



**Law
Commission**
Reforming the law

Hate Crime: Should the Current Offences be Extended? Summary for non-Specialists

Law Com No 348 (Summary)

Law Commission

Report No LC348

**HATE CRIME: SHOULD THE CURRENT
OFFENCES BE EXTENDED?**

Summary for non-specialists

PART 1

INTRODUCTION

- 1.1 This is a summary of our report on hate crime.¹ It gives an overview of the report and the recommendations we make in it. It is for people with no specialist legal knowledge.

THE TERMS OF THE PROJECT

- 1.2 This project was referred to us by the Ministry of Justice. It forms part of a wider cross-government plan for tackling hate crime, launched in March 2012. In that plan, the Government explained that it wanted to focus on:

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

- 1.3 Specifically, the Ministry of Justice asked us to look at:

“(a) extending the aggravated offences in the Crime and Disorder Act 1998 to include where hostility is demonstrated towards people on the grounds of disability, sexual orientation or gender [ie “transgender”] identity;

(b) 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 gender identity.”

OVERVIEW OF THE CURRENT LAW

- 1.4 At present, the police and the Crown Prosecution Service (“CPS”) record as a “hate crime” any crime perceived by the victim or another person to have been motivated by hostility or prejudice based on a person’s race, religion, sexual orientation, disability or transgender identity. Although “hate crimes” are recorded for all five of these “protected characteristics”, the criminal offences that specifically deal with hate crime only cover some of the characteristics.
- 1.5 The first set of hate crime offences are the “aggravated offences”. They are contained in the Crime and Disorder Act 1998 (“CDA”). If a person commits one of a list of offences and, in doing so, demonstrates, or was motivated by, hostility on the grounds of *race or religion*, that offence becomes a separate “aggravated”

¹ http://lawcommission.justice.gov.uk/areas/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 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).

offence, with a higher sentence available. At present, the aggravated offences do not cover hostility based on sexual orientation, transgender identity or disability.

- 1.6 The second set of hate crime offences are the offences of “stirring up hatred”. These are contained in the Public Order Act 1986 (“POA”). They tackle the problem of people who try to stir up hatred on grounds of *race*, *religion* or *sexual orientation*. At present, the stirring up offences do not cover hatred on grounds of transgender identity or disability.
- 1.7 As well as these offences, the law deals with hate crimes through special sentencing powers set out in sections 145 and 146 of the Criminal Justice Act 2003 (“CJA”). We refer to this throughout this document as “enhanced sentencing”. The judge can increase the sentence for an offender convicted of any offence, if it was motivated by hostility or involved a demonstration of hostility on the basis of any of the five characteristics. The test for demonstration or motivation of hostility is the same as that used in the aggravated offences.

THE CONSULTATION PAPER

- 1.8 We published our Consultation Paper (“CP”)³ on 27 June 2013. The CP looked at the case for extending both sets of offences, so that they would cover all five protected characteristics. Our project did not extend to looking at anything wider. It did not ask: why the existing hate crime offences are needed; if they should be in a different form; or if they should cover other groups, such as older people or members of sub-cultures, even though crimes based on hostility against these and other groups occur.
- 1.9 We also looked at how enhanced sentencing works and how it affects the case for extending the existing offences. We asked whether changes would make enhanced sentencing more effective.
- 1.10 The consultation closed on 27 September 2013. We received 157 written responses. They came from NGOs, criminal justice agencies, judges, magistrates, lawyers, academics and members of the public, some of them victims of hate crime.

HATE CRIME: THE STATISTICAL CONTEXT

- 1.11 Statistics on hate crime are collected and reported on by several Government departments and criminal justice agencies. There are statistics on the number of cases that are reported, recorded and prosecuted as hate crimes each year, broken down across the five characteristics. Also, there are statistics on how many recorded hate crime cases are prosecuted each year and how many convictions result. In Appendix B to the report, we present the main national statistics on hate crime. Some brief information is given below.
- 1.12 According to official figures based on the latest crime survey in England and Wales there are around 278,000 incidents of hate crime annually. This is around 3% of all crime, according to the same survey. Not all incidents are reported to the police. In 2012, 42,236 cases were recorded by police as hate crimes. The

³ 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.

proportions for the five characteristics are: race 85%; sexual orientation 10%; religion 4%; disability 4%; and transgender 1%.

- 1.13 Information on the annual number of hate crime prosecutions is contained in the CPS annual report *Hate Crime and Crime against Older People*. The latest report states that in the year 2012 to 2013, the CPS completed 13,070 hate crime prosecutions. (Due to the wider definition they use for treating something as a hate crime, these will not just be prosecutions for the aggravated or stirring up offences or where enhanced sentencing was used.)
- 1.14 The statistics do not show the exact scale or nature of offending based on hostility towards disability, sexual orientation and transgender identity.

