the symbolic benefits of enacting offences, it is difficult to evaluate the relative communicative value of prosecuting new

⁸⁴ Author of the Theory Paper published with the Consultation Paper and available on our website: http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf

⁸⁵ The same view was expressed by Prof P Alldridge at the symposium and by several members of the Birkbeck Gender and Sexuality Group.

⁸⁶ See para 4.81 above.

⁸⁷ Ms Ubhey is the Chief Crown Prosecutor, national CPS hate crime champion and head of CPS London. These remarks were made by Ms Ubhey when addressing the symposium on 17 September 2013.

⁸⁸ Participants at a meeting of the Sandwell Safeguarding Multi-Agency Best Practice Forum on 6 September 2013: similar points were made by Prof R Taylor and Dr A Wilson.

aggravated offences and of prosecuting hate crime using other, existing offences together with a reformed system of enhanced sentencing. It is a matter of speculation whether the communicative gains would be greater for one than the other.

- 4.87 Clearly there is strong communicative potential in the effective application of either aggravated offences or enhanced sentencing. Each system singles out hostility based on a protected characteristic, referring to it specifically as an aggravating feature – that is, one that makes the offence worse. Each enables the court to uplift a sentence to reflect that greater seriousness. In each case the communicative value lies in the message the sentence and accompanying remarks send: to the offender; the victim; those in court; and the wider public if the media reports that a conviction or sentencing process has occurred in which hostility has been expressly recognised and punished.
- 4.88 The communicative function of the criminal law's response to hate crime could, in our view, flow equally effectively from the enhanced sentencing system, particularly if our recommended sentencing reforms were implemented to improve its application. The statement in open court conveys the law's recognition of the seriousness of the offending and its unacceptability, both to the victim and to others who share the victim's protected characteristic and who may themselves have suffered hate crime or been unsure whether to report what they considered a hate-motivated attack. We do not consider that extending the aggravated offences represents the only, or necessarily the best, method of ensuring that the criminal law communicates the seriousness of such offending and the state's and society's censure of it.

(4) The potential deterrent effects of extending the aggravated offences

- 4.89 In the CP we explained that a distinct argument for extending the offences was their potential to deter perpetrators from committing them.
- 4.90 There are two key ways in which criminal offences carrying sanctions (including custodial sentences) could deter.⁸⁹ Deterrence of a direct or specific kind could result from potential perpetrators becoming aware of the offences and perhaps also the sanctions they carry. This could occur, for example, from news coverage of cases where people are prosecuted or sentenced, or from someone known to a potential perpetrator being prosecuted. They would be less inclined to commit the offences because they would not want to incur the sanction or the resulting criminal record. Deterrence could also occur in a less direct way, by bringing about a gradual change in attitudes over time, through the general public awareness that particular offences are enacted and people are prosecuted and sentenced for them.
- 4.91 In the CP, we discussed whether extending the offences could have a greater deterrent effect than the pre-existing equivalent non-aggravated forms of offence

⁸⁹ The deterrent effect of criminal sanctions is difficult, if not impossible, to prove. On deterrence theory generally, see T Brooks, *Punishment* (2012) ch 2. See also, eg, S Levitt, "Juvenile Crime and Punishment" (1998) 106 *Journal of Political Economy* 1156; P Robinson and J Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24 *Oxford Journal of Legal Studies* 173; and *Lanham and Willis* [2008] EWCA Crim 2450, [2009] 1 Cr App R (S) 105.

and the enhanced sentencing system. We pointed out that the law already provides criminal offences that are used in prosecuting hostility-based offending for the characteristics of disability, sexual orientation and transgender identity. In addition, the law also provides the statutory sentencing regime requiring courts to enhance the sentence of any offender proved to have been motivated by, or to have demonstrated, hostility. If criminal offences and the enhanced sentencing system had any deterrent effect, therefore, they would already deter people from this offending.

- 4.92 However, as we explained, the deterrent effects discussed above could theoretically be greater in relation to the aggravated offences: first because they have higher available maximum sentences; and secondly, because they carry a stigmatising label that marks out the perpetrator as having been motivated by, or having demonstrated, hostility based on a personal characteristic.
- 4.93 Although it is in theory possible that higher available maximum sentences and the “aggravated” label could increase any deterrent effect on potential perpetrators, there is no way of proving this. In relation to the more general deterrent effect discussed above, it is also possible that prosecuting aggravated offences might change society’s attitudes towards disabled, transgender and LGB people by reinforcing the state’s commitment to ensuring they are treated with dignity and respect.
- 4.94 Dr Walters thought that extending the aggravated offences would be unlikely to deter potential perpetrators from committing hostility-based offences against disabled, transgender or LGB people.⁹⁰ However, he argued for the more general deterrent effect discussed above. He considered that the creation and prosecution of these extended aggravated offences would have a longer term transformative effect on social norms and attitudes. This would come about by displacing the assumption that offences based on hostility towards these characteristics are justifiable or have the tacit support of the state or society. Dr Walters gave the example of the effect of legislation banning smoking indoors, which changed attitudes towards smoking by displacing or challenging the view that this form of harmful conduct was acceptable.⁹¹
- 4.95 Weston and North Somerset DIAL also argued that the deterrent effect would be a general one, deriving from “legal recognition... that this behaviour is unacceptable”, which would “help to generate a gradual societal shift in attitude”.

Counter-arguments

- 4.96 As discussed above, several consultees doubted whether any direct deterrent effects would be produced from extending the aggravated offences. For example, Independent Academic Research Studies said their workshop participants saw little deterrent potential in higher potential sentences for hate crime.

⁹⁰ Dr Walters referred to studies casting doubt on the direct deterrent effect of hate crime legislation, including L Moran, B Skeggs, P Tyrer, and K Corteen, *Sexuality and the Politics of Violence and Safety* (2004).

⁹¹ Dr Walters made this point at the symposium on 17 September 2013.

- 4.97 Members of Greenwich Association of Disabled People Centre for Independent Living and participants at the Birkbeck Gender and Sexuality Forum meeting⁹² also challenged the assumption that the higher sentences made available by the aggravated offences would have any deterrent effect in relation to hate crime.

Discussion

- 4.98 As we pointed out in the CP⁹³ there is significant doubt over both the direct and the general deterrent effects of criminal offences, their creation, prosecution or punishment. We consider that attributing any direct deterrent effect to extending the aggravated offences would be open to further doubt, in that the conduct involved is already criminal. People who are inclined, for reasons of hostility towards a victim's disability, sexual orientation or transgender identity, to commit one of the offences capable of being aggravated would probably not be deterred from doing so simply because a new criminal offence had been created with a higher potential sentence or an "aggravated" label.
- 4.99 While we see the potential for an indirect or general deterrent effect, we consider that such an effect could only be produced if the offences were widely used to prosecute hate crime affecting the three characteristics, and if this resulted in convictions for the aggravated offences, which were reported on. If the new aggravated offences were not widely used or did not result in convictions, for example due to flaws in their operation or the prosecution difficulties identified by some consultees, any wider deterrent effect would be unlikely.
- 4.100 Furthermore, it is also possible that equivalent changes in public attitudes and potential perpetrators' assumptions could be produced by initiatives short of enacting new criminal offences. These include education, the promotion of diversity and anti-discrimination measures, the effective rehabilitation of hate crime offenders and the removal of barriers to the effective handling hate crime reported by disabled, LGB and transgender people.⁹⁴

(5) Extending the aggravated offences would increase public awareness of hate crime, improve confidence in the criminal justice response and increase reporting

- 4.101 Several consultees⁹⁵ argued that extending the offences could improve public awareness of what constitutes hate crime. It could also increase confidence in the justice system's ability to tackle it. This in turn could encourage more hate crime victims to report offences and more witnesses to come forward. Some consultees cited their own research on hostility-based offending in support of

⁹² Held on 8 August 2013 and attended by around 30 people working in academia and in NGOs across the justice, human rights and disability sectors.

⁹³ Para 3.69.

⁹⁴ See Part 3: Other Comments in the Analysis of Responses.

⁹⁵ HM CPS Inspectorate, Stop Hate UK, UNISON, Stonewall, Victim Support, Essex Police, Northamptonshire Police, Greater Manchester Police, the CPS, Diverse Cymru, Weston and North Somerset DIAL.

their view. These included the National Union of Students,⁹⁶ Galop,⁹⁷ Stonewall,⁹⁸ EHRC,⁹⁹ Mencap,¹⁰⁰ and the Mental Health Foundation.¹⁰¹

- 4.102 Essex Police commented on the “vast increase in the amount of disability hate crime being reported to us”. They explained this as being “partly due to our improved recognition of this type of crime but also our improved links to community groups and their growing confidence in the police”. Essex Police also argued that “having a specific offence based on the grounds of disability, sexual orientation or gender identity would encourage victims to come forward”.

Counter-arguments

- 4.103 Teesside and Hartlepool Magistrates sounded a note of caution about extending the offences to improve public awareness. They said: “It would be folly to dismantle the sentencing landscape, create new aggravating offences or introduce new guidelines simply in the hope the public will attain a greater understanding of the [sentencing] process.”
- 4.104 The Law Society said that if the aggravated offences were ineffective (they referred to difficulties with proof of aggravation or complications for prosecutors in the selection of charges)¹⁰² this could in fact undermine public confidence in the ability of the criminal law to address hate crime.

Discussion

- 4.105 As for raising public confidence in the response to hate crime and dealing with the problem of under-reported hate crime, it is pure speculation whether extending aggravated offences is more likely to succeed than other targeted approaches. It is equally plausible that changes in public confidence and

⁹⁶ National Union of Students, *No Place for Hate: Hate Crimes and Incidents in Further and Higher Education: Disability* (2011), http://www.nus.org.uk/PageFiles/12238/2011_NUS_No_Place_for_Hate_Disability.pdf (last visited 15 May 2014) and *No Place for Hate: : Hate Crimes and Incidents in Further and Higher Education:: Sexual Orientation and Gender Identity* (2011), http://www.nus.org.uk/PageFiles/12238/2011_NUS_No_Place_for_Hate_Full_Report.pdf (last accessed 15 May 2014).

⁹⁷ Galop, *The Hate Crime Report* (2013), <http://www.galop.org.uk/wp-content/uploads/2013/08/The-Hate-Crime-Report-2013.pdf> (last visited 15 May 2014).

⁹⁸ Stonewall, *Homophobic Hate Crime: The Gay British Crime Survey 2013* (2013), available from: http://www.stonewall.org.uk/documents/hate_crime.pdf (last visited 15 May 2014).

⁹⁹ Equality and Human Rights Commission, *Hidden in Plain Sight: Inquiry into Disability-Related Harassment* (2011), <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/> (last visited 15 May 2014) and *Out in the Open: A Manifesto for Change* (2012), <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/out-in-the-open-manifesto-for-change/> (last visited 15 May 2014).

¹⁰⁰ Mencap, *Living in Fear. The Need to Combat Bullying of People with a Learning Disability* (1999).

¹⁰¹ Foundation for People with Learning Disabilities, *Loneliness and Cruelty: People with Learning Disabilities and their Experience of Harassment, Abuse and Related Crime In the Community* (2012), <https://lemonsandcrane.co.uk/home/resources/loneliness.pdf> (last visited 15 May 2014).

¹⁰² These issues are discussed separately below, from paras 4.159 and 4.173.

reporting levels could be achieved by improvements in the police response to hate crime,¹⁰³ and by better use of the enhanced sentencing system, or other initiatives consultees have called for. These include, for example, education and guidance for criminal justice professionals, not only on hate crime-specific matters such as the enhanced sentencing system but also on the challenges facing those with the relevant characteristics when reporting hate crime and giving evidence in court. Several consultees have called for such reforms.¹⁰⁴

- 4.106 The achievements of regional police forces such as Essex Police in improving their response to hostility-based offending by building stronger community links are evidence of what can be achieved short of creating criminal offences. Similarly the work of non-governmental organisations¹⁰⁵ in setting up third party reporting centres and supporting hate crime victims should bring greater confidence and lead to more victims and witnesses reporting hate crime.
- 4.107 This is not to say that we see no argument in principle for the legislative response to hate crime to offer equivalent protection to all characteristics needing protection. As we have explained, there is a need to address the current disparity in legislative treatment. The point we make here is that extending the aggravated offences should not be seen as the only way to achieve improvement in the criminal justice response to hostility-based offending.

(6) The aggravated offences will improve investigative and prosecution approaches

- 4.108 As we reported in Chapter 3, consultees raised several problems in the prosecution of offending involving hostility based on disability, transgender identity or sexual orientation. In particular, they argued that the enhanced sentencing system resulted in less emphasis being placed on the need to investigate allegations of hostility to ensure sufficient evidence was obtained. By contrast, where an aggravated offence was being considered by the police, they were well aware of the need to investigate hostility from the start, so that evidence could be adduced to prove it at trial.
- 4.109 The CPS and others believed that extending the aggravated offences would help to improve the investigation and prosecution of disability, LGB and transgender hate crime.¹⁰⁶ Extending the offences to cover these characteristics would help to raise police awareness of hate crime as it affects those with these characteristics. As a result, the police would rigorously investigate hostility allegations in such

¹⁰³ Several recent reports suggest that this is needed. For example: the Criminal Justice Joint Inspection Report *Living in a Different World* (see fn 2 to Chapter 3 above) pp 3, 4, 26, 27; Mind and Victim Support, *At Risk Yet Dismissed* (2013), pp 29 and following (available from <http://www.victimsupport.org.uk/what-we-do/policy-and-research/reports>, last visited 15 May 2014); Galop, *The Hate Crime Report* (2013) pp 6 to 8 (fn 97 above) and Stonewall, *The Gay British Crime Survey 2013* (2013) pp 20 to 23) (fn 98 above).

¹⁰⁴ See para 1.115 and following and Part 3: Other Comments in the Analysis of Responses.

¹⁰⁵ Several NGOs operate advice and advocacy services for victims of hate crime. Examples include Stop Hate UK, Galop and the Disability Hate Crime Network. The Association of Chief Police Officers offers an on-line reporting service (True Vision), whose website gives a list of organisations that can assist people who wish to report a hate crime. See: http://report-it.org.uk/report_a_hate_crime (last visited 15 May 2014).

¹⁰⁶ The CPS, HM CPS Inspectorate, Worcestershire Safeguarding Adults Board and the Practitioner Alliance for Safeguarding Adults.

cases and prioritise the gathering of evidence to support a finding of hostility. As a further result, the enhanced sentencing system would be used more effectively.

- 4.110 As HM CPS Inspectorate put it, new aggravated offences would bring disability hate crime into the “mainstream” for the police, for whom section 146 CJA was currently “an alien concept” according to their report’s findings.¹⁰⁷ New offences would mean hostility and motivation would be a “point to prove” for the police.¹⁰⁸

Counter-arguments

- 4.111 Thames Valley Police said:

Given the training implications associated with every change in the law it seems illogical to expect the police service, nationally, to introduce a raft of internal training and re-adjustment when existing provisions which are currently available to the judiciary are not being fully utilised.

Discussion

- 4.112 It is impossible to know whether extension of the aggravated offences would have the knock-on benefits of improving police awareness, investigation approaches or the operation of enhanced sentencing in relation to disability, LGB and transgender hate crime, as some have argued.
- 4.113 However, in the CP, we pointed to evidence suggesting that the enhanced sentencing system is not used sufficiently in cases of racial and religious aggravation either, despite having existed alongside aggravated offences since the latter were enacted.¹⁰⁹ Extension of the aggravated offences therefore seems unlikely in itself to result in any substantial improvement. In our view, other measures (including our recommended sentencing reforms)¹¹⁰ are more likely to do so.

(7) The higher maximum sentences available under aggravated offences are needed in practice, albeit rarely

- 4.114 It is a key feature of both the aggravated offences regime and the enhanced sentencing system that they enable sentences to be increased to reflect the aggravating factor of hostility. The main difference between the sentencing models offered lies in the maximum sentences available. For the aggravated offences, substantially higher maximum sentences are available in comparison

¹⁰⁷ Criminal Justice Joint Inspection report, *Living in a Different World* (fn 2 to Chapter 3 above).

¹⁰⁸ Stop Hate UK also considered that new aggravated offences would “have a positive impact on the operation of section 146” for similar reasons, as did Greater Manchester Police, Devon and Cornwall Police and Weston and North Somerset DIAL.

¹⁰⁹ CP para 3.46 and footnote 65.

¹¹⁰ Several consultees have also called for better training at various levels of the criminal justice system, to ensure the system is understood and applied, and for better monitoring. See the Analysis of Responses, Part 3: Other Comments.

with those for the corresponding non-aggravated form of the offence.¹¹¹ For example, the offence of malicious wounding carries a maximum penalty of 5 years, but this is increased to 7 years in the aggravated form. In contrast, under the enhanced sentencing regime, the increase applied by the court to reflect hostility can never exceed the ordinary maximum for that offence (even if it is one of the offences that can be charged as aggravated offences under the CDA).¹¹²

- 4.115 In relation to these offences, therefore, a higher sentence is available for cases of racial and religious aggravation than for cases where the hostility is due to disability, sexual orientation or transgender identity. Nonetheless, as we also explained, sentences actually handed down for the aggravated offences almost never exceed the maximum available for the corresponding non-aggravated form of the offence.¹¹³
- 4.116 As set out in the CP, this difference in maximum penalties available raises the following distinct issues.¹¹⁴ Some LGB, transgender or disabled victims of hostility-based offending might consider that the sentences passed under the enhanced sentencing regime do not adequately reflect the seriousness of the aggravation. There may also be a few occasions when the seriousness of the offence requires a higher sentence than the maximum available (even allowing for the application of enhanced sentencing). Though this is more controversial and difficult to prove, it could also be claimed that the higher maximum sentences could have greater deterrent effects, as we discussed in the last section. Several consultees reflected these points in their responses.
- 4.117 Some consultees pointed to what they considered excessively lenient sentences handed down in cases prosecuted as “hate crime”.¹¹⁵ For example, Greater Manchester Police referred to a “real sense of injustice in the maximum penalties a defendant can receive on conviction”. The Equality and Human Rights Commission also argued that sentences in cases of disability hate crime are too low. In support they referred to the cases discussed in their report, *Hidden in Plain Sight*.¹¹⁶ This led them to argue that “aggravated offences provide punishments which more adequately reflect the hate crime”.
- 4.118 Victim Support said that enhanced sentencing could not provide a sufficient response to hate crime because it “does not increase the available maximum sentence, and thus risks not reflecting or recognising the additional harm caused

¹¹¹ See the table comparing maximum penalties for non-aggravated and aggravated offences in Chapter 2 above at para 2.29.

¹¹² CP para 2.133.

¹¹³ See the CP para 3.98, and the CP Impact Assessment para C.61. See also below from para 4.122.

¹¹⁴ CP paras 3.26 to 3.28.

¹¹⁵ Several consultees referred to the sentence in *Sheard* [2013] EWCA Crim 1161 as an example of undue leniency in the sentencing of disability hate crime. As this was a manslaughter case, the current aggravated offences regime would not have caught it even if it were extended to cover disability. The case is discussed further at paras 4.118 and 4.135 and fn 118 below.

¹¹⁶ Equality and Human Rights Commission, *Hidden in Plain Sight* (2011) (fn 99 above). Part 2 of the report discusses ten cases (at p 21 and following). None of the cases was described as having resulted in a sentence uplift under s 146, although insufficient information was available to establish whether any should.

to the victim”.¹¹⁷ People First advanced a similar argument. Referring to the recent case of *Sheard*¹¹⁸ and also to SCOPE's report, *Getting Away with Murder*,¹¹⁹ they said: “Lenient sentences shake disabled people’s faith in the judiciary and act as a deterrent to reporting disability hate crime and taking court action.” To put this right, in their view, the aggravated offences had to be extended to make higher sentences available for hate crime against people with disabilities.

- 4.119 Whilst they considered that it would rarely be necessary to sentence above the maximum available for the non-aggravated offence, the Justices’ Clerks Society and the CPS said that the higher maximum provided by the aggravated offences might be needed occasionally for hate crime affecting disabled, LGB and transgender people. They referred specifically to offences under sections 4, 4A and 5 of the Public Order Act 1986 and common assault, for which the sentences are relatively low.¹²⁰ We discuss this further from paragraph 4.123 below.

Counter-arguments

- 4.120 The Senior Judiciary argued:

There will be very few occasions indeed, if any, when the maximum sentence for the “basic” offence will not be sufficient to enable the court adequately to reflect the aggravation in question. It is only common assault, where religious or racial aggravation increases the maximum four-fold (from 6 months to 2 years), that any difficulty is conceivably likely to arise.¹²¹ It is unusual in our experience, however, for common assault to attract a sentence at or near the maximum of 6 months where no physical injury is caused. Where there is injury, even only minor, assault occasioning actual bodily harm can be charged, providing a maximum of 5 years. Often common assault is committed in the context of other criminality which can be charged separately, thereby increasing the scope of the court’s sentencing powers.

¹¹⁷ Similar points were made by Merseyside Police and Diverse Cymru.

¹¹⁸ *R v Sheard* [2013] EWCA Crim 1161. D admitted manslaughter of an 18 year-old man and received a custodial sentence of three years and six months. Prosecution counsel asserted for sentencing purposes that D had engaged in “cruel behaviour towards a vulnerable target.” These are aggravating factors under the *Seriousness* guideline (see fn 77 above). When sentencing, the trial Judge did not find this established on the evidence before him at the *Newton* hearing, which (unusually) took place without oral evidence. The Attorney General referred the case for undue leniency, submitting to the Court of Appeal that the papers before the trial Judge contained “ample evidence” of D’s awareness of V’s vulnerability and that bullying and homophobic abuse had taken place. However, the Court of Appeal (Criminal Division) declined to interfere with the sentence, in view of the impossibility of testing these allegations with oral evidence and giving D the opportunity to respond. The Court of Appeal noted that if the Attorney’s submissions on the aggravating factors had been supported by oral evidence, it was likely that the sentence would have been quashed as unduly lenient. The CPS has since revised its guidance on the conduct of *Newton* hearings: see Chapter 2 above, fn 160.

¹¹⁹ Scope, *Disability Hate Crime: Getting Away with Murder* (2008).

¹²⁰ See the table of sentences in Chapter 2 above at para 2.29.

¹²¹ We respond on this point at para 4.124 below.

- 4.121 Thames Valley Police pointed out that average sentences passed for aggravated offences are, in practice, well below the maximum available for the equivalent non-aggravated offences. This indicated that for hostility based on the three additional characteristics, also, the higher maxima offered by the aggravated offences would not be needed. As we discuss below, however, it is not possible to be sure about this based on the evidence available.

Discussion

- 4.122 As we explained in the CP,¹²² while in a few extreme cases the maximum sentence available for a non-aggravated offence may not be sufficient to reflect the full seriousness of the offending in a hostility case, the number of such cases is extremely small. In fact, it is very rare for sentences for aggravated offences to exceed the maximum available even for the equivalent non-aggravated offence.¹²³
- 4.123 As was noted above, the maximum sentences for the sections 4, 4A and 5 Public Order Act 1986 offences and for common assault are fairly low: 6 months (except for section 5 POA, for which the maximum penalty is a £1,000 fine). They extend to 2 years in the “aggravated” forms.¹²⁴
- 4.124 As to whether these higher sentences are needed, a comparative analysis of average sentences handed down for aggravated and the equivalent non-aggravated offences over the period 2008 to 2011 supports the Senior Judiciary’s argument at paragraph 4.120 above. For virtually all the relevant offences, the average sentences handed down were well below the maximum set for the non-aggravated form of the offence. Only for common assault did average sentences marginally exceed the maximum for the non-aggravated offence: 6 months. This only occurred in the years 2010 and 2011, and the excess was of less than a month in each of those years.¹²⁵
- 4.125 It is impossible to know from the data available whether extending the aggravated offences would in fact lead to the imposition of higher sentences for offences driven by hostility towards one of the three relevant characteristics. It is also impossible to know whether these higher sentences would exceed the maximum set for the offences in their non-aggravated form.
- 4.126 Moreover, higher sentences are by no means the most important factor for many hate crime victims.¹²⁶ It is clear from the consultation responses that an equally high, or a higher, value is placed on other matters.¹²⁷

¹²² CP paras 3.26 to 3.28.

¹²³ CP para 3.28 and the CP Impact Assessment para C.61.

¹²⁴ See the table in Chapter 2 above at para 2.29, which compares the penalties for all of the basic and aggravated forms of offences.

¹²⁵ See Appendix C to the CP (Impact Assessment), Table 15.

¹²⁶ CP para 3.26. For example, these would include matters such as effective rehabilitation and re-education of offenders and, where appropriate, alternative, non-custodial disposals.

¹²⁷ See below Chapter 5 from para 5.56, and Part 3: Other Comments in the Analysis of Responses.

- 4.127 It is important to emphasise that the creation of new criminal offences should be confined to situations where a true practical need can be shown and other measures cannot serve the same or a similar purpose.¹²⁸ The record suggests that the principal reason for introducing the aggravated offences was to allow for higher maximum sentences in the most commonly occurring forms of racially aggravated offending.¹²⁹ This is shown, for example, by the explanation provided by the government of the day for not including offences that already carried maximum sentences of life imprisonment, such as murder or malicious wounding contrary to section 20 of the Offences Against the Person Act:

There is nothing to be gained, if there is no increased sentence, in placing the additional burden on the Crown Prosecution Service to meet the racially aggravated test.¹³⁰

- 4.128 However, as discussed above, the evidence suggests that the sentences available for the non-aggravated forms of the offences are in fact sufficient, perhaps more than sufficient, to address the seriousness of hate crime, at least in relation to race and religion.
- 4.129 In conclusion, we do not consider that the higher maximum sentences available are a strong argument in favour of extending the aggravated offences, at least as a practical matter. It may be that other benefits flow from the higher sentences because of the message these send about the state's censure of hate-offending, or because these sentences have some deterrent potential. There is no evidence against which to test this.
- 4.130 Nonetheless, as explained above,¹³¹ principles of fairness and equal treatment make it unsatisfactory that higher potential sentences are available for racial and religious hate crime than for disability, sexual orientation or transgender identity hate crime, unless there is some justification for the distinction. Such justification may, for example, relate to differences in the nature, seriousness or impact of such offending as between the characteristics, but we have seen no evidence for this.

(8) The availability of a challenge to unduly lenient sentences

- 4.131 We explained in the CP¹³² that when an offender is sentenced for any of the aggravated offences, the sentence can be referred by the Attorney General to the Court of Appeal as unduly lenient. By contrast, no sentence for any of the corresponding offences in their non-aggravated form can be referred, even where the offence has been aggravated by hostility due to sexual orientation, transgender identity or disability. No challenge is available even for sentences for potentially very serious offences such as assaults under sections 20 or 47 of the Offences Against the Person Act 1861 (which carry a maximum sentence of 5 years) or criminal damage (maximum sentence 10 years).

¹²⁸ CP paras 3.66 to 3.67.

¹²⁹ See Appendix B to the CP on the history of hate crime legislation, paras B.22 to B.26.

¹³⁰ Alun Michael, *Hansard* (HC), Standing Committee B, 12 May 1998, col 325.

¹³¹ See paras 4.14 to 4.64 above.

¹³² CP paras 3.42 to 3.44, and also in Chapter 2 above at para 2.32.

- 4.132 Some consultees¹³³ referred to the disparity in the availability of a challenge, depending on whether the case involved hostility on grounds of race or religion, or of the other three protected characteristics. For example, Diverse Cymru said:

There is a need to ensure that the Attorney General's power to refer sentences that appear unduly lenient to the Court of Appeal for review should be extended to apply to all cases where sections 145 and 146 have been utilised as an aggravating factor in determining the sentence for an offender. This is due to the fact that case law is an essential component in UK law in relation to prosecuting and sentencing future cases. Given the issues in relation to the application of sections 145 and 146 referenced in the consultation paper, we feel there is a risk that proposals to address problems may have limited success without case law supporting the effective application of sections 145 and 146.

Counter-arguments

- 4.133 The Senior Judiciary did not consider this a serious problem in practice:

We should be surprised if, on examination of the statistics, there have been more than a handful of racially or religiously aggravated offences [under the CDA, sections 28 to 32] which have been referred to the Court of Appeal solely because the element of racial or religious aggravation was not sufficiently marked in the sentence.¹³⁴

Discussion

- 4.134 We have considered the point consultees made about unduly lenient sentence (“ULS”) challenges and their availability for aggravated offence sentences as an argument for extension. We accept that it is important for public confidence in the justice system’s response to hate crime that there be a fair and transparent system in place to challenge what may amount to unduly lenient sentences in appropriately serious cases. However, we do not agree with the implicit suggestion that ULS reviews should be available in every case where enhanced sentencing has been applied. This would not, in any case, provide a means for challenging undue leniency that has occurred by reason of a court *failing* to apply sections 145 or 146 of the CJA at all.
- 4.135 In the course of this project, the sentence in the case of *Sheard*¹³⁵ was referred as unduly lenient. As discussed in the previous section, this case was cited by some consultees in the context of a perceived need for longer sentences as

¹³³ Diverse Cymru, EHRC, the TUC, Bromley Experts by Experience and Inclusion London, Royal National Institute of Blind People and Guide Dogs for the Blind.

¹³⁴ We have examined reported cases and the available statistics: these bear out the point made here, as we discuss at para 4.137 below.

¹³⁵ The offence, to which the defendant had pleaded guilty, was manslaughter, hence its inclusion within the existing undue leniency regime. The defendant did not accept allegations about factual matters which could have affected sentence and these were dealt with at a separate *Newton* hearing. See fn 118 above for further background on the case.

provided by the aggravated offences regime.¹³⁶ This argument aside, the case provides an example of the value of undue leniency challenges in clarifying important aspects of the sentencing process.¹³⁷ In arguing for the sentence of three years and six months for manslaughter to be increased, the Attorney General submitted that the papers before the trial judge had contained evidence of the defendant's awareness of the victim's vulnerability¹³⁸ and that bullying and homophobic abuse had taken place. However, the Court of Appeal declined to interfere with the sentence in view of the impossibility of testing these allegations with oral evidence and allowing the defendant to respond.

- 4.136 The Court also noted that, if the Attorney General's submissions on the aggravating factors had been supported by oral evidence adduced by the Crown at the *Newton* hearing, it was likely that the sentence would have been quashed as unduly lenient. Following *Sheard* the CPS revised its guidance on the conduct of *Newton* hearings. This now states that oral evidence should be called to help the judge to resolve issues of fact that are substantially disputed.¹³⁹
- 4.137 Responding to the Senior Judiciary's comment on the number of aggravated offence sentences referred as unduly lenient, our research indicates that numbers are indeed low. In the period since the aggravated offences were enacted, only three references have been made in relation to sentences for such offences.¹⁴⁰ On average fewer than two requests for undue leniency referrals in such cases are made to the AGO each year.¹⁴¹
- 4.138 We have seen no evidence to show that judges are more likely to be unduly lenient when sentencing cases of racially or religiously aggravated offences, than when sentencing equivalent conduct prosecuted under the non-aggravated form of the offence with hostility on grounds of sexual orientation, transgender identity

¹³⁶ See para 4.118 above. As the charge in *Sheard* was manslaughter, the aggravated offences regime would not have applied in any event. Furthermore, the maximum sentence for manslaughter is life imprisonment.

¹³⁷ Campaigners active in the field of disability and homophobic hate crime, such as Stonewall, Stop Hate UK and Disability Rights UK, organised a petition for the sentence to be referred to the Court of Appeal. The Attorney General decided to grant the request and the sentence was referred.

¹³⁸ There was no evidence that the victim's Asperger's condition was known to the defendant but it was argued that, over the course of a five-hour party, a speech impediment as well as clear signs of "suggestibility" should have indicated his vulnerability.

¹³⁹ CPS Legal Guidance on *Newton* hearings, available from: http://www.cps.gov.uk/legal/l_to_o/newton_hearings/ (last visited 15 May 2014).

¹⁴⁰ We have identified three reports of cases in which the Attorney General's reference submitted that the racial aggravation element of a CDA 1998 offence was deemed to be insufficiently reflected in the sentence. (There were no such referrals relating to religious aggravation.) The cases were: *Donohue*, AG's Ref No 78 of 2006 EWCA Crim 2793, [2007] 1 Cr App R (S) 114; *Sellars, Broad and Matthews*, AG's Refs Nos 86-88 of 2004 [2005] EWCA Crim 527, [2005] 2 Cr App R (S) 91; *Charlton*, AG's Ref No19 of 2004 [2004] EWCA Crim 1239, [2005] 1 Cr App R (S) 18.

¹⁴¹ According to information from the Attorney General's Office, since 2009 there have been between 1 and 2 requests for reference each year, in relation to cases prosecuted under the CDA. Most were assault cases.

or disability proved at sentencing.¹⁴² The distinction between race and religion on the one hand and the other three characteristics on the other may therefore require further consideration when it comes to challenges for undue leniency. We return to this issue in Chapter 5.¹⁴³

(9) The greater “fair labelling” potential of aggravated offences in comparison with enhanced sentencing

- 4.139 We asked in the CP whether the aggravated offences offered distinct benefits relating to aspects of the “fair labelling” requirements of criminal law.¹⁴⁴ We also asked whether these benefits could also be provided by the enhanced sentencing system, if this were reformed in accordance with our proposals.
- 4.140 The underlying concern of fair labelling is that the law should signal the severity of different types of offence, “so as to represent fairly the nature and magnitude of the law-breaking”.¹⁴⁵ Labels are important to describe to the general public the nature of offending behaviour and to draw public attention to the culpability and harm of particular types of conduct. There may also be distinct social arguments for creating separate offences with special labels to indicate that certain aggravating features of offending are taken particularly seriously: the current aggravated offences are a clear example of this.¹⁴⁶
- 4.141 Accurate labelling is also important to differentiate one kind of offending behaviour from another for those working in the criminal justice system. This is particularly important, for example, to ensure sentencing courts and prison and probation staff have the information they need to perform their functions in terms of public protection and effective rehabilitation.¹⁴⁷
- 4.142 There is also a proportionality concern. The offence for which a person is convicted must be seen to be a proportionate response to the law breaking. Accurate description of offence types helps to ensure fair treatment for offenders (making sure they are not labelled with an offence more serious than that which they have committed).
- 4.143 The fair labelling advantages of aggravated offences as distinct from enhanced sentencing were acknowledged by some consultees, including Dr Walters and the Society of Legal Scholars. As explained earlier,¹⁴⁸ several consultees also considered that specific aggravated offences relating to disability, sexual

¹⁴² As we have pointed out (CP para 1.25, CP Impact Assessment para C.71) there is no systematic collection of or reporting on sentencing outcomes in relation to hate crime, except in relation to the aggravated offences under the CDA.