WHERE TO FIND MORE INFORMATION

- 1.15 We do not provide as much detail here as we do in our main report. We do not give references to our sources as we do there. Also, this summary does not go into detail about the many and extremely valuable consultation responses we received. These are referred to in detail in our main report and are also set out in longer form in an Analysis of Responses, available online.⁴
- 1.16 Our website gives access to the CP with our proposals and questions set out in full.⁵ There are also appendices on: the relationship between the hate crime offences and the right to freedom of expression (CP Appendix A); the history of hate crime laws in England and Wales (CP Appendix B); and the potential economic impact of implementing our provisional proposals (Appendix B). The website also hosts a separate paper by Dr John Stanton-Ife on the wider legal theory behind hate crime law and how the theoretical arguments relate to possible extension of the current offences.

⁴ http://lawcommission.justice.gov.uk/areas/hate_crime.htm.

⁵ http://lawcommission.justice.gov.uk/consultations/hate_crime.htm

PART 2

AGGRAVATED OFFENCES AND ENHANCED SENTENCING

- 2.1 It is important to understand how the aggravated offences dealing with hostility towards race and religion work because, if they were extended to cover other protected characteristics, the new offences would work in the same way.

THE CURRENT LAW ON AGGRAVATED OFFENCES

- 2.2 Someone who commits one of the offences in the list below and, in doing so, either demonstrates, or is motivated by, hostility based on race or religion, commits an "aggravated offence".

- 2.3 "Aggravated offences" are the aggravated versions of certain other criminal offences, which we call "basic offences" in this summary. The only basic offences which can be aggravated are set out in sections 29 to 32 of the CDA. They are:

- (1) common assault;
- (2) assault occasioning actual bodily harm;
- (3) maliciously wounding or inflicting grievous bodily harm;
- (4) destroying or damaging property;
- (5) threatening, abusive or insulting conduct towards someone with intent to cause fear of violence or provocation of violence;
- (6) threatening, abusive or insulting conduct intended to cause harassment, alarm or distress;
- (7) threatening, abusive or insulting conduct likely to cause harassment, alarm or distress;
- (8) harassment and stalking; and
- (9) putting people in fear of violence and stalking involving fear of violence, serious alarm or distress.

- 2.4 A defendant, D, can be liable for the aggravated form of the offences if, in the course of committing one of these offences:

(1) D *demonstrates* hostility towards the victim of the offence based on the victim's actual or presumed race or religion; or

(2) D is *motivated* to commit the offence by hostility towards members a racial or religious group because of their membership of that group.

What does it mean to "demonstrate hostility"?

- 2.5 Hostility can be demonstrated through words, gestures and other behaviour, such as singing certain songs. It does not matter why the offender committed the basic crime. All that matters is that, in doing so, racial or religious hostility was demonstrated towards the victim. It also does not matter if the offender was mistaken about the victim's race or religion.

- 2.6 It is also an aggravated offence to demonstrate racial or religious hostility towards a victim because they mix or socialise with members of the race or religion which the offender is hostile towards, even if the victim does not belong to that group.

What does it mean to be “motivated by hostility”?

- 2.7 A basic offence is motivated by hostility - and therefore becomes an aggravated offence - if the offender committed it because of hostility towards members of a racial or religious group based on their membership of that group. Racial or religious hostility does not need to be the offender’s only motivation. The offender might also be motivated by hostility for other reasons, such as the victim’s occupation.
- 2.8 The offender’s behaviour on other occasions can be used to help prove motivation: for example, belonging to a racist group. But it can be difficult to prove why someone has committed an offence. Aggravated offences are more often prosecuted based on a demonstration of hostility than a hostile motivation.

Higher sentences for aggravated offences

- 2.9 The aggravated offences have higher available maximum sentences than the basic offence versions. In the table below we show the differences between the maximum sentences for the basic, compared to the aggravated, offences.

Basic Offence	Maximum Penalty	Aggravated Offence	Maximum Penalty
Common assault	6 months	Aggravated common assault	2 years
Actual bodily harm	5 years	Aggravated actual bodily harm	7 years
Malicious wounding/GBH	5 years	Aggravated malicious wounding/GBH	7 years
Criminal damage	10 years	Aggravated criminal damage	14 years
Fear or provocation of violence	6 months	Aggravated fear or provocation of violence	2 years
Harassment, alarm or distress	Fine of up to £1,000	Aggravated harassment, alarm or distress	Fine of up to £2,500
Causing intentional harassment, alarm or	6 months	Aggravated causing intentional harassment, alarm or distress	2 years

distress			
Offence of harassment	6 months	Aggravated offence of harassment	2 years
Putting people in fear of violence	5 years	Aggravated putting people in fear of violence	7 years

2.10 If a sentence passed for an aggravated offence in a particular case appears to be too low, or “unduly lenient”, the case can be referred to the Court of Appeal for review. Sometimes that results in a longer sentence being imposed. Sentences passed for the basic offences cannot be challenged in this way.