¹⁴³ From para 5.79 below.

¹⁴⁴ CP paras 3.71 to 3.74.

¹⁴⁵ A Ashworth, “The Elasticity of *Mens Rea*” in C Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) pp 45 to 53.

¹⁴⁶ A Ashworth, *Principles of Criminal Law* (6th ed 2009) pp 78 to 80.

¹⁴⁷ See J Chalmers and F Leverick, “Fair Labelling in Criminal Law” (2008) 71 *Modern Law Review* 217. Available from: http://www2.law.ed.ac.uk/file_download/publications/0_1143_fairlabellingincriminallaw.pdf (last visited 15 May 2014).

¹⁴⁸ From paras 4.62 and 4.74.

orientation and transgender identity would have greater communicative and symbolic effects by drawing public attention to the culpability and harm of hate crime affecting these characteristics.

- 4.144 Mencap noted that the “aggravated” label attaching to an offender’s conviction would provide a more accurate way than the application of enhanced sentencing to “identify issues that must be tackled in effective rehabilitation”.¹⁴⁹

Discussion

- 4.145 As we explained in Chapter 3, a conviction for an aggravated offence is recorded on the Police National Computer (PNC), but there is no equivalent process when enhanced sentencing is applied. This leads to an important difference in the type of information available on an offender’s criminal record when they have been convicted of a hostility-based offence. Whereas a records check will show that someone has been convicted of racially aggravated criminal damage, if a similar offence was carried out with hostility proven under section 146 CJA based on the victim’s disability, the record will usually only refer to criminal damage, not the aggravating factor of hostility.¹⁵⁰
- 4.146 This misses an opportunity to ensure that some of the “fair labelling” benefits of aggravated offences discussed above could be achieved in all cases where the court has found that hostility based on one of the five protected characteristics is an aggravating factor, not only those where an aggravated offence was committed. Our recommendation to record the use of enhanced sentencing on the PNC would address this.¹⁵¹
- 4.147 We agree with the comments made by consultees as to the advantages PNC recording would carry in connection with effective rehabilitation and re-education of those convicted of hostility-based offences, and clearer information for courts and prosecutors when assessing character including in bail or sentencing decisions. These can be seen as benefits of fair labelling. However, it is arguable that extending the aggravated offences would carry additional fair labelling advantages for defendants and the general public over and above those that might flow from the PNC recording of enhanced sentencing decisions.

(10) The benefits of a trial of the hostility element

- 4.148 In the CP, we explained that a further advantage of aggravated offences, as compared with enhanced sentencing, might lie in the fact that the tribunal of fact, whether a jury or magistrates, must be satisfied beyond reasonable doubt that

¹⁴⁹ A similar point was made by Scope and by the Royal National Institute of Blind People and Guide Dogs for the Blind in their joint response.

¹⁵⁰ Although it is possible to record the aggravation on the PNC, this is not usually done. Even if it is, this information will only be available to bodies (such as the CPS, prison service and courts) with direct PNC access. It cannot appear automatically on criminal records checks through the Disclosure and Barring Service, however, because aggravation is not one of the details which have been prescribed by statutory instrument. However, on a case-by-case basis, it could be considered for inclusion as part of the additional information that may be included on enhanced criminal records certificates (ECRCs) (see Chapter 2 above, paras 2.115 and 2.116).

¹⁵¹ See Chapter 3 above, paras 3.52 to 3.104.

the defendant committed the aggravated offence.¹⁵² The tribunal must therefore be sure on the evidence that in committing the offence, D was motivated, in whole or in part, by hostility or that D demonstrated hostility. This ensures procedural fairness. The defendant will know before trial that hostility must be proved with evidence and can challenge that evidence at trial.

- 4.149 By contrast, in prosecutions for other offences, evidence of hostility could emerge late in the course of a trial, or only be raised at the sentencing stage to be dealt with as a potential aggravating factor. As this could have a serious impact on the sentence passed, the prosecution will need to call evidence to support the hostility allegation, assuming the defendant contests this. This usually takes place at a *Newton* hearing before the judge alone, without a jury.¹⁵³
- 4.150 Although the defendant must be given fair notice of the hostility allegation and an opportunity to contest it, the decision to challenge this may work unfairness for the defendant in certain cases. This is because, if the challenge fails, the defendant's credit towards a reduced sentence for pleading guilty to the offence itself will be reduced as a result.¹⁵⁴ This could be a disincentive to challenge hostility allegations for sentencing purposes.
- 4.151 The Society of Legal Scholars argued that it would be preferable for the defendant to have the determination of hostility conducted by the tribunal of fact in all cases, given the potential seriousness of the separate hostility allegation and its impact on sentence. They also considered it "undesirable that the right to trial by jury should exist only in relation to the substantive offence and not the aggravation".
- 4.152 Professor Taylor suggested that practitioner and sentencing guidance on the enhanced sentencing system could usefully reinforce the fact that the sentencing tribunal must be satisfied to the criminal standard of proof that hostility was present. He also pointed to case law¹⁵⁵ requiring that adequate notice be given to defendants in any case where hostility allegations are to be made in support of sentence enhancement, for example, at an adjourned hearing.

Discussion

- 4.153 We consider that fairness to defendants facing a possible sentence uplift under section 146 CJA can be ensured by adequately informing them of the hostility allegations in advance of sentencing and giving them a full opportunity to contest the allegations with evidence. As hostility must be established to the criminal standard for purposes of section 146, this should remove the risk of procedural

¹⁵² Approximately 10% of all racially and religiously aggravated offences are heard in the Crown court: *An Overview of Hate Crime in England and Wales* (fn 42 above), Appendix Tables 3.04 and 3.08. There is no data from which a reliable prediction can be made as to whether the proportion of cases heard in the Crown court would differ in relation to disability, transgender identity or sexual orientation related aggravated offences.

¹⁵³ For more detail on the *Newton* process and relevant authorities see paras 2.166 to 2.168 of the CP, and Chapter 2 above at paras 2.89 and 2.90.

¹⁵⁴ Chapter 2 above, para 2.90.

¹⁵⁵ See Chapter 2 above, paras 2.70 and 2.89. See also Prof Taylor's article "The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?" (2014) 13 *Contemporary Issues in Law* 76.

unfairness to the defendant.¹⁵⁶ For this reason we do not agree that where an offence has been tried by a jury, the jury should also be asked to determine hostility for the purpose of sections 146.

- 4.154 Judges frequently make findings of fact at the sentencing stage that have a very significant bearing on defendants' liberty. They are required to do so not just by section 146 of the CJA,¹⁵⁷ but in every sentencing exercise in which they apply the relevant Sentencing Council guidelines, as they are bound by law to do.¹⁵⁸ An obvious example is in drug importation or dealing offences, where the judge's finding of fact as to the level of role played by the defendant will have a significant impact on the custodial term served, even though this is not an element of the offence.¹⁵⁹
- 4.155 Furthermore, as we explain later in this chapter,¹⁶⁰ some practitioners have argued that, in practice, juries may be reluctant to convict defendants for aggravated offences. If a jury chooses to acquit for an aggravated offence but convict for a corresponding non-aggravated offence, there will be no further way to reflect hostility as an aggravating factor at sentencing.¹⁶¹ Therefore if jurors are unwilling to convict for aggravated offences, jury trials are potentially disadvantageous from the victim's viewpoint.
- 4.156 In any event, these considerations only apply to a small proportion of aggravated offence cases (albeit the most serious ones) because around 90% of aggravated offences are tried in the magistrates' courts.¹⁶²

(B) CONSULTATION RESPONSES ARGUING AGAINST EXTENSION

- 4.157 A number of distinct objections were raised by consultees regarding the current aggravated offences and their potential extension. In some cases the arguments stemmed from principled objections to the offences in and of themselves, for example, because a pure sentencing approach was seen as sufficient or preferable. In others the arguments focused on the need to ensure the CDA offences offered the right type of response to hostility-based offending, prior to any extension. Finally, some consultees argued that a wider review was needed

¹⁵⁶ In terms of the possible loss of credit for a guilty plea, the amount of credit lost would depend on the circumstances, but the credit would not be wholly dissipated: Chapter 2 above, para 2.90.

¹⁵⁷ And also by Schedule 21 of the CJA (whereby their finding may determine whether the starting point for a minimum term in a life sentence is 15 years, 30 years or life).

¹⁵⁸ See Chapter 2 above, paras 2.59, 2.86 to 2.87 and 2.96 to 2.99.

¹⁵⁹ Depending on the quantity involved and other factors, the starting point for an offender with a leading role in a dealing operation may be two to three times higher than that for an offender with a lesser role. Sentencing Council, *Drug Offences Definitive Guideline* (2012), available from:
http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_final_%28web%29.pdf (last visited 15 May 2014).

¹⁶⁰ At para 4.175.

¹⁶¹ As explained in Chapter 2 at para 2.64.

¹⁶² See fn 152 above. We are assuming, in the absence of evidence to the contrary, that the proportion would be the same in respect of offending aggravated by hostility on the basis of sexual orientation, disability and transgender identity.

of the offences' effectiveness and legitimacy, prior to any decision being taken to extend them to other characteristics.

4.158 The main arguments advanced by consultees were:

- (1) The current aggravated offences are unduly complex;
- (2) The interaction between aggravated offences and section 145 CJA is also complex and misunderstood;
- (3) Other prosecution difficulties exist;
- (4) The list of offences capable of being aggravated for race and religion may not be appropriate for hostility on grounds of disability, sexual orientation and transgender identity;¹⁶³
- (5) Extending the aggravated offences is not necessary as enhanced sentencing could provide an adequate response;
- (6) A wider review is required before any decision is taken to extend hate crime offences and if so, in what form, and to cover what characteristics.

(1) Current offences are unduly complex

4.159 We referred in our CP to some of the key difficulties that can arise from the hostility test contained in the aggravated offences:

- (a) there is no definition of the term "hostility" in the CDA itself;¹⁶⁴
- (b) there are two distinct ways in which hostility can constitute an aggravation: demonstration or motivation (we called these alternative "limbs" of the hostility test);¹⁶⁵
- (c) confusion can arise as to which limb is relied on where the prosecution does not make this wholly clear;¹⁶⁶ and
- (d) proving motivation in particular can be challenging for prosecutors.¹⁶⁷

4.160 Several consultees with practical experience of aggravated offence cases objected to extending the current offences, in large part because of what they considered to be serious practical difficulties with the current aggravated offences, both in their own right and in combination with enhanced sentencing under section 145 CJA.

¹⁶³ As we point out later, some of the consultees concerned about this issue were not against extending the offences but in favour, so long as the offences were in the correct form to address LGB, transgender and disability hate crime.

¹⁶⁴ CP para 2.13.

¹⁶⁵ CP paras 2.14 to 2.34.

¹⁶⁶ CP paras 2.10 to 2.12.

¹⁶⁷ CP paras 2.32 and 2.33.

- 4.161 The Senior Judiciary were of the view that aggravated offences should not be extended, adding a number of observations about the offences. Their response was also endorsed by the Council of HM Circuit Judges, who deal with aggravated offence prosecutions in the Crown Courts. The Senior Judiciary said:

The distinction between what has to be proved in an offence brought under limb (a) (demonstration of hostility) and limb (b) (motivation by hostility) can be problematic conceptually and evidentially. The distinction is fundamental and has been the subject of several appellate decisions e.g. *G and T v DPP* [2004] EWHC 183 (Admin), (2004) 168 JP 313 and *DPP v M* [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758. But it is not unknown for an indictment to plead both limbs in the same count. This is theoretically possible where the facts of the case satisfy both limbs simultaneously (*Jones v DPP* [2011] 1 WLR 833) but it makes for difficulty and confusion in presenting the case and can lead to highly technical legal arguments.¹⁶⁸

- 4.162 Professor Taylor also expressed unwillingness to see the complexities of the current aggravated offences extended to further characteristics. He has written elsewhere¹⁶⁹ that there are “legal difficulties inherent in the legislation” as a result of the alternative limbs of aggravation. He has argued that extension would be “inappropriate and counterproductive and would only exacerbate existing difficulties...” The Law Society also noted the risk that extended aggravated offences might be ineffective because of these inherent complexities.
- 4.163 In addition, Mr Iqbal Bhana, Deputy Chair of the Government’s Independent Advisory Group on hate crime expressed the concern that little would be gained by extending the aggravated offences in view of the further complexity they would introduce.

Discussion

- 4.164 There is a clear argument that the offences are unduly complex and contain unusual features which cause difficulties in practice: the appellate decisions that we referred to in the CP¹⁷⁰ (as highlighted by the Senior Judiciary) bear this out. These complexities may to some extent account for what some consultees have referred to as a practice of accepting pleas to the non-aggravated form of the offence and dropping aggravated ones, where necessary to obtain a conviction.¹⁷¹
- 4.165 If the problems arise from over-complexity in the hostility test itself, this points against extending the offences in their current form. However, it does not necessarily mean that enhanced sentencing can provide a sufficient solution, because the sentencing regime relies on the same hostility test as the offences.

¹⁶⁸ We discuss these appellate decisions and the difficulties arising from the two alternative ways of establishing hostility in the CP at paras 2.10 to 2.12.

¹⁶⁹ “The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?” (2014) 13 *Contemporary Issues in Law* 76. We discuss this further in Chapter 5 below, from para 5.44.

¹⁷⁰ CP paras 2.13 to 2.34.

¹⁷¹ This is discussed further under “Other prosecution difficulties” from para 4.173 below.

- 4.166 It is important to address this matter to ensure that the law offers an effective response to hate crime in respect of all the five characteristics. The limited evidence available suggests that, even in racial and religious aggravation cases, the use of section 145 CJA is lower than it should be.¹⁷² This system has been in place for as long as the aggravated offences themselves and, accordingly, it is not a question of it not yet having become fully embedded into the criminal justice system (as might arguably be the case for section 146 CJA). It is important to assess whether it is in fact the complexity of the hostility test which is causing any failure in the enhanced sentencing regime.
- 4.167 As we discuss in the next chapter, these matters would benefit from a wider review of the operation and effectiveness of the aggravated offences.

(2) Inter-relationship between offences and section 145 CJA is complex and misunderstood

- 4.168 In the CP we explained that in relation to racial and religious aggravation, if an offence has been prosecuted as an aggravated one but hostility allegations are not proved, there is no opportunity for section 145 to apply at the sentencing stage.
- 4.169 The Senior Judiciary and Professor Taylor were concerned that these already complex offences were made even more complex through the interaction with enhanced sentencing under section 145. There was confusion in the case law and guidance about whether the aggravated offences and the sentencing regime are entirely “mutually exclusive”.¹⁷³ For the Senior Judiciary, this raised a “serious practical issue” which risked “the whole purpose of extending the aggravated offences [being] defeated”.¹⁷⁴
- 4.170 Professor Taylor suggested that, in view of these complexities, it would be preferable to repeal the aggravated offences and focus on improving the enhanced sentencing system.¹⁷⁵

Discussion

- 4.171 The CDA originally introduced the aggravated offences and the statutory enhanced sentencing regime as a single package.¹⁷⁶ However, the enhanced sentencing provisions were twice repealed and re-enacted elsewhere as part of sentencing consolidation exercises; first they were moved to the Powers of Criminal Courts (Sentencing) Act 2000,¹⁷⁷ then they became section 145 of the

¹⁷² Apparent under-use of s 145 powers is evidenced in Crown Prosecution Service, *Anti-Muslim Hate Crime: Learning from casework* (2012) para 5.6. None of the cases within a sample of 76 religiously aggravated hate crimes made reference to sentence uplift in accordance with s 145.

¹⁷³ This point is explained in detail in Chapter 2 above, from para 2.65.

¹⁷⁴ The Council of HM Circuit Judges agreed with this response.

¹⁷⁵ As we explained in Chapter 3 above at para 3.43, a new Sentencing Council guideline could assist in providing the necessary clarification. A wider review into the operation of the current “combined” regime could examine the extent of the problem in practice.

¹⁷⁶ The offences were set out at CDA ss 29 to 32; s 82 mandated the use of enhanced sentencing for all other offences in which racial hostility was found.

¹⁷⁷ Section 153.

CJA.¹⁷⁸ For practitioners, this may obscure the fact that this system was conceived as a single regime to ensure sentences in all cases aggravated by racial hostility were enhanced to reflect the greater seriousness of such cases.

- 4.172 As to the degree of mutual exclusivity between the two parts of the system, the authorities on this point are only of limited assistance.¹⁷⁹ Elsewhere in this report we have suggested that clearer practitioner and sentencing guidance could go some way to address the confusion on this matter.¹⁸⁰

(3) Other prosecution difficulties

- 4.173 The Senior Judiciary, with whom the Council of HM Circuit Judges agreed, described the aggravated offences as “surprisingly complex to interpret and apply [and] notoriously difficult to litigate”.

- 4.174 The Law Society said:

There is also a risk that the extended aggravated offences will be ineffective, perhaps because of difficulties with proof of aggravation or complications for prosecutors in the selection of charges, which may undermine confidence in the ability of the criminal law to address hate crime.

- 4.175 The Senior Judiciary and some practitioners argued that in practice, juries are reluctant to convict defendants for aggravated offences and defendants are reluctant to plead to them.¹⁸¹ This results in the hostility element going unrecognised, as the jury convicts of the non-aggravated offence only and sentence enhancement for hostility is then not possible.¹⁸² The Senior Judiciary noted that when this results in “apparently unjust acquittals [it] makes the situation even worse for the complainant”.
- 4.176 It was also argued that defendants are rarely prepared to plead to aggravated offences and do not admit to racial or religious hostility as a motivating factor

¹⁷⁸ In the meantime, religious aggravation had been added to both the aggravated offences and enhanced sentencing provisions by the Anti-terrorism, Crime and Security Act 2001. See Appendix B to the CP at para B.263, and the Explanatory Note to the Criminal Justice Act 2003, [6] and [53].

¹⁷⁹ The relevant authorities are *McGillivray* [2005] EWCA Crim 604, [2005] Cr App R (S) 60 and *O’Callaghan* [2005] EWCA Crim 317, [2005] 2 Cr App R (S) 514. See our detailed discussion in Chapter 2 at paras 2.65 to 2.70 and Chapter 3 at paras 3.43 to 3.44.

¹⁸⁰ Chapter 3 above at para 3.43.

¹⁸¹ The response of the Senior Judiciary was endorsed by the Council of HM Circuit Judges. The practitioners making the same point about juries included Mr T Devlin and other barristers at Furnival Chambers, who provided several examples to us of cases in which juries had acquitted of aggravated offences. One included a road rage incident in which the defendant had beaten up the other driver and in the process called him a “white c**t”: the judge ordered an alternative charge of (non-aggravated) assault occasioning actual bodily harm to be left for the jury to decide. The jury convicted of that charge and acquitted of the racially aggravated one. Several similar examples were provided. In some, defendants were acquitted of all charges when judges did not direct juries that they could find guilt in relation to the non-aggravated offences on the indictment instead.

¹⁸² As explained at para 4.169 above. Consultees making this point included Mr T Devlin, and other practitioners.

during investigations. Defendants often call character witnesses of the same racial group as the victim to cast doubt on any racist motive.¹⁸³

4.177 At our symposium on 17 September 2013,¹⁸⁴ the President of the Justices' Clerks Society, Mr Graham Hooper, pointed to the difficulty in proving hostility with sufficient evidence, coupled with defendants' reluctance to admit to aggravated offences. He said these factors often lead to prosecutors having to accept a plea to the non-aggravated offence to secure a conviction.¹⁸⁵

4.178 A risk was also identified by some consultees of aggravated offences being dropped or downgraded to non-aggravated offences, despite CPS policy being explicitly against aggravated offences being dropped solely for reasons of expediency.¹⁸⁶ Northamptonshire Police said:

For our victims it is important to them that the hate element is recognised. The CPS lawyers do not appear to take this into consideration when bargaining and often look to drop the aggravated side as it is easier to get a prosecution if the defendant won't admit it.

4.179 Stonewall also said that "anecdotal evidence suggests that plea bargaining...can lead to the hostility element being dropped and the offender being prosecuted for the basic offence only".

4.180 On the other hand, some practitioners said that in their experience of defending clients against aggravated offence charges, the above CPS policy is very strictly adhered to by prosecutors. A solicitor from Freemans¹⁸⁷ noted that, based on her experience in defending clients against aggravated offence charges, plea deals are only made where evidence of the hostility element is weak but there is strong evidence in support of the basic offence. Mr T Devlin, a barrister who both prosecutes and defends such cases, agreed.¹⁸⁸

Discussion

4.181 There is inherent complexity both in the present form of aggravated offences and their interaction with enhanced sentencing.

¹⁸³ Mr T Devlin, Senior Judiciary, the Council of HM Circuit Judges.

¹⁸⁴ See Chapter 1 above, para 1.24.

¹⁸⁵ Responding to the point, Arwel Jones of the CPS emphasised that the guidance is clear on accepting pleas to lesser charges, stating that this can never be done for reasons of "expediency." See further CP paras 2.42 to 2.44. The CPS guidance on prosecution of aggravated offences also says that one reason for accepting a plea might be a lack of evidence strong enough to support hostility: see <http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html#a30> (last visited 15 May 2014).

¹⁸⁶ Victim Support, Justices' Clerks Society, the Senior Judiciary, Northamptonshire Police, Stonewall.

¹⁸⁷ Speaking from the floor at the symposium.

¹⁸⁸ Mr Devlin and other barristers from Furnival Chambers have provided examples of cases they have appeared in to illustrate prosecutors' reluctance to accept pleas to non-aggravated forms of offence. In one case a plea was accepted to an aggravated s 5 POA offence in preference to one for a non-aggravated s 4 POA offence, despite the former carrying a maximum sentence of a fine of £2,500, whereas the s 4 offence carried a maximum custodial sentence of 6 months.

4.182 If this complexity and the other prosecution difficulties identified above are causing aggravated offence cases to fail or be seen by prosecutors as likely to fail, this needs to be examined in greater depth prior to any extension of the current system.

4.183 A recently published report provides detailed information on racial and religious aggravated offence prosecutions over the period 2002 to 2012.¹⁸⁹ The report explains:

Between the initial hearing at the magistrates' court and the first hearing at the Crown Court, the prosecuting authority (CPS) may decide the initial charge is incorrect and change it to another, lesser offence. This is known as downgrading. At any stage, the defendant can plead guilty to this lesser charge, be found guilty by a jury or be acquitted.

4.184 If aggravated offence charges are being downgraded or dropped to lesser, non-aggravated offences as some consultees have stated, this may be occurring in part because of the offences' complexity. It may also be due to the fact that in most hate crime cases, alternative charges are laid, one for the basic and one for the aggravated form of the offence.¹⁹⁰

4.185 There may be ways to simplify the structure of the offences and the hostility test they (and the enhanced sentencing regime) contain, but still to ensure that they achieve their objectives. However, it fell outside the scope of the current project to propose any change to the core elements of the current offences. We return to this in Chapter 5.

(4) The offences capable of being aggravated may require reconsideration for hostility based on disability, sexual orientation and transgender identity

4.186 We discussed in Chapter 3 of the CP¹⁹¹ that the available evidence does not provide a clear picture of the types of offence committed where hostility based on disability, sexual orientation or transgender identity is an aggravating factor. What evidence there was suggested that disability hate crime, in particular, frequently involved offences not covered by the list of offences that can be aggravated.

4.187 Several consultees queried whether the current list of offences was sufficient to deal with hostility-based offending involving the three relevant characteristics. In particular, the examples of financial crime and sexual offences (which are not on the list) were highlighted as occurring more commonly in relation to the three characteristics than was the case for racial and religious hate crime.

4.188 The EHRC also referred to emerging evidence that the types of crimes disabled victims of hate crime experience are different from those experienced by other hate crime victims. Others raised the same point with regard to anti-LGB and

¹⁸⁹ Home Office et al, *An Overview of Hate Crime in England and Wales* (fn 42 above).

¹⁹⁰ As we explained in the CP at paras 2.42 to 2.45, the use of alternative charges reflects CPS guidance on prosecuting racial and religious hate crime. It is intended to deal with the problem of magistrates not being permitted to return alternative verdicts for lesser charges not specified in the information.

¹⁹¹ CP from para 3.8.

transgender hate crime.¹⁹² Professor Moran referred to “sexual assaults and rape in particular [which] are one form of violence more likely to be experienced by lesbians and trans people”. This point was echoed by Galop who said they frequently dealt with cases of transphobic sexual assaults and homophobic robberies of gay men.

- 4.189 Some consultees argued that the list of offences capable of being aggravated should be reviewed to ensure all the necessary offences were included.¹⁹³ We return to this point in Chapter 5.

Discussion

- 4.190 We accept that sexual and financial offences, for example, could be committed with a hostility motive, yet such offences cannot be aggravated under the CDA.
- 4.191 Reports and the evidence of our consultees also suggest that the internet and social media are increasingly being used to abuse, harass or threaten individuals because of their transgender status, sexual orientation, or disability.¹⁹⁴ In some instances, these cases amount to criminal conduct capable of being charged as aggravated public order offences. Some of the conduct would not be capable of being prosecuted in that way and would be prosecuted as offences under section 1 of the Malicious Communications Act 1988 or section 127(1) of the Communications Act 2003, neither of which can currently be aggravated.
- 4.192 It would be important prior to any extension of the aggravated offences to examine the evidence on the nature and prevalence of hate-based offending against the three characteristics.¹⁹⁵ This may suggest that the offences which can be aggravated should be reselected.
- 4.193 More broadly, it is clearly important to ensure that the offences commonly reported to have been committed in a hate or hostility context are capable of being charged as aggravated, whether in the racial or religious context or in relation to the other three protected characteristics.¹⁹⁶

(5) Extending the aggravated offences is not necessary as enhanced sentencing could provide an adequate response

- 4.194 As we have explained, a majority of consultees considered that the enhanced sentencing regime (if reformed as provisionally proposed) could provide an adequate response to hostility-based offending against people with any of the

¹⁹² Galop, Prof L Moran.

¹⁹³ The EHRC, S Taylor CBE, Victim Support, the Society of Legal Scholars, Scope, the TUC, Disability First, Jane Healy, CPS London Scrutiny and Involvement Panel, Dr A Dimopoulos and Action Disability Kensington & Chelsea.

¹⁹⁴ Consultees referring to this problem in their responses or reports included Stonewall, Galop, Trans Media Watch. Supt P Giannasi also raised the point in his presentation on the stirring up offences at the symposium on 17 September 2013.

¹⁹⁵ In relation to empirical evidence of the nature and prevalence of hostility-based offending against those with the relevant characteristics we addressed this at paras 3.7 to 3.17 of the CP. More evidence has become available since the CP was published (in particular, *An Overview of Hate Crime in England and Wales* (fn 42 above), and the reports cited at fns 96, 97, 98, and 103 above).

¹⁹⁶ As discussed further in Chapter 5 below, from para 5.28.

three characteristics.¹⁹⁷ Of the consultees who were against extending aggravated offences on this basis, the reasons they gave included:

- (1) Flexibility: all offences can be aggravated for hostility, not just those listed in the CDA.
- (2) Simplicity: there is no need for prosecutors to choose whether to charge an aggravated offence or not and no need for alternative charges to be laid.
- (3) Transparency: the judge decides the effect hostility should have on the sentence to be passed, based on the facts that have been proved with evidence in the course of trial. This is then explained in open court.
- (4) The sentencing model is adequate in practice, both as to length and as to symbolic and communicative purpose.
- (5) Economy of law reform is achieved.
- (6) A pure sentencing approach avoids the risk of aggravation element being downgraded or dropped, resulting in hostility not being addressed at all in the sentence.
- (7) This also avoids other prosecution risks identified with respect to aggravated offences.¹⁹⁸

(6) A wider review is required before any decision is taken to extend hate crime offences and if so, in what form, and to what characteristics

4.195 As is clear from the foregoing analysis of responses, both principled and practical issues were raised by consultees in their evaluation of the case for extending the current aggravated offences and of the alternative approach we presented, of having a purely sentencing-based response to the problem. Many consultees expressly called for a wider review than that which we were asked to carry out on this project. They said this was needed in order to:

- (1) inform an assessment of the case for extension of offences or relying on enhanced sentencing;¹⁹⁹
- (2) establish the basis on which characteristics are selected for protection under the aggravated offence regime,²⁰⁰

¹⁹⁷ See para 4.5 above.

¹⁹⁸ For example, magistrates having insufficient evidence of hostility presented to them, and juries being reluctant to convict for aggravated offences. See paras 4.173 to 4.180 above.

¹⁹⁹ These included Prof L Moran, National Black Crown Prosecution Association, Stonewall, North Yorkshire Police, the Equality and Human Rights Commission, Diverse Cymru, Barnsley LGBT Forum, Action Disability Kensington and Chelsea, Practitioner Alliance for Safeguarding Adults and Worcestershire Safeguarding Adults Board. In addition some of those who attended our symposium raised similar points, including Paul Carswell of the Crown Prosecution Service.

²⁰⁰ The Society of Legal Scholars.

- (3) ensure that offences in the right form are enacted (in relation to sexual orientation, disability and transgender identity);²⁰¹ and
 - (4) address problems with the present offences' structure and operation.²⁰²
- 4.196 Some consultees argued for deferring the decision to extend the offences until more information was available on the effectiveness of the race and religion hate crime model.

CONCLUSION

- 4.197 We have addressed the key arguments raised by consultees in favour of, and against, extending the current form of aggravated offences to cover hostility based on sexual orientation, transgender identity and disability.
- 4.198 In our view, most if not all of the benefits that have been argued for the aggravated offences could flow from a reformed and properly applied enhanced sentencing system. That regime reflects the will of Parliament to single out hostility as an aggravating factor and to sentence hostility-based offending more severely. Published sentencing remarks are capable of conveying, through the court, the state's and society's condemnation of hate crime and of recognising the severe harm it causes to victims and wider communities. In practice, the higher maximum sentences that aggravated offences make available appear not to be needed except in a very small number of racially or religiously aggravated common assault cases. There is no evidence to suggest the case would differ as regards disability, transgender identity or sexual orientation.
- 4.199 A majority of consultees were in favour of extending the aggravated offences, although this was not supported by as significant a proportion as our proposed sentencing reforms.
- 4.200 By far the most common ground for supporting extension was the view that it was inherently unfair and discriminatory not to have aggravated offences in place for hostility-based offending on grounds of transgender identity, sexual orientation and disability, when they exist for hostility on the grounds of race and religion. In our view the most compelling point made in this argument was that: (1) legislation has already been passed to recognise and punish such hostility-based offending: section 146 of the Criminal Justice Act 2003; (2) this statutory sentencing requirement mirrors that in place for racial and religious aggravation under section 145 of that Act; and (3) the wrong message is sent about the seriousness with which such offending is taken and the severity of its impact, if offences attaching a specific aggravated label and potentially higher sentences only exist in relation to two of the five statutorily protected hate crime characteristics.
- 4.201 We consider that this would be a sufficiently compelling argument for immediate extension of the offences, were it not for the serious concerns that have been

²⁰¹ In addition some consultees have argued that the list of basic offences contained in the CDA may not have been sufficiently comprehensive, as discussed above from para 4.189 and below in Chapter 5 at paras 5.29 to 5.31.

²⁰² These included the Society of Legal Scholars, the Senior Judiciary, the Council of HM Circuit Judges, Prof R Taylor, Prof F Stark, Mr T Devlin. Their arguments are set out above at paras 4.159 to 4.185.

raised about the current aggravated offences. These suggest that complexities in the offences and difficulties in their use may be causing aggravated offence prosecutions to fail. These complexities may also be having adverse effects on the operation of enhanced sentencing given that the two systems share the same hostility test.

- 4.202 In addition to concerns about the current aggravated offences, some fundamental questions have been asked by consultees about the principled basis for creating aggravated offences and for selecting characteristics for hate crime protection. We believe that these questions also require deeper consideration as part of a wider review, prior to any decision to extend the current offences.
- 4.203 In view of these concerns, we believe that the interests of disabled, LGB and transgender victims of hate crime would be better served by conducting the full-scale review that we recommend in the next chapter. This should take place before any decision is taken as to whether to extend the offences. Extending prior to such review would, in our view, represent a less valuable reform option and one that would have limited benefits for victims of hate crime and some potential adverse consequences.

CHAPTER 5

THE NEED FOR A FULL-SCALE REVIEW

- 5.1 This chapter explains why we consider that what is now required is a full-scale review of the operation of the aggravated offences under the Crime and Disorder Act 1998 (“CDA”). The review required is wider in scope than the project envisaged by our terms of reference. We have concluded that it is preferable to conduct this review prior to extending the aggravated offence regime to any additional characteristics.
- 5.2 The CP did not itself discuss the need for such a review. Nonetheless, arguments and evidence in support of it were advanced by a wide range of consultees, irrespective of whether they were in favour of, or against, extending the aggravated offences under the CDA. In particular, several stakeholders, consultees and other experts considered that our terms of reference were too narrow to enable a fully informed decision to be taken on whether to extend the current offences and, if so, in what form and on what grounds of principle this should be done.¹
- 5.3 In what follows, after providing a brief background, we explain why such a review is now necessary. We then set out in general terms what such a review might address.² We conclude with our recommendation for a wider review.