THE CURRENT LAW ON ENHANCED SENTENCING

2.11 The law provides a further response to offending based on hostility: enhanced sentencing. We considered this when looking at the need to extend the aggravated offences. If any crime, other than an aggravated offence, is committed and that involved a demonstration of hostility or was motivated by hostility based on race, religion, disability, sexual orientation or transgender identity, the offender’s sentence can be increased. We call this the “enhanced sentencing” scheme.

2.12 The same explanations of what it means to demonstrate hostility and what it means to be motivated by hostility (see above) also apply to enhanced sentencing.

2.13 If hostility is proved, the court must take it into account when setting the sentence. The judge or magistrate passing the sentence must state openly in court that hostility has been taken into account and how the sentence has been increased as a result.

2.14 The law on enhanced sentencing is contained in sections 145 and 146 of the CJA. Section 145 covers hostility based on race and religion. It applies to the sentencing of anyone convicted of an offence where hostility is proved, except an aggravated offence under the CDA (which already carry higher sentences). Section 146 covers hostility based on disability, sexual orientation and transgender identity. It currently covers any offence at all where hostility is proved. But if aggravated offences were extended to the new characteristics, it would work in the same way as section 145. This “dual” feature can cause problems and confusion, as we explain later: it has made some experts doubt whether extending the aggravated offences in their current form is a good idea.

The sentences available

2.15 The sentence that a judge passes using enhanced sentencing must come within the range available for the crime in question. It cannot exceed the maximum penalty. So, if D commits theft motivated by homophobic hostility, the sentence cannot exceed seven years, even if enhanced sentencing is applied. (That would not change if aggravated offences were extended in their current form to cover

sexual orientation hostility, because theft is not an offence that can be aggravated.)

- 2.16 Similarly, for example, the maximum sentence for an assault is six months' imprisonment, so the maximum sentence for an assault which involved hostility on the basis of disability, sexual orientation or transgender identity is six months' imprisonment. In contrast, the aggravated offences have higher, maximum sentences than the basic offence versions, so the maximum sentence for a racially or religiously aggravated assault, charged under the CDA, is two years' imprisonment.
- 2.17 The amount by which the sentence is increased by enhanced sentencing will depend on the seriousness of the hostility. Factors taken into account include the impact which the offender's behaviour had on the victim and others and whether the hostility element was planned.

What if hostility cannot be proved?

- 2.18 Some crimes against disabled, transgender or lesbian, gay or bisexual people (as a group, "LGB") are treated by the police and the CPS as "hate crimes". This can happen because the victim or someone else believed the crime was motivated by hostility based on the victim's disability, transgender status or sexual orientation. It can also happen because hostility on that basis was shown when the offence was committed, for example, by an abusive term used by the perpetrator about the victim's disability.
- 2.19 In some cases, it might not be possible to prove that the crime was motivated by hostility or that hostility was demonstrated. It could still be possible for the sentence to be increased to reflect the seriousness of the crime. For example, a disabled person might be a victim of a theft because they are seen as an easy target. People might be targeted for assault because they are dressed as goths or belong to another minority group. In this situation, other provisions and guidance already give courts the power to increase the sentence.¹

THE CONSULTATION PAPER

Enhanced sentencing: an adequate response?

- 2.20 In Chapter 3 of the CP we looked at the case for extending the aggravated offences to hostility based on disability, sexual orientation and transgender identity. First, we compared the offences with the enhanced sentencing system we have just described, given that the enhanced sentencing system:

- (1) already applies to hostility-based offending on grounds of disability, sexual orientation and transgender identity; and

¹ See *Overarching Principles: Seriousness* (Dec 2004) issued by the Sentencing Guidelines Council, which states that factors indicating higher culpability include: (1) the offence was motivated by hostility towards a minority group, or a member or members of it; (2) that a vulnerable victim was deliberately targeted; or (3) that there was an abuse of power or of a position of trust. These are of obvious relevance in a hate crime context and still apply to sentencing decisions, although the body in charge of issuing guidelines is now the Sentencing Council.

- (2) has a hostility test identical to that in the aggravated offences.

Example 1: D commits blackmail against V, who is transgender, and is motivated to do so based on his hostility towards transgender people. The maximum sentence for blackmail is 14 years. The sentence must reflect all the circumstances of the offence. Under section 146 CJA and other applicable sentencing guidance, the court must assess the seriousness of the aggravation. It does so by looking at factors such as the impact of the conduct on V and the extent to which the conduct was planned or formed part of a pattern of similar offending by D. When passing sentence, the judge must state in open court that the offence was motivated by hostility towards transgender people. If the aggravation and all the other features of the case made it particularly serious, the sentence could be as high as 14 years.

Example 2: D commits a serious and prolonged physical attack on a learning disabled person and, in doing so, shouts abuse about V's disability causing her further distress. As a result of the offence V suffers serious injuries and psychological harm. D is charged with maliciously inflicting GBH (section 20 of the Offences against the Persons Act 1861) and also with an offence under section 5 Public Order Act 1986, for using threatening or abusive words or behaviour towards someone likely to be caused harassment, alarm or distress. The GBH offence carries a maximum sentence of 5 years and the section 5 offence carries a maximum sentence of a £1,000 fine. When passing sentence the judge must carry out the same process as that described in the example above. Again, the sentence could be at the high end of the scale and, if a hostility enhancement is applied under section 146, this must be stated in open court.