INTRODUCTION

- 5.4 As explained in Chapter 1 of the CP,³ our terms of reference required us to examine whether the aggravated offences should be extended so that they would apply to all five characteristics currently recognised in one context or another by the hate crime regime: race, religion, sexual orientation, disability and transgender identity.
- 5.5 We were not asked to examine the underlying rationale for the existing offences,⁴ or consider whether they should be amended prior to extension, or repealed rather than extended. We were not asked to consider whether the current legislation should be extended to include characteristics other than the five currently recognised ones. Our work was limited to analysing the form and operation of the existing offences insofar as was necessary to assess whether they should be extended.

¹ See para 5.6 and following, below.

² At para 5.90 and following, below.

³ CP paras 1.6 to 1.8.

⁴ The separate Theory Paper by Dr John Stanton-Ife, which accompanied the CP, considered the underlying arguments legitimising criminalisation in the context of hate crime, with a specific focus on the proposed extensions under review in this project: available from http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf. In addition, Appendix B to the CP set out the historical background to the legislation and the key arguments made for and against the introduction of these offences: available from http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_appendix-b.pdf.

- 5.6 However, some consultees argued that a broader project would have been preferable to the one we were asked to undertake. Some wished to see a wider review, or at least additional data, in order to inform an assessment of the case for extending the offences or relying on enhanced sentencing.⁵ Others called for a wider review in order to ensure that any offences enacted were in the right form or that problems with the operation and structure of the present offences be addressed.⁶ Yet others sought a wider review to evaluate which characteristics ought to be protected and on what principled basis characteristics were selected for this special protection.⁷ Some wanted a fresh evaluation of the “doctrinal legitimacy” of the aggravated offences,⁸ or of the value of higher sentences for hate crime, of the effectiveness of these as compared to other approaches.⁹ Others wanted consideration of the case for abolishing the offences.¹⁰
- 5.7 We consider that these issues need further examination, as part of a full-scale review of the criminal justice response to hate crime.

WHY IS A WIDER REVIEW NEEDED?

- 5.8 It is clear from the concerns raised by consultees, as described in Chapter 4, that the current aggravated offence scheme may not be functioning as well as it should be in the prosecution of racially and religiously aggravated offences. Several consultees with practical experience of aggravated offence prosecutions have rejected the argument for extending the offences because of their complexity and difficulties in their prosecution.¹¹
- 5.9 If there are such serious problems with the existing offences, it would be unwise to extend that system to any further characteristics. It would also be unacceptable to leave in place what may prove to be an unsatisfactory system for dealing with racial and religious hate crime. Instead, the matters that consultees have raised should be investigated.
- 5.10 If the conclusion of a wider review is that changes are needed to the structure of the existing aggravated offences to make them more effective, these changes should be implemented prior to extension of the regime to any other characteristics. Depending on the outcome of this wider review, it may be

⁵ These included Prof L Moran, National Black Crown Prosecution Association, Stonewall, North Yorkshire Police, Ms R Grootendorst, the Equality and Human Rights Commission, Diverse Cymru, Barnsley LGBT Forum, Action Disability Kensington and Chelsea, Practitioner Alliance for Safeguarding Adults and Worcestershire Safeguarding Adults Board. In addition some of those who attended our symposium raised similar points, including Paul Carswell of the Crown Prosecution Service.

⁶ These included the Society of Legal Scholars, the Senior Judiciary, the Council of HM Circuit Judges, Prof R Taylor, Prof F Stark, Mr T Devlin, Scope, Disability First, the TUC, and S Taylor CBE.

⁷ Society of Legal Scholars.

⁸ Society of Legal Scholars.

⁹ Birkbeck Gender and Sexuality Group forum.

¹⁰ Either due to objections to the offences on principle, for practical reasons, or because of the inequality of treating race and religion differently to the other three characteristics. These consultees included Prof R Taylor, I Hare, the Council of HM Circuit Judges, Galop, South Yorkshire Police, the Justices’ Clerks Society, and the Society of Legal Scholars.

¹¹ See paras 4.159 and following above.

necessary to simplify or alter the elements of the offence, for example in relation to the “hostility” test. The wider review may decide that the list of offences that can be prosecuted as aggravated needs revision, either in respect of racial and religious hate crime, or before any extension to other protected characteristics. If the review suggests that what is required is additional guidance on the use of the offences, this can be produced and an assessment then made as to whether the operational problems consultees identified have been resolved.

Problems with the existing aggravated offences

5.11 In summary, the following problems have been raised by consultees:

- (1) The offences in sections 28 to 32 of the CDA are too complex;¹²
- (2) The way the aggravated offences inter-relate with the enhanced sentencing provisions is too complex;¹³
- (3) Other difficulties exist in prosecuting the offences;¹⁴
- (4) Prosecutions for aggravated offence cases may be failing as a result of these problems rather than for a lack of evidence;¹⁵
- (5) The list of offences capable of being prosecuted as aggravated ones under the CDA needs to be reviewed to ensure it is appropriate to reflect criminal conduct involving hostility based on:
 - (a) race and religion;¹⁶ and
 - (b) disability, transgender identity, or sexual orientation.¹⁷

Deeper questions of principle requiring consideration

5.12 A wider review could also provide an opportunity to consider some of the deeper questions of principle. Some consultees raised concerns about features of the aggravated offences, the justification for such offences and their value in the overall response to hate crime. A review could also address important questions of principle about the aims of hate crime legislation and which characteristics should be given this special protection. It would provide an opportunity to debate

¹² For example there is no definition of “hostility”; the dual “motivation”/“demonstration” test causes confusion; motivation is difficult to prove.

¹³ There is confusion over the degree of “mutual exclusivity” between the two systems. See Chapter 4, paras 4.168 to 4.172 above and Chapter 5, para 5.17 below.

¹⁴ The choice prosecutors must make as to whether to charge an aggravated offence or not; the risk the aggravated offence will be downgraded or dropped to secure a conviction; the risk that jurors may be reluctant to convict, particularly where an alternative basic offence is offered; the risk that if aggravated offences are charged but unsuccessful there will be no opportunity to enhance the sentence to reflect the hostility. See paras Chapter 4, paras 4.168 to 4.170 and 4.173 to 4.185 above, and Chapter 5 paras 5.18 to 5.20 below.

¹⁵ The official statistics show that conviction ratios for most types of aggravated offence are significantly lower than for the corresponding “basic” offences. See Chapter 5, paras 5.21 to 5.27 below.

¹⁶ See Chapter 5, paras 5.29 to 5.31 below.

¹⁷ See Chapter 5, paras 5.32 to 5.35 below.

the case for repealing the aggravated offences, as some consultees have recommended.¹⁸

5.13 A number of deeper questions have been asked by consultees:

- (1) What is the value of specific “hostility”-based aggravated offences and sentencing provisions?
- (2) Is there any justification, or need, to provide higher maximum sentences for aggravated offences?
- (3) What is the principled basis for selecting characteristics for protection under hate crime legislation?
- (4) What role, if any, should enhanced sentencing have in a hate crime regime?
- (5) Should there be greater scope for unduly lenient sentence challenges in cases where enhanced sentencing is applicable?

5.14 We now examine in more detail the arguments for a wider review.

PROBLEMS WITH THE EXISTING AGGRAVATED OFFENCES

5.15 Problems with the existing aggravated offences have been highlighted by some consultees, as we set out in Chapter 4.¹⁹ Further examination of these problems is necessary to assess whether the law is responding effectively to racial and religious hate crimes. Such an investigation would reveal whether it was safe to extend the existing offences without reproducing the problems. In summary, the following concerns have been expressed.

(1) The offences in sections 28 to 32 CDA are too complex

5.16 Consultees highlighted the complexity of the offences, especially in the “hostility” test, which can give rise to confusion about which “limb” of hostility (demonstration or motivation) the prosecution relies on.²⁰

(2) The way the aggravated offences inter-relate with enhanced sentencing is too complex

5.17 Further complexity was identified in the system applicable to racial and religious hostility. The aggravated offences and enhanced sentencing operate as a combined system, but there was a lack of clarity as to whether they are “mutually

¹⁸ Para 5.49 and following, below. The option of repeal was advocated or discussed by Dr F Stark, Prof P Aldridge, Mr I Hare, Mr J Troke, the Justices’ Clerks Society, South Yorkshire Police, Galop, Prof L Moran, Stop Hate UK, the Society of Legal Scholars and Prof R Taylor in their responses.

¹⁹ Chapter 4 above, paras 4.159 and 4.185.

²⁰ Senior Judiciary and the Council of HM Circuit Judges (representing the judges who deal with aggravated offences in the Crown Courts). Chapter 4 above, paras 4.159 to 4.163.

exclusive”.²¹ This was seen as leading to an unacceptable risk that in some cases the potential to reflect hostility in a higher sentence was being lost.

(3) Other difficulties exist in prosecuting the offences

- 5.18 Difficulties were reported including proving hostility to the necessary standard, and particularly proving a hostility motivation, given that defendants do not admit to such motivation during investigations and often call character witnesses of the same racial group as the complainant to cast doubt on any racist motive.²²
- 5.19 Some consultees referred to the reluctance of juries to convict because they do not consider words or gestures used in the heat of the moment to justify ascribing the “racist” label to an offender.²³
- 5.20 A further possible problem identified by consultees was that of charges having to be downgraded or dropped,²⁴ as a result of defendants being prepared to plead only to the non-aggravated form of the offence.²⁵

(4) Prosecutions for aggravated offences may be failing as a result of the above problems and not for a lack of evidence

- 5.21 Figures taken from the CPS annual hate crime report for 2011-12 indicated that at least 85% of cases flagged as racial and religious hate crime by the CPS involved an offence which was capable of being charged as an aggravated offence under the CDA.²⁶
- 5.22 A recently published report provides statistics on racially and religiously aggravated offence cases prosecuted and sentenced, over the period 2002 to 2012.²⁷ The data in this report show that conviction ratios²⁸ for most types of aggravated offence have been significantly lower than for the corresponding non-

²¹ South Yorkshire Police, Senior Judiciary, the Council of HM Circuit Judges and Prof R Taylor. See Chapter 4 above, paras 4.168 to 4.170.

²² Mr T Devlin, Senior Judiciary, the Council of HM Circuit Judges.

²³ Mr T Devlin, Senior Judiciary, the Council of HM Circuit Judges.

²⁴ Northamptonshire Police, Stonewall, Victim Support, President of Justices’ Clerks Society. See paras 4.176 to 4.180 above.

²⁵ The non-aggravated form of the offence is generally charged alongside the aggravated offence, in order to ensure that an alternative verdict can be returned: see Chapter 2 above, para 2.26.

²⁶ CPS, *Hate Crime and Crimes Against Older People Report, 2011-2012* (2012) p 26. Figures from the 2012-13 CPS hate crime report present similar data: see Table 10, p 31. Both reports are available from http://www.cps.gov.uk/data/hate_crime/index.html (last visited 6 May 2014).

²⁷ Home Office, Office for National Statistics and Ministry of Justice, *An Overview of Hate Crime in England and Wales* (December 2013). See pp 28 to 41 and the data tables appended to the report. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf (last visited 15 May 2014).

²⁸ The number of convictions as a proportion of the number of proceedings. See *An Overview of Hate Crime in England and Wales* (fn 27 above), Appendix Table 3.12.

aggravated offence since 2002. For example, in relation to assault with injury,²⁹ the conviction ratio for aggravated offences over this period has never been higher than 51% whereas for the corresponding non-aggravated assault offences the rate was 85% in 2012 and has not fallen below 72% since 2007. The conviction ratios for offences of harassment and criminal damage are also significantly lower for the aggravated than the non-aggravated forms of the offences.³⁰

- 5.23 This report also shows an overall fall in the number of offenders sentenced for aggravated offences since 2010.³¹ These figures may indicate that aggravated offence charges are being dropped or downgraded in the course of proceedings.³²
- 5.24 There has, however, also been a decline in the overall number of prosecutions in cases flagged by the CPS as racial or religious hate crime, during the period since the CPS began reporting annually on hate crime prosecutions. In 2007-08 there were 13,008 completed prosecutions of cases initially flagged as racial or religious hate crime;³³ in 2011-2012 there were 12,367;³⁴ and in 2012-13 there were 11,334.³⁵ Similarly there have been falls in the number of racial and religious hate crime cases referred by the police for prosecution over this period.
- 5.25 A wider review of the current use of the aggravated offences could help explain the relatively low conviction ratios for most aggravated offence types and the fall in the number of offenders sentenced for aggravated offences. It could examine whether these relate to the difficulties consultees have raised in connection with prosecuting them. It could consider whether and, if so, why charges for aggravated offences are being dropped or downgraded.
- 5.26 The review would provide the opportunity to conduct detailed analysis of case files. A review of a representative sample of decided racial or religious hate crime cases might provide insights into where the problems identified by consultees are most severe and their causes. It might also inform possible solutions to the problems. These solutions may be legislative. Equally they may lie in producing

²⁹ Assault with injury refers to the offences of malicious wounding or inflicting grievous bodily harm (s 20 Offences Against the Person Act 1861) and assault occasioning actual bodily harm (s 47 Offences Against the Person Act 1861), and the aggravated equivalents of these offences (s 29(1)(a) and (b) of the CDA).

³⁰ There is also a disparity in respect of the public order offences (ie ss 4, 4A and 5 POA 1986 and their aggravated equivalents at ss 33(1)(a) to (c) CDA), but it is much less marked, at only half a percentage point. For common assault, the disparity is in the other direction, with the conviction ratio for the aggravated version being higher (albeit by less than one percentage point).

³¹ See Appendix Table 3.13, *An Overview of Hate Crime in England and Wales* (fn 27 above).

³² CPS guidance on racial and religious crime states that all available evidence of hostility should be advanced and that pleas to the “basic” offence must not be accepted on grounds of “expediency.” *CPS Guidance on Racist and Religious Crime*, available from: http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a18 (last visited 15 March 2014).

³³ CPS Hate Crime Report 2008-2009, p 12.

³⁴ CPS Hate Crime Report 2011-2012, p 6.

³⁵ CPS Hate Crime Report 2012-2013, p 13.

clearer guidance for police, prosecutors and courts, or making other changes to the way aggravated offences are handled.³⁶

- 5.27 This would help to ensure that any current operational flaws are not replicated if the offences are extended. It would also have a beneficial effect on the prosecution of racial and religious hate crime, which represents at least 85% of all reported hate crime³⁷ and which some reports have suggested is a growing problem in England and Wales.³⁸

(5) The list of offences capable of being prosecuted as aggravated ones under the CDA needs to be reviewed

- 5.28 Only a limited group of offences is specified in the CDA as capable of being prosecuted as aggravated offences.³⁹

The continued suitability of offences originally selected to protect race and religion

- 5.29 Academics have criticised the approach that was taken to selecting the offences that can be prosecuted as aggravated and the practical difficulties that arise from the current list of offences.⁴⁰ It has been argued that the inclusion of section 20 Offences Against the Person Act 1861⁴¹ but exclusion of the more serious section 18 offence could risk confusion on the part of juries and result in anomalous outcomes.⁴² Practitioners have confirmed to us that this is a particular problem in

³⁶ A number of cases of racially motivated attacks were analysed in the report by the Institute of Race Relations, *Investigated or Ignored? An analysis of race-related deaths since the Macpherson Report* (February 2014), <http://www.irr.org.uk/wp-content/uploads/2014/02/Investigated-or-ignored.pdf> (last visited 15 May 2014). The report concludes that failings occur at every level in the criminal justice response to racial and religious hostility-based offending.

³⁷ See Table 3, p 13, *An Overview of Hate Crime in England and Wales* (fn 27 above).

³⁸ See for example the *Guardian* on a rise in anti-Muslim hate crime, 27 December 2013: <http://www.theguardian.com/society/2013/dec/27/uk-anti-muslim-hate-crime-soars>. However, see also the report of 1 May 2014, HM Government, *Challenge it, Report it, Stop it – delivering the Government's hate crime action plan*, available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307624/Hate-CrimeActionPlanProgressReport.pdf (last visited 14 May 2014). This states (on p 9) that, following an “initial spike in reports of anti-Muslim hatred” following the murder of Fusilier Lee Rigby in May 2013, the level of reports had subsequently “dropped significantly”.

³⁹ See para 2.4 above.

⁴⁰ R Taylor, “The role of aggravated offences in combating hate crime, 15 years after the CDA 1998 – time for a change?” (2014) 13 *Contemporary Issues in Law* 76, 78.

⁴¹ The maximum sentence for the s 20 offence (malicious wounding or infliction of grievous bodily harm) is 5 years (7 years if racially or religiously aggravated). For the s 18 offence (wounding or causing grievous bodily harm with intent to cause grievous bodily harm) the maximum is life imprisonment and there is no aggravated offence available.

⁴² See Ch 3, Leng et al, *Blackstone's Guide to the Crime and Disorder Act 1998* (1998). It has also been argued that, in excluding offences with a maximum life sentence because there was “nothing to be gained” from adding them, the other justifications for aggravated offences were overlooked, namely those of a clear denunciation of the hate element and the associated stigma of the aggravated “label.” See R Taylor, “The role of aggravated offences in combating hate crime” (fn 40 above).

cases where alternative charges are available to the jury but no clear direction is given as to the consequences of a finding of guilt in relation to one or the other.⁴³

- 5.30 According to official statistics the most commonly prosecuted aggravated offences in recent years have been the aggravated forms of the Public Order Act 1986 offences.⁴⁴ However, there may be a case for examining the list of offences that can be aggravated to decide whether there is merit in adding the more serious public order offences of violent disorder and affray.⁴⁵
- 5.31 The list of offences that can be aggravated has not been reviewed or amended since the CDA was first enacted, but much has changed in terms of hate offending in that time. For example, a sharp rise in internet and social media-based hate crime has been reported,⁴⁶ including extremist and anti-Muslim content.⁴⁷ There may be an argument for aggravated forms of some of the communication offences.⁴⁸

Adequacy for other protected characteristics

- 5.32 The list of offences that can be aggravated was not selected with disability, sexual orientation and transgender identity hostility in mind. As we pointed out in the CP⁴⁹ there is only limited evidence as to whether the list is appropriate for these characteristics. This question would need to be assessed separately in relation to any additional characteristics.
- 5.33 Several consultees referred to this as a matter requiring a wider review. For some it was a basis to object to extension of the current model of offences;⁵⁰ for others

⁴³ Mr T Devlin and other barristers at Furnival Chambers.

⁴⁴ 72% in 2012: *An Overview of Hate Crime in England and Wales* (fn 27 above), p 35. See also Crown Prosecution Report, "Hate crime and crimes against older people 2012-2013", p 17.

⁴⁵ Public Order Act 1986, ss 2 and 3 respectively. The maximum sentence for violent disorder is 5 years and that for affray is 3 years. Their potential relevance in the hate crime context has been discussed by Prof Taylor (in the article referenced in fn 40 above) and Mr T Devlin. The latter has given the example of a particularly serious case of racist chanting which he prosecuted as an aggravated offence under Public Order Act 1986, s 4 (maximum sentence 2 years), but which on its facts would have merited being prosecuted as affray.

⁴⁶ According to data obtained by the think tank Parliament Street using Freedom of Information requests to 25 English and Welsh police forces, there has been a sharp rise in reported crime that is linked to social media: see the *Mail on Sunday*, 12 March 2014: <http://www.mailonsunday.co.uk/news/article-2579345/Twitter-crimes-double-three-years-police-forces-report-sharp-rise-social-media-crimes.html> (last visited 13 Mar 2014).

⁴⁷ See N Copsey, J Dack, M Littler, M Feldman, "Anti-Muslim hate crime and the far right" (June 2013), para 4.10. Available from: <http://tellmamauk.org/wp-content/uploads/2013/07/antimuslim2.pdf> (last visited 26 Mar 2014).

⁴⁸ These offences are described in the CP at paras 4.24 to 4.30. For a recent example of racially abusive language in a social media context, where D was convicted under Communications Act 2003, s 127, see this report in Asian Image News, 12 March 2014: http://www.asianimage.co.uk/news/11069855.Soldier_spared_jail_over_F_____LOL_to_that_P_____found_dead_Facebook_post/ (last visited 14 Mar 2014).

⁴⁹ CP paras 3.7 to 3.17.

⁵⁰ As discussed in the previous chapter at paras 4.186 to 4.193.

it was a matter needing review prior to extension. For example, Seamus Taylor CBE said the aggravated offences were created to deal with racist crime. He called for a wider review to ensure any new offences served the purpose of protecting the relevant characteristic.⁵¹

- 5.34 As we indicated in the CP⁵² the data on the nature and prevalence of hostility-based offending is principally derived from the CPS annual hate crime report and the Crime Survey of England and Wales. However, a number of other potentially useful sources exist which have only recently become available.⁵³ A wider review of hate crime as it affects those with the three protected characteristics could examine this data. This would help to show whether changes are required to the list of offences that can currently be aggravated.
- 5.35 A wider review would provide a useful opportunity to re-examine the offences that should be listed, both in relation to race and religion and for any new characteristics to be protected.

DEEPER QUESTIONS OF PRINCIPLE REQUIRING CONSIDERATION

(1) What is the value of specific hostility-based aggravated offences and sentencing provisions?

- 5.36 The current form of the aggravated offences has drawn criticism from parliamentarians, academics and others, as we discuss below. Some consultees called for a review of the legitimacy of the aggravated offences. For example, the Society of Legal Scholars said:

Prior to any extension of the aggravated offences, the optimal approach would be for a comprehensive review of the CDA provisions in order to determine their effectiveness and doctrinal legitimacy.

- 5.37 Other consultees have called for the criminal justice system to shift its response to hate crime away from the creation of new offences to alternative measures. For example, participants in the Birkbeck Gender and Sexuality Group forum⁵⁴ suggested during workshop discussions that there should be more focus on examining people's actual experience of hate crime to ensure that the right methods, including educative, mediation-based, and non-custodial solutions

⁵¹ The TUC made the same point and "encourage[d] the government to review and potential[ly] expand the list of basic offences in light of this". Scope similarly noted that the limitations of the current list of aggravated offences would be perpetuated in the case of extension and called for the list to be reviewed as part of a wider enquiry. Disability First asked us to convey to Government their view that a wider review was necessary to ensure all potential offences could be charged as aggravated, if hostility was demonstrated or was a motivating factor.

⁵² CP, Chapter 3 and Appendix C, paras C22 to C29.

⁵³ Several third party reporting centres and helplines have been established across England and Wales which publish data on the numbers and types of cases reported to them. Examples include those established by the NGOs Stop Hate UK and the Disability Hate Crime Network. The Association of Chief Police Officers offers an on-line reporting service (True Vision) and its website gives a list of organisations that can assist people who wish to report a hate crime. See: http://report-it.org.uk/report_a_hate_crime (last visited 15 May 2014).

⁵⁴ Held on 8 August 2013 and attended by around 30 people working in academia and in NGOs across the justice, human rights and disability sectors.

based on a “social contract” approach to justice, were given sufficient resources. They feared adverse consequences would result from taking an “equalising and neutening” approach by extending criminal offences to additional characteristics, without addressing the bigger underlying causes and effects of hate crime.

Why “hostility”?

- 5.38 It has been asked why “hostility” is the aggravating factor for the purposes of these offences. An alternative form of aggravated offence for hate crime purposes is one based not on hostility but “bias”, a potentially broader signifier for an attitude towards a group or a particular victim, which could encompass deliberate selection by an offender due not only to hatred or hostility, but also to the victim’s perceived vulnerability or inability to resist or defend against the crime.⁵⁵
- 5.39 Others have asked why hostility is singled out as a statutory aggravating factor by the CDA offences and the enhanced sentencing regime, while potentially more serious factors such as extreme cruelty or deliberate exploitation of a victim due to a personal characteristic such as sexual orientation are not.⁵⁶
- 5.40 For reporting and monitoring of hate crime, different and potentially wider terms are used to describe the pre-disposition or attitude towards the victimised group which may drive the commission of hate crime. For example, “discrimination” and “prejudice” are terms commonly used by police forces and hate crime reporting centres.⁵⁷
- 5.41 In the field of disability hate crime, it could be asked whether “hostility” should be the only aggravating factor for the offence, or whether other matters that currently operate as aggravating factors only at sentencing are appropriate for inclusion. These include the deliberate targeting of a vulnerable victim and an abuse of power or of a position of trust.⁵⁸
- 5.42 As we explained in the CP⁵⁹ these factors have obvious relevance in the hate crime context and are already specified as aggravating factors in the existing sentencing guideline *Overarching Principles: Seriousness*.⁶⁰ There may be an

⁵⁵ This is the form of offence suggested by I Hare in “Legislating Against Hate: the Legal Response to Bias Crimes” [1997] 17 *Oxford Journal of Legal Studies* 415 at fn 91. As Mr Hare explains, this is the approach adopted in the US Federal Hate Crimes Sentencing Enhancement Act 1993.

⁵⁶ For example, Prof P Alldridge.

⁵⁷ See, for example, the definition of hate crime agreed by ACPO and the CPS (also used in the Government Hate Crime Action Plan): “a criminal offence, perceived by the victim or any other person, as being motivated by a prejudice or hate based on [one of the five protected characteristics]”; the True Vision reporting website uses “any crimes that are targeted at a person because of hostility or prejudice”; the NGO Stop Hate UK uses “a crime that the victim or any other person perceives to be motivated by hostility or prejudice towards any aspect of a person’s identity”.

⁵⁸ These are often features of crimes against older people, as is shown in the CPS annual hate crime reports, which contain a separate section on the prosecution of such offences. “Age” is a protected characteristic under the Equality Act 2010. Some consultees, eg Victim Support, have argued for its specific inclusion in hate crime legislation.

⁵⁹ See CP para 2.179.

⁶⁰ See Chapter 2 above, paras 2.97 to 2.99.

argument for bringing them into the hate crime regime to ensure they are employed in appropriate cases. Again, the argument can be made: why “hostility” rather than other, perhaps equally important aggravating factors such as cruelty, exploitation of a weak or vulnerable person, or wilful neglect?

- 5.43 On the other hand it has also been argued that a broad approach to conceptualising hostility can and should be taken in interpreting section 28(1). It offers flexibility of interpretation which could account for there being more prosecutions of “hate crimes” in England and Wales than in almost any other country in the world.⁶¹ The choice of “hostility” and its interpretation warrant further examination.

The “limbs” of hostility

DEMONSTRATION

- 5.44 It has been argued that this element of the section 28(1)(a) offence is an attempt to police emotions⁶² or that it could result in wrongfully ascribing a hostility ground to a criminal offence when in fact the relevant demonstrative utterance was, for example, simply an expression of anger, or a way to refer to the intended target of the offence as distinct from some other person in the vicinity.⁶³
- 5.45 On the other hand Dr Walters has argued that the demonstration limb can be justified on the basis that demonstrations of racial or religious hostility, even if not motivated by hostility, “are conscious attempts to subordinate and *additionally* harm victims by targeting their “difference” either intentionally or recklessly”. He argues that it is irrelevant whether the act is committed in the heat of the moment, or is out of character (though this can be taken into account in the sentence passed).⁶⁴

MOTIVATION

- 5.46 The requirement to prove “motivation” in section 28(1)(b) was controversial from the outset. It was argued in the course of parliamentary debates that an offence might be no worse because it is motivated by hostility than by greed or cynical opportunism,⁶⁵ and that the criminal law is better when dealing with people’s actions than their motives.⁶⁶
- 5.47 The academic literature has examined objections to motivation-based offences. It has been argued that motivation should only be a matter for the jury in

⁶¹ M Walters, “Conceptualizing Hostility for Hate Crime Law” (2013) 34 *Oxford Journal of Legal Studies* 1.

⁶² CP Appendix B para B.16.

⁶³ As in the case of *Cole* [1993] Crim LR 300, discussed in I Hare, “Legislating Against Hate: the Legal Response to Bias Crimes” (1997) 17 *Oxford Journal of Legal Studies* 415.

⁶⁴ M Walters, “Conceptualizing Hostility for Hate Crime Law” (2013) 34 *Oxford Journal of Legal Studies* 1, 27.

⁶⁵ CP Appendix B para B.16.

⁶⁶ As noted by Prof P Alldridge in “Prosecuting Disability Hate Crime” in G Healy, G Kirton, M Noon (eds) *Equality, Inequalities and Diversity* (2010) p 119.

determining guilt, or the sentencer when considering the culpability of the offender.⁶⁷

- 5.48 It has also been argued that motivation-based offences represent an unacceptable infringement of the freedom of thought, expression and association. In addition it has been suggested that undue infringements of these freedoms could result from the investigation of offences when prosecutors are seeking evidence of prior statements or associations in order to build a case based on motivation.⁶⁸

The need to consider repeal as well as extension

- 5.49 As we explained in the CP, our terms of reference were solely concerned with examining the case for extending the current offences to additional characteristics. We had no scope to ask whether there was in fact a case to repeal them. However, the need for a wider review to examine the merits of both options was raised by some consultees.⁶⁹

- 5.50 The alternative option of repeal was also raised by other consultees who did not expressly call for a wider review to address this. For example, it was argued that:

- (1) the offences are so defective and confusing in their form or operation that they should not be extended, but should be repealed and replaced with a better model, or with a better functioning enhanced sentencing regime;⁷⁰ and
- (2) the offences create inequality and confusion, because they exist alongside the enhanced sentencing regime in respect of race and religion, but not the other three characteristics.⁷¹

- 5.51 In relation to the first argument, we have already set out the points made by consultees.⁷²

- 5.52 In relation to the second, equality-based argument, several consultees expressly or implicitly pointed to repeal of the existing offences as a way of bringing about parity of treatment and simplifying the current system. Galop were “open to the

⁶⁷ See the discussion of motivation as an element of criminal offences, in the Theory Paper by Dr J Stanton-Ife (fn 4 above) at paras 177 to 197.

⁶⁸ I Hare, “Legislating Against Hate: the Legal Response to Bias Crimes” (1997) 17 *Oxford Journal of Legal Studies* 415.

⁶⁹ Dr F Stark was concerned at the one-sided nature of the terms of reference, noting that “the request to examine ‘the case for extending’ suggests that the Commission is to look at one side of the debate, which runs contrary to its general approach.” In presentations at the symposium on 17 September 2013, Prof P Alldridge and Mr I Hare both regretted that the Law Commission had not been briefed to consult on whether the current aggravated and stirring up offences should remain or be repealed, rather than focusing solely on the case for extension. In his response, Mr J Troke called for a review of the case for abolition on the ground that hate crime laws are disproportionate and misguided.

⁷⁰ Prof R Taylor.

⁷¹ Repeal on this basis was acknowledged as an option by the Justices’ Clerks Society, South Yorkshire Police, Galop, Prof L Moran, Stop Hate UK, the Society of Legal Scholars and Prof R Taylor.

⁷² Paras 5.15 to 5.35 above.

possibility of equalising all hate crime sentencing up to the level of aggravated offences or down to the level of section 145/146". A few other consultees (some in favour, in principle, of extending the aggravated offences) suggested that the problem of unequal treatment could be resolved by abolishing the existing aggravated offences.⁷³ The Justices' Clerks Society added that if this approach were adopted, consideration would need to be given to raising the maximum penalty for a small range of basic offences.

- 5.53 Repeal of the aggravated offences would be unlikely to attract broad support unless there was clear evidence that the current system was not serving any useful purpose or was structurally or operationally flawed beyond improvement. If the aggravated offences were to be repealed, a better alternative would need to be in place to ensure the criminal law adequately addressed hate-based offending. Based on the consultation responses and the limited available evidence, the current system of enhanced sentencing would require improvements in its application before it alone could be regarded as a sufficient response to hostility-based offending.
- 5.54 Clearly, any call for repeal of the aggravated offences would cause controversy. This is particularly so in view of recent reports suggesting that there was a significant increase in racist and anti-Muslim hate crime during the course of 2013.⁷⁴
- 5.55 A wider review could address some of the principled objections to the aggravated offences and examine the merits of the available alternatives, including a pure sentencing approach, reformed to improve its use. In the course of that debate the case for repeal could be assessed.

(2) Is there any justification – or need – for higher maximum sentences available under the aggravated offences?

- 5.56 As we pointed out in the CP, the aggravated offences make higher maximum sentences available. There were no particular reasons of policy or principle behind how the maximum sentences were set.⁷⁵
- 5.57 It has been argued that the higher sentences and added stigma attaching to the aggravated offences have no significant deterrent effect and could prove counterproductive.⁷⁶ Some consultees saw the effect of these higher sentences as not preventive but "purely retributive".⁷⁷

⁷³ See paras 4.57 to 4.60 above.

⁷⁴ For example see the *Guardian*, 27 December 2013, discussing the response made by several UK police forces to a Freedom of Information Act request (fn 38 above).

⁷⁵ As we explained in the CP at para 3.27.

⁷⁶ For example, by Prof R Taylor, Dr M Walters, GAD CIL, IARS, and attendees of the Birkbeck Gender and Sexuality Forum meeting held on 8 August 2013 and attended by around 30 people working in academia and in NGOs across the justice, human rights and disability sectors.

⁷⁷ Participants at the Birkbeck Gender and Sexuality Forum meeting.