- 2.21 These examples show the potential of existing sentencing laws to address hostility-based offending. Because the sentencing regime already expressly applies to hostility on grounds of sexual orientation, transgender identity and disability, we wanted to establish whether the system already provided an adequate response in practice, or could do so if it was improved.
- 2.22 In discussions with stakeholders before we published the CP, the issue raised most often was the failure to use enhanced sentencing in cases of disability hate crime and homophobic and transphobic hate crime. Many people with experience of hate crime and its prosecution complained of failures to investigate hostility, obtain evidence of it, and put that evidence before the court so it could be used at sentencing. The clear message was that enhanced sentencing could be a powerful weapon in the fight against hate crime, but it was being under-used.
- 2.23 In the CP we asked whether the sentencing system could be improved so that it could provide an adequate response to crimes involving hostility based on transgender identity, sexual orientation and disability. We saw advantages in a sentencing-only approach: clarity, simplicity and flexibility. We also noted the

communicative power of enhanced sentencing - the judge is obliged to declare in open court that the sentence has been increased because hostility to that characteristic has made the offence more serious.

- 2.24 We also explained in the CP that the fact that an offender has had his or her sentence enhanced to reflect the hostility element in the offending does not usually appear on the offender's criminal record on the Police National Computer ("PNC"). This database can be searched for different purposes, for example to see the offender's previous criminal record when they are being sentenced for a new offence. It can be searched by the authority in charge of criminal records checks (the Disclosure and Barring Service), for example when the offender applies for a job and the employer wants to see whether any recent convictions exist that make the offender unsuitable for that job.
- 2.25 By contrast, when a person has been convicted of an aggravated offence, the aggravated nature of the offending does appear on the PNC, because "racially [or religiously] aggravated" is part of the name of the offence. As a result, agencies in the criminal justice system that rely on the PNC do not have access to enhanced sentencing information. Several agencies might benefit from it, including the police, courts, probation service and prison service. Also, a criminal records check will not routinely disclose the fact that an offender has a previous record of hostility-aggravated offending, except where the person has been convicted of a racially or religiously aggravated offence under CDA.
- 2.26 Our analysis of enhanced sentencing and the aggravated offences led us to the provisional view that enhanced sentencing could provide an adequate response if it was properly applied and if its use was recorded. We made two provisional proposals to bring this about:
- (1) a new Sentencing Council² Guideline dealing with hostility; and
 - (2) the recording of the use of enhanced sentencing on the PNC.

The aggravated offences: the case for extension

- 2.27 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 hostility-based crimes against LGB, transgender and disabled people. We asked whether other offences might already deal with this offending.
- 2.28 We asked whether aggravated offences would offer benefits that enhanced sentencing could not, including: the higher maximum sentences available; the aggravated "label" expressing the more serious criminality; and any deterrent effects from the higher sentences or the "aggravated" label and its extra stigma.
- 2.29 We offered two reform options:

² The Sentencing Council is an official body that promotes greater consistency in sentencing and produces guidelines on sentencing for judges. It aims to increase public understanding of sentencing. For more information on the Council and its guidelines process, see: <http://sentencingcouncil.judiciary.gov.uk/>

Option 1: our two proposed reforms to enhanced sentencing (above), to produce a system capable of providing an adequate response

and/or:

Option 2: extending the aggravated offences.

- 2.30 Consultees were asked whether they thought 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 as well as sentencing reforms (Option 2). We summarise the responses at paragraphs 2.37 – 2.46 below.

Models for new offences

- 2.31 For this project we had to assume that if the aggravated offences were extended, they would take the form of the existing aggravated offences in the CDA. We were not asked to look at whether some other form of offence would be preferable. Most elements of the offences would remain the same if they applied to the three characteristics: a basic offence would need to be proved; and hostility would need to be proved, either by the demonstration or motivation route.
- 2.32 For example, it would be an aggravated offence if, in the course of committing a basic offence, D demonstrated hostility towards the victim of a basic offence based on the victim's disability. Also it would be an aggravated offence if the hostility to the victim is because he or she "associates with" disabled people, or is a carer, doctor or other professional offering support or services to disabled people. The same would apply where a victim "associates with" transgender and LGB people and the hostility is on that basis.
- 2.33 But the new offences would have to define "disability", "sexual orientation" and "transgender identity". The way these terms are defined would impact directly on the scope of the offences. They would need to be clear enough for police and prosecutors to make full use of the offences, and for the courts to interpret them in line with their intended purpose.
- 2.34 In the CP we explained that we would prefer any new offences to use the same definitions of the three characteristics as the enhanced sentencing system uses. It would be easier if the same definitions applied to both sentencing and aggravated offences, unless there was a strong reason to prefer some other definition. This would help to avoid inconsistencies or gaps between the way aggravated offences are applied, and the way other offences are sentenced using section 146 of the CJA.
- 2.35 One potential difficulty that we identified for any new disability-aggravated offences is deciding whether an offender was motivated by hostility or whether the crime was committed because the victim was seen as "vulnerable". For example, an offence might be committed against a disabled person because they are seen as an "easy target", not because the offender is motivated by hostility towards people with disabilities. This would not be an aggravated offence.

- 2.36 In the CP, we asked consultees whether any particular problems would arise from the existing elements of the aggravated offences if they were extended to disability, sexual orientation or transgender identity.

THE RESPONSE TO THE CONSULTATION

Aggravated offences and enhanced sentencing reform

- 2.37 Almost all the responses expressed support for our two sentencing reform proposals. Most also said 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. Again, most responses said that the two reforms should be implemented whether or not aggravated offences were also extended.
- 2.38 However, most consultees said that the aggravated offences should also be extended. Many of those who said this are people or organisations with experience of the criminal justice system or of supporting victims of hate crime.
- 2.39 The reason most often given was a sense of inequality in the current system and of the need to send a clear message that hate crime is taken equally seriously, whichever of the five protected characteristics the hostility relates to. Some consultees calling for extension said that they would also accept removing the existing aggravated offences altogether, as another way of solving the inequality.
- 2.40 Other arguments in favour of extending the offences included the following:
- (1) Enacting and prosecuting offences that carry an “aggravated” label and higher maximum sentences might have extra symbolic value as a sign of the state’s disapproval of hate crime against disabled, LGB or transgender people. When someone is prosecuted for an aggravated offence it also has communicative effects to other people who belong to those groups, potential perpetrators, and society as a whole.
 - (2) Extending the offences might increase public awareness of hate crime, improve confidence in the criminal justice response to hate crime and lead to more hate crimes being reported.
 - (3) Extending the offences might improve police investigations and the approach of prosecutors, in cases of hate crime against disabled, LGB or transgender people.
 - (4) The higher maximum sentences available under aggravated offences are sometimes needed.
 - (5) There would be more scope to challenge unduly lenient sentences (“ULS”) in hate crime cases against disabled, LGB or transgender people because all aggravated offences can be referred to the Court of Appeal for undue lenience. None of the underlying basic offences can.
 - (6) There are benefits of hostility being decided by juries rather than as a matter of sentencing alone. As the prosecution must prove hostility as an element of the offence itself, D has a full opportunity to challenge the evidence before the jury decides if hostility was present. On the other

hand, if hostility is only decided at sentencing, the jury is not involved and the judge alone makes the assessment. Also, if D challenges hostility at sentencing, but pleads guilty, the credit for that guilty plea could be reduced if the challenge fails. (Currently only about 10% of aggravated offence cases are tried in the Crown Court. The rest are tried by magistrates, who decide on both guilt and sentence.)

- 2.41 Arguments against extending the offences were made by a minority of consultees, mainly judges and professionals with experience of prosecuting the offences or analysing them for academic purposes. Forceful points were made in these responses about the risks of extending the offences in their current form, due to their unnecessary complexity and problems in their operation.
- 2.42 Some also expressed doubts about whether we should simply graft onto three distinct characteristics a set of offences that were designed two decades ago to address racial hostility. The offences might not be suitable in view of the offending now being committed due to hostility on these quite different grounds.
- 2.43 Of all the arguments in favour of extension, we found the argument based on a need for equality of treatment the strongest. Disability, transgender identity and sexual orientation have already been selected by Parliament as protected characteristics in the enhanced sentencing system. That system was originally introduced as part of the same Act of Parliament that brought in the aggravated offences.³ Equal treatment principles mean there should be good reasons for not also including them in the aggravated offences regime. We see no good reasons for excluding them, based on our investigations and the consultation responses.
- 2.44 However, as we said above, strong reservations were also 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, even though this would leave in place unequal treatment of protected hate crime characteristics, for which there was no obvious justification; or
 - (2) sentencing reform plus extension of the aggravated offences in their current form, despite the serious concerns raised about the form and operation of the offences and their suitability for disability, sexual orientation and transgender identity hate crime?

The need for a wider review

- 2.45 Some consultees said that our terms of reference were too narrow. They suggested that a wider scope would have helped:
- (1) to deal with problems in the current of aggravated offences
 - (2) to take proper account of differences between the types of hate crime affecting disabled, LGB and transgender people.

³ Although they were later re-enacted and are now contained in the CJA 2003.