- 5.58 Some consultees expressed doubt as to whether the higher maximum sentences enacted for the aggravated offences are necessary in practice.⁷⁸ As we also explained in the CP,⁷⁹ statistical evidence shows that there are very few cases where the sentence imposed for an aggravated offence exceeds the maximum that would have been available had it been prosecuted as the corresponding non-aggravated offence.
- 5.59 A wider review could examine the sentences passed in hate crime cases involving all five characteristics in order to assess the number of cases in which the higher maximum sentences are in fact necessary.

(3) What is the principled basis for selecting characteristics for protection under hate crime legislation?

- 5.60 Our terms of reference did not include any examination of how characteristics are selected for protection under the hate crime scheme. We were not asked to examine whether characteristics other than the three addressed by this project should be included in any of the current hate crime legislation.⁸⁰
- 5.61 However, some consultees called for a more principled consideration of the basis on which a particular characteristic is selected for enhanced protection. For example, the Society of Legal Scholars said it was necessary to ask why race and religion should be treated differently from the other three characteristics. They argued that developments in equality legislation were a useful starting point in determining which other characteristics, whether “protected” under the Equality Act 2010 or not, should be covered by aggravated offences.⁸¹
- 5.62 The underlying, principled basis for the selection of hate crime characteristics has been identified by some consultees (and by some experts in the field) as one of the most challenging unresolved issues of current hate crime theory.⁸² As consultees have pointed out, the selection of characteristics for express

⁷⁸ For example, Thames Valley Police, the Senior Judiciary, Council of HM Circuit Judges.

⁷⁹ See CP para 3.28, giving the examples of average sentences for a range of aggravated offences.

⁸⁰ Nonetheless consideration is given to the difficult issues involved, in the Theory Paper published with our CP (fn 4 above), paras 201 to 218.

⁸¹ As explained in Chapter 4, many consultees considered that the Equality Act 2010 required the aggravated offences to be extended in order to ensure equivalent legislative treatment for protected characteristics. In particular, consultees referred to the public sector duty under Equality Act 2010, s 149: see paras 4.18 to 4.22 above. Two consultees also made reference to the Convention on the Rights of Persons with Disabilities: see paras 4.24 to 4.25 above.

⁸² See, for example, N Hall, *Hate Crime* (2nd ed 2013), in which it is argued that one of the most contentious issues in current hate crime theory is which characteristics should be included in the formal legislative response. For a lucid account of the problem see the recent article by G Mason, “Victim Attributes in Hate Crime Law: Difference and the Politics of Justice” (2014) 54 *British Journal of Criminology* 161. See also the Theory Paper (fn 4 above) at paras 201 to 218, and the sources cited there. See also H Mason-Bish, “Future Challenges for Hate Crime Policy: Lessons from the Past” in N Chakraborti (ed) *Hate Crime: Concepts, Policy, Future Directions* (2010), p 66.

protection in the existing hate crime legislation has taken place in a piecemeal way.⁸³ There has been relatively little debate about the applicable principles.

- 5.63 The five current characteristics were selected in part as the result of a consultation process in the course of which 21 characteristics were identified for possible monitoring and reporting. The five characteristics were selected on the basis of their prevalence, the likelihood that offending would be motivated by hatred as distinct from vulnerability, their impact on community cohesion and their disproportionate impact on victims.⁸⁴
- 5.64 In guidance to police forces issued by the Association of Chief Police Officers, it is explained that the five characteristics currently protected by hate crime legislation are the minimum for which police must record reported hate crime, but that they must not ignore other groups affected by hate crime in their areas.⁸⁵ Forces are advised that agencies and partnerships can extend their own policy response to hate crime to include any other characteristics affected.
- 5.65 Some consultees referred to specific additional characteristics (such as gender or age) as needing to be brought into the hate crime protection regime. The National Union of Students and others pointed to the fact that hostility based on the victim's gender can drive hate crime and that gender is a protected characteristic under the Equality Act 2010.⁸⁶
- 5.66 Others referred to the need to have regard to principles of harm recognition and fairness to victims, in the selection of characteristics for protection. For example, Victim Support argued that characteristics outside those protected in the Equality Act 2010 require protection because those with the relevant characteristics are targets of violence and hostility.⁸⁷ They gave as examples members of the armed

⁸³ For example, the Senior Judiciary, the Council of HM Circuit Judges.

⁸⁴ N Hall, *Hate Crime* (2nd ed, 2013), p 187-188, referring to ACPO, *Hate Crime Operational Guidance*, para 3.4.1, http://www.report-it.org.uk/strategy_and_guidance (last visited 12 May 2014).

⁸⁵ ACPO, *Hate Crime Operational Guidance*, para 3.4.1.

⁸⁶ NUS, RadFem, Dr L Harne.

⁸⁷ Victim Support referred to C H Sin, A Hedges, C Cook, N Mguni and N Comber, *Disabled people's experiences of targeted violence and hostility*, Equality and Human Rights Commission Research Report No 21 (2009), [2.4]. This article notes the terminology used in the hate crime context is often confused and interchangeable and that "different agencies and disabled people themselves tend not to use the term 'hate crime' to describe the issues or their own experiences". Therefore for the purposes of its report it preferred to use "'targeted violence and hostility' as an encompassing term to include incidents involving verbal, physical, sexual and emotional violence, harassment and abuse that is directed towards disabled people".

forces,⁸⁸ the homeless and members of subcultures. As to the last category they referred to the case of Sophie Lancaster as evidence of the “devastating effects hate crimes can have on those belonging to subcultures”.⁸⁹ They proposed the law be reformed to address targeted violence and hostility towards a person because of any personal characteristic.⁹⁰

5.67 CPS North Wales Scrutiny Panel said the law needed to do more to address the cynical or targeted exploitation of disabled and older people, deemed easy targets or vulnerable to attack or abuse.⁹¹ They argued that proving hostility in such cases can be difficult.

5.68 Others expressed concern at the proliferation of characteristics being proposed for express hate crime protection.⁹² Dr Nathan Hall⁹³ commented on the difficulty that arises with a potentially unlimited list of characteristics vulnerable to hate crime, each with strong claims to equivalent protection. Adding further characteristics may solve one problem but it gives rise to another when a victimised group is not included. Eventually the power of the “hate crime” marker is watered down to such an extent that it becomes almost meaningless.

5.69 The Magistrates’ Association argued:

Crimes committed where the perpetrator demonstrates or is motivated by hatred of any difference between the perpetrator and the victim should be sentenced in the same way. There is a danger otherwise that a wave of hate crime on the grounds of gender,

⁸⁸ In the Lee Rigby case, the fact that Fusilier Rigby was performing a public duty was taken into account as an aggravating factor (alongside the treatment of the body, and ideological, religious or political motivation) in setting the minimum tariff in accordance with Schedule 21 of the Criminal Justice Act 2003: *R v Adebolajo*, sentencing remarks of Sweeney J. Available from: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/adebolajo-adebowale-sentencing-remarks.pdf> (last visited 28 January 2014). An amendment to the Crime and Courts Bill 2014 to add membership of the armed forces to section 146 of the CJA was moved by Dan Jarvis MP and was defeated at Committee stage (see *Hansard* (HC), 27 March 2014 from col 514). When this report went to press, the matter had been reintroduced and was due for reconsideration at the Bill’s third reading in the Commons: see *Hansard* (HC), 12 May 2014, col 456 and Mr Jarvis’s article in the *Telegraph*, 13 May 2014, <http://www.telegraph.co.uk/news/politics/10824619/Why-we-must-punish-those-who-assault-our-troops.html> (last visited 14 May 2013).

⁸⁹ But see para 5.70 below, where the sentencing approach in that case is discussed further.

⁹⁰ A similar point was made by Ms C Gerada. In fact, the general *Seriousness* guideline goes some way towards recognising this as an aggravating factor, insofar as it refers to aggravating where “the offence was motivated by hostility towards a minority group, or a member or members of it.” See para 5.70 below, and paras 2.97 to 2.99 and 3.25 to 3.26 above.

⁹¹ See fn 90 above.

⁹² Devon and Cornwall Police, Community Security Trust, Northamptonshire Police and the Magistrates Association.

⁹³ Dr Hall made these comments at a meeting of the Government’s Independent Advisory Group on hate crime. He is the author of *Hate Crime* (fn 82 above). The chapter on “Victims and Victimisation” discusses some of the arguments for and against the selection of particular characteristics for protection under hate crime legislation, including not only the characteristics currently protected under English law but also gender, age, alternative subcultures and homelessness.

occupation, social class etc would lead to the law being changed piecemeal as public opinion found such behaviour unacceptable.

- 5.70 As we pointed out earlier, under the overarching *Seriousness* guideline, deliberate targeting of a vulnerable victim, and hostility to the victim because of his or her membership of a minority group, are both currently to be treated as aggravating factors when sentencing.⁹⁴ Indeed, in the Sophie Lancaster case, which Victim Support referred to at paragraph 5.66 above, the sentencing judge stated:

[The victims were] singled out for their appearance alone because they looked and dressed differently from you and your friends. I regard this as a serious aggravating feature of this case, which is to be equated with other hate crimes such as those where people of different races, religions, or sexual orientation are attacked because they are different ... [T]he courts are perfectly capable of recognising and taking account of such aggravating features without the necessity of Parliament enacting legislation to instruct us to do so.⁹⁵

- 5.71 However, it is clear that some consultees consider that the current law and sentencing system require review to ensure they provide a sufficient response in relation to those requiring protection through hate crime legislation. For some the key factor is hostility “towards any personal characteristic”; for others it is that the victim is vulnerable, or there is hostility due to the victim’s “difference” from the perpetrator. Other consultees are concerned that the force of hate crime laws will be watered down, or the offences made too complex, if special protections are extended to too many characteristics.
- 5.72 We see the virtue of a wider examination of these issues so that principles can be elucidated to determine whether any further characteristics should be expressly protected within the aggravated offences and/or enhanced sentencing legislation, or whether current sentencing guidance is sufficiently broad for hostility to be reflected as an aggravating factor.

(4) What role, if any, should enhanced sentencing have in a hate crime regime?

- 5.73 A central question in the consultation was whether a reformed enhanced sentencing regime is capable of providing an adequate response to hostility-based offending against the five protected characteristics.
- 5.74 In responding to this question, consultees raised several important distinctions between the scope and effect of the aggravated offences and enhanced sentencing systems.
- 5.75 It has been argued that a sentencing-only approach risks the aggravating factor of hostility being either overlooked or simply assessed along with all other aggravating factors, resulting in the specific message about hostility-driven

⁹⁴ See paras 2.97 to 2.99 and 3.25 to 3.26 above.

⁹⁵ *R v Herbert* [2008] EWCA Crim 2501 at [20] This passage in the trial judge’s sentencing remarks was cited in the judgment on appeal. The Court of Appeal stated at [23] that “the judge was not only entitled, but fully justified in the view that he took”.

offending and its seriousness and impact being lost.⁹⁶ In addition, consultees identified serious concerns about the operation of enhanced sentencing in practice, arguing that it is under-used and little understood. These claims need to be addressed to ensure that the important role enhanced sentencing has in the law's response to hate crime is being fulfilled.

- 5.76 In terms of procedural fairness, criticism has been levelled at the enhanced sentencing system on the basis that the hostility element of sentencing enhancement is not a matter for the jury to determine in cases tried at the Crown Court. Although the defendant must have an opportunity to respond to the hostility allegation, and the hostility must be established to the criminal standard, in practice it was considered that there may be greater benefits for defendants in having the hostility allegation determined at trial.⁹⁷
- 5.77 We have recommended stronger and clearer sentencing guidance as part of the solution to some of these problems and have recommended this reform be implemented irrespective of any wider review.
- 5.78 Nonetheless, a wider review may bring associated benefits for the enhanced sentencing scheme. The problems being encountered in the application of the system⁹⁸ may derive in some part from the complexity of the dual test for hostility (motivation or demonstration) or, in the case of racial and religious hostility, to the complexities of the combined system and the other prosecution difficulties identified by consultees.⁹⁹

(5) Should there be greater scope for unduly lenient sentence challenges in cases where enhanced sentencing under section 146 CJA applies?

- 5.79 As explained in the CP,¹⁰⁰ any sentence for an aggravated offence can be challenged as an unduly lenient sentence ("ULS"). In contrast, sentences for the corresponding non-aggravated offences cannot be challenged, even where it has been proved at sentencing that the offence was aggravated by hostility due to sexual orientation, transgender identity or disability. Several consultees highlighted this disparity as an argument for extending the aggravated offences.¹⁰¹

⁹⁶ See Chapter 4 above, paras 4.80 to 4.81, and CP Appendix B para B.21.

⁹⁷ See Chapter 4 above, paras 4.148 to 4.156. The relative merits of sentence enhancement and aggravated offences were considered in the CP at paras 3.71 to 3.74; in Dr J Stanton-Ife's Theory Paper, at paras 219 to 229; and in Appendix B to the CP, at paras B.19 to B.21.

⁹⁸ As explained in Chapter 3 at para 3.6 and following. These problems may also be affecting racial and religious aggravation cases.

⁹⁹ The "mutual exclusivity" question was discussed above at para 5.17 above (and also at para 3.43 and from 4.168 above); the other prosecution difficulties were addressed at paras 5.18 to 5.20 above.

¹⁰⁰ CP paras 3.42 to 3.44. See also Chapter 2 above, para 2.32.

¹⁰¹ See Chapter 4 above, para 4.131 and following.

5.80 Arguably, the ULS system is currently over-inclusive in applying to all forms of aggravated offence, given that some are less serious and carry fairly low penalties even in their aggravated forms. There may be a case for removing from the ULS regime aggravated offences for which the maximum penalty is no greater than 2 years (common assault, sections 4, 4A and 5 of the Public Order Act 1986, and harassment). It may also be sensible for the wider review to consider whether there is a need to bring some offences which carry high maximum sentences, and which currently have racially and religiously aggravated equivalents, into the ULS regime.¹⁰² This would enable ULS challenges where hostility based on sexual orientation, disability or transgender identity was a factor, even without extending the aggravated offences.

5.81 A wider review could examine whether changes are required to the ULS regime for the reasons outlined above.

WHY NOW?

5.82 In the course of our fact-finding work before the CP was published, stakeholders highlighted to us several problems in the criminal justice response to hate crime.¹⁰³ However, in terms of the legislative response, their comments focused on perceived failings of the enhanced sentencing system. The potential seriousness of concerns in connection with the aggravated offences has only emerged as a result of the response to this consultation.

5.83 If the current aggravated offences are flawed in their structure or operation, there will be little benefit for future victims of hate crime for the offences to be extended in their current form. Furthermore, as the law employs the same hostility test in the enhanced sentencing scheme, if that test is flawed it impacts on the enhanced sentencing system to the further detriment of victims of hostility-based crime.

5.84 Flaws in the current system are also of concern because they may prevent the law from addressing racial and religious hate crime effectively. This is a significant problem because racial and religious hate crime accounts for 85% of all reported and prosecuted hate crime.¹⁰⁴ CPS hate crime reports indicate that most of the offences committed in a hate crime context are on the list of offences capable of being prosecuted as aggravated.¹⁰⁵

5.85 As we have explained, some consultees argued strongly for deferring the decision to extend the offences until more information was available on their effectiveness. For example, Professor Moran argued that as part of a wider review it was important to ask how well the current laws are serving their purpose

¹⁰² For example, malicious wounding (contrary to OAPA 1861, s 20) and actual bodily harm (contrary to OAPA, s 47) carry maximum sentences of five years; criminal damage (contrary to Criminal Damage Act 1971, s 1(1)) carries a maximum sentence of 10 years.

¹⁰³ These included lack of confidence that police would respond and take reports seriously, and specific failures to deal appropriately with disability or transgender hate crime victims. In relation to disability hate crime, see the Criminal Justice Joint Inspection report, *Living in a Different World* (fn 2 to Chapter 3 above), as discussed at para 3.35 of the CP.

¹⁰⁴ *An Overview of Hate Crime in England and Wales*, p 19. (See fn 27 above.)

¹⁰⁵ See the CP, paras 3.9 to 3.11. See also the CPS annual hate crime reports, for 2011-12 (p 26) and for 2012-13 (p 31).

and how hate crime is actually experienced by all groups and communities whose members suffer violence and harassment due to who they are.

- 5.86 It has also been argued that if the aggravated offences were extended now, there would be little or no likelihood of any further significant law reform relating to hostility-based offending affecting those with any of the three characteristics. As Dr Stark put it, if the aggravated offences were extended, “there might be a feeling in Parliament that this problem has been dealt with adequately”. Dr Stark saw our proposed sentencing reform option as “a superior stopgap, in that it leaves more open the possibility of wholesale consideration of the substantive aggravated offences at a later date”.
- 5.87 As explained above, the EU Victims’ Directive becomes binding on the UK from 16 November 2015. It contains requirements relevant to the way victims of hate crime are protected at all stages of the court process.¹⁰⁶ A full review of the criminal justice response to hate crime would provide an opportunity to assess whether the current system of special measures and the guidance on their use are sufficient to meet the Directive’s requirements in relation to victims of hate and bias crimes.
- 5.88 In the Government’s Hate Crime Action Plan a commitment is expressed to “keep the law under constant review, taking action where necessary to enhance the protection it offers to victims of hate crime”.¹⁰⁷
- 5.89 Finally, there is a risk that, if the principles governing the selection of hate crime characteristics are not clearly stated, time will be spent revisiting the issues each time a new class of hate crime victim emerges. The legal system could be brought into disrepute as a result. This project has prepared some of the ground for future extension by considering the definitions of the existing characteristics, which can be used when time comes to decide whether to extend.¹⁰⁸

WHAT QUESTIONS MIGHT THE REVIEW ADDRESS?

- 5.90 In view of the points raised in the course of the consultation, it appears that a wider review of the legislative response to hate crime could usefully address at least the following questions:
- (1) What are the purposes of legislation specifically addressing hostility- or hate-based offending:
 - (a) for victims?
 - (b) for the criminal justice system?

¹⁰⁶ See paras 4.47 and following above.

¹⁰⁷ *Challenge it, Report it, Stop it – the Government’s Plan to Tackle Hate Crime*, para 4.5. One of the actions listed under “Dealing effectively with offenders” was: “Conduct a review of sentences for offences motivated by hostility on the grounds of disability, sexual orientation and transgender [identity] to consider whether there is a need for new specific offences similar to racially and religiously aggravated offences.” As explained elsewhere in this report, the key obstacle to this is the absence of recorded data on the use of enhanced sentencing under CJA, s 146. However, a wider review would provide an opportunity to examine a sample selection of hate crimes across all three characteristics.

¹⁰⁸ We report separately on these in Chapter 6.

- (c) for wider society?
- (2) To what extent do the current systems of aggravated offences and enhanced sentencing (individually and in combination) serve those purposes?
- (3) For victims, what is the best way for the law to respond to hate crime?
- (4) If aggravated offences are needed or desirable:
 - (a) What model should be used to criminalise the hate or hostility element?
 - (i) Should the offences refer to “hostility”, or some other attitude such as “prejudice” or “bias”?
 - (ii) Or should they criminalise the “deliberate targeting” of a person due to their characteristic, or vulnerability or inability to defend themselves or report the attack?
 - (iii) How should this be assessed? Through evidence of the defendant’s motivation, or through evidence of the circumstances surrounding the offence, for example, what did the defendant say or do to the victim when committing the offence?
 - (b) For each protected characteristic, what forms of hate crime are most prevalent, and should all the relevant offences be designated as offences that can be aggravated?
- (5) If enhanced sentencing is needed or desirable, what model should be used? If it is “hostility”-based, how should this be assessed (4(a)(i) to (iii) above)? Should the additional general aggravating factors of abuse of trust or power, or targeting a vulnerable victim, be placed on the same statutory footing as section 146 of the CJA?
- (6) What protected characteristics should be specifically referred to in offences and/or the enhanced sentencing system? On what principles should they be selected?¹⁰⁹
- (7) What other initiatives or measures could be introduced, alongside or in place of legislation? Should they include, for example: better guidance for those applying existing legislation; more effective use of alternatives to the criminal process, such as restorative justice, in suitable cases; anti-bullying and other education initiatives; more effective internet and social media control; press and media regulation; rehabilitation of former hate

¹⁰⁹ Consultees have put forward: Equality Act 2010 protected characteristics; any personal characteristic or difference (such as belonging to alternative sub-cultures); those who are targeted for carrying out certain occupations or professions (armed forces, members of the clergy, sex workers); having “immutable” characteristics; and being vulnerable.

crime offenders; or prison-based re-education?¹¹⁰ All of these were called for in the consultation responses and many people said they were as important as legislation, or more so, in responding to hate crime effectively.

- 5.91 It is not for us to prescribe in detail the scope of any future review of hate crime legislation. This will be for Government and the criminal justice agencies to determine, in light of responses to this consultation, the results of the Government's three-year Hate Crime Action Plan,¹¹¹ which runs until March 2015, and the most recent statistical and empirical evidence on hate crime. Nevertheless, we consider that the questions set out above are ones that the review could usefully address.

ARGUMENTS AGAINST A WIDER REVIEW

- 5.92 An in-depth review of the aggravated offences and sentencing regime will take time and resources if it is to serve any useful purpose. By deferring the extension of the aggravated offences until the review was complete, the Government would be going against the views of the majority of consultees in this project. Many of these consultees are critical of the current criminal justice response to hate crime, notably the enhanced sentencing system, and have supported extension of the aggravated offences because they see this as a key part of the solution.
- 5.93 Some may argue against a wider review because they fear that an examination of the purpose or value of hate crime legislation will reopen the debate about whether the aggravated offences are justifiable. They may argue that this will inevitably lead to confusion and misinformation about what the offences in fact criminalise. For example, it is sometimes inaccurately argued that the offences amount to "punishing thoughts rather than acts". It is more accurate to say that the offences punish acts committed in particular aggravating circumstances, which have been accepted by Parliament as more serious because they cause greater and wider harms and involve greater culpability.
- 5.94 With any long-term review involving different Government departments and criminal justice agencies, there is a risk of slippage and changed priorities. If this results in the shelving of important questions about how to respond sufficiently to the problem of hate crime, it will mean an important opportunity for reform may have been lost. At the very least, pending the outcome of the wider review, an inherently unfair and unequal level of protection for the five recognised hate crime characteristics would remain in place.

¹¹⁰ See points made by consultees in the Other Comments section of the Analysis of Responses document.

¹¹¹ In her foreword to the 2012 – 13 CPS annual hate crime report, the Director of Public Prosecutions, Alison Saunders CB, refers to recent research conducted by the CPS and ACPO on the handling of hate crime cases, which aims "to identify any potential issues that may be impacting on the decline in volumes and prosecutions". The findings of this research are likely to produce useful data for the full-scale review we recommend. See page 2. Available from http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2013.pdf (last accessed 15 May 2014).

- 5.95 In response to these possible arguments against a wider review, we would make the following points. If the aggravated offences are not working adequately, or if they are not suitable in their current form to address crime based on hostility towards the three additional characteristics, then their extension will risk being largely symbolic. The new offences would have little practical value. Worse still, they may result in hostility aggravation not being addressed at all in the final disposal of cases, despite those cases having been reported and prosecuted as “hate crimes”.
- 5.96 Racial and religious hate crime represents the bulk of all reported and recorded hate crime in England and Wales. Failings in the legislation by which it is prosecuted and sentenced need addressing for this reason too. If the current system is not working as well as it should, this results in poor outcomes for victims and wastes resources. It sends the wrong message to potential perpetrators, offenders, and wider society about the seriousness with which the law takes hate crime.

Recommendation

- 5.97 In view of the matters discussed in this chapter, we conclude that there is some evidence that the present aggravated offences are not working satisfactorily and that the protection they afford to victims of crime driven by hostility towards the characteristics of race and religion may as a result be inadequate. This brings into doubt whether the offences in their current form should be extended to any further characteristics.
- 5.98 Furthermore, the list of offences capable of being aggravated may require review to ensure the offences can address hate crime affecting the additional characteristics of disability, sexual orientation and transgender identity.
- 5.99 The list of characteristics that need express protection under the aggravated offences regime also requires deeper consideration as part of a wider review.
- 5.100 Such a review would provide an opportunity for Government and the criminal justice agencies to assess, in light of the responses to this consultation, how well the current regime is serving its purpose for all the existing characteristics that the legal system serves to protect. It will also enable policy makers and practitioners to consider more deeply whether other characteristics ought to be covered by hate crime legislation and on what principles this should be decided.
- 5.101 Finally, a fully informed and balanced decision on the case for extending this legislation must necessarily consider the theoretical arguments against the offences and the case for their repeal.
- 5.102 **Therefore, our recommendation is for a full-scale review of the operation of the aggravated offences and of the enhanced sentencing system. Such a review should examine all the available data to establish whether aggravated offences and sentencing provisions should be retained, amended, extended or repealed, what characteristics need to be protected, and the basis on which characteristics should be treated as protected.**

Alternative recommendation

- 5.103 In making the recommendation for a full review, we have sought to ensure that the best overall criminal justice response is made to hate crime and the best possible outcome achieved for victims who suffer crime based on hostility towards a protected characteristic. However, we appreciate that without Government support and the necessary resources, a review of sufficient scope will not take place.
- 5.104 Disability, transgender identity and sexual orientation have been selected as protected characteristics for other hate crime purposes, namely monitoring, reporting, recording and the statutory enhanced sentencing regime under sections 145 and 146 of the Criminal Justice Act 2003. In light of that, considerations of equal treatment would require there to be good, principled reasons for not also including them in the aggravated offences regime. We see no compelling reasons of principle, based on our investigations.¹¹²
- 5.105 **Therefore, if our recommendation for a wider review is not supported by Government, we recommend in the alternative that the aggravated offences be extended to cover hostility based on disability, sexual orientation and transgender identity, in order to bring about equality of treatment across the five protected hate crime characteristics. For the reasons explained in Chapter 4,¹¹³ this is not our preferred solution and in our view represents a less valuable reform option in comparison to the wider review we have recommended.**
- 5.106 In Chapter 6 we report on consultees' responses concerning the definitions of disability, sexual orientation and transgender identity that could be used for any new aggravated offences, and we make recommendations relating to these.
- 5.107 For the avoidance of doubt, we make clear that our recommendations for sentencing reforms set out in Chapter 3 should be taken forward irrespective of the recommendations in this chapter.

¹¹² Nonetheless, for the reasons we set out in Chapter 4, we have a number of concerns as to whether extending the aggravated offences in their current form would produce the optimal solution. The wider review we recommend would provide an opportunity to address these concerns before any steps are taken to extend the aggravated offences.

¹¹³ Paras 4.157 to 4.203.

CHAPTER 6

DEFINING THE AGGRAVATED OFFENCES

INTRODUCTION

- 6.1 In Chapter 5 we explained our recommendation for a wider review of the aggravated offences under the Crime and Disorder Act 1998 (“CDA”). We also explained that, if such a review is not undertaken, our recommendation is to extend the aggravated offences to cover hostility on the basis of disability, sexual orientation and transgender identity. Since our terms of reference do not extend to recommending change to the form or structure of those offences, we do not engage in a detailed drafting exercise in respect of any new offences.
- 6.2 However, the new offences would need to define the terms “disability”, “sexual orientation” and “transgender identity”. In the CP we considered what definition might be used in respect of each protected characteristic, and provisionally proposed that it would be preferable to adopt the definitions currently used for the purposes of the enhanced sentencing scheme.¹ In this chapter, we consider the consultation responses to those proposals before making our recommendations.
- 6.3 We also analyse in this chapter consultees’ responses to the questions we posed about difficulties that might arise in applying the elements of the existing aggravated offences to each additional characteristic.² We conclude in relation to each characteristic that no particular difficulties were identified in consultees’ responses, such as would preclude the offences being extended to any of the new characteristics. This is not to deny that it would be preferable to conduct a wider review, as we recommend in Chapter 5, particularly to ensure that the offences listed as capable of being “aggravated” are appropriate.

DISABILITY

The CP

- 6.4 In the CP, we considered the following definitions of “disability”:³
- (1) Section 146(5) of the Criminal Justice Act 2003 (“CJA”), which provides that “disability means any physical or mental impairment”;
 - (2) Section 6 of the Equality Act 2010, which provides that “a person has a disability if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities”; and

¹ See the CP at paras 3.86 to 3.100 (disability), 3.112 to 3.116 (sexual orientation) and 3.126 to 3.140 (transgender identity).

² We discussed potential difficulties in the CP at paras 3.101 to 3.110 (disability), 3.117 to 3.124 (sexual orientation), and 3.141 to 3.148 (transgender identity). We focused on the elements of hostility, membership (including presumed membership) of the relevant group, and motivation.

³ CP paras 3.86 to 3.100.

- (3) Article 1 of the UN Convention on the Rights of People with Disabilities (“CRPD”), which provides that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”
- 6.5 Our provisional proposal was that, if the aggravated offences are extended to include disability, the section 146(5) CJA definition should be used in preference to these alternatives. We noted that in the absence of case law interpreting section 146(5), there is some uncertainty as to precisely what constitutes “impairment”.⁴ Nevertheless we preferred it because it would offer consistency with the enhanced sentencing regime and is already familiar to judges and practitioners.⁵
- 6.6 We considered the Equality Act 2010 and CRPD definitions to be inappropriate due to their different focus and context. They would require an examination at trial of the impact complainants’ impairments have on their lives. This would amount to an unnecessary and irrelevant intrusion. It would also place an unnecessary burden on the criminal courts.⁶

Responses

- 6.7 We asked consultees whether they agreed that the CJA definition should be used (**Proposal 6**), and whether they agreed that the Equality Act 2010 and CRPD definitions are inappropriate (**Question 2** and **Question 3** respectively). There was broad agreement with our views:
- (1) **Proposal 6:** Of the consultees who answered this question, 87 agreed, 12 disagreed, and 29 were unsure or expressed no opinion.
 - (2) **Question 2:** 71 consultees agreed, 9 disagreed, and 41 were unsure or gave no opinion.
 - (3) **Question 3:** 63 consultees agreed, 11 disagreed, and 49 were uncertain or did not give a view.
- 6.8 We now consider the arguments consultees raised in respect of each definition.

Proposal 6: Is the CJA definition preferable?

YES

- 6.9 Most of the 87 consultees who agreed that the section 146 CJA definition should be used did not provide reasons.⁷ Of those who did comment, the main reason advanced was that of ensuring consistency with the enhanced sentencing

⁴ CP para 3.88.

⁵ CP paras 3.88 to 3.90.

⁶ CP paras 3.93 and 3.98.

⁷ Among the responses from consultees using the Easy-Read format, Speaking Up Southwark suggested the definition “any physical or mental abnormality that has been medically defined/diagnosed as such”. Making Our Choice felt that any definition ought to be wide enough to include long-term health conditions, learning disabilities, autism, mental health issues and physical disabilities.

regime.⁸ The Senior Judiciary commented that it would be “highly undesirable” for new aggravated offences to use a different definition from section 146.

- 6.10 Thirteen of those who agreed with us preferred to see the section 146 definition modified to make explicit reference to particular matters such as sensory impairments,⁹ long-term health conditions such as HIV, hepatitis and multiple sclerosis¹⁰ and learning disabilities such as autism.¹¹ Stay Safe East suggested that guidance could be issued to clarify that these categories are included in the scope of the section 146 definition.¹²
- 6.11 Some commented on the need to ensure the definition was broad enough to encompass presumed disability,¹³ and the targeting of victims due to their association with disabled people (for example, carers of disabled people).¹⁴

NO

- 6.12 Some consultees were concerned that section 146 does not adopt the “social model” of disability. The social model distinguishes between an impairment and disability. Whereas an impairment refers to a functional limitation, a disability is the result of a specific set of social or economic structures which hinder the equal participation in everyday life of a person who has an impairment. The model thus shifts the focus from the impairment and the disabled person onto the duty of society to adapt to their needs. We return to the point at paragraph 6.22 below.
- 6.13 Others considered that the section 146 definition may not be sufficiently explicit about the conditions and impairments it covers. Stop Hate UK argued that the definition did not expressly include sensory impairments and long-term health conditions. They also argued that any definition should expressly distinguish learning and cognitive impairments from impairments affecting mental health.¹⁵

⁸ Victim Support, Leonard Cheshire Disability, Dr F Stark, the Royal College of Nursing, the Disability Hate Crime Network, the Senior Judiciary, the Teesside and Hartlepool Magistrates, and the CPS London Local Scrutiny and Involvement Panel.

⁹ J Healy, A Scutt, the Brandon Trust, Diverse Cymru, Worcestershire Safeguarding Adults Board.

¹⁰ National Aids Trust and Diverse Cymru. (The latter proposed that the definition be amended to read “any physical or mental or cognitive or intellectual or sensory impairment, including long-term health conditions”.)

¹¹ Linkage Community Trust, Diverse Cymru, Worcestershire Safeguarding Adults Board, Stay Safe East.

¹² The categories they listed were “physical, sensory, mental health, learning difficulty/disability, long term health condition, deaf BSL user, and neuro-diversity”. However they advised against an exhaustive list. They also wanted any guidance to refer to the “social model” of disability, discussed further below at para 6.12 and from para 6.22.

¹³ Society of Legal Scholars and Dr A Dimopoulos. This point also arose regarding transgender identity and sexual orientation. However, as the existing aggravated offences cover presumed membership of a group (see Chapter 2 above, at para 2.14), extended offences applying to the additional characteristics would also do so.

¹⁴ Diverse Cymru, Mencap. Other consultees raised similar concerns regarding transgender identity and sexual orientation. We discuss this issue in detail below, from para 6.35.

¹⁵ Learning Disability Partnership and PA Funnell also argued that s 146 is under-inclusive, and that an entirely new definition should be devised in consultation with disabled people.

- 6.14 Christian Concern and the Christian Legal Centre regarded the definition as being too broad, arguing that it could for example capture “an offensive remark against someone who had a sore foot for a couple of days”.

OTHER COMMENTS

- 6.15 Changing Faces¹⁶ highlighted that the Equality Act 2010 provides that severe disfigurements come within the scope of disability for the purposes of that Act,¹⁷ and argued that the definition of “disability” should be “broader” than that contained in the Equality Act 2010.¹⁸

Question 2: Is the Equality Act definition inappropriate?

YES

- 6.16 Many consultees who agreed that the Equality Act definition is unsuitable focused on the fact that it requires an impairment to have a “substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities”.¹⁹ They were concerned that this would place the onus on complainants to prove their disability,²⁰ set a high threshold that would unjustifiably exclude too many disabilities and impairments,²¹ and unfairly exclude short-term impairments.²² The Senior Judiciary encapsulated several of these points in their response:

The degree of impairment may be highly relevant in the wider context of rights and obligations but it is irrelevant to the question of whether an offence is motivated by or demonstrates hostility based on disability. The effect of a disability may not be particularly serious, but hostility towards the disability will be. Any investigation into the precise diagnosis of a victim’s condition would be embarrassing and demeaning.

- 6.17 There was concern that defendants might seek to argue that the effect of the complainant’s impairment was insufficiently substantial or that it was short-term in

¹⁶ A charity that supports and represents people whose appearance is affected by health conditions or injuries.

¹⁷ Under the Equality Act 2010, Sch 1, para 3(1): “[A]n impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect” on the ability to carry out everyday activities. Since s 146(6) defines disability as “any mental or physical impairment”, with no corresponding requirement that it have a substantial adverse effect, disfigurement would in our view be likely to be considered by a court as a physical impairment.

¹⁸ They did not elaborate as to how the definition should be broader. As we explain from para 6.26 below, the s 146 definition is in fact wider than that contained in the Equality Act 2010.

¹⁹ See para 3.93 of the CP.

²⁰ UNISON, Stay Safe East, and the Senior Judiciary.

²¹ Lesbian & Gay Foundation, Diverse Cymru, and Action Disability Kensington and Chelsea.

²² Ms A Scutt pointed out that the defendant would not know whether the impairment is short or long term.

nature,²³ or in view of the degree to which the complainant was able to participate in society.²⁴

NO

- 6.18 Christian Concern and Christian Legal Centre opposed new aggravated offences. However, they considered that, if they were to be introduced, this definition would be most suitable because it would not criminalise remarks concerning trivial conditions.²⁵
- 6.19 Hate Free Norfolk argued that it would be desirable for the aggravated offence and Equality Act definitions to be consistent.

Question 3: Is the CRPD definition inappropriate?

YES

- 6.20 Consultees advanced similar arguments against the CRPD definition as they did against the Equality Act definition. These centred on the fact that the CRPD refers to “long term... impairments which, in interaction with various barriers may hinder [the person’s] full and effective participation in society on an equal basis with others”.²⁶
- 6.21 UNISON argued that this definition “would again put more of an onus on the victim to prove that they were disabled, rather than on the perpetrator to prove whether or not they carried out the offence”. Stay Safe East gave the example of a person with a mild learning disability that is not a significant barrier to participation in society, but who might be the victim of a hate crime because they are seen as “different”.²⁷

NO

- 6.22 A number of consultees²⁸ rejected the section 146 definition in favour of the CRPD definition because they preferred the “social model” of disability (explained above at paragraph 6.12).²⁹ For example, Leicestershire Police and the ACPO LGBT Portfolio (who submitted the same response) observed:

[It] is based more on the social model of disability which focuses on removing barriers to disabled people participating in society on an equal basis rather than the medical model which has shown to focus mainly on what a disabled person can or cannot do. This definition

²³ Leicestershire Police.

²⁴ Stop Hate UK.

²⁵ For example a remark about a sore foot: see para 6.14 above.

²⁶ The Senior Judiciary observed that the definition is “partial and non-exhaustive” owing to the use of the word “includes”.

²⁷ Stop Hate UK raised a similar point.

²⁸ North Yorkshire Police, ACPO LGBT Portfolio, Leicestershire Police and Cheshire Police.

²⁹ Which follows the “social model” by referring to impairments which “in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Article 1).

lends itself to hate crime which attempts to address the denial of equal respect and dignity to people who are seen as different.

6.23 Diverse Cymru argued that the social model is the best approach to disability, because it sends a message that “disabled people are not to be deemed at fault for their impairments...” However they did not endorse the CRPD model because they were not sure it would be workable.³⁰

6.24 Against this, Dr Dimopoulos said that the social model of disability

makes the distinction between impairment and disability. In other words, the impairment is the underlying medical condition, which evolves into a disability because the social and legal responses to impairment perpetuate social exclusion and inequality for persons with disabilities. This approach is laudable in understanding what disability is about. But in the context of hate crime, what constitutes the basis of disability hate crime is the impairment. For this reason, the definition of disability in section 146 is actually CRPD compliant.

Discussion

6.25 We recognise the importance of the social model concept as an approach to resolving disability-related inequality. However, we agree with the consultees who identified potentially undesirable consequences that would flow from using a definition that focuses on the impact of the disability on the alleged victim in the hate crime context. In particular, it would not be beneficial to adopt a definition of disability that could lead to challenges by defendants on the grounds that the impairment was insufficiently serious, or that the complainant had surmounted its effects sufficiently to live a normal life.

6.26 On the contrary, it might be argued in the particular context of hate crime, that it is the section 146 definition that better vindicates the “social model”. Using that definition, it is sufficient that the defendant was motivated by hostility towards disabled people, or demonstrated hostility towards the complainant due to his or her disability (or presumed disability). The definition of disability would be any form of physical or mental impairment. This must be interpreted using its ordinary meaning and would be a low threshold to establish. This therefore places the focus on the attitude and behaviour of the defendant, rather than on the degree or specific nature of the disability. By contrast, under the Equality Act and CRPD models, more focus would be placed on the nature of the complainant’s disability, which could detract from the significance of the defendant’s hostility.³¹

6.27 We consider that adopting either the Equality Act or the CRPD definitions of disability may in fact risk excluding certain impairments or conditions, notably those that amount to physical or mental impairments, but do not comply with the further requirements of the Equality Act or CRPD definitions as to, for example, being long term or hindering participation in normal activities. In our view, it is the breadth of the section 146 definition that is its chief benefit in the hate crime

³⁰ Action Disability Kensington and Chelsea made similar points.

³¹ Although it would still suffice for the hostility to be based on a “presumed” disability or impairment rather than an actual one.

context. For hate crime purposes it should be irrelevant whether a particular impairment or that condition makes it impossible or difficult to live a normal life. We therefore do not see any grounds to prefer either of these definitions over the section 146 definition. We are not aware of any cases in which the existing definition has presented difficulties for enhanced sentencing purposes.

- 6.28 We now turn to the concerns raised about whether the section 146 definition is under-inclusive, or whether it should be modified so as to include certain conditions expressly. We agree that if any new offences are to address disability hate crime effectively and command the confidence of the public, it is essential that the scope of the offences is sufficient to address all the possible forms of criminality based on hostility towards those with disabilities. It would be as undesirable for hostility based on a victim's learning disability to be excluded as it would be for the offences to be trivialised by treating remarks about minor injuries (such as a broken finger) as manifesting hostility towards disabled people generally.
- 6.29 However, we consider that the section 146 definition is already sufficient to cover hostility based on learning disability, as well as impairments affecting mental health, provided sufficient evidence of hostility is adduced. We do not anticipate any risk of charges being brought for aggravated offences where hostility is alleged due to some minor and temporary ailment such as a broken finger.
- 6.30 We recognise that it is possible to interpret "impairment" narrowly. For example, it might be argued that conditions which affect appearance, or involve personal stigma but do not necessarily impair physical or mental functions, should not be interpreted as "impairments".
- 6.31 In our view such arguments would fail in a criminal trial. In considering what constitutes an impairment, the court would have regard if necessary to the conditions listed in Schedule 1 of the Equality Act. This provides, for example, that disfigurement is an impairment. It also lists cancer, HIV and multiple sclerosis.³²
- 6.32 For these reasons, we consider it unnecessary to add specific conditions or impairments to the flexible and inclusive definition provided by section 146. To do so would risk inviting defence arguments that other conditions not specifically referred to should be interpreted as excluded. Furthermore, we are reluctant to adopt a different definition for the aggravated offences than that which applies for enhanced sentencing, given how closely the two schemes are inter-related.
- 6.33 It is also important to bear in mind that new aggravated offences would not be limited to what a defendant knows, or correctly assumes, about a complainant's disability. For the demonstration "limb" of the aggravated offences, at section 28(1)(a), it would be enough that the defendant presumed the person was disabled; to satisfy the motivation limb at section 28(1)(b), it will suffice that

³² Equality Act 2010, Schedule 1, paras 3 and 6. Case law on the meaning of "impairment" in the Equality Act 2010 also establishes that a broad interpretation should be adopted. See, for example, *McNicol v Balfour Beatty Rail Maintenance* [2002] EWCA Civ 1074, in which it was held that the term "impairment" bears its ordinary and natural meaning and that an impairment may result from an illness or it may consist of an illness, provided that, in the case of mental impairment, it is a "clinically well-recognised illness".

the defendant was motivated by hostility towards disabled people generally. Nor does this need to be the sole or even the main motivation for the offence.

- 6.34 **Therefore, we recommend that the definition of disability in any new aggravated offences should be the definition in section 146(5) of the Criminal Justice Act 2003: “any mental or physical impairment”.**

Possible difficulties

Targeting by association

- 6.35 As we noted in Chapter 2, the CDA provides that membership of a racial or religious group is defined to include membership by association.³³ This stipulation also applies for the purposes of section 145, because section 145(3) refers back to the CDA in defining when an offence is racially or religiously aggravated. However, section 146 does not use the language of membership of a group, referring instead simply to sexual orientation, disability and being transgender. No express provision is made to extend this to cover hostility on the basis of a person’s association with people who are disabled, transgender or of a particular sexual orientation.
- 6.36 Several consultees addressing the question of how to define “disability” for aggravated offences were concerned that the definition should be broad enough to cover targeting by association, such as the targeting of carers of disabled people.³⁴ The issue was also raised in relation to sexual orientation and transgender identity.
- 6.37 It is unclear why no explicit provision was made for membership by association when section 146 was drafted.³⁵ It is possible that a view was taken that the language of “membership” used in the CDA was inappropriate for the additional characteristics. It is also possible that the issue was overlooked.
- 6.38 It may have been assumed that offences targeting those who “associate with” disabled people would in any case be covered by the motivation limb of the hostility test (in section 146(2)(b)). This is likely to be so in many cases, as it is difficult to imagine conduct amounting to an offence motivated by hostility towards a person’s association with disabled people that is not ultimately motivated by hostility towards disabled people generally. However, most aggravated offence cases are brought using the narrower demonstration limb of the test (in section 146(2)(b)),³⁶ due to the difficulty of proving subjective motivation. The demonstration limb applies only to demonstrations of hostility based on the *victim’s* disability, not hostility towards disabled people generally or people with a particular disability. Consequently there is a gap in the law, which

³³ Chapter 2 above, para 2.83 and following

³⁴ See para 6.11 above.

³⁵ We have not found any indication in parliamentary records that the issue was actively considered by Parliament.

³⁶ As we pointed out in Chapter 2 above, para 2.18.

may be significant in circumstances where it is only possible or practical to rely on the demonstration limb of the offence.³⁷

- 6.39 We agree with consultees that any new aggravated offences should apply to offending in which the defendant demonstrates hostility, or is motivated by hostility, towards a person based on that person's association with disabled people (or with people of a particular sexual orientation, or who are transgender). If the aggravated offences were extended in their current form (with necessary adaptations), targeting by association with disabled, LGB or transgender people would be covered. However, this would have the unfortunate consequence of creating an inconsistency with section 146, in light of the gap we have just explained.
- 6.40 To avoid the inconsistency we identify above, and to ensure consistency between all new aggravated offences and the existing enhanced sentencing regime, we make the further recommendation below.
- 6.41 **We recommend that, if the aggravated offences are extended, section 146 of the CJA should be amended so that it mirrors the effect of section 145(3) and covers the targeting of victims due to their association with people who are disabled, LGB or transgender.**³⁸

Hostility and vulnerability

- 6.42 In the CP we discussed possible difficulties applying the existing aggravated offences to disability. We noted that a problem that can arise in applying this definition in section 146 is the difficulty of distinguishing between offending motivated by hostility towards disability, on the one hand, and crimes which target a disabled person because their disability is perceived as making them less able to resist, and thus more vulnerable to a particular type of crime, on the other.³⁹

RESPONSES

- 6.43 A small number of consultees did not accept that there was any distinction to be drawn between hostility and exploitation of vulnerability. Their view was that motivation based on greater vulnerability is (or should be considered) as serious an aggravating factor as motivation based on hostility, or that it should be seen as amounting to a hostile demonstration, or motivation by hostility.⁴⁰
- 6.44 Dr Dimopoulos argued:

³⁷ For instance because there is evidence that the offender used highly offensive words while intoxicated, but evidence that they are usually well-inclined towards disabled people. In that instance, it would be more straightforward to rely on the objective demonstration of hostility, rather than attempt to prove subjective motivation. For a brief outline of what constitutes demonstration of and motivation by hostility, see Chapter 2 above, paras 2.11 and 2.17.

³⁸ Although our terms of reference only allow us to make recommendations relating to extension of the aggravated offences and not to modification of the enhanced sentencing legislation, we make this recommendation in the interests of consistency.

³⁹ CP para 3.105 and from para 2.149 onwards.

⁴⁰ J Healy, Dr A Dimopoulos, the Practitioner Alliance for Safeguarding Adults, Worcester Safeguarding Adults Board, one member of the CPS London Local Scrutiny and Involvement Panel, and Community Members of the CPS North Wales Scrutiny Panel.

Hostility should be understood as disablism: regarding someone as inferior because of her disability. Disablism therefore is a wider concept, but it is arguably more suited to capture the essence of what disability hate crime is about. By focusing on hostility (as we currently understand it) we lose sight of the wider picture about disability hate crime.

6.45 Mencap were anxious that the distinction needed to be better understood. They were keen to avoid a focus on vulnerability such that people's disabilities are seen as making them vulnerable to attack, rather than placing the focus on the hostile attitude of perpetrators. They argued that more must be done to prevent the condescending perception that disabled people are vulnerable.

6.46 Other consultees felt that this difficulty can be addressed by having regard to the guidance on disability-related hostility. For example, Diverse Cymru said:

There is already comprehensive CPS guidance on these distinctions, which could apply to aggravated offences... We do not feel that creating a new offence where this distinction is relevant causes any particular difficulties.⁴¹

DISCUSSION

6.47 We agree with the consultees who felt that the vulnerability/hostility distinction is not one that would cause insurmountable difficulties if the aggravated offences were to be extended to disability.

6.48 As we explained in the CP,⁴² there may be cases where hostility towards disability is present in addition to a perception that the victim was vulnerable and could therefore be easily exploited. The CPS legal guidance on disability hate crime recognises that targeting a person on grounds of their disability is often, though not always, a clear indication of hostility based on disability.⁴³ Seeing the particular disabled person as an easy target for a particular criminal offence does not alter this: the person is still being targeted specifically because of their disability. It will be necessary to assess whether hostility formed part of this.

6.49 As the CPS guidance makes clear, each case would turn on its own particular facts and circumstances: this would apply equally to interpreting hostility for purposes of a disability aggravated offence as for deciding whether hostility existed for enhanced sentencing purposes.

6.50 We have explained elsewhere that the sentencing court is already required to treat a defendant's deliberate exploitation of a vulnerable target as an

⁴¹ In a similar vein, Mencap, the Linkage Community Trust, and UNISON suggested guidelines could address the issue. Others argued the difficulty could be overcome if the CPS and police understand the issue and approach it correctly: Stay Safe East, the Senior Judiciary and HM CPS Inspectorate.

⁴² CP para 3.108.

⁴³ Crown Prosecution Service Legal Guidance, *Disability Hate Crime*, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/#a31 (last visited 6 May 2014).

aggravating factor.⁴⁴ This approach would remain open to a court even in a case where hostility towards disability could not be established on the evidence.

SEXUAL ORIENTATION

The CP

- 6.51 In the CP we provisionally proposed⁴⁵ that the definition of “sexual orientation” in any new offences should be “orientation towards people of the same sex, opposite sex, or both”. This would mirror the definition used for the purposes of the enhanced sentencing provisions in section 146 of the CJA⁴⁶ and would match that contained in the stirring up offences.⁴⁷
- 6.52 Our view was that using this definition would ensure consistency and uniformity in the law’s response to sexual orientation hate crime.

Responses

- 6.53 The vast majority of consultees agreed that this definition should be used.⁴⁸ Where reasons were given by those in favour, the most common was that this approach would ensure consistency across the existing criminal law and sentencing provisions.⁴⁹ Several consultees, including Stonewall, also referred to the advantage that this definition is widely understood.⁵⁰ The Senior Judiciary noted that they had seen no evidence that the current definition was inadequate or unworkable.
- 6.54 RadFem opposed retaining the current definition because they did not feel that hate crime on the grounds of heterosexuality was conceivable, and that providing for it may result in unintended consequences.

Concerns about under-inclusiveness

- 6.55 A number of consultees were concerned that the existing definition is not inclusive enough.⁵¹ Two consultees opposed the definition on that basis,⁵² while

⁴⁴ See above, para 2.98.

⁴⁵ CP paras 3.112 to 3.115.

⁴⁶ Although sexual orientation is not defined in section 146, in *B* [2013] EWCA Crim 291 the Court of Appeal held that s 146 reflects the definition in s 29AB of the Public Order Act 1986, which also appears in s 12 Equality Act 2010. See Chapter 2 above at para 2.79, and the CP at paras 3.112 to 3.116.

⁴⁷ Contained in Public Order Act 1986 s 29AB: see fn 46 above.

⁴⁸ 70 consultees agreed, 3 disagreed, and 11 were unsure.

⁴⁹ Safe Durham Partnership, Victim Support, Cheshire Constabulary, West Midlands Police.

⁵⁰ Also Cheshire Constabulary, and Christian Concern and Christian Legal Centre.

⁵¹ Several consultees (Diverse Cymru, Stop Hate UK, the CPS and an anonymous consultee) raised the issue of those targeted due to their association with LGB people. The issue of targeting by association has already been dealt with in relation to all three proposed new protected characteristics at paras 6.35 to 6.41 above.

⁵² Stop Hate UK and Prof C Munthe.

others qualified their support with comments, as discussed further below.⁵³

- 6.56 Leicestershire Police and Stop Hate UK were concerned that those with “non-binary” genders would not be included. Stop Hate UK said that:

Anyone can experience Hate Crime because of their actual, self-defined or perceived sexual orientation, whatever that might be... We do not believe that sexual orientation can only be defined by reference to the terms “gay”, “lesbian”, “bisexual” and “heterosexual” ... We believe that there is a need for consistency but a sexual orientation aggravated offence should not and need not adopt such a narrow definition of sexual orientation in order to ensure consistency.

- 6.57 Professor Moran suggested that “sexuality” rather than “sexual orientation” would be a more inclusive definition, and would include asexual people.⁵⁴

- 6.58 Galop also stated that some people identify in ways that are difficult to categorise, such as queer⁵⁵ or pansexual (Diverse Cymru also referred to people who identify as polysexual⁵⁶). Galop suggested that “it is more useful to broadly define sexual orientation in terms of sexual gender preference” instead of naming identity groups considered to fall within the definition of sexual orientation. They also expressed the view that it is important that any such definition encompasses hostility against bisexual people; while section 146 does so, they said that the police and CPS in practice interpret sexual orientation hate crime as referring only to homosexuality.

- 6.59 Professor Munthe suggested that the definition “orientation of sexual desires or amorous attachments or emotions towards some particular type of person, being or object” should be adopted. He said this was necessary in order to accommodate orientations towards, for example, animals⁵⁷ and inanimate objects.

⁵³ Leicestershire Police, Galop, Prof L Moran agreed with the proposal but with caveats; Diverse Cymru, PASAUK, and Worcestershire Safeguarding Adults Board did not come down either way.

⁵⁴ Diverse Cymru, the Practitioner Alliance for Safeguarding Adults, Worcester Safeguarding Adults and Galop also wanted asexual people to be expressly covered.

⁵⁵ This term does not appear to have a widely accepted definition. Wikipedia notes it can be used to encompass all non-heterosexual people, or as a socio-political term to describe those who reject traditional gender and sexual identities. See <http://en.wikipedia.org/wiki/Queer> (last visited 21 March 2014).

⁵⁶ Again, polysexual and pansexual are amorphous terms which do not appear to have widely accepted definitions. Based on the Wikipedia entries, they may be broadly summarised as referring to those who are attracted to all (pansexual) or multiple (polysexual) genders and gender identities, including males, females, transsexuals and others, but who do not identify as bisexual as they do not accept a dichotomy of gender. See <http://en.wikipedia.org/wiki/Pansexuality> and <http://en.wikipedia.org/wiki/Polysexuality> (last visited 21 March 2014).

⁵⁷ It should be noted that acting upon zoophilia by engaging in bestiality or possessing pornography portraying it is illegal (respectively under the Sexual Offences Act 2003, s 69 and Criminal Justice and Immigration Act 2008, s 63).

Discussion

- 6.60 We note consultees' concerns regarding the existing definition not extending to asexual people and others who do not "identify" as heterosexual, homosexual or bisexual. Their argument is that a wider and "non-binary" approach to orientation may be advantageous, and that one of the purposes of hate crime legislation is to challenge the damaging consequences of negative social stereotypes of people with any orientation that differs from the perceived "norm".
- 6.61 It could be argued that under the current definition, the sexual orientation offences would not be limited exclusively to gay or bisexual characteristics but would extend to the orientation of heterosexuality. Therefore they should equally extend towards those with no sexual orientation. This is the approach adopted for the definition of religious hostility in the aggravated offences, which cover those defined by reference to religious belief and lack of religious belief.
- 6.62 However, we have not been provided with evidence to show that individuals suffer hate crime due to being asexual. On balance, we consider that the benefits of consistency between the definition currently used by the enhanced sentencing system and the aggravated offences outweigh any potential benefits of a different or wider definition for the purpose of extended aggravated offences.
- 6.63 We do not agree that the definition of "sexual orientation" should be widened to include non-gender-based sexual preferences such as fetishism, as argued by some consultees. We consider that it would be undesirable to incorporate sexual attraction towards animals or objects within the definition of sexual orientation. In particular it would be offensive to people whose orientation is bisexual or homosexual if their sexual orientation were covered in the same definition as orientations extending to potentially criminal behaviour such as bestiality or child sexual abuse, for the purpose of a hate crime offence.⁵⁸ We consider that such preferences fall well outside the ordinary understanding of what "sexual orientation" encompasses.⁵⁹
- 6.64 As to "polysexual", "pansexual" and "queer", these terms are in our view used to denote concepts of identity which are socio-political in nature rather than orientations as such. They may well be useful and important terms in the context of defining personal and sexual identity. However their lack of precise definition and the resulting openness to interpretation renders them unsuitable for inclusion in a statutory criminal offence.
- 6.65 The central question in the hate crime context is whether the offending behaviour involves a demonstration of, or is motivated by, hostility on grounds of sexual orientation. It is important not to lose sight of the need for the criminal law dealing with hate crime to engage with and provide a response to specific types of

⁵⁸ Furthermore it should be noted that paedophilia and fetishism are generally recognised as mental disorders (including by the World Health Organisation and American Psychiatric Association), rather than as sexual orientations.

⁵⁹ As reflected by the definitions adopted elsewhere in the law, which we noted in the CP at para 3.113. We also note that in jurisdictions where paedophiles (or suspected paedophiles) have fallen within the ambit of hate crime legislation, this was not on the basis that paedophilia was a sexual orientation: see for example G Mason, "Victim Attributes in Hate Crime Law: Difference and the Politics of Justice" (2014) 54 *British Journal of Criminology* 161.

wrongdoing and the harm they give rise to. The legislation does not need to encompass every possible term denoting personal sexual identities or preferences.

- 6.66 Although hate crime against heterosexuals is rare in comparison to hostility-based offending on grounds of homosexuality or bisexuality,⁶⁰ it is not possible to rule out such offending. We do not agree that the definition of sexual orientation should exclude heterosexuality for the purposes of an aggravated offence.
- 6.67 **We therefore recommend that the definition of sexual orientation in any new aggravated offences should be the same as the definition currently used for the purposes of section 146 Criminal Justice Act 2003: “orientation towards people of the same sex, the opposite sex, or both”.**

Potential difficulties

- 6.68 In the CP we also asked whether any particular elements of the offences or of the hostility test would cause difficulties in the context of sexual orientation.⁶¹ We noted that the new offence would not catch the indiscriminate use of insulting terms relating to sexual orientation unless there is also evidence that the defendant did presume the victim was of that particular orientation (whether correctly or not).⁶²
- 6.69 The Grip Project expressed the concern that this was a potential loophole that would “provide cover for a defendant who is involved in a hate based attack”.
- 6.70 However, Stonewall said that they did not foresee any difficulties in establishing presumption as to sexual orientation. This was on that basis of their research indicating that victims usually report that the perpetrator was aware of their orientation due to where they were at the time of an offence (for example, outside a gay bar), who they were with (for example, a same sex partner), or the way they looked or dressed. They argued that it would be straightforward for prosecutors to demonstrate these factors in court with evidence.
- 6.71 We note that in the situation the Grip Project was concerned about, the offending would be caught if the tribunal of fact accepted that the term was used as a result of hostility based on sexual orientation, irrespective of the actual sexual orientation of the complainant. However, if the defendant was not motivated by hostility on this basis, and neither knew of nor presumed the victim’s sexual orientation, it would not be a hostility-based offence. Instead it would be an offence in which an abusive term was used relating to sexual orientation.
- 6.72 It will always be open to defendants to argue, for example, that they have nothing against gay people and would use the same offensive language whenever they were involved in an altercation, because that language tends to provoke or insult. As with the other aggravated offences, it will be for the court to decide whether, based on the evidence, the words or behaviour were in fact used as a result of

⁶⁰ We acknowledged in the CP at fn 29 of Chapter 1 that we had not seen any evidence of hostility-based offending against heterosexuals.

⁶¹ CP paras 3.117 to 3.124.

⁶² CP para 3.120.

knowledge or belief as to the victim's sexual orientation. As Stonewall point out, much will depend on the surrounding circumstances.

TRANSGENDER IDENTITY

The CP

6.73 In the CP, we considered two existing criminal law definitions of transgender identity.⁶³

- (1) Section 146(6) of the Criminal Justice Act 2003, which provides that "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"; and
- (2) Section 2(8) of the Scottish (Aggravation by Prejudice) (Scotland) Act 2009, which provides that "reference to transgender identity is reference to:
 - (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or
 - (b) any other gender identity that is not standard male or female gender identity."

6.74 We also noted the definitions used by NGOs and the CPS in their reports and guidance.⁶⁴

6.75 We recognised that it is unclear whether the CJA definition extends to transvestites and cross-dressers, intersex people, and other non-standard gender identities. On the other hand, the Scottish definition expressly refers to these terms. Nonetheless, we preferred the CJA definition. We considered that it is inclusive and non-exhaustive and therefore does not necessarily exclude other potential meanings so long as these are broadly in line with current perceptions and understanding of transgender issues.⁶⁵ We also considered that it was important to avoid incoherence and inconsistency with the enhanced sentencing system.⁶⁶

Responses

6.76 We asked consultees whether they agreed that the definition in any new offence should mirror the definition in section 146 (**Proposal 7**), and whether they

⁶³ CP paras 3.125 to 3.140.

⁶⁴ Paras 3.129 to 3.132.

⁶⁵ CP, paras 3.133 to 3.134 and 3.139.

⁶⁶ If there were clear benefits to the Scottish definition then it could be argued that this should be used in preference to the current definition in s146, and that the new aggravated offences should adopt it too. However, on balance we do not consider that there is a need to alter the s 146 definition.

thought the Scottish definition would be preferable (**Question 6**). The responses on this issue were somewhat inconsistent.⁶⁷

- (1) **Proposal 7:** 43 consultees agreed that the section 146 definition would be preferable, and 29 disagreed. 82 did not answer or gave no opinion.
- (2) **Question 6:** 32 consultees said yes, the Scottish definition would be preferable, and 26 said no.

Proposal 7: Is the section 146 definition preferable?

YES

- 6.77 Most of those responding affirmatively to this proposal did not advance reasons, although a small number provided brief comments. Victim Support, the Senior Judiciary, and Devon and Cornwall Police cited the need for consistency between any new offences and the current enhanced sentencing regime. The Senior Judiciary commented:

There is no suggestion (as yet) that the definition in section 146(6) is unworkable or inadequate. We note, however, that the definition does not explicitly cover cross-dressers, although it may well be that any judicial interpretation is likely to include them. Cross-dressers are not necessarily motivated by a desire to change gender and may even be insulted by the suggestion that they fall within a definition which concentrates on the issue of gender change.

NO

- 6.78 A significant number of consultees disagreed with our proposal due to the possibility that it might be interpreted too narrowly.⁶⁸ They were concerned that it might exclude hostility towards some categories that should come within the definition. Examples were given, including: people who do not intend to undergo surgical reassignment; those with other non-standard gender identities; intersex people;⁶⁹ and cross-dressers and transvestites, a distinct category of people who do not generally identify as transgender.
- 6.79 Suzanna Hopwood said that “gender reassignment is not a defining characteristic of a gender variant person”. Stop Hate UK stressed the need to “encompass the many different ways in which people might define their gender (or not) and experience hostility on the basis of it”.

⁶⁷ None of those who favoured both the s 146 and Scottish definitions gave any reason for doing so.

⁶⁸ 27 consultees disagreed on this basis, with a further two disagreeing for other reasons. 43 consultees agreed, and 82 did not answer this question. Stop Hate UK and the CPS raised the issue of those targeted due to their association with transgender people. The issue of targeting by association has already been dealt with in relation to all three proposed new protected characteristics at paras 6.35 to 6.41 above.

⁶⁹ That is, people who have some of the sexual characteristics (chromosomes, hormones, gonads, sexual anatomy, reproductive anatomy) of both genders. Such individuals may identify as either gender, neither, or both.

- 6.80 Diverse Cymru were concerned that the section 146 definition would not address hostility-based crime affecting:

other members of the trans community, including cross-dressers, transvestites, genderqueer, third gender and androgynous people. Whilst in many circumstances the hostility directed towards cross-dressers and transvestites may well be on the basis of presuming an individual is transsexual this may be difficult to prove in court.

- 6.81 The Lancashire Police and Crime Commissioner said:

Perpetrators of transphobic hate crime would not normally be able to distinguish between a part time cross dresser (who does not fit into the proposed definition) and someone who is in the process of undergoing gender reassignment. The crime would still be motivated by hostility to transgender people.

- 6.82 Galop also said that the phrase “gender transition” should be used instead of the “medicalised” term “gender reassignment”, as transgender people themselves readily use the former term, whereas the latter has been imposed on them.

- 6.83 RadFem argued that the section 146 definition is too inclusive, on the basis that it would be too “easy for men to claim to present as women in order to harass, intimidate and exploit women” or to violate their privacy.

Question 6: is the Scottish definition preferable?

YES

- 6.84 Many arguments in favour of the Scottish approach were the converse of the arguments about under-inclusivity that arose regarding section 146.⁷⁰ For example Teesside and Hartlepool Magistrates said it would “provide greater clarity”, and encompassed “a ‘fall-back option’ that would provide greater protection”.

- 6.85 Stop Hate UK preferred it for the same reasons, while noting that it would be preferable if it were “gender identity” and not “transgender identity” that is being defined; they are of the view that not all of those living with a different gender from their birth gender can be described as “transgender”, including cross-dressers and those of no gender.

NO

- 6.86 Most negative responses to this question were on the basis that the definition used for any aggravated offences should be consistent with the one used under the enhanced sentencing regime.

- 6.87 A small number of consultees opposed the Scottish definition because they felt that transvestites ought not to be included. RadFem and Dr Lynne Harne argued that transvestism relates to sexuality or eroticism, not to transgender identity. The Magistrates’ Association preferred the section 146 definition and said:

⁷⁰ As the Scottish definition specifically includes transvestism and intersexuality at s 2(8)(a), and has a catch-all provision for any other non-standard gender identity at s 2(8)(b).

Scottish law appears to consider that transgender includes transvestism, which is not the case. However this again points up the disparities in sentencing which may arise from an inclusive list of hate factors. Why should victimising someone for being transvestite be any different to victimising someone for being transgender?

Discussion

- 6.88 We are in broad agreement with the consultees who argued that transgender identity is wider than simply undergoing physical aspects of gender transition, or wishing to do so. We are conscious in particular that some individuals who identify as transgender or gender-variant may have no intention or wish to undergo surgical or other physical gender reassignment processes. The focus of section 146(6) on this particular aspect of transgender identity is thus perhaps unfortunate, although it is a non-exhaustive definition.
- 6.89 However we are reluctant to propose an alternative definition in respect of the aggravated offences, in view of the risk that that this could result in inconsistencies and contradictions between the aggravated offences and the enhanced sentencing scheme. It appears to us to be unnecessary to risk such inconsistency in order to ensure inclusivity, unless we are sure that the section 146 definition will fail to provide adequate protection. It seems unlikely that the identified groups are currently excluded, because the section 146 definition of transgender is non-exhaustive, and the courts may interpret it to apply to them explicitly.⁷¹ In doing so the court would no doubt look to all the available guidance including the Scottish definition and the definitions used by NGOs, the CPS and others.⁷²
- 6.90 Regarding intersexuality, this raises slightly different issues, because it refers to physical gender characteristics rather than to identity. Intersexual people may also be transgender, but they may equally identify comfortably with the gender they were assigned at birth; their status may not be physically obvious or visible. Hostility-based offending against them will be covered by the section 146 definition to the extent that it is based on a presumption that they are transgender, or hostility towards transgender people generally. To the extent that any hostility is based on their intersexuality specifically, the sentence can be increased by the application of the general aggravating factor of hostility towards a minority group.⁷³
- 6.91 As to RadFem's point about men pretending to be transgender in order to violate the privacy of women, we do not consider that this is relevant for the purposes of defining the aggravated offences. In the scenario described, the aggravated offences would only come into play if the women were to respond by committing

⁷¹ Similarly as regards concepts like "genderqueer" and "third gender", which seem likely to be insufficiently well understood and physically obvious concepts, such that any hostility towards such individuals would be due to the mistaken presumption that they are transgender.