- 2.46 Some also said the project was too “one-sided” because it only considered extending the offences, not removing them. Others wanted a deeper analysis of the basis for having hate crime laws at all, what their aim should be, and why some personal characteristics should have protection but not others.
- 2.47 If the present aggravated offences are too complex and not working as well as they should, it is not clear that the offences in their current form should be extended to any further characteristics. Existing problems need to be investigated and dealt with before extension.
- 2.48 Also, the types of offence that are capable of being aggravated under the CDA 1998 may require review. They may not include some offences that are commonly committed, in circumstances of hostility, against disabled, LGB and transgender people. For example, financial crime and sexual offences are reported more frequently in a hate crime context by LGB, transgender and disabled crime victims. If aggravated offences were to offer effective protection it might be necessary to create aggravated forms of those offences. For this reason, too, some consultees said it would be better to review the adequacy of aggravated offences to address disability, LGB and transgender hate crime before extending the offences.
- 2.49 Such a review would enable policy-makers to consider more deeply whether other characteristics ought to be covered by hate crime legislation and on what principles the characteristics should be selected. 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. The first two are “protected characteristics” when it comes to discrimination laws under the Equality Act 2010: the second two are not, but people with those characteristics can be victims of hate crime.

OUR RECOMMENDATIONS: ENHANCED SENTENCING

- 2.50 We think that most - if not all - of the benefits that might come from extending the aggravated offences could flow from the properly applied and accurately recorded use of the enhanced sentencing system.
- 2.51 The enhanced sentencing system reflects Parliament’s decision to single out hostility as an aggravating factor, giving judges a duty to sentence hostility-based offending more severely. When judges’ sentencing remarks are published, as they sometimes are, they can convey the state’s and society’s condemnation of hate crime. They give expression and recognition to the severe harm it causes to victims and wider communities. In practice, it is very rare for a judge in an aggravated offence case to use the range of sentences beyond the maximum available for that offence if had just been a basic offence. There is no evidence to suggest the case would differ as regards disability, transgender identity or sexual orientation.
- 2.52 Yet the current under-use of enhanced sentencing could be having an adverse effect on community confidence and victim satisfaction. This may be contributing to the under-reporting of hate crime. We make two recommendations to improve the operation of the enhanced sentencing scheme (below). We recommend that these be implemented whether or not aggravated offences are also extended.

Guidance on sentencing for hostility

- 2.53 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 section and sentence accordingly. This should address concerns that section 146 of the CJA has not been “embedded” in the prosecution process. It would lead to consistent sentencing for crimes involving hostility based on disability, transgender or sexual orientation. It would provide an opportunity to clarify the correct sentencing approach in all cases where hostility is an aggravating factor, clearing up current areas of confusion where there is insufficient guidance.
- 2.54 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

- 2.55 As we explained earlier, when a person is convicted of an offence, it is recorded on the PNC. By contrast, no record is usually entered onto the PNC about the use of enhanced sentencing. The PNC simply records that an offence was committed and what the sentence was, not that it was aggravated by hostility.
- 2.56 An offender’s record ought to show the application of enhanced sentencing under the CJA 2003 just as it already shows convictions for racially or religiously aggravated offences under the CDA 1998.
- 2.57 Giving the prison and probation services accurate information about offenders’ records where hostility aggravation findings have been made should enable them to tailor rehabilitation and education programmes. This could help reduce re-offending of the same kind. In cases of reoffending, this would give future sentencing courts a full picture of the punishment merited and the danger the offender poses to the public or sections of the public.
- 2.58 For public protection reasons, too, an offender’s history of hostility-based offending should be available, including for criminal records checks. The central purpose of criminal records vetting scheme is to ensure that employment decisions, particularly those relevant to posts working with vulnerable groups, are made with the necessary information about the applicant’s criminal record.
- 2.59 We therefore 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 and reflected on the offender’s record.

OUR RECOMMENDATIONS: THE AGGRAVATED OFFENCES

The need for a full-scale review

- 2.60 We share the view of many 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 impact of such offending and the seriousness with which it is taken, if offences

with a specific “aggravated” label and a potentially higher sentence only exist for two of the five protected hate crime characteristics.

- 2.61 The current inequality would have been a sufficiently strong argument for us to recommend the immediate extension of the offences, but for the serious concerns expressed about the current aggravated offences. Problems with these offences may be causing prosecutions to fail. Unnecessary complexities may also be having a negative impact on the enhanced sentencing system, because of their common features and due to confusion over the way the two schemes – aggravated offences and enhanced sentencing – inter-relate. These issues must be examined further.
- 2.62 In addition to concerns about the current aggravated offences, deeper questions have been raised about the justifications for aggravated offences and for selecting some characteristics for protection, but not others. These questions also require further consideration, ideally prior to any decision to extend the current offences. As some consultees⁴ also argued, an informed and balanced decision on the case for extending this legislation must also consider the theoretical arguments against the offences and the case for their abolition.
- 2.63 If the aggravated offences are not working effectively, or if they are ill-suited in their current form to tackle hate crime against disabled, LGB or transgender people, the new offences would have little or no practical value. Their extension would risk being largely symbolic. 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.” This is because if a case was prosecuted as an aggravated offence but the offender was only convicted of the basic form of the offence, the sentence cannot then be enhanced for hostility under sections 145 or 146 of the CJA.
- 2.64 Racial and religious hate crime is around 85% of all reported hate crime in the UK. To ensure hate crime based on those characteristics is also addressed effectively, it is important that any failings in the current model of aggravated offences and enhanced sentencing are addressed. If the current aggravated offences are not working well, this wastes resources and results in poor outcomes for victims. It sends the wrong message to potential hate crime perpetrators, actual offenders and wider society about the seriousness with which the state takes hate crime. The same goes for enhanced sentencing and any failings in its operation.
- 2.65 Finally, we need clearer principles for the selection of characteristics that ought to be protected under the hate crime regime.
- 2.66 For these reasons, we conclude that the interests of justice in responding effectively to hate crime would be best served by conducting a full-scale review. This should take place before any decision is taken on whether to extend the aggravated offences. Extending before such a review would be a less valuable