⁷² As we discussed in the CP at paras 3.131 and 3.132, these also include transvestites and non-standard gender identities.

⁷³ See paras 2.97 to 2.99 and 3.25 to 3.26 above.

a criminal offence against the man pretending to be transgender, such as an assault or harassment and, in doing so, demonstrated (or were motivated by) hostility against transgender people. If the hostility expressed in the incident was based entirely on the fact that the complainant had pretended to be transgender in order to violate their privacy or for some such purpose, the hostility would not be captured by the aggravated offence.

- 6.92 **We therefore recommend that the definition of transgender identity in any new aggravated offences should be the same as the definition in section 146(6) of the Criminal Justice Act 2003.**

Potential difficulties

- 6.93 In the CP we highlighted some possible difficulties in connection with the various elements of the aggravated offences.⁷⁴ For example, we referred to the risk that courts would interpret section 146(6) as excluding transvestites, giving defendants an argument that they did not presume the complainant was transgender but merely took them to be a cross-dresser.⁷⁵ We also pointed out, however, that the court would need to have regard to the context in which the words or behaviour occurred, in order to assess whether hostility based on transgender identity (actual or presumed) had been demonstrated or was a motivating factor.
- 6.94 A concern with the aggravated offences being extended to transgender identity was expressed by Police Sergeant Laura Millward and Anna Scutt. They identified potential difficulties in ensuring the adequate understanding of transgender issues by criminal justice professionals. This is an important issue and one that needs to be addressed with training and guidance.
- 6.95 No examples were given of specific issues or elements of the offence relating to transgender identity, such as would undermine the effective use of the offences.

⁷⁴ CP paras 3.143 to 3.147.

⁷⁵ CP para 3.144.

CHAPTER 7

EXTENDING THE STIRRING UP OFFENCES

INTRODUCTION

- 7.1 At present, the law of England and Wales provides criminal offences based on the stirring up of hatred on the grounds of race,¹ religion and sexual orientation.² In this chapter we examine the case for extending them to cover the stirring up of hatred on the grounds of disability and transgender identity.

Current law

- 7.2 The existing offences are found in the Public Order Act 1986. The current law was set out in Chapter 2 of the CP and is described more briefly in Chapter 2 of this report.³ The history of the introduction of these offences was discussed in Appendix B to the CP.⁴
- 7.3 The racial hatred offences apply to specified forms of behaviour or content that is:
- (1) threatening, abusive or insulting; and
 - (2) intended, or likely, to stir up racial hatred.
- 7.4 The offences relating to hatred on the grounds of religion or sexual orientation apply to specified forms of behaviour or content that is:
- (1) threatening; and
 - (2) intended to stir up hatred on these grounds.

In the case of these offences, there are provisions safeguarding freedom of expression, so as to allow discussion of religious beliefs and practices, sexual practices and the merits of same-sex marriage.

The CP and related documents

- 7.5 In Chapter 4 of the CP we examined the case for extending the stirring up of hatred offences under the Public Order Act 1986 to include stirring up of hatred on the grounds of disability or transgender identity. The provisions of the European Convention on Human Rights concerning freedom of expression were discussed in Appendix A to the CP.⁵ The application of those provisions to the offences of stirring up hatred is discussed in paragraphs A.80 and following of

¹ Public Order Act 1986, ss 18 to 23.

² Public Order Act 1986, ss 29A to 29G.

³ Chapter 2 above, paras 2.33 to 2.56.

⁴ Paras B.54 to B.260, at http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_appendix-b.pdf.

⁵ http://lawcommission.justice.gov.uk/docs/CP_213_hate_crime_appendix-a.pdf.

that Appendix. The theoretical arguments relevant to these offences were considered further by Dr John Stanton-Ife in his paper published with the CP.⁶

- 7.6 In Chapter 4 of the CP, we analysed the arguments in principle for and against extending the offences to these additional characteristics. We then examined whether there was a practical need to extend the offences.

Structure of this chapter

- 7.7 In this chapter we consider the responses to our proposals concerning these offences.
- 7.8 As in the CP, we first analyse the arguments in principle and then examine whether there is a practical need to extend the offences. Within each of those two questions we group the consultation responses by theme, following each group of responses with our own discussion of that theme. We then present our recommendation, that the offences should not be extended.

IS THERE A CASE IN PRINCIPLE FOR EXTENDING THE OFFENCES?

- 7.9 In the CP we considered whether the existing law already addressed conduct which would be likely to fall within any new offences of stirring up hatred against disabled or transgender people. We also considered whether new offences would have a valuable symbolic function and whether they would infringe other rights and freedoms. In Proposal 9, we asked:

On the basis of the arguments set out above, our provisional view is that there is a case in principle for new offences of stirring up hatred on grounds of disability and transgender identity. Do consultees agree? If not, why not?⁷

- 7.10 Of those who answered this question, 102 agreed there was a case in principle; 11 disagreed; and 20 were unsure or raised further questions.⁸
- 7.11 The issues raised in those responses were as follows:
- (1) Is there a need for parity in the treatment of the stirring up of hatred of all the protected characteristics?
 - (2) Does lack of parity amount to unlawful discrimination, or offend against the principles in the Equality Act 2010?

⁶ This paper is on our website at http://lawcommission.justice.gov.uk/docs/Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf; the passages relating to offences of stirring up hatred are paras 55 to 72 and 80 to 110.

⁷ CP para 4.63.

⁸ The 7 consultees who answered the corresponding question using the easy-read form were unanimously in favour of extension, five on grounds of equality, one on the basis that the current law was insufficient, alternatively that new laws would act as a deterrent, and one arguing that extension is necessary to send the message that crimes against disabled people are as serious as those against other groups.

- (3) Do offences of stirring up hatred infringe the right to freedom of expression?
- (4) Would new offences of stirring up hatred have a deterrent effect in practice?
- (5) Is it justifiable to create new offences of stirring up hatred for the sake of symbolic effect?
- (6) What level of practical need is required to justify new offences of stirring up hatred?⁹

(1) The need for parity

- 7.12 One argument for introducing new offences of stirring up hatred is that there should be parity in the protection of all five protected characteristics. This argument was advanced in one form or another by 21 consultees. Powers of enhanced sentencing¹⁰ already extend to all five characteristics, and we discussed in Chapter 4¹¹ the argument that the aggravated offences should do the same in view of the close connection between the two regimes. Similarly, it can be argued that having offences of stirring up hatred on the grounds of race, religion and sexual orientation but not disability or transgender identity gives an undesirable impression that some groups deserve more protection than others.

The responses

- 7.13 Consultees who argued for extension of the stirring up offences in the interests of parity included the Crown Prosecution Service, the Equality and Human Rights Commission, Stop Hate UK, two police forces, two academics and several NGOs supporting disabled, LGB or transgender people.

- 7.14 The Crown Prosecution Service argued:

There is a commonality of experience in relation to hate crime across the five strands, and this would provide the opportunity to meet the experience of those involved with these communities and provide for the equalisation of legislation that has evolved in a piecemeal fashion over the last 20 years.

- 7.15 Diverse Cymru said that the absence of stirring up offences for transgender identity and disability sends the message that stirring up hatred against those with these characteristics is treated less seriously by the law. They noted the impact of such behaviour on social cohesion and in making members of these groups feel unsafe. They felt that the wrongdoing involved in this conduct and its impact should be addressed by stirring up offences. They noted that stirring up

⁹ This question relates only to the issue of principle as to what level of need is required. Whether that level of need in fact exists is considered in the second half of this chapter (para 7.103 and following). Many consultees discussed the two questions together, but we have separated them out as far as possible.

¹⁰ Criminal Justice Act 2003, ss 145 and 146; described in Chapter 2 above at para 2.57 and following.

¹¹ Chapter 4 at para 4.14 and following.

offences provide for a higher maximum penalty than existing offences which might be prosecuted in such circumstances and that existing offences do not apply unless there is an individual directly targeted or affected by the conduct.

- 7.16 The Senior Judiciary and HM Council of Circuit Judges agreed that there was a lack of parity between the stirring up offences and other forms of hate crime but questioned whether there was any practical need to extend the offences.¹²

Discussion

- 7.17 Several consultees based their view that there is a case in principle purely on the fact that stirring up offences exist for three other protected characteristics and argue that parity is required for all five characteristics for all hate crime purposes.

- 7.18 We considered in Chapter 4¹³ the argument that the protected characteristics ought all to be provided with the same protection under the criminal law. We see less force in the argument in relation to stirring up offences than we do in relation to the aggravated offences, because:

- (1) The five characteristics are protected by aggravated offences and the enhanced sentencing provisions with almost identical definitions. The offences and sentencing regime constitutes a single scheme and was introduced in one statute, albeit it is now contained in separate Acts. The stirring up offences fall outside that scheme and were created for different purposes.
- (2) New stirring up offences, unlike new aggravated offences, would criminalise conduct that is not at present criminal.
- (3) Creating such offences also carries the danger of infringing the right to freedom of expression.¹⁴

We develop these points below.

- 7.19 In our view consistency of treatment as between protected hate crime characteristics is desirable, but only once it is established that those offences are justified in principle. At present there are offences of stirring up hatred relating to three out of the five protected characteristics. There is a justification for extending them to the other two characteristics if:

- (1) there is a clear, principled justification for the existing offences; and
- (2) the same justification would apply to the new offences.

- 7.20 Historically, the reasons advanced for stirring up offences have assumed a presumption in favour of freedom of expression, only to be departed from if there is an exceptional need.

¹² See further under para 7.79 below.

¹³ At paras 4.14 and following, above.

¹⁴ We consider this argument at para 7.38 and following, below.

- (1) The original offence of stirring up racial hatred, introduced in 1965, was advocated on the grounds that racial hatred existed to a sufficient degree that it could lead to retaliation, violence and disorder.¹⁵
- (2) Religiously aggravated offences and the extension of enhanced sentencing to include religious hostility¹⁶ were introduced, in part, as a response to the terror attacks against the United States on 11 September 2001.¹⁷ The offences of stirring up religious hatred¹⁸ were introduced, in part, in response to the London bombings on 7 July 2005.¹⁹
- (3) The offences of stirring up hatred on the ground of sexual orientation²⁰ were introduced, not for the sake of equality or consistency in the treatment of different protected characteristics, but rather because the evidence showed that, in practice, extreme examples of incitement to homophobic violence existed on a considerable scale.²¹

7.21 In the debates on the religious hatred offences, arguments were advanced advocating parity of treatment between religion and race. However, this was not simply in the interests of consistency, but because in some cases religion and race are hard to distinguish. Arbitrary results were at risk of arising from the treatment of some religious groups as “racial groups” (for example, Jews and Sikhs) but not others (for example, Muslims). There is no similar difficulty in distinguishing disability or transgender identity from the other protected characteristics.

7.22 It should be noted that the stirring up offences in relation to race and religion are in a special position, in that EU law requires member states to have such legislation.²² There is no equivalent provision for sexual orientation, though there is a directive prohibiting discrimination on this ground.²³ The EU has also signed

¹⁵ CP Appendix B para B.60, speech of Sir Frank Soskice (Home Secretary): “When hatred has been stirred up history, unfortunately, shows only too clearly that violence and disorder are probably not far away.”

¹⁶ Anti-terrorism, Crime and Security Act 2001.

¹⁷ CP Appendix B para B.30 and following. For previous unsuccessful attempts to do the same, see paras B.27 to B.29.

¹⁸ Racial and Religious Hatred Act 2006.

¹⁹ CP Appendix B paras B.185 to B.205. There were unsuccessful attempts to introduce such offences in the Anti-terrorism, Crime and Security Bill in 2001 (para B.147 and following), the Religious Offences Bill in 2002 (para B.164 and following) and the Serious Organised Crime and Police Bill in 2005 (para B.172 and following).

²⁰ Criminal Justice and Immigration Act 2008.

²¹ CP Appendix B paras B.206 to B.255. The issue was raised earlier, in the debates on the Racial and Religious Hatred Bill, but no amendment was then proposed to create such an offence.

²² Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

²³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

the United Nations Convention on the Rights of Persons with Disabilities, which we discuss below.²⁴

- 7.23 So far, then, particular offences of stirring up hatred have been introduced in response to a perceived need in relation to particular characteristics. There may be a case for a broader principle that the stirring up of hatred between any groups should be criminalised regardless of any practical need, as we discuss later.²⁵ However, this broader principle needs a stronger justification than a need for consistency with other existing hate crime legislation.

(2) Discrimination and the Equality Act 2010

- 7.24 It was argued by some consultees that it was discriminatory for the criminal law to differentiate between the various protected characteristics and that this could be argued to contravene the public sector duty in section 149 of the Equality Act 2010.²⁶ For convenience, we also address here the argument of some consultees that stirring up offences should be introduced in order to comply with the UN Convention on the Rights of Persons with Disabilities (“the CRPD”).²⁷

Responses to consultation

- 7.25 Stop Hate UK argued that articles 5.1, 5.2,²⁸ 16.1 and 16.2²⁹ of the CRPD oblige the signatory state to take the necessary measures to “guarantee disabled people equal and effective legal protection against discrimination” including the discrimination manifested by hate crime.³⁰ Extending the stirring up offences would be one way to comply with the obligation under article 8 CRPD, to raise awareness and combat stereotypes, prejudices and harmful practices.
- 7.26 Dr Dimopoulos argued that offences of stirring up hatred on the ground of disability are required by the CRPD, as “article 16 places an obligation to

²⁴ Para 7.35 and following, below.

²⁵ Under the heading of “symbolic effect”, para 7.73 and following, below.

²⁶ Discussed at para 7.29 and following, below.

²⁷ The UK ratified the CRPD on 8 June 2009: the Equality and Human Rights Commission monitors compliance with the duties of the CRPD. Its website contains relevant guidance and other materials: <http://www.equalityhumanrights.com/human-rights/our-human-rights-work/international-framework/un-convention-on-the-rights-of-persons-with-disabilities/> (last visited 15 May 2014).

²⁸ Art 5 is titled “Equality and Discrimination”. Art 5.1 provides: “States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.” Art 5.2 provides: “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

²⁹ Art 16 is titled “Freedom from exploitation, violence and abuse”. Art 16.1 provides: “States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. Art 16.5 provides: “States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”

³⁰ This response related to aggravated offences, but the same point could be made about stirring up offences.

introduce legislation to protect persons with disabilities from all forms of violence and abuse”.

7.27 Professor Phillipson argued:

This ... suggests what is perhaps the core argument for the extension of the law in this area, namely the need for the law to be consistent and principled – to exhibit integrity. If the primary purposes of the law in this area is expressive and communicative, then where it protects some vulnerable groups but not others, it inescapably communicates the message that the unprotected groups are not worthy of the same protection as the protected groups. Ironically, therefore, it undermines the equal status of some victim groups. And it fails in this way to treat like cases alike – the fundamental requirement of a just system of law. Given that the stirring up of hatred against certain vulnerable groups (racial, religious) is regarded by European democracies as requiring authoritative condemnation by means of criminal law, then this should apply to similarly vulnerable groups (disabled, transgender). Otherwise ... the law, intended to guarantee basic equality, becomes itself a source of discrimination and inequality. It is the avoidance of this harm that the extension of the law would address.

Discussion

7.28 Several of the responses refer to discrimination, both in connection with domestic legislation (the Equality Act 2010) and in connection with Article 5 of the CRPD. However, both the Equality Act and the CRPD go well beyond the elimination of discrimination.

EQUALITY ACT 2010

7.29 Section 149 of the Equality Act 2010 confers a duty on public authorities to have due regard to the need:

- (1) to eliminate discrimination against people with a protected characteristic,
- (2) to advance equality of opportunity between people who have the characteristic and people who do not, and
- (3) to foster good relations between people who have the characteristic and people who do not.

7.30 Two questions arise about this.

- (1) One is whether the existence of stirring up offences in relation to some groups (racial, religious, defined by sexual orientation) but not others (disabled and transgender people) constitutes discrimination against the latter.
- (2) The other is whether, regardless of comparison between the groups, stirring up offences in relation to disabled and transgender people should be introduced, in order to advance equality of opportunity and foster good relations.

- 7.31 The first question was the main focus of the argument as advanced by consultees, in particular Professor Phillipson. We do not understand these consultees to be arguing that failure to extend stirring up hatred to disability or transgender identity amounts to direct or indirect discrimination, of a kind which could ground a claim under section 13 or 19 of the Equality Act 2010. The point is, rather, that it would be undesirable, and in a sense discriminatory, if the overall picture were such as to give the impression that public authority cared about some groups, and the need to protect them from hatred and its consequences, more than about others.
- 7.32 We appreciate the force of this argument. However, there are two points to be made.
- (1) As we have set out more fully in Chapter 4,³¹ the Equality Act imposes neither a duty to take particular measures nor a duty to achieve particular results. It is a duty to have due regard to the need to achieve those results.
 - (2) It is therefore permissible, and correct, to take account of the different factual circumstances affecting different groups, and to make different provision for them where appropriate. That is, the same consideration must be given to the protection of all groups with relevant characteristics.³² It does not follow that the outcome of that consideration must be the same.
- 7.33 In other words, as argued in our discussion of the aggravated offences,³³ there is no duty to secure formal equality in the legislation concerning all protected characteristics. The duty is, rather, to work for substantial equality, if necessary making different provision for different groups on the basis of practical need. This is the most desirable approach to the needs of disabled and transgender people, as well as being the correct interpretation of the Equality Act.
- 7.34 That still leaves open the wider question of whether the introduction of stirring up offences is desirable as a way of advancing equality of opportunity and fostering good relations. This issue is part of the more general question of practical need, discussed below.³⁴ Our present point is simply that the Equality Act cannot be used in support of the parity argument. It does not follow that, because there are in fact stirring up offences for one characteristic, there is a duty to introduce them for the others. (Similarly, if there were no stirring up offences for one characteristic, that would not be an argument against introducing such offences for another characteristic.)

THE UN DISABILITY CONVENTION

- 7.35 The CRPD was adopted on 13 December 2006 and entered into force on 3 May 2008. It does not specifically address the stirring up of hatred. It calls, among

³¹ See Chapter 4 above, paras 4.53 to 4.64.

³² That is, those listed in Equality Act 2010, s 149(1) (a) to (c).

³³ See Chapter 4 above, paras 4.53 to 4.64.

³⁴ Para 7.103 and following, below. See also our discussion of symbolic effect, para 7.73 and following, below.

other things, for the elimination of discrimination against disabled people;³⁵ the raising of awareness of disability issues and the combating of stereotypes, prejudices and harmful practices;³⁶ equal recognition before the law;³⁷ liberty and security of person;³⁸ and freedom from exploitation, violence and abuse.³⁹

7.36 We argue, in Chapter 4,⁴⁰ that the CRPD does not require extension of the aggravated offences provided that the state ensures the full and non-discriminatory application of existing criminal offences and the enhanced sentencing regime. We believe that the same argument applies in the context of offences of stirring up hatred.

7.37 Apart from the elimination of discrimination, consultees referred to two other obligations under the CRPD.

(1) Article 8 concerns the raising of public awareness and the combating of stereotypes, prejudices and harmful practices. The argument here is that creating new stirring up offences is one way of sending a message that hateful attitudes are unacceptable. We discuss this under the heading of symbolic effect, below.⁴¹

(2) Article 16 concerns freedom from exploitation, violence and abuse. The stirring up of hatred may itself constitute abuse, and may contribute to acts of exploitation and violence. Criminalising the stirring up of hatred might help to discourage this behaviour. We discuss this under the heading of deterrence.⁴²

To anticipate the conclusion of those two discussions, we argue that symbolic effect and deterrence are both potentially good reasons for introducing new stirring up offences, but only if the conduct which would fall within those offences occurs on a significant scale and the offences could be effectively enforced.

(3) Freedom of expression

The CP

7.38 Previous attempts to extend the offences met with concerns about how they might restrict freedom of expression. Any new stirring up offences that might be created would need to respect article 10(2) and article 9 of the European Convention on Human Rights (ECHR).⁴³ We explained that there are provisions in the offences of stirring up of hatred on grounds of religion and sexual

³⁵ Article 5.

³⁶ Article 8.

³⁷ Article 12.

³⁸ Article 14.

³⁹ Article 16.

⁴⁰ At paras 4.41 and 4.42.

⁴¹ Para 7.73 and following, below.

⁴² Para 7.53 and following, below.

⁴³ We examined the article 10 implications of extending the offences in CP Appendix A.

orientation that expressly protect freedom of speech, and asked whether new offences should contain analogous provisions.⁴⁴

Responses

7.39 Professor Moran was against the proliferation of stirring up offences, because of their potential to impact on freedom of expression. Professor Alldridge summarised this view: “Most societies most of the time should put up with an awful lot of free speech before they start imposing criminal sanctions.”⁴⁵

7.40 Mr John Troke feared that the proposed offences amounted to prosecution of people for their views. Professor Eric Heinze and Mr Ivan Hare, each making presentations at the symposium,⁴⁶ argued against the existing stirring up offences and, accordingly, their extension, on freedom of expression grounds. Professor Heinze argued that the causative link between the commission of the offence and the harms it sought to prevent was too speculative and weak to justify the infringement of freedom of expression. Mr Hare said the lack of any legal definition of the meaning of “threatening” (an ingredient in all the existing stirring up offences) created an unacceptable “chilling effect”. He doubted whether the supposed safeguards of a narrower model or an explicit freedom of expression clause would alleviate this concern.

7.41 RadFem argued that such new offences would stifle legitimate criticism of gender reassignment surgery and create difficulties for those women-only organisations which preferred to admit only those born as women. Dr Lynne Harne made a similar point.

7.42 As against these, the Crown Prosecution Service, while recognising the right to “shock, offend or disturb”, argued:

However this freedom of expression must still be necessary and proportionate. However when dealing with disability hate crime, we cannot see that freedom of expression arguments should prevail as the nature of the hatred is similar to that of racial hatred whereby it is singling out the individual’s characteristics as opposed to their practices, beliefs or conduct.

7.43 On the other hand, Stop Hate UK argued:

We fail to see how any freedom of speech arguments that may be legitimately put forward (without discrimination) in opposition to an extension could be applied only to the strands of disability and gender identity. Stop Hate UK expects that the majority of those who hold the view that the stirring up offences should not be extended to disability and gender identity on free speech grounds will also hold the view that the existing stirring up offences should be repealed on the same basis.

⁴⁴ CP, Questions 11 and 12 (paras 4.84 and 4.85).

⁴⁵ Comment made during a presentation at the symposium held at Queen Mary University of London on 17 September 2013.

⁴⁶ On 17 September 2013, see fn 45 above.

Discussion

7.44 We agree with consultees who point to the need, in a democratic society, to be slow to criminalise the expression of opinion, however offensive it may be, where no other criminal offence is committed or incited.

7.45 Article 10 of the European Convention on Human Rights states that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

7.46 Under paragraph 2 of the same article, this right may be subject to such restrictions “as are prescribed by law and are necessary in a democratic society”, for the purposes, among others, of the prevention of disorder or crime, the protection of health or morals or the protection of the reputation or rights of others. The word “necessary” does not mean indispensable, in the sense of there being no other existing or possible way of achieving the same protection. The meaning is broader: that there is a pressing social need,⁴⁷ that the restriction in question meets that need, and that it is not a disproportionate response to that need.⁴⁸

7.47 In the context of expression in a political or quasi-political context the exceptions are narrowly interpreted.⁴⁹ In some cases article 17 has been applied.⁵⁰ This states that there can be no Convention right to engage in activity aimed at destroying or weakening human rights. It has principally been used to remove from the protection of the Convention acts amounting to attacks on democracy, but it has been applied to acts of racism as well.⁵¹

7.48 Following the principles laid down by the European Court of Human Rights, we consider that:

- (1) the creation of offences of stirring up hatred on the ground of disability or transgender identity is in principle an interference with freedom of expression; but
- (2) it pursues legitimate objectives of securing public safety, preventing disorder and crime and protecting the rights of others.⁵²

⁴⁷ *Sunday Times v UK* (1979) 2 EHRR 245 (App No 6538/74) at [59]; R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2008) paras 15.239(ii) and 15.306.

⁴⁸ A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) para 4.10.28.

⁴⁹ CP Appendix A: see also *Gündüz v Turkey* (2005) 41 EHRR 5 (App No 35071/97); *Fáber v Hungary* (2012) App No 40721/08; *Vajnaj v Hungary* (2010) 50 EHRR 44 (App No 33629/06).

⁵⁰ CP Appendix A, para A.28 and following.

⁵¹ For further discussion, see B Emmerson and others, *Human Rights and Criminal Justice* (3rd ed 2012) paras 18-30 to 18-41.

⁵² For example, in 1965 the offence of stirring up hatred was introduced on the ground that racial hatred led to public disorder: para 7.20(1) above.

To that extent we agree with the argument put forward by Stop Hate UK, that as the existing offences of stirring up hatred are not infringements of the right to free expression further offences of the same kind cannot be either.⁵³

7.49 There still remains the question whether the interference with freedom of expression is “necessary” for the pursuit of those objectives, that is, whether there is a pressing social need. This can arise in two forms:

- (1) whether there is a pressing social need to introduce the offence;
- (2) whether there is a pressing social need to enforce it in a particular instance. That is, even when the existence of an offence is not a disproportionate infringement of the right to free expression, individual prosecutions may be held to be such an infringement if there cannot be shown to be a pressing social need in the particular case.⁵⁴

In practice the second question is the more relevant, as it is only in the context of a particular prosecution that a challenge on article 10 ECHR grounds will arise.

7.50 For this reason, the question of how many cases are likely to occur is less relevant than one might expect. The question before the court in any particular case will not be whether the conduct in question occurred on a large enough scale to justify the original introduction of the offence. Rather, the question is whether the conduct that occurred in the particular case is likely to cause social harm of a type and degree sufficient to justify restraining it by criminalisation.

7.51 Accordingly, from the human rights point of view it is not an objection that the requirements for new stirring up offences are not likely to be met in many cases.⁵⁵ It would be an objection if the requirements for the offences *would* be met in many cases, but if in most of those cases it was impossible to demonstrate a pressing social need. Given the high threshold for the existing offences of stirring up hatred,⁵⁶ we find it difficult to envisage such cases.

7.52 We conclude that the introduction and enforcement of new offences of stirring up hatred on the ground of disability or transgender identity would not be held to infringe the right to freedom of expression in article 10 ECHR. We nevertheless consider that, as a matter of general principle, it would be undesirable to introduce further restrictions on freedom of expression in the absence of a clearly demonstrated practical need. We turn to consider whether there is a need for such offences as a deterrent or for their potential symbolic effects, before discussing what level of practical need is required to justify creating an offence.

⁵³ Para 7.43 above.

⁵⁴ For example, in *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 (App No 6538/74) (judgment of 26 April 1979) the court held that a particular injunction against publication could not be justified on the basis of pressing social need, though the power to grant such injunctions could be justified as pursuing the legitimate aim of maintaining the authority of the judiciary. This case is discussed in CP Appendix A (at paras A.42 – 45).

⁵⁵ Whether this is in fact so is discussed at para 7.125 and following, below.

⁵⁶ Para 7.132 below.

(4) Deterrence

The CP

7.53 In the CP we discussed whether creating or prosecuting new offences of stirring up hatred on the grounds of disability or transgender status would have any deterrent effects. We raised a number of issues.

- (1) Some conduct that would fall within new stirring up offences also falls within existing offences, such as the harassment, alarm and distress offences under the Public Order Act 1986.⁵⁷ To that extent, if criminal offences deter, there is already a deterrent against the conduct in question. However, the sentencing powers for the existing offences are less than those for stirring up offences, so it could be argued that the stirring up offences would have greater potential deterrent effect on that basis. This is speculative and depends on potential perpetrators' awareness of offences and their penalties.⁵⁸
- (2) Activities of propagating hatred may result in other offences being committed later by those whose hatred has been stirred up, although the activities do not in themselves constitute any offence in present law. Criminalising the propagation of hatred may reduce that later offending.
- (3) There is some doubt of the deterrent effect of the criminal law in general.⁵⁹ In particular, it is doubtful whether an offence can be a deterrent when it covers conduct which is already criminal, or if there are very few successful prosecutions.

Responses to consultation

7.54 Action Disability Kensington & Chelsea commented:

Documented and anecdotally narrated increases in hostility and hostility-based harassment of disabled people may be correlated with negative and stereotypical press portrayals of disabled people. Public use of disablist language and offensive stereotypes has been shown to escalate towards a range of offences that can be prosecuted as hate crimes including life-threatening physical violence. The practical need for these new stirring up offences relates to deterrence, prevention and early intervention, especially in community settings where disabled people's quality of life is diminished by behaviours that are not currently offences.

7.55 Devon and Cornwall Police questioned the impact any new offences would have. They also contrasted the case for extending these offences with that for aggravated offences, noting that the latter are less controversial and do not impinge on other freedoms to the same degree as the stirring up offences do.

⁵⁷ Public Order Act 1986, ss 4A and 5.

⁵⁸ CP para 4.46. The maximum sentence for all the current stirring up offences is seven years' imprisonment: CP para 2.128.

⁵⁹ CP para 4.47.

7.56 Stop Hate UK commented:

We believe that one of the reasons there are so few prosecutions for the existing stirring up hatred offences is that organised groups, such as the far-right (as opposed to individuals not associated with any group), who may be likely to make statements which would amount to an offence under the existing provisions are generally aware of the offences and limit their conduct accordingly, so as not to become criminally liable. In that sense we consider that the stirring up offences do have a small deterrent effect on the basis that there are so few prosecutions for the offences but there are many who hold and express views in opposition to some of the groups currently afforded legislative protection from having hatred stirred up against them.

Nevertheless they went on to say:

We believe that, if nothing else, the introduction of stirring up hatred offences on the grounds of disability and gender identity may prevent some harmful statements that are currently made freely and without fear of prosecution from being made in the first place.

- 7.57 Dr Walters, in his response to the proposal to extend the aggravated offences,⁶⁰ argued that new offences have an indirect deterrent effect, by displacing potential perpetrators' assumption that the conduct in question is justifiable or has the tacit support of the state or society. His argument does not specifically address the stirring up of hatred, but the same point could be made.

Discussion

- 7.58 In the most obvious sense, when one speaks of the deterrent effect of an offence, one means the deterrence of conduct falling within the boundaries of the offence.⁶¹

- 7.59 However, some consultees argued that there is also a more indirect type of deterrence. Creating an offence, according to this argument, can also discourage a wider spectrum of conduct that does not quite fall within the boundaries of the offence but is similar in character or motivated by similar attitudes. This might happen in several ways.

- (1) There may be some uncertainty in the public mind about where the boundaries of the offence lie, and therefore a tendency to avoid similar conduct for reasons of caution.
- (2) If creating an offence successfully deters the stirring up of hatred, it will have a knock-on effect of reducing crimes motivated by that hatred.⁶²

⁶⁰ See para 4.94 above. See also para 7.76 below.

⁶¹ For example A Ashworth, *Sentencing & Criminal Justice* (3rd ed 2000) p 64.

⁶² Para 7.64 below.

- (3) The offence can influence social attitudes, and deter people from engaging in the wider type of conduct for fear of incurring public disapproval.⁶³

DETERRENCE IN GENERAL

- 7.60 In the CP we mentioned that there was considerable academic debate about whether criminalisation is a deterrent.⁶⁴ However, this debate largely concerns the deterrent effect of punishment on the individual offender and relies on statistics about the rate of re-offending.⁶⁵ It is less easy to measure the possible wider effect of introducing or enforcing an offence in creating a general fear of punishment that might deter offending by others.⁶⁶
- 7.61 In one sense the existing offences of stirring up hatred have clearly had a deterrent effect.⁶⁷ In the debates on the Bill that became the Race Relations Act 1976 it was pointed out that the introduction of these offences in 1965 had had an effect on the tone of racist publications: to avoid prosecution these had changed from the crudely inflammatory to the pseudo-academic.⁶⁸ It was also pointed out that this was not necessarily beneficial, because the more temperately expressed kind of propaganda might have a more insidious effect.⁶⁹
- 7.62 It is not clear how far the same point would apply to offences of stirring up hatred on the grounds of disability or transgender identity. As compared with expressions of racial or religious hatred, expressions of hatred on the ground of disability or transgender identity are less likely to take the form of systematic propaganda.⁷⁰ Creating the new offences may or may not deter hateful expression but is unlikely to divert it into equally hate-driven utterances in more measured or coded language.
- 7.63 Some deterrent effect may or may not follow from the introduction of new offences and the publicity attending it. If there is such an effect, we believe that it will operate only in the short term unless it is maintained by a substantial number of successful prosecutions.⁷¹ Conversely, if there are several unsuccessful prosecutions the deterrent effect may be negated or reversed. The argument from deterrence therefore turns on the question of how much conduct, of the kind that would fall within the new offences, actually occurs.

⁶³ This is discussed further under the heading of symbolic effect, para 7.73 and following, below.

⁶⁴ CP para 4.46.

⁶⁵ See for example T Brooks, *Punishment* (2012) pp 36 (“microdeterrence”) and 42; W Wilson, *Criminal Law* (3rd ed 2008) pp 55 and 56.

⁶⁶ A von Hirsch, *Doing Justice: the Choice of Punishments* (1976) pp 38 and 39.

⁶⁷ Stop Hate UK response, para 7.56 above.

⁶⁸ CP Appendix B para B.83, citing White Paper on Racial Discrimination Cmnd 6234 (September 1975) para 126. See also the response of Stop Hate UK, para 7.56 above.

⁶⁹ Compare the arguments of Judith Butler, cited by Prof L Moran (para 7.80 below).

⁷⁰ Paras 7.134 to 7.135 below.

⁷¹ Compare the similar point about symbolic effect made by Dr Stark, discussed at para 7.91 below.

CONDUCT FALLING WITHIN OTHER OFFENCES

- 7.64 The question here is whether the new offences would have any added deterrent effect in cases where the conduct in question also falls within other existing offences.⁷² We discussed this in detail in the CP.⁷³
- 7.65 One effect of introducing new stirring up offences would be to allow higher sentences to be passed. The maximum sentence for the existing stirring up offences is seven years,⁷⁴ as against six months' imprisonment for the other offences most likely to be engaged by the conduct in question.⁷⁵
- 7.66 We do not believe that this increase in available sentencing powers, taken on its own, will have a significant deterrent effect:⁷⁶ the public is not normally aware of what the sentence for an offence is.⁷⁷ Any deterrent effect is more likely to follow from the fact that a new offence has been introduced and is labelled as being more serious than the existing ones.

INDIRECT DETERRENCE

- 7.67 In the context of offences criminalising conduct intended or likely to stir up hatred, the indirect deterrent effect argued for by some consultees can be described as follows. If the introduction of the offences results in fewer people engaging in incitement of hatred, there will be less hatred, and therefore fewer other crimes motivated by hatred. In that way, criminalising the stirring up of hatred will not only reduce the amount of stirring up but also have a knock-on effect in reducing other hate related offences.⁷⁸
- 7.68 Another form of the indirect deterrence argument is that, whether or not criminalisation reduces the amount of activity that stirs up hatred, the very fact of creating the offences sends a message that hateful attitudes are unacceptable and that society takes them seriously.⁷⁹ This will contribute to a social atmosphere in which these attitudes are condemned, and therefore make offences motivated by hatred less likely.
- 7.69 However, this is a very indirect way of discouraging criminal conduct. The proper deterrent purpose of any offence is, primarily, the deterrence of conduct falling

⁷² Para 7.53(1) above.

⁷³ How far the conduct falls within existing offences is discussed at CP paras 4.14 to 4.44; their deterrent effect is discussed at CP paras 4.46 to 4.48.

⁷⁴ Public Order Act 1986, ss 27 and 29L.

⁷⁵ Six months' imprisonment is the maximum penalty for: the ss 4 and 4A POA offences; harassment (s 2 Protection from Harassment Act 1997); and s 1 Malicious Communications Act 1988 is six months' imprisonment. For s 127(1) Communications Act 2003 and for s 5 POA, the only sentence available is a fine. See fn 148 below regarding the CPS's reservations about using POA offences in respect of online communications.

⁷⁶ For the criminological research on this, see A Doob and C Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" in M Tonry (ed), *Crime and Justice: A Review of Research* (2003) pp 143-195.

⁷⁷ T Brooks, *Punishment* (2012) p 46.

⁷⁸ CP para 4.46.

⁷⁹ M Walters, "Hate Crimes in Australia: Introducing punishment enhancers" (2005) 29 *Criminal Law Journal* 201, 206.

within that offence. That it may also have an indirect effect in discouraging other undesirable conduct is no more than an added bonus.

- 7.70 Some guidance may be derived from the figures for the existing stirring up offences. Between 2008 and 2012, only 113 charges of stirring up racial hatred and 21 charges relating to offences under either the religious hatred or sexual orientation hatred provisions reached a first hearing in a magistrates' court, compared with over 75,000 charges for the aggravated offences.⁸⁰ Given these figures, any effect of the stirring up offences in deterring violence of the sort covered by aggravated offences must be far outweighed by the deterrent effect of the aggravated offences themselves. The same would presumably be true if new stirring up offences were introduced.
- 7.71 It is further argued that, quite apart from its effect of deterring either the stirring up of hatred or other offences, the criminalisation of incitement declares society's values by discouraging hatred-driven attitudes and conduct. In this form, the argument is not so much about deterrence as about symbolic value, and is discussed below.⁸¹

CONCLUSION ON DETERRENT EFFECT

- 7.72 New stirring up offences may in principle have some value as a deterrent, both of conduct falling within the offences and of other offences and attitudes encouraged by such conduct. Whether they will do so in practice depends on whether the conduct that would fall within those offences in fact occurs to a significant extent, and would be successfully prosecuted. We discuss this below, under the heading of practical need.⁸²

(5) Symbolic effect

The CP

- 7.73 In the CP we discussed the argument that criminalising conduct intended or likely to stir up hatred has symbolic value. On the one hand, it could have an educative or moralising effect by expressing the state's condemnation of the conduct in question and emphasising the importance of giving disabled and transgender people the same respect as other members of society.⁸³ On the other hand, it could have the following adverse effects:

- (1) preventing debate, including arguments challenging hateful attitudes;
- (2) creating resentment against the protected groups;
- (3) contributing to a perception of the protected group as weak and helpless;
- (4) driving hate speech underground, making it harder to detect.⁸⁴

⁸⁰ CP para 4.8.

⁸¹ Para 7.73 and following, below.

⁸² Para 7.103 and following, below.

⁸³ CP paras 4.49 to 4.51.

⁸⁴ CP para 4.52.

Responses

- 7.74 Mencap argued that extending the offences “would have strong symbolic value and, in light of the higher maximum sentence applicable to stirring up hatred, would send a stronger message than other existing offences about the kind of speech that society finds unacceptable.”
- 7.75 Professor Phillipson argued that insulting remarks in the public media should not be criminalised except when they involved attacks on particular groups, but that it was important to treat all groups as equally as possible. Resentment against protected groups will be greater if it is perceived that some groups are protected and not others, as this will appear unjust. The new offences would not have the effect of silencing the offending communications, but would authoritatively express disapproval of them. “Driving underground” has a valuable function in depriving such communications of respectability. He argued that this was a justifiable purpose of criminalisation.
- 7.76 The response of Dr Walters in relation to aggravated offences, cited at paragraph 7.57 above, could equally be applied in the present context. He said that the enactment of specific offences to address hate crime served an important symbolic function that could not be achieved by sentencing legislation. It did this by:

...conveying social disapproval for hate-motivated offences to the wider community.⁸⁵ As such, the law contains a message to society that these conducts will not be tolerated by the state. The significance of symbolic denunciation is that it plays an important role in supporting positive social norms.

He further argued that hate crime legislation represented “recognition of the history of prejudice-based victimisation that certain groups have had to endure and that the state is willing to do something about it”.

- 7.77 Scope argued that new offences could create benefits in terms of increased confidence among disabled people in the criminal justice system. Similarly, West Midlands Police argued that extending the existing offences would be seen as a statement of support by members of the protected groups.

- 7.78 Victim Support argued that:

The creation of new offences also sends a clear message throughout society of what is and what is not acceptable. As previously stated, statute laws are not only powerful in recognising changing attitudes, but actually changing public attitudes too.

- 7.79 The Senior Judiciary said that even the symbolic case for extension would be undermined by the negative consequences that may flow from extending the offences, including that criminalisation of hate speech can: prevent debate, including arguments challenging hateful attitudes; contribute to a perception of the protected group as weak and helpless; or drive hate speech underground,

⁸⁵ Dr Walters here referred to A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007).

making it harder to detect.⁸⁶ HM Council of Circuit Judges stated that they were even more strongly against extending the stirring up offences than they were against extending the aggravated offences and adopted the same arguments as the Senior Judiciary for their view.

- 7.80 Professor Moran spoke of the “great potential for the prolific growth of status categories to be added to the list” and for “seemingly endless status differentiation and recognition”. He added:

I would also support Judith Butler’s concerns⁸⁷ that prohibition of speech may have the effect of making it more difficult to challenge the prejudice as well have having the effect of giving that prejudice a positive value.

- 7.81 Professor Taylor and the Society of Legal Scholars argued against creating criminal offences for purely symbolic reasons.
- 7.82 Action Disability Kensington & Chelsea argued that restraints on disablist language could inhibit attempts to explore and argue against historical and contemporary prejudices.
- 7.83 Pembrokeshire People First feared that new offences of stirring up hatred against disabled people would reinforce a perception of people with disabilities as victims.

Discussion

- 7.84 Extending the stirring up offences could have symbolic or communicative effects.
- (1) The argument here is that the effect of criminal punishment is not confined to a “prudential” disincentive, that is, one that causes a potential offender to abstain out of fear, or because of a rational calculation that the adverse effect of punishment outweighs the advantage gained by the crime.⁸⁸ Conviction and sentence also carry a stigma, to which the experience of punishment acts as a “prudential supplement”, having an added deterrent effect.⁸⁹ Creating and enforcing the offences will

⁸⁶ These points were set out at CP para 4.52: para 7.73 above.

⁸⁷ *Excitable Speech: A Politics of the Performative* (1997). Her argument is that censorship (for example of pornography, but also of hate speech) always has the effects of increasing and strengthening the prohibited expression.

⁸⁸ It is doubtful whether most potential offenders do in fact carry out any such rational calculation: P Robinson and J Darley, “Does Criminal Law Deter: A Behavioural Science Investigation” (2004) 24 *Oxford Journal of Legal Studies* 173; D Husak, *Overcriminalization* (2008) pp 145 and 146.

⁸⁹ A P Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the principles of criminalisation* (2011) p 6. For the “prudential supplement” to the communicative effect of punishment, see A von Hirsch, “Proportionality in the Philosophy of Punishment: From ‘Why Punish?’ to ‘How Much?’” in (1990) 1 *Criminal Law Forum* 259; A von Hirsch, “Punishment, Penance and the State: a reply to Duff” in M Matravers (ed), *Punishment and Political Theory* (1990).

communicate to those convicted,⁹⁰ and to those who might be tempted to commit similar acts, that society condemns the propagation of hatred.⁹¹ Offenders convicted of the offence will be “labelled” in a way that reflects the serious nature of their wrongdoing.

- (2) It also communicates to society in general, and transgender and disabled people in particular, that the law aims to protect them from hatred and its harmful effects. In this way it should enable disabled and transgender people to have more confidence in the legal system.

7.85 The arguments on the other side are that:

- (1) new offences would backfire by creating resentment or contributing to an image of the protected group as weak;⁹²
- (2) the symbolic effect of simply creating the offences is limited; and
- (3) there will be no substantial communicative effect unless the new offences are seen to be enforced.

DANGER OF CREATING RESENTMENT

7.86 Professor Phillipson argues that the danger of creating resentment against the protected groups is overstated. It is more likely to arise if fewer groups are protected: it will appear that some groups are unjustly privileged compared with the rest.⁹³

7.87 We are not entirely convinced by this argument. There is equally a danger that protecting ever more groups may create a perception of creeping censorship and thought control. Some might also argue that although at one time certain groups genuinely needed special protection, equal treatment has now been secured to a large extent and it is time to “rein in” those making further claims to protection.

SYMBOLIC EFFECT OF CREATING OFFENCES

7.88 As pointed out by both Professor Phillipson and Dr Walters, legislative restraints on hate speech may not be effective in suppressing it, but may still have a valuable function in declaring that the attitudes in question must never be allowed to become respectable. There is considerable truth in this, for example in relation to racist and anti-Semitic rhetoric: material of this kind exists on the internet on a large scale, but there is a social consensus that it must never find its way into respectable political or academic discourse.

7.89 However, it should be noted that such a social consensus can exist and be effective in the absence of a criminal offence: Holocaust denial is a case in

⁹⁰ J Feinberg, “The Expressive Function of Punishment”, from *Doing and Deserving* (1970) pp 95 to 118; anthologised in R A Duff and D Garland, *A Reader on Punishment* (1994). A more recent statement of a similar position is A von Hirsch, *Censure and Sanctions* (1993).

⁹¹ M Walters, “Hate Crimes in Australia: Introducing punishment enhancers” (2005) 29 *Criminal Law Journal* 201, 206; see also para 7.76 above.

⁹² See Dr Stanton-Ife’s theory paper (fn 6 above), paras 39 and 40.

⁹³ Para 7.75 above.

point.⁹⁴ Equally, while hatred on the ground of disability or transgender identity clearly exists, we have seen no evidence of danger of its becoming respectable. The situation is not comparable to those of race, religion and sexual orientation, where in historical times various degrees of persecution or discrimination have been officially sanctioned, and a special effort is required to show that this is no longer the case.

THE NEED FOR ENFORCEMENT

7.90 Finally, we consider that if the new offences do not address the bulk of hate crime experienced by disabled and transgender people and are rarely prosecuted there will be little if any lasting impact on confidence. There might even be an adverse effect, if the introduction of the new offences creates expectations that are not then fulfilled. There are better ways to address the problem of low confidence: many were proposed by consultees under the “Other Comments” section of their response forms.⁹⁵

7.91 It is argued by some (for example Dr Stark⁹⁶) that, even if a case for a symbolic effect is accepted in principle, legislation will not in practice have that symbolic effect unless it is enforced. We agree with this point, with two exceptions.

- (1) There are some offences that are so iconic that they have symbolic effect simply by existing, even though the conduct in question is rare to non-existent. The obvious examples are treason and genocide. However, these offences will only have this value if there are very few of them. Trying to enshrine all desirable social values in symbolic legislation dilutes the effect.
- (2) In other cases an offence may be rarely enforced, simply because it is such an effective deterrent that the conduct in question seldom occurs.⁹⁷ This is all to the good, and here too it is desirable to keep the offence as a sign of society’s disapproval as well as to prevent recurrence.

7.92 These are both cases in which an offence has symbolic or communicative effect despite not being enforced. They must be contrasted with the case in which the prohibited conduct occurs frequently and is nevertheless not prosecuted. In this case Dr Stark is right in saying that an offence does not send a message unless it is enforced.

7.93 We do not believe that offences of stirring up hatred on the grounds of disability or transgender identity would fall within either of the two cases mentioned above.⁹⁸ Such offences may well have a valuable symbolic or communicative

⁹⁴ Similarly, Professor Phillipson points out that in the United States, where there are no hate speech laws, there are huge pressures on politicians to avoid the use of racist language or insults.

⁹⁵ Para 7.173 and following, below.

⁹⁶ Para 7.97 below.

⁹⁷ For example, the Children and Young Persons (Harmful Publications) Act 1955 was described in Parliament as “completely successful” in preventing the import of horror comics, though no prosecutions had ever been brought: Lord Stonham, HL Deb 10 December 1968 vol 298 col 460; Smith and Hogan para 3.3 p 37.

⁹⁸ Para 7.91(1) and (2).

function, once enforced. However it would not be justified to create the offences for that reason alone, unless it also met a practical need such as deterrence. It would only do this if a sufficient volume of conduct falling within the new offences occurred and was successfully prosecuted.

(6) Requirement of practical need

- 7.94 We conclude, above, that new offences of stirring up hatred should only be created if there is a practical need to create and enforce them, and that their symbolic effect, while important, is not sufficient in itself. The next question is what level of practical need is required. In particular, on what scale must the conduct in question occur, and how much harm must it cause, before it is justified to criminalise it?

The CP

- 7.95 In the CP we discuss several distinct ways in which the stirring up of hatred can be seen to cause harm.⁹⁹ These include the following:

- (1) The stirring up of hatred may incite people to commit offences such as assault against individuals in the target group.
- (2) Those offences can cause both the victim and other members of the target group to feel that their particular characteristic makes them more vulnerable to attack, and that they are excluded from the wider community.
- (3) The stirring up of hatred, even when not resulting in offences against individuals, can produce similar feelings.
- (4) It can contribute to a social atmosphere in which prejudice and discrimination are accepted as normal, contrary to the values of a liberal and democratic society.

Responses

- 7.96 The Discrimination Law Association answered:

... The lack of prosecutions under the existing offences cannot be taken as a lack of a practical need for extending them ... Also, the law should not be limited to responding to developments in society, but should play a role in shaping how we want society to be.

- 7.97 Dr Stark answered that there the extension of the offences would be justified in principle if “such hatred were being stirred up on a sufficiently large scale, and the existing range of offences surveyed in the consultation paper were proving inadequate”. However:

⁹⁹ CP paras 4.38 to 4.44.

That said, criminalisation might appear a heavy-handed approach in the absence of evidence that it, rather than alternative measures, is required. ... Criminal law ought not to be used to cover every form of actual or potential wrongdoing, because its necessarily minimal enforcement (due to the small number of incidents) might dilute the strong condemnatory message of the criminal sanction.

- 7.98 The Bar Council and Criminal Bar Association questioned whether the case in principle was met by the arguments presented in the CP, which they considered too abstract to support a “pressing need” for criminalisation.

Discussion

- 7.99 In our discussion of symbolic effect we have rejected the argument that the offences should be extended for symbolic reasons alone. If they are to be extended, it should be on the basis of practical need. The only question is what level of practical need is required.
- 7.100 Broadly speaking there could be two views on this. On one view, the presumption is in favour of criminalising all incitement of hatred between social groups: to create offences protecting a new group it need only be shown that some such conduct affecting that group occurs. On the other view, the presumption is in favour of freedom of expression: offences should only be created if the conduct occurs to such an extent that there is danger in *not* criminalising it.
- 7.101 In our opinion the answer lies somewhere in between these opposing views. New stirring up offences could in theory pursue a legitimate aim under the ECHR.¹⁰⁰ However, this is not a sufficient reason for creating the offences: their creation would need to be justified on other grounds, such as deterrence¹⁰¹ or symbolic or communicative effects.¹⁰² In our discussion of these we argued that such effects would be unlikely to flow from extending these offences unless there were a sufficient volume of successful prosecutions to affect public attitudes.
- 7.102 In conclusion, the case for introducing new offences of stirring up hatred on the ground of disability or transgender status depends on the following questions.
- (1) Does conduct intended or likely to stir up hatred on these grounds occur to an extent sufficient to constitute a real social problem?
 - (2) If so, would it satisfy the requirements for new offences, if these were to be introduced, in enough cases to generate a significant volume of successful prosecutions?
 - (3) Are there other, less coercive means of dealing with the same problem?

¹⁰⁰ Paras 7.38 to 7.52 above.

¹⁰¹ Paras 7.53 to 7.72 above.

¹⁰² Paras 7.73 to 7.93 above.

IS THERE A PRACTICAL NEED TO EXTEND THE OFFENCES?

7.103 We conclude above that there is a justification in principle for creating new offences of stirring up hatred, provided that a sufficient practical need can be shown. We now turn to the question of whether this need exists in practice.

7.104 In the CP we asked consultees the following question:

Do consultees consider that there is a practical need for the new offences? If so, why?¹⁰³

7.105 Of those who responded to this question, 65 thought there was a practical need for new offences; 15 thought that there was not; and 11 were unsure or raised further questions.

7.106 The issues raised by the responses are as follows:

- (1) Is there in practice a serious problem of incitement to hatred against disabled or transgender people?
- (2) If so, would significant numbers of cases fall within a new stirring up offence, assuming that this is drafted on the same lines as the existing offences?
- (3) Is the position complicated by under-reporting?
- (4) Is the conduct in question covered by existing offences?
- (5) Can the enhanced sentencing regime adequately reflect the wrongfulness of the conduct in question?
- (6) Are there other means of dealing with the problem?

(1) The problem in practice

The CP

7.107 Chapter 4 of the CP considered whether there was a practical need for extension.¹⁰⁴ We explained that the existing stirring up offences are rarely prosecuted.¹⁰⁵ This may be because the sort of extreme conduct that they cover is rare, or because other offences are being used instead, perhaps because they are easier for the prosecution to prove. That might be especially true of the offences relating to religion and sexual orientation, where both an *intention* to stir up hatred and *threatening* behaviour must be shown.

7.108 We explained¹⁰⁶ that, in our early fact-finding work, we did not encounter calls for

¹⁰³ CP para 4.66.

¹⁰⁴ CP para 4.64 and following.

¹⁰⁵ CP para 4.8.

¹⁰⁶ CP para 4.12.

the stirring up offences to be extended. We noted¹⁰⁷ that in 2008, the Government had decided not to extend the stirring up offences to cover hatred against disabled or transgender people. They had concluded that there was no compelling evidence that this kind of hatred was “actively being stirred up”.

Responses

ARGUMENTS FOR PRACTICAL NEED

7.109 Respondents who considered that there was a practical need for the new offences advanced two types of argument.

- (1) Some reported that, in their experience, examples of hate speech against disabled or transgender people were frequent.
- (2) Others admitted that reported examples of this kind of conduct were few, but they argued that this was because of under-reporting.¹⁰⁸

7.110 Mencap referred to two recent examples of speech that, in their view, revealed a gap in the law. As Mencap argued, the language used in each case “fundamentally called into question the equal value of disabled people and their right to life [because] both men publicly advocated the killing of disabled children on grounds of their disability.” They pointed to a gap in the law because, as they saw it, it is not an offence to make public statements dismissing disabled people’s right to life.¹⁰⁹

7.111 Examples were also provided in relation to transgender identity. Trans Media Watch referred to “the publication of suggestions that trans people should be assaulted, raped or killed” which they said was “endemic”.¹¹⁰ They went on to say that transgender people “report high levels of threatening behaviour from strangers and other, more severe forms of aggression” and it was logical to draw a causative link.

7.112 The National Union of Students referred to their own surveys¹¹¹ in which significant numbers of respondents said they had “witnessed the distribution or display of writing, signs or visible representation that they found threatening,

¹⁰⁷ CP para 4.10.

¹⁰⁸ We address this below, at para 7.139 and following.

¹⁰⁹ See para 7.130 below and the subsequent discussion with examples.

¹¹⁰ Trans Media Watch did not provide actual examples of such material in their response to the CP. However in April 2013, they provided us with a dossier of what they considered particularly egregious examples of hate speech in the media and on the internet. Although much of the language was extremely offensive, we did not see any material we considered would unquestionably meet the high threshold set by stirring up offences. See discussion at para 7.119 and following, below.

¹¹¹ National Union of Students, “No Place for Hate: Hate Crimes and Incidents in Further and Higher Education: Disability (2011),” available from: http://www.nus.org.uk/PageFiles/12238/2011_NUS_No_Place_for_Hate_Disability.pdf (last visited 15 May 2014) and “No Place for Hate: Hate Crimes and Incidents in Further and Higher Education: Sexual Orientation and Gender Identity (2011),” available from: http://www.nus.org.uk/PageFiles/12238/2011_NUS_No_Place_for_Hate_Full_Report.pdf (last visited 15 May 2014).

abusive or insulting and that they believed to be prejudiced against [each of the following: disability, gender identity or sexual orientation]”.

- 7.113 Some consultees said they believed the offences would curb negative media reporting, false statistics and stereotyping of people with disabilities.¹¹² Others suggested a causative link between such “disablist language and offensive stereotyping” and “a range of hate crimes including life-threatening physical violence”:

The practical need for these new stirring up offences relates to deterrence, prevention and early intervention, especially in community settings where disabled people’s quality of life is diminished by behaviours that are not currently offences.¹¹³

- 7.114 Similarly another consultee argued that new stirring up offences could “lead to convictions [for] more indirect offences that can be equally as damaging, such as cyber bullying”.¹¹⁴ Trans Media Watch said that they had seen several cases in which “individual trans people demonised by newspapers have subsequently been subject to threats made by strangers, or even physical attacks”.
- 7.115 Suzanna Hopwood described several kinds of behaviour in relation to transgender people, including “stereotypical, demeaning and false representations... which may be presented as banter, humour or analysis”, and “pseudo-feminist” critique of gender-variant people, which might not necessarily stir up hatred, but validated transphobic attitudes.

ARGUMENTS QUESTIONING PRACTICAL NEED

- 7.116 Several respondents agreed with the case in principle to extend, provided that the evidence showed a practical need, but believed that so far the evidence was not sufficient. The Senior Judiciary said:

On the evidence presented in the consultation paper it seems very doubtful that there is any practical need for the new offences. There are likely to be more effective ways of addressing the problems, in particular by working with the Press Complaints Commission and the media generally.

- 7.117 North Yorkshire Police made a similar point, adding that they would only support extension if evidence were available that the current criminal law could not address the relevant conduct.¹¹⁵
- 7.118 HM Crown Prosecution Service Inspectorate conducted a year-long investigation into the treatment of disability hate crime by the criminal justice system. In their response they said that they had heard no express calls for new stirring up offences: the main emphasis was on the need to apply the existing law, in particular enhanced sentencing, effectively and in a non-discriminatory way.

¹¹² Weston and North Somerset DIAL, Full of Life, Action Disability Kensington & Chelsea.

¹¹³ Action Disability Kensington & Chelsea.

¹¹⁴ Learning Disability Partnership.

¹¹⁵ Hampshire Police also considered that the evidential case for extension was inconclusive.

Discussion

- 7.119 In our initial discussions with interested groups, having explained the extreme and serious nature of the conduct dealt with by the stirring up offences, we called for as many examples as possible of such conduct or material relevant to disability or transgender identity. We were conscious of the high threshold set, not only by the elements of the offences themselves, but also by article 10 of the ECHR. We explained that examples would also assist us in considering what model of offence might be best suited to these forms of expression and material and whether freedom of expression provisions like those introduced for the later models of the offences ought also to be considered here. However, little if any clear evidence emerged at this stage that hatred was being stirred up on grounds of disability or transgender identity, within the meaning of the existing offences.
- 7.120 We do not intend, in making these points, to minimise the scale or impact of hate crime affecting disabled and transgender people, or to deny the existence of prejudiced and hostile attitudes that underlie such offending.¹¹⁶ We see these as serious social problems requiring a strong and coordinated response. We simply doubt whether a significant proportion of hate-offending against disabled or transgender people would meet the specific requirements of a stirring up offence.¹¹⁷
- 7.121 In light of the information we received before publishing the CP, it appeared to us that the material stakeholders considered as exemplifying the stirring up of hatred consisted of: negative, false and offensive media reporting on disability and transgender issues; ridicule, harassment, bullying and the use of offensive language. It was most commonly directed to individuals as opposed to groups of people with a particular characteristic. The internet and social media were frequently referred to as the public spaces where hatred is most commonly stirred up. Similarly, we were struck by the number of consultees whose responses referred to social media and the internet as a primary source of hate-content.
- 7.122 The examples that some consultees provided in their responses (of cyber-bullying, negative media reporting and the use of false statistics) causes us to fear that unrealistic expectations are held about what the stirring up offences would be capable of preventing or discouraging.¹¹⁸
- 7.123 In view of the examples of hateful speech and content against transgender or disabled people that have been put forward by consultees as typical, the question arises whether existing offences could be used to prosecute such conduct. We addressed the scope of existing offences in detail in the CP.¹¹⁹ Responding on this point, Professor Phillipson¹²⁰ identified a “gap” in the law, in that abusive, insulting or threatening online content is rarely prosecuted under section 5 of the Public Order Act 1986. However, the section 5 offence deals with conduct committed in public and will be less relevant to hate content online than the

¹¹⁶ See for instance M Sherry, *Disability Hate Crimes: Does anyone really hate disabled people?* (2010) p 29, cited in Dr Stanton-Ife's theory paper (fn 6 above), para 55.

¹¹⁷ We discuss this issue further from para 7.125 below.

¹¹⁸ We refer here to the examples at paras 7.113 to 7.115 above.

¹¹⁹ CP paras 4.14 to 4.37.

¹²⁰ Para 7.152 below.

Malicious Communications Act 1988 and Communications Act 2003 offences.¹²¹ These offences are more likely to be effective than section 5 in prosecuting sufficiently serious cases of on-line abuse and cyber-bullying. As we discuss below, prosecution will need to be in the public interest.

- 7.124 In June 2013, following a consultation, the CPS issued final guidelines on the prosecution of offences involving the use of social media.¹²² These guidelines advise that for communications falling under the Malicious Communications Act 1988 or the Communications Act 2003,¹²³ prosecution is unlikely to be in the public interest if the communication was quickly removed, there was remorse, it was only intended for a small audience, or does not go beyond what is tolerable in a society that respects free expression. They also provide that prosecution may be in the public interest if there is a hate crime element, the material was targeted at an individual victim and there is evidence of an intention to cause distress (particularly if the behaviour is repeated).¹²⁴

(2) Whether the conduct in question would be covered by a stirring up offence

Responses to consultation

- 7.125 Instances of hate speech against disabled or transgender people were reported by Mencap and the National Union of Students among others. Here we discuss whether they would be caught by new offences of stirring up hatred.
- 7.126 Superintendent Paul Giannasi,¹²⁵ in a presentation to the symposium, discussed the recent surge in reported internet hate crime, which he attributed to the increased use of social media. He referred to the following specific challenges this presented:
- (1) Volume: there is now more hate speech on the internet than police have resources to address;
 - (2) Jurisdiction: the internet is global and most web-hosting entities are based outside the EU, many in the USA where legislation is relatively permissive due to the strong constitutional protections for free speech.

¹²¹ A point also recognised by the CPS: see fn 148 below.

¹²² Crown Prosecution Service, *Guidelines on prosecuting cases involving communications sent via social media*, paras 12 and 42 to 45. Available from: http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html (last visited 15 May 2014).

¹²³ Other than those which breach a court order, make credible threats of violence or damage to property, or amount to harassment against a specific individual or individuals.

¹²⁴ CPS Guidelines (fn 122 above), paras 42 to 45. The Law Commission as part of its 12th Programme of law reform has been asked by the Criminal Bar Association to undertake a project on social media and the criminal law, specifically with regard to the investigatory powers of the police.

¹²⁵ Supt Giannasi leads the government's Hate Crime Strategy and is a member of the Association of Chief Police Officers Hate Crime Group. He has responsibility for the True Vision website, an on-line hate crime reporting portal supported by ACPO and police forces in England, Wales and Northern Ireland.

- 7.127 Superintendent Giannasi added that the “vast majority” of disability and transgender internet hate crime reports received by the Association of Chief Police Officers’ True Vision website would not meet the threshold set by the existing stirring up offences. For example, it is common for highly offensive content to be “tweeted” to a small number of people where there is no specific intention on the part of the sender that the message be spread. Nonetheless when the message is “re-tweeted” it can reach thousands very rapidly. It may be re-tweeted by people who, far from sharing or wishing to endorse the views of the original sender, intend only to draw attention to what they see as unacceptable material. In such cases, neither the original sender nor the re-tweeters can be shown to have intended to stir up hatred, as required by at least the narrower form of the proposed offences.
- 7.128 In view of these challenges, Supt Giannasi saw little benefit in extending the stirring up offences, which would fail to capture the bulk of the material being reported as hate speech. He said there would be greater benefit in continuing the current collaboration between the police and the multinational corporations that control the internet and social media industry, towards improved monitoring and control of extremist, offensive and hateful material on the internet.¹²⁶

Discussion

- 7.129 Unsurprisingly, given how rarely the existing stirring up offences are prosecuted or reported on in the media, there was widespread misunderstanding about the conduct they could be used to prosecute. Of the examples provided in relation to disability, while many could satisfy the requirements of existing offences such as harassment and the use of threatening, abusive or insulting language,¹²⁷ there was little if any evidence of conduct that would clearly satisfy the very different elements of the stirring up offences (whether the broad or narrow model were used). We discuss in more detail the extent to which existing offences are capable of addressing conduct of the kind consultees have highlighted, at paragraphs 7.147 and following, below.
- 7.130 For example, we are uncertain whether the conduct described by Mencap, namely statements that “fundamentally question the equal value of disabled people and their right to life” would meet the threshold. It appears that no charges under section 5 of the Public Order Act 1986 were brought in either of the cases they referred to, suggesting the statements were not seen as reaching even the lower threshold set by section 5. If the stirring up offences had existed, it would

¹²⁶ Tackling online hate crime is presented as one of several “emerging challenges” in the recent Government report, *Delivering the Government’s hate crime action plan*, published on 1 May 2014. On pp 4-5 the report lists several ongoing initiatives in this regard. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307624/HateCrimeActionPlanProgressReport.pdf (last accessed 14 May 2014).