⁴ This point was raised in different ways by Prof P Alldridge, Prof R Taylor, Dr F Stark, Mr I Hare and Mr J Troke. As we explained earlier, several NGOs also suggested that equal treatment could be produced by repealing the offences, as well as by extending them.

reform option. It would have limited benefits for hate crime victims and some potential adverse effects.

2.67 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 treated as protected.

2.68 We are not prescribing the terms of the review, but anticipate that it could look at the following questions.

- (1) What are the purposes of laws specifically addressing hostility-based offending
 - (a) for victims?
 - (b) for the criminal justice system?
 - (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/inability to defend or report the attack?
 - (iii) How should this be assessed: through evidence of the defendant’s motivation? Or of the circumstances surrounding the offence, eg 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 common and should they all be listed 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 that be assessed (questions (i) to (iii) above)? Should the 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?
- (7) What other initiatives or measures could be introduced? Should they include, for example: better guidance for those applying the legislation; more effective use of alternatives to the criminal process, such as restorative justice; anti-bullying and other education initiatives; more effective internet and social media control; press and media regulation; rehabilitation; prison-based re-education? All 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.
- 2.69 It is not for us to set out in detail the scope of any future review of hate crime legislation. This will be for responsible Government departments (the Home Office and the Ministry of Justice) and criminal justice agencies to decide. They will be guided by the results of the Government's three year Hate Crime Action Plan (ending March 2015) and the most recent evidence on hate crime. We hope that this report and the responses to this consultation will be of value in that exercise.
- 2.70 In recommending a full review, we want to ensure that the best overall criminal justice response is made to hate crime. We want to see the best possible outcome 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 how well the current system serves its purpose for all the characteristics it aims to protect.

Alternative recommendation

- 2.71 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.
- 2.72 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. In all three cases, the definitions of these characteristics should be those already used in the enhanced sentencing system. For the reasons explained at paragraphs 2.60 – 2.70 above, this is not our preferred solution and represents a second best reform option compared to the wider review we have recommended.

PART 3

THE STIRRING UP OFFENCES

THE CURRENT LAW

- 3.1 There are a number of offences that make it a crime to engage in conduct that is intended to, or likely to, stir up hatred towards a group of people because of their race, religion or sexual orientation. The racial hatred offences are in sections 18 to 23 of the Public Order Act (“POA”) 1986. The offences of stirring up hatred on the grounds of religion and sexual orientation are in sections 29B to 29F.
- 3.2 The six types of behaviour covered by these offences are:
- using threatening, abusive or insulting words or behaviour or displaying written material which is threatening, abusive or insulting;
 - publishing or distributing written material which is threatening, abusive or insulting;
 - presenting or directing a play in public involving the use of threatening, abusive or insulting words or behaviour;
 - distributing, showing or playing a recording of pictures or sounds which are threatening, abusive or insulting;
 - providing, producing or directing a programme (for example, a TV or radio programme) where the programme involves threatening, abusive or insulting pictures or sounds, or use of threatening, abusive or insulting words or behaviour; or
 - possessing written material, or a recording of pictures or sounds, which is threatening, abusive or insulting, with a view to it being displayed, published, distributed, shown, played or included in a programme.
- 3.3 The stirring up offences have different elements for racial hatred than for hatred based on sexual orientation or religion. The key differences are:
- (1) **Race** - the words or conduct must be *threatening, abusive or insulting* and there must have been an *intention* to stir up hatred, or a *likelihood* that it might be stirred up.
 - (2) **Religion** - the words or conduct must be *threatening* and there must have been an *intention* to stir up hatred. Also, a specific defence is provided to protect free speech. This says that criticising, insulting or ridiculing religious beliefs is not an offence under the stirring up law.
 - (3) **Sexual orientation** - the words or conduct must be *threatening* and there must have been an *intention* to stir up hatred. A specific defence is provided to protect free speech. This says that criticising sexual conduct or practices or urging restraint is not an offence under the stirring up law.
- 3.4 The stirring up offences are very different from the aggravated offences and the enhanced sentencing law. The aggravated offences apply to pre-existing crimes (like assault, harassment or criminal damage), against one or more individual victims, as explained earlier. But the stirring up offences create specific new

crimes of stirring up hatred. The hatred is against a particular group, not an individual. Prosecutions for the stirring up offences are very rare compared to the aggravated offences.