¹²⁷ At CP paras 4.14 to 4.48 we discussed the extent to which existing offences could deal with the same conduct new stirring up offences would seek to address, including under Public Order Act 1986, ss 4, 4A and 5; Malicious Communications Act 1988, s 1; and s 127(1) of the Communications Act 2003. We also considered encouraging and assisting crime under Serious Crime Act 2007, ss 44 to 46 at paras 4.36 to 4.37.

have been a matter for the CPS to decide whether the case was strong enough to bring a prosecution.¹²⁸

- 7.131 We note the pragmatic view taken by Superintendent Giannasi on the ability of police, and the criminal law, to deal with the growing tide of such material.¹²⁹ We also note his view that the stirring up offences would rarely, if ever, be the appropriate offences to use to prosecute those who produce or distribute this material.
- 7.132 One reason that so little of the online material described would meet the threshold for a stirring up offence is that the existing stirring up offences are very narrowly drawn. The conduct must be targeted at a group rather than an individual; but it must also be of a nature likely to make individuals feel threatened.
- (1) The conduct must be intended, or in the case of the racial hatred offences likely, to incite hatred in others. In this respect the stirring up offences are different from other hate crime legislation (the aggravated offences and enhanced sentencing), where it is sufficient that the conduct expresses, or is motivated by, hostility on the part of the perpetrator. The different offences reflect the distinction between:
 - (a) conduct that targets an individual as the object of a criminal offence while using a characteristic as a point of attack; and
 - (b) conduct that targets as objects of hatred members of a group who share that characteristic.
 - (2) While this element of incitement is a necessary part of the offences, it is not sufficient. It is also necessary that the conduct be “threatening, abusive or insulting” (in the case of the racial hatred offences), or simply “threatening” (in the case of the religious and sexual orientation offences). This refers to the likelihood of an immediate effect on individuals, such as fear or upset.
- 7.133 This double requirement excludes most of the cases that have been described to us or that we have been able to devise. On the one hand, the offences do not extend to pure vulgar abuse, as this may express hatred on the part of the perpetrator but is not calculated to inspire hatred in others. On the other, they do not extend to criticism in the course of a debate on public policy, however adverse to the interests of the groups in question, unless it is likely to make individuals feel threatened.
- 7.134 This can be illustrated by the following real and imaginary examples:

¹²⁸ The leaflets distributed by the defendants in *R v Ali, Javed and Ahmed* 2012 WL 608645 also questioned the right to life – in this case, of homosexuals. The language and imagery used in the leaflets were, however, of a different order to the two disability examples described by Mencap, as were the context and circumstances. (This case is discussed briefly in Chapter 2 above at para 2.49 and accompanying footnote.)

¹²⁹ See para 7.126 above.

- (1) D shouts at V, a disabled or transgender person, using offensive language relating to V's disability or appearance. This expresses D's own hostility, but is not calculated to cause hatred in others. It would be likely, in any case, to be captured by section 4A and/or 5 of the POA.
- (2) D, a local councillor, is heard to say "Are we still letting Mongols have sex with each other?"¹³⁰ Again, this expresses D's own hostility rather than stirring up hatred in others.
- (3) D writes a blog in unemotional medical language calling for euthanasia of severely disabled children. This is unpleasant and offensive and may also be considered to be threatening. But it is not intended (or, in our view, likely) to promote hatred of disabled children or adults.
- (4) D says that most of those in receipt of disability benefits are scroungers. Challenged, D says she was not attacking disabled people but people who pretend to be disabled and are not. She argues that false benefits claims do occur¹³¹ and are a legitimate subject of public debate.¹³² However, D is contributing to an atmosphere of suspicion and hostility that could make genuine claimants feel that they are under attack. Nevertheless, on balance we believe that D's words would fall outside the offence.
- (5) D, an employer, expresses resentment at the adjustments now required to accommodate disabled employees and says that an employer is not a charity. This is legitimate debate, and criminalising it would be an unjustifiable restraint on freedom of expression.
- (6) D, a preacher, says that gender reassignment surgery is an abomination in the eyes of God, and compares those who undergo it to the cult eunuchs of pagan religion. This is an argument that certain behaviour is sinful and abhorrent but, without more (for example, a demand that transgender people should be executed¹³³), would be protected by the right to freedom of expression (and freedom of religion).¹³⁴
- (7) D expresses fear and disgust at transgender people, on the ground that he does not want to become sexually involved with a woman and find out, too late, that from his point of view she is not a woman at all. Even apart from any question of freedom of expression, criminalising this would be perceived as an undesirable attempt to police emotions.

¹³⁰ See <http://www.bbc.co.uk/news/uk-england-wiltshire-27034445> (last visited 19 May 2014).

¹³¹ Though truth, or belief in the truth of one's claims, is not a defence to the stirring up offences: *Birdwood* [1995] 6 Archbold News 2.

¹³² Dr Stanton-lfe's theory paper (fn 6 above), paras 86 and 87.

¹³³ See, for example, *Ali, Javed and Ahmed* (unreported, 10 Feb 2012), <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf> (last visited 15 May 2014). The defendants had distributed leaflets calling for the death penalty for homosexuals and discussing different methods of execution. These were accompanied by lurid imagery. The leaflets were posted through community residents' letterboxes at a time intended to coincide with a Gay Pride parade.

¹³⁴ See the discussion of article 9 European Convention on Human Rights, at CP paras 4.56 to 4.62 and CP Appendix A paras A.80 to A.92.

- 7.135 One can conceive of all the above situations occurring, and some of them are similar to those mentioned in the responses to consultation. However, they are very different from the kind of material that is the intended and legitimate target of the stirring up offences.
- 7.136 One other point should be made. The examples listed, on our argument, all or mostly fail to meet the requirements of stirring up offences.¹³⁵ However, there would be scope for the individuals in question to be subjected to harassment or over-zealous investigation for having come near the boundary. In this sense, new offences could have a chilling effect.
- 7.137 Trans Media Watch reports comments posted to online newspapers and blogs advocating that transgender people should be assaulted, raped or killed.¹³⁶ This would come within the scope of new offences of stirring up hatred. However it also falls within the existing offence of encouraging crime.¹³⁷
- 7.138 Another borderline case is where a gang searches for people with relevant characteristics with a view to attacking them, or attacks such people having found them by chance, and gang members verbally encourage each other to “kill the ---s”. It is questionable whether the gang members are trying to promote hatred where it does not exist or only to appeal to hatred that they believe already exists. In either case it appears to us that the attack itself is the main part of the wrongdoing and that the verbal encouragement is mainly relevant as aggravation. Such cases would therefore be more appropriately dealt with by means of aggravated offences (or under the Serious Crime Act 2007 if the requirements of sections 44 to 46 are met) than by stirring up offences.

(3) Under-reporting

Responses

- 7.139 Some consultees argued that the reason that the existing stirring up offences are little used is that hate crime incidents, even against groups already protected by such offences, are under-reported.¹³⁸ Creating new stirring up offences would lead to more reporting of hate speech and content.
- 7.140 UNISON said the practical need should not be dismissed on grounds that prosecutions of the existing stirring up offences are very rare, as this was because “victims are reluctant to report such crimes” and police and prosecutors are failing to record hate crime correctly.
- 7.141 Stop Hate UK made the same point. At present victims are reluctant to report incidents that do not amount to crimes, as they consider that they will not be taken seriously and nothing will be done; accordingly we do not know the scale of the problem. Creating stirring up offences would change this, increase victim

¹³⁵ Though this may depend on whether the offences are drafted in the “broad” or the “narrow” form: para 7.3 and 7.4 above.

¹³⁶ Para 7.111 above.

¹³⁷ Para 7.160 below.

¹³⁸ Metropolitan Police, UNISON, Stop Hate UK. Related arguments were made by the Police Superintendents Association of England & Wales, UNISON, Full of Life, Galop and the Discrimination Law Association.

confidence and lead to “more confidence in reporting hate crime across the spectrum of offences”. They said there was a “practical need to know about community tensions, even if ultimately nobody is charged with or convicted of an offence.” They went on:

At present, because the stirring up offences do not exist, there is no way of properly categorising and recording how often conduct is occurring which would amount to an offence of stirring up hatred on the grounds of disability of gender identity if the offences did exist. All we have at the moment is anecdotal evidence from individuals and some information collated by interested groups. An extension of the stirring up offences would enable us to monitor trends and patterns.

- 7.142 Similar points were made by the Police Superintendents Association of England & Wales, Full of Life, Galop and the Discrimination Law Association.

Discussion

- 7.143 We do not accept that practical need can be made out on the basis of under-reporting, as some consultees argue. Clearly, conduct that meets all the elements of what would be a stirring up offence but does not amount to any other offence cannot be “under-reported” as it is not currently an offence.¹³⁹ There may be under-reporting of current stirring up offences. But even if we knew the proportion by which such cases are under-reported, that would not enable us to estimate the volume of relevant conduct that now occurs in relation to disability and transgender status, as we have no figures for the number of such cases that *would* be reported if it were an offence.
- 7.144 Some¹⁴⁰ made a wider argument that criminalising stirring up could have a knock-on effect. It might encourage people to report disability or transgender hate crime because of the message sent that stirring up this kind of hatred is as wrong, and treated as seriously, as hatred on the other three (existing) grounds. This is a form of the argument that the criminal law can be used to educate public attitudes, and is discussed above under the heading of symbolic effect.¹⁴¹ In our opinion the under-reporting of existing offences (in this case, of violence against or harassment of disabled and transgender people) can never be a reason for creating new offences addressing different conduct. It would be more productive to concentrate on measures directly concerned with the existing offences and their reporting.
- 7.145 It is further argued that making stirring up an offence would encourage people to report it and thus give an idea of the scale of the problem.¹⁴² This too is not a legitimate reason for creating an offence. The correct approach is first to establish whether there is a problem and then, if there is one, to create the offence. To approach it in the opposite order is to use the criminal law as a tool of social research.

¹³⁹ “It is also not possible to know whether previously reported incidents would have hit the criteria of the new offence, as it does not currently exist”: Galop.

¹⁴⁰ Eg Stop Hate UK, para 7.141 (third sentence).

¹⁴¹ Para 7.73 and following, above.

¹⁴² Stop Hate UK; Police Superintendents Association.

7.146 The under-reporting of hate crime by disabled and transgender people is in our view more likely to reflect low confidence in the ability or willingness of the criminal justice system to address the offending, or to meet the needs of disabled and transgender people in the criminal justice process. We argue above¹⁴³ that little if any lasting impact on public confidence would result from creating new stirring up offences, if those offences would not address the bulk of hate crime experienced by disabled and transgender people and would be very rarely prosecuted.

(4) Other offences

The CP

7.147 Some of the behaviour that would be targeted by any new stirring up offences is already covered by existing offences. For example:

- (1) The existing Public Order Act 1986 offences make it a crime to use threatening, abusive, or insulting words or behaviour; to cause someone to fear violence; to provoke someone to violence; or to intentionally cause harassment, alarm or distress.
- (2) The Malicious Communications Act 1988, section 1 makes it an offence to send a letter or electronic communication which conveys a message which is indecent or grossly offensive or a threat, with the purpose of causing stress or anxiety.
- (3) The Communications Act 2003, section 127 makes it an offence to use a public electronic network (such as the internet) to send a message or other matter that is grossly offensive or of an indecent, obscene or menacing character or to cause any such message or matter to be sent.
- (4) The Serious Crime Act 2007, Part 2 makes it an offence to do acts capable of encouraging someone to commit a crime, regardless of whether a crime is committed.¹⁴⁴

7.148 Nonetheless, we concluded that the existing offences do not cover all of the behaviour that new stirring up offences would cover. The gap was a unique and serious type of wrongdoing: the spreading of hatred against disabled or transgender people as a group, or conduct that encouraged people to hate disabled or transgender people but did not, in the process, also encourage anyone to commit a crime against disabled or transgender people.

7.149 We also pointed out that the maximum sentence for the existing stirring up offences (seven years) exceeded that for malicious communications and similar offences (six months, a fine or both).¹⁴⁵

¹⁴³ Para 7.90 above.

¹⁴⁴ The maximum penalty for offences under this Act is the same as the maximum for the offence encouraged or assisted: Serious Crime Act 2007, s 58.

¹⁴⁵ CP para 4.34.

Responses to consultation

THE CONDUCT IS COVERED BY OTHER OFFENCES

- 7.150 Christian Concern and the Christian Legal Centre said that the behaviour in question is adequately covered by section 1 of the Malicious Communications Act 1988 and section 127(1) of the Communications Act 2003.¹⁴⁶ Similar points were made by Superintendent Giannasi.¹⁴⁷
- 7.151 Others said that the behaviour in question was covered by other offences, but did not give details. For example Cleveland Police said “they are rarely used and other offences could be found if necessary”.

THE CONDUCT IS NOT COVERED BY OTHER OFFENCES

- 7.152 For Professor Phillipson the gap in the law was more than theoretical. Having analysed in detail the uses and potential limitations of the various available criminal offences discussed in the CP, he said there was:

... a significant area of liability that is not covered by existing public order and malicious/offensive messaging offences that would be covered by the new offences: speech addressed to the world at large, particularly online. ... In my view the [CP] goes too far in saying that the gap in the existing law ‘may be narrow’ (paragraph 4.51). It is a large and obvious gap.

- 7.153 As to the kind of conduct the existing law would not address, Professor Phillipson referred to insulting material published online, in blogs, or on websites that “is likely to cause distress to readers”. He referred to “words that are not spoken aloud or displayed in public but rather published in pamphlets, newspapers or – most importantly – online.” Noting the wide scope of the existing offence under section 5 of the Public Order Act 1986 he argued, nonetheless, that in practice prosecutions are not brought under section 5 for such conduct.¹⁴⁸
- 7.154 Victim Support also disputed the adequacy of existing public order offences to prosecute individuals who intend their audience to hate particular groups of people. Prosecutions for these offences would not capture the seriousness of the conduct or the harm it causes, given that victims of hate crime report more serious feelings of victimisation and psychological or emotional trauma which ought to be recognised both in the label of an offence and the applicable sentence range.
- 7.155 Stop Hate UK referred to the inadequacy of penalties set for existing offences potentially available to prosecute conduct that would be caught by stirring up

¹⁴⁶ These offences are discussed in the CP, para 4.14 and following.

¹⁴⁷ Para 7.126 and following above.

¹⁴⁸ We discuss use of s 5 POA at para 7.123 above. The CPS guidelines on prosecuting cases involving communications via social media (see para 7.124 above) counsel that “particular care” should be taken in using public order offences in respect of online communications, noting that public order legislation is primarily concerned with conduct committed in person rather than online [conduct that takes place in direct proximity to the persons affected]: para 47.

offences. They argued that the seven year maximum penalty for the stirring up offences reflected the greater harm that can flow from the conduct concerned.

- 7.156 As against this, Ivan Hare¹⁴⁹ noted that the racial hatred offences had a far lower maximum sentence when first enacted under the Race Relations Act 1965.¹⁵⁰ He was concerned that if new offences were created, the penalties would similarly increase over time.

Discussion

- 7.157 There are really two questions here. One is whether, in principle, the definition of any new offences of stirring up hatred would cover conduct not falling within existing offences. The other is whether such conduct occurs.
- 7.158 We stand by the view expressed in the CP that there is a theoretical gap in the law. One could devise examples of stirring up hatred that would (a) meet the high threshold set by the stirring up offences and either (b) would not fall within existing offences or (c) would be far too serious in nature for the sentences available under existing offences adequately to punish them. However, as discussed above,¹⁵¹ we are not aware of evidence showing that such conduct occurs in practice.
- 7.159 While a small number of consultees produced examples of material to illustrate practical need,¹⁵² much of which would be seen as highly offensive by most people, it would in our view be covered by other offences. For instance, the example given by the National Union of Students of prejudicial written material that was “threatening, abusive or insulting” would be likely to fall within section 5 of the Public Order Act 1986.
- 7.160 Similarly the “publication of suggestions that trans people should be assaulted, raped or killed”, raised by Trans Media Watch, might reach the threshold for stirring up offences but would potentially also be covered by the offence of solicitation to murder.¹⁵³ Where the person making the suggestion believes that it will be acted upon,¹⁵⁴ an offence of “assisting or encouraging” under section 45 or 46 of the Serious Crime Act 2007¹⁵⁵ is committed. It is true that such offences are more normally used in cases where there is a call to kill (or rape or assault) a particular individual. However, Abdullah el-Faisal was prosecuted and sentenced

¹⁴⁹ In a presentation to the symposium at Queen Mary on 17 September 2014.

¹⁵⁰ The original penalty was £200 and/or 6 months’ imprisonment (tried summarily), or £1000 and/or two years’ imprisonment (on indictment): Race Relations Act 1965, s 6(3).

¹⁵¹ Para 7.129 and following, above.

¹⁵² Set out at paras 7.110 to 7.112 above.

¹⁵³ Offences Against the Person Act 1861, s 4.

¹⁵⁴ Including cases where the suggestion might be taken as encouraging any of a number of offences and D believes that one of them will be committed but has no belief as to which: Serious Crime Act 2007, s 46. For example, in *Blackshaw* [2012] 1 WLR 1226 the defendant was convicted under s 46 for using Facebook to encourage or assist the commission of offences including riot.

¹⁵⁵ We discuss the potential application of offences under this Act in the CP, paras 4.36 and 4.37.

for solicitation to murder, after sermons exhorting young Muslims to kill “unbelievers”, Jews, Americans and Hindus.¹⁵⁶

- 7.161 While the existing law addresses the direct harm caused to victims when the stirring up of hatred leads to crimes being committed against them, it does not address the indirect harms. These include the feeling among those with the characteristic that they do not belong in their community and that their place in society is threatened. They also include the harm to the fabric of society caused by the spreading of hatred, prejudice and discrimination. There may however be other ways of dealing with these problems, short of criminalisation.

(5) Can enhanced sentencing adequately reflect the wrongdoing?

- 7.162 In the previous section we discussed the argument that there is conduct which would be caught by new offences of stirring up hatred but which does not fall within the existing offences. There may however be another way in which existing offences fail to address the problem: that is, if the conduct in question does fall within an existing offence but the sentencing powers are not great enough.
- 7.163 As against this, it could be argued that the conduct in question will almost necessarily either express hostility based on the relevant characteristic or be motivated by such hostility. Where the conduct falls within an offence, the enhanced sentencing regime under section 146 of the Criminal Justice Act 2003 will therefore apply. (Furthermore, if the aggravated offences are extended to cover these characteristics, they may apply to this conduct.)
- 7.164 The question therefore arises whether the application of the enhanced sentencing regime to existing offences adequately reflects the wrongdoing of conduct which stirs up hatred on grounds of transgender identity or disability as well as already constituting another offence.

The CP

- 7.165 Question 14 of the CP asked:

Do consultees agree that the sentencing provisions in section 146 cannot capture this type of extreme and discrete wrongdoing against disabled or transgender people?

Responses to consultation

- 7.166 67 respondents agreed that the sentencing provisions could not capture this kind of wrongdoing, 14 respondents thought that the sentencing provisions were sufficient and 5 were unsure or made other observations.
- 7.167 On the specific comparison between stirring up offences and sentencing provisions, two arguments stand out.

¹⁵⁶ *El-Faisal* [2004] EWCA Crim 456. For completeness we note that this defendant was also convicted and sentenced for using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred under the Public Order Act, s 18(1). This and the other counts on the indictment related to separate tape recordings found in his possession.

- (1) Several consultees¹⁵⁷ argued that the type of harm, or the type of wrongdoing, targeted by the proposed stirring up offences is fundamentally different from those targeted by offences to which section 146 applies. The former consists of incitement of those who may see or hear the words or conduct to hate people with a particular protected characteristic. The latter consists of direct wrongdoing against individuals with one of the protected characteristics, based on hostility towards that characteristic. Some mentioned the 7-year maximum sentence available for the offences of stirring up hatred.
- (2) As against that, some consultees questioned the existence of any extreme, discrete type of wrongdoing which the sentencing regime could not capture.¹⁵⁸

7.168 Among those considering that the sentencing provisions were adequate were the Senior Judiciary who answered:

Section 146 is adequate to capture wrongdoing that is criminal, because the aggravation can be properly reflected in sentence. There will be very few cases where the maximum penalty would not be adequate. A single malicious communication might be an example (where the maximum is only six months) but serious offending is likely to involve multiple communications, affording scope for consecutive sentences. Even if section 146 does not apply, community impact is always a relevant aggravating factor.

They went on to accept that section 146 cannot apply if the wrongdoing is not criminal, because it consists solely of encouraging hatred rather than encouraging offences. But they doubted that this gave rise to any actual gap in the law as such cases would rarely if ever occur.

7.169 Radfem also questioned whether this particular, discrete and serious kind of wrongdoing existed. They argued that the real problem, in the transgender context, was one of “prejudice against gender non-conformity”.

Discussion

7.170 We accept that a theoretical gap remains in the current law, even after taking account of the potential to enhance sentences for basic offences used to prosecute conduct intended or likely to stir up transgender or disability hatred. It might also be argued that, regardless of whether stirring up offences would be a greater deterrent, it is necessary to have a higher sentence available to deal with such conduct in order to reflect the serious nature of the wrongdoing involved.

7.171 Once more, however, the evidence presented to us does not indicate that this kind of conduct occurs on a significant scale.

¹⁵⁷ Victim Support, Lesbian & Gay Foundation, Bar Council and Criminal Bar Association, Diverse Cymru, CPS London Scrutiny and Involvement Panel – Community Members, Derbyshire Police, National LGB&T Partnership, Stay Safe East, Society of Legal Scholars, Stop Hate UK, GIRES, Dr F Stark, Full of Life and one anonymous respondent.

¹⁵⁸ The Senior Judiciary, Christian Concern and the Christian Legal Centre, Radfem, Devon and Cornwall Police, North Yorkshire Police, Anna Scutt.

- (1) One exception is the response of Trans Media Watch, which refers to suggestions that transgender people should be assaulted, raped or killed. In such cases, there is no defect in sentencing powers. These acts can qualify as assisting and encouraging crime, under sections 44 and 45 of the Serious Crime Act 2007,¹⁵⁹ and the penalty for this is the same as that for the crime encouraged.¹⁶⁰
- (2) The other possible exception is the case mentioned above,¹⁶¹ of the roaming gang looking for victims and encouraging each other to attack. Here it is quite possible that these cases occur, and that the requirements for an offence of stirring up hatred are met. However, as explained above we consider that these cases are more appropriately dealt with by aggravated offences or other, existing criminal offences (in combination with enhanced sentencing where appropriate).

7.172 Accordingly, we do not believe that there is a practical need for the stirring up offences to be extended.

(6) Are there other means of dealing with the problem?

Responses to consultation

- 7.173 In response to the question whether there was a practical need for the offences, HM Crown Prosecution Service Inspectorate (HMCPSP) did not answer “yes” or “no” but raised arguments both ways. They said the research they had conducted during their disability hate crime inspection¹⁶² mirrored our own early findings in this project. The greater focus of stakeholders was on the need for improved hate crime reporting, better use of enhanced sentencing and a need to tackle negative media representation. HMCPSP said they did not come across evidence of behaviour that could be described as stirring up hatred within the meaning of the offences (though this did not mean that such evidence did not exist). In their view the strongest arguments in favour of extension were equality and potential deterrence, though they added a caveat about the lack of evidence to support a deterrence argument.
- 7.174 Other consultees were concerned about the proliferation of new offences and the over-complication of the criminal law. Among these, the Law Society’s Criminal Committee said it was right to ask whether the “problem might be dealt with by means other than the criminal law, for example education and media publicity”.

Discussion

- 7.175 Our early discussions with disability and transgender groups revealed a sense that negative and prejudicial media coverage is fuelling an increase in bullying,

¹⁵⁹ Para 7.160 above.

¹⁶⁰ Serious Crime Act 2007, s 58.

¹⁶¹ Para 7.138 above.

¹⁶² This led to the Criminal Justice Joint Inspection report by HM CPS Inspectorate, HM Inspectorate of Constabulary and HM Inspectorate of Probation, *Living in a Different World*, published March 2013, available from <http://www.hmic.gov.uk/media/a-joint-review-of-disability-hate-crime-living-in-a-different-world-20130321.pdf> (last visited 15 May 2014).

harassment and crime against disabled and transgender people. The rise of the internet and social media may allow this coverage to spread more quickly and widely.

7.176 The problem may be one of confidence in the ability and willingness of the criminal justice system to respond to the needs of disabled and transgender people when incidents of hate crime or hostility occur. Of consultees who commented on this, none cited the absence of stirring up offences as a reason. Factors cited include:

- (1) poor police response;
- (2) lack of support through the criminal justice system when a complaint is made;
- (3) lack of education;
- (4) lack of control over the media;
- (5) lack of control over the internet; and
- (6) a perception of lenient sentences or failure to use the enhanced sentencing regime in appropriate cases, which are already criminal in existing law.¹⁶³

7.177 Initiatives already exist to combat some of these problems, and some of these are part of the Government's ongoing hate crime action plan. They include working with the Press Complaints Commission to address media reporting, a programme to tackle internet hate crime (including guidance for moderators), and education initiatives to assist schools to prevent and address prejudice and bullying.¹⁶⁴

CONCLUSION

7.178 We believe that, if new offences were created of stirring up hatred on the grounds of disability and transgender identity, there would be very few successful prosecutions. We base this on the following considerations.

- (1) There are very few prosecutions for the existing offences of stirring up hatred. In the CP, we reported that, between 2008 and 2012, only 113 charges of stirring up racial hatred and 21 charges of stirring up hatred on the ground of religion or sexual orientation reached a first hearing in a

¹⁶³ See in particular the response of HM Crown Prosecution Service Inspectorate, para 7.173 above. The other points listed can be found in the section on practical need at para 2.35 and following of the Analysis of Responses.

¹⁶⁴ See also our discussion of Supt Paul Giannasi's views on internet hate crime (at para 7.126 above) and our discussion of social media prosecutions at para 7.124 above.

magistrates' court.¹⁶⁵ We contrasted this with over 75,000 charges for the aggravated offences.

- (2) We argue, above, that the type of hate speech typically found in relation to disability and transgender status is far less likely to satisfy the requirements for a stirring up offence than that found in relation to race and religion;¹⁶⁶ and that such examples as have been brought to our attention would mostly be covered by other offences.¹⁶⁷
- (3) Therefore, there would be still fewer successful prosecutions for the new stirring up offences than there are now for the existing ones.

Accordingly, the deterrent¹⁶⁸ and communicative¹⁶⁹ effects of the new offences would be very limited indeed.

7.179 In view of the consultation responses and our analysis of these as set out above, we recommend that the offences of stirring up hatred should not be extended to include hatred on the ground of disability or transgender identity.

¹⁶⁵ CP para 4.8. In its annual hate crime report for 2012-2013 (at pp 35 and 36) the CPS reports that none of the cases referred for prosecution under the stirring up offences met the test set by the Code for Crown Prosecutors. Instead convictions were secured in several cases under the Malicious Communications Act, the Communications Act and the aggravated versions of Public Order Act 1986 offences.

¹⁶⁶ Paras 7.129 and following, above.

¹⁶⁷ Paras 7.157 to 7.161 above.

¹⁶⁸ Para 7.72 above.

¹⁶⁹ Para 7.93 above.

CHAPTER 8

SUMMARY OF RECOMMENDATIONS

CHAPTER 3: THE ENHANCED SENTENCING SYSTEM

- 8.1 We recommend that the Sentencing Council issue guidance on the approach to sentencing hostility-based offending, both for the existing aggravated offences in the Crime and Disorder Act 1998 and in accordance with sections 145 and 146 of the Criminal Justice Act 2003.

[paragraph 3.49]

- 8.2 We recommend that this reform be implemented whether or not the current racially and religiously aggravated offences are extended to address hostility based on transgender identity, sexual orientation or disability. Simple revisions to the guideline could be made if aggravated offences were to be extended in the future.

[paragraph 3.51]

- 8.3 We recommend that use of the enhanced sentencing provisions in section 145 or 146 of the Criminal Justice Act 2003 should always be recorded on the Police National Computer (PNC) and reflected on the offender's record.

[paragraph 3.104]

- 8.4 We recommend that this reform be implemented whether or not the current racially and religiously aggravated offences are also extended.

[paragraph 3.105]

CHAPTER 5: THE NEED FOR A FULL-SCALE REVIEW

- 8.5 We recommend that a full-scale review is conducted of the operation of the aggravated offences and of the enhanced sentencing system. Such a review should examine all the available data to establish whether aggravated offences and sentencing provisions should be retained, amended, extended or repealed, what characteristics need to be protected, and the basis on which characteristics should be treated as protected.

[paragraph 5.102]

- 8.6 If our recommendation for a wider review is not supported by Government, we recommend in the alternative that the current aggravated offences in the Crime and Disorder Act 1998 be extended to cover hostility based on disability, sexual orientation and transgender identity, in order to bring about equality of treatment across the five protected hate crime characteristics. For the reasons explained in Chapter 4, this is not our preferred solution and represents a less valuable reform option in comparison to the wider review we have recommended.

[paragraph 5.105]

CHAPTER 6: DEFINING THE AGGRAVATED OFFENCES

- 8.7 We recommend that the definition of disability in any new aggravated offences should be the definition in section 146(5) of the Criminal Justice Act 2003: “any mental or physical impairment”.

[paragraph 6.34]

- 8.8 We recommend that the definition of sexual orientation in any new aggravated offences should be the same as the definition currently used for the purposes of section 146 Criminal Justice Act 2003: “orientation towards people of the same sex, the opposite sex, or both.”

[paragraph 6.67]

- 8.9 We recommend that the definition of transgender identity in any new aggravated offences should be the same as the definition in section 146(6) of the Criminal Justice Act 2003.

[paragraph 6.92]

- 8.10 We recommend that, if the aggravated offences are extended, section 146 of the Criminal Justice Act 2003 should be amended so that it mirrors the effect of section 145(3) of that Act and covers the targeting of victims due to their association with people who are disabled, LGB or transgender.

[paragraph 6.41]

CHAPTER 7 EXTENDING THE STIRRING UP OFFENCES

- 8.11 We recommend that the offences of stirring up hatred should not be extended to include hatred on the ground of disability or transgender identity.

[paragraph 7.179]

(Signed) DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
20 May 2014

APPENDIX A

CONSULTEES, LISTED BY CATEGORY

Some consultees could be placed in more than one category. Here, they are divided into what appears to be the most appropriate category. Any one consultee will only appear in one category.

Members of the Public
Ann Marie Bishop
Michal Chantkowski
Clair Coverdale
Neth Dugan
Jan Evans
Carole Gerada
Pieter Grootendorst
Rita Grootendorst
Dr Lynne Harne
Kate Hillier
Suzanna Hopwood and Michelle Ross
Pamela Mahindru
Anna Scutt
Ursula Solari
John Starbuck
Jo Thacker
John Troke
<i>A further five members of the public responded anonymously</i>
Non-Governmental Organisations and Local Government
Action Disability Kensington Chelsea
Association of Directors of Adult Social Services
Barnsley LGBT Forum
Big Voice and All About Us
Brandon Trust

Brent Mencap
Brighton and Hove Council Community Safety Team
Bromley Experts by Experience
Changing Faces
Christian Concern and Christian Legal Centre
Community Links Bromley
Community Security Trust
Disability First Blackpool CIL
Disability Hate Crime Network
Disability Rights UK
Disabled Persons Transport Advisory Committee (DPTAC)
Discrimination Law Association
Diverse Cymru
Equality and Diversity Forum
Equality and Human Rights Commission
Federation of Muslim Organisations
Full of Life
Galop
Gender Identity Research and Education Society (GIRES)
Greenwich Association of Disabled People
Grip Project
Hate Free Norfolk
Inclusion London
Independent Academic Research Studies
Judith Trust
Learning Disability Partnership
Leonard Cheshire Disability
Lesbian and Gay Foundation
LGBT Sheffield
Linkage Community Trust

Making Our Choice
Mencap
Mental Health Foundation
Merton Centre for Independent Living
Mind
National Aids Trust
National LGBT Partnership
National Union of Students
Pembrokeshire People First
People First
RadFem
Rainbow Friends
Regional Forum Working Group Walsall
Respond
Royal College of Nursing
Royal College of Psychiatrists
Royal National Institute of Blind People and Guide Dogs for the Blind
Safe Durham Partnership
Safety Net People First
Scope
Speaking Up Southwark
St Helens Council Community Safety
Stand Against Racism and Inequality
Stay Safe East
Stonewall
Stop Hate UK
Trades Union Congress
Trans Media Watch
Unison
Victim Support

Weston and North Somerset Disability Information Advice Line
Worcestershire Safeguarding Adults Board
<i>One NGO (A Self-Advocacy Group for People with Disabilities) Responded Anonymously</i>
Prosecution, Police and Probation Services
Association of Chief Police Officers LGBT Portfolio
British Transport Police
Cambridgeshire Constabulary
Cheshire Constabulary
Cleveland Police
CPS London Scrutiny and Involvement Panel - Community Members
CPS Wales North Wales Scrutiny Panel - Community Members
Crown Prosecution Service
Cumbria Constabulary
Derbyshire Constabulary
Derbyshire Criminal Justice Board inter-agency disproportionality sub-group
Devon and Cornwall Police
Essex Police
Peter Funnell (as Harm Reduction Lead, Warwickshire Police and West Mercia Police; Trustee of Speakeasy Now; and Co-Chair of Worcestershire Learning Disability Hate Crime Partnership)
Greater Manchester Police
Hampshire Constabulary
West Yorkshire Police Hate Crime Lead
Hertfordshire Constabulary
HM CPS Inspectorate
Kent Police
Lancashire Police and Crime Commissioner
Leicestershire Police
Merseyside Police
Merseyside Probation Trust

Metropolitan Police
PC Stephanie Mills
Police Sgt Laura Millward
National Black Crown Prosecutors' Association
Norfolk and Suffolk Probation Trust
North Yorkshire Police
Northamptonshire Police
Police Federation of England and Wales
Police Superintendents Association
South Yorkshire Police
Surrey Police
Sussex Police
Thames Valley Police
West Midlands Police
West Mercia Police Disability Independent Advisory Group
Wiltshire Police
Judiciary, Magistrates, Lawyers and their Professional Associations
Bar Council and Criminal Bar Association
Council of HM Circuit Judges
Timothy Devlin (barrister)
Ivan Hare (barrister)
Justices' Clerks Society
Law Society Criminal Committee
London Criminal Courts Solicitors Association
Magistrates' Association
Senior Judiciary
Teesside & Hartlepool Magistrates
Academics
Dr Andreas Dimopoulos
Jane Healy

Leicester Hate Crime Project
Professor Leslie Moran
Professor Christian Munthe
Professor Gavin Phillipson
Society of Legal Scholars, Criminal Justice Section
Dr John Stanton-Ife
Dr Findlay Stark
Professor Richard Taylor
Seamus Taylor CBE
Dr Mark Walters
Dr Andrew Wilson