Common features of the stirring up offences

Meaning of “threatening, abusive or insulting”

- 3.5 The words “threatening, abusive or insulting” do not have any special legal meaning. The jury or the magistrates deciding the case will decide whether the words or behaviour were threatening, abusive or insulting, based on the ordinary meaning of those words.

Meaning of “hatred”

- 3.6 Hatred is not defined in the POA, but a dictionary definition of hatred is: “the emotion or feeling of hate, active dislike, detestation, enmity, ill will, malevolence”. The verb is defined as: “to hold in very strong dislike, to detest, to bear malice to, the opposite of ‘to love’”. “Hatred” is stronger than “hostility”. The CPS guidance on stirring up hatred says:

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

THE CONSULTATION PAPER

- 3.7 In Chapter 4 of the CP we analysed the case for extending the stirring up offences 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 existing offending involving 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).
- 3.8 We first looked at whether, in principle, there was a case for extending the stirring up offences to include disability and transgender identity. We asked whether existing criminal offences (and non-criminal measures) already dealt with the conduct that new stirring up offences would address. We discussed the symbolic value of criminalisation in expressing what conduct the state and society view as serious enough to warrant making a crime, in terms of the gravity of the wrongdoing, or the impact it has on victims and wider communities. We explored whether new stirring up offences would fulfil that function more effectively than existing laws and their enforcement.
- 3.9 We also asked what impact criminalisation would have on other rights and freedoms, particularly freedom of expression. Concerns about this featured in debates on whether the original racial hatred offences should be extended to cover hatred on grounds of religion and sexual orientation.
- 3.10 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. We identified overlap between the types of

conduct covered by existing criminal offences and conduct that would be covered by any new stirring up offences. But we found that a unique, specific type of wrongdoing would not be covered by existing law: the spreading of hatred against a group (disabled or transgender people), either intentionally, or where that was likely in the circumstances. New stirring up offences would capture that.

- 3.11 Although enhanced sentencing can be used to address hostility against disabled or transgender people where a crime has been committed, it does not provide a complete response. This is because where the conduct is not criminal, section 146 cannot be used – enhanced sentencing can only be used once a defendant has been convicted of an existing crime. Also, even where the wrongdoing is criminal, applying section 146 cannot
- (a) change the label or description of the offence to make clear that it is the stirring up of hatred that is the wrongdoing in question; or
 - (b) increase the maximum penalty available for the particular offence.
- 3.12 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 RESPONSE TO THE CONSULTATION

- 3.13 Most consultees agreed that there was a case in principle to extend the stirring up offences. Most did not give reasons. 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 common reason was that the offences would deal with serious wrongdoing against disabled and transgender people that the current law and sentencing model could not properly address.
- 3.14 As for the consultees who disagreed that there was a case in principle, their main concerns were:
- (1) The offences would unduly infringe freedom of expression. They might inhibit discussion of disability and transgender issues and of social attitudes or practices relevant to them.
 - (2) The offences are unnecessary in practice due to:
 - (a) a lack of evidence that the conduct they would address is widespread;
 - (b) the conduct they would address is already covered by existing offences and non-criminal measures.
- 3.15 Most consultees argued that there was a practical need for the offences. Two main reasons were given: (1) conduct intended or likely to stir up hatred on grounds of transgender identity or disability is, in fact, frequent; some examples were given of speech showing the practical need for new offences; (2) there is a general problem of under-reporting of hate crime affecting disabled and transgender victims. Extending the stirring up offences may lead to more

reporting, both of existing hate crimes and of conduct intended or likely to stir up hatred that is not currently being reported because it is not an offence.

- 3.16 Those arguing against there being any practical need for extension said there was no clear evidence of conduct that could not be dealt with under the existing law. They also said that new offences would, in any case, be unlikely to help combat or prosecute the enormous increase in social media and internet-based abuse and hate speech. More would be gained by improving the monitoring and control of such material on the internet.

OUR RECOMMENDATION: THE STIRRING UP OFFENCES

- 3.17 We conclude that there would be a justification in principle for extending the offences of stirring up hatred, if a real practical need could be shown for doing so.
- 3.18 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 could be prosecuted (and adequately sentenced) under the existing law.
- 3.19 There is widespread misunderstanding about the conduct that new stirring up offences could be used to prosecute. This is not surprising: they are hardly ever prosecuted and are extremely complex in structure. Of the examples provided to us in relation to disability, while many could satisfy 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.
- 3.20 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. (There were none at all for the year 2012-2013 according to the latest CPS hate crime report.)
 - (2) The type of hate speech typically found in relation to disability and transgender identity is less likely to satisfy the requirements for a stirring up offence than that found in relation to race and religion. Commonly it amounts to (often highly offensive) statements of opinion that are intended to provoke comment or debate and are not intended or likely to cause people 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.
- 3.21 Accordingly, the symbolic and deterrent effects of the new offences, and any other impacts, eg on the reporting of hate crime, would be very limited.

- 3.22 We therefore recommend that the stirring up offences are not extended.
- 3.23 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